

Approved: 1/18/94
Date

MINUTES OF THE HOUSE COMMITTEE ON TAXATION.

The meeting was called to order by Chairperson Keith Roe at 9:00 a.m. on January 12, 1994 in Room 519-S of the Capitol.

All members were present except: none

Committee staff present: Chris Courtwright, Legislative Research Department
Tom Severn, Legislative Research Department
Don Hayward, Revisor of Statutes Office
Bill Edds, Revisor of Statutes Office
Lenore Olson, Committee Secretary

Conferees appearing before the committee:
Mark Burghart, General Counsel, Kansas Department of Revenue

Others attending: See attached list

A motion was made by Representative Adkins, seconded by Representative Larkin, to introduce five bills recommended by the summer 1993 working group. The motion carried.

Mark Burghart, General Counsel, Kansas Department of Revenue, briefed the Committee on several tax issues. He explained the *Morton-Thiokol* case and said that on December 10, 1993, the Kansas Supreme Court upheld the current system of taxing multinational corporations for state income tax purposes. Mr. Burghart also said that this case is fairly complicated (Attachment 1).

Mr. Burghart brought the Committee up-to-date on *Stephan v. Finney, et al* and issues associated with the authority of the state to tax transactions occurring on federally-recognized Indian reservations. He reported that on December 21, 1993, Judge Jackson dismissed the suit and basically said that the issues raised by the Attorney General are moot until the legislature either accepts or rejects the tax compacts. Attached to his remarks were copies of Judge Jackson's Order of Dismissal (Attachment 2).

The third case reviewed by Mr. Burghart was *Eric Peden v. State of Kansas* challenging the rate differential between married and single taxpayers. The judge recently dismissed the refund claims and the class certification claims. This case is now a simple question on whether our law is constitutional. The Department of Revenue research indicates the State has a very strong case on the constitutional question (Attachment 3).

Regarding *Barker v. Kansas* taxation of military retirement, Mr. Burghart reported that the State had filed a defense motion to dismiss the refund claims on the basis that the court lacked subject matter jurisdiction because the majority of retirees had failed to exhaust administrative remedies. He said that he understands that there will soon be a motion filed by the plaintiff's attorneys to have Judge Allen modify his orders to open up the statute of limitations to allow the retirees to file amended returns for refund claims all the way back to 1984 (Attachment 4). Mr. Burghart was requested to provide to the Committee the step-by-step process available to military retirees to protect their position, along with the phone number(s) for their contact at the Kansas Department of Revenue.

The minutes of January 11, 1994, were approved as read.

The meeting adjourned at 10:25 a.m.

The next meeting is scheduled for January 12, 1994.

DATE 1/12/94

DATE _____

REPRESENTING

[illegible]

STATE OF KANSAS

Mark A. Burghart, General Counsel
Robert B. Docking State Office Building
915 S.W. Harrison St.
Topeka, Kansas 66612-1588



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Department of Revenue
Legal Services Bureau

MEMORANDUM

To: Representative Keith Roe, Chairperson
House Committee on Taxation

From: Mark A. Burghart, General Counsel
Kansas Department of Revenue

Date: January 12, 1994

RE: *In re Morton-Thiokol*

On December 10, 1993, the Kansas Supreme Court upheld the current system of taxing multinational corporations for state income tax purposes. In particular, the Court upheld (1) the use of the domestic combination policy in determining the corporate income tax liability of corporate taxpayers; and (2) the Kansas treatment of foreign dividends and \$78 gross-up as apportionable business income. The specific issues considered by the Supreme Court were:

1. Domestic v. Worldwide Combination. Kansas currently employs the domestic combination method of income apportionment. Under this method, the income of corporations incorporated in the United States which are part of a unitary business are combined and the income of the companies is apportioned to Kansas based upon the property, payroll and sales of the companies doing business in Kansas. Morton-Thiokol sought to use worldwide combination instead of the domestic combination method of apportionment. Under this taxing method, the income of all of the Taxpayer's companies would be combined whether they are domestic or foreign incorporated. Multinational taxpayers generally prefer worldwide combination because: (1) it dilutes the apportionment formula and reduces the income apportioned to Kansas, and (2) it allows the taxpayer to take advantage of foreign losses to reduce Kansas taxable income. If the State were to not prevail on this issue the State would have lost approximately \$5 million annually on an ongoing basis as well as having been subject to refund claims for back years.

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*House Taxation Cmte
Attachment 1*

2. Foreign Dividends & Gross-up. Foreign dividends and gross-up are a part of the federal taxable income of most multinational corporations. Prior to 1988 Kansas taxed a portion of foreign dividends and gross-up. Foreign dividends are simply a cash payment made from foreign subsidiaries to a U.S. parent. Gross-up is a concept that is employed in calculating a multinational corporation's tax liability under the federal income tax law. Gross-up arises under I.R.C. §78 when a parent corporation elects to take a federal credit for foreign income taxes related to the foreign dividends. It represents the proportion of foreign taxes which the dividends bear to the foreign subsidiary's after-tax income. The taxation of foreign dividends and gross-up had been one of the greatest irritants to corporations doing business in the state prior to 1988.

The taxation of foreign dividends generated tax in the amount of \$5 million per year. Tax of \$4 million was generated from the taxation of \$78 gross-up. Although the State's refund exposure would have been limited on these issues because the law was amended in 1987 to delete these items from the tax base, the Department would nevertheless have been required to abate approximately \$40 million in outstanding assessments had the state not prevailed.

3. Taxation of §936 Corporations. A §936 corporation is a domestic company which operates in a U.S. possession. Companies do so for several reasons: (1) tax benefits at the federal level; (2) cheap labor. In Kansas, §936 companies are included in a combined report because (1) they are incorporated in the United States; (2) they have federal taxable income; and (3) they are unitary with their parent corporation.

Under the §936 arrangement, a U.S. parent corporation will transfer patents and technological know-how to a §936 corporation in exchange for its stock. The § 936 corporation will then manufacture the product and sell it back to the U.S. parent at a substantial profit. Thus, §936 corporations generally have disproportionately large amounts of income resulting from the uncompensated patent and technological benefits received without charge from the U.S. parent.

The corporate income tax revenue obtained from the unitary combination of §936 corporations ranges from \$4 - \$8 million annually depending on the profitability of the §936 companies.

I would be happy to respond to any questions you might have.

STATE OF KANSAS

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Department of Revenue
Legal Services Bureau

MEMORANDUM

To: The Honorable Keith Roe, Chairman
House Committee on Taxation

From: Mark A. Burghart, General Counsel
Kansas Department of Revenue

Date: January 12, 1994

RE: *Stephan v. Finney, et al.*

The issues associated with the authority of the state to tax transactions occurring on federally-recognized Indian reservations are complex and longstanding. On February 26, 1991, the United States Supreme Court issued its decision in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). From that date forward the issue of state taxation on federally-recognized reservations has been a topic of considerable public interest insofar as Northeast Kansas is concerned. In the *Potawatomi* case, the Supreme Court held that under the Oklahoma allotment system tribal smokeshops were subject to the collect and remit requirements of the Oklahoma cigarette tax provisions on sales to non-tribal members. Notwithstanding this holding, the Court recognized that states would have considerable difficulty enforcing state tax provisions in Indian Country.

No specific determination has ever been made by a Kansas state court whether the rationale underlying the *Potawatomi* decision also would apply to the particular reservations in Kansas. Since the treaties with the Kansas Nations are unique, there is some question whether the Organic Act (Sec. 19) and the Kansas Act for Admission (Sec. 1) except reservation land from the state's taxing jurisdiction. The Kansas Board of Tax Appeals has determined that the state's ad valorem property tax provisions do not apply on the Potawatomi Reservation. (See *In The Matter of the Application of Roger Kaul for Exemption from Ad Valorem Taxes in Jackson County*, Docket No. 91-6432 TX, October 5, 1992)

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*House Taxation Committee
Attachment 2*

Kansas Litigation

On July 12, 1991, the Attorney General filed an action for mandamus, declaratory judgment and injunctive relief against the Governor and the Department of Revenue to require the Department to enforce the state's sales, cigarette and motor fuel tax provisions on the Indian Reservations (*Stephan v. Finney et al.*, 91 CV 954). On August 21, 1992, Shawnee County District Court Judge Fred S. Jackson stayed the proceedings until the 1993 Legislature adjourned. The stay was necessary to provide the Legislature the opportunity to consider and approve tax compacts previously negotiated with the Kansas Nations. Judge Jackson held that the Governor was authorized to negotiate such compacts with the Indian Nations. The Legislature failed to act on the compact legislation during the 1993 Session and the litigation recommenced.

On December 21, 1993, Judge Jackson dismissed the Attorney General's suit. The Court ruled that until the Kansas Legislature specifically acts to either approve or disapprove the Tax Compacts, the issues raised by the Attorney General are moot and there was no case in controversy. The Court was without authority to render an advisory opinion in an otherwise moot case (copy of decision attached).

Pending Legislation

One of the alternatives identified by the United States Supreme Court to address the Indian tax issue is the negotiation of tribal tax compacts. The office of the Governor commenced the negotiation of such compacts with the Kansas Nations immediately after the Supreme Court issued its ruling in the *Potawatomie* case. 1992 H.B. 2735 was requested to provide legislative ratification of the tax compacts. H.B. 2735 did not pass. Instead, the Indian tax issue was referred to the 1992 Special Committee on Assessment and Taxation for interim study. The Special Committee recommended the introduction of H.B. 2002. That bill would authorize the Department of Revenue to negotiate and execute tax compacts with the Kansas Indian Nations on behalf of the State of Kansas.

The House Committee on Federal and State Affairs recommended that H.B. 2002 be passed. However, the bill was subsequently withdrawn from the calendar and referred to the House Committee on Taxation. No hearings were held during 1993 in the House Committee on Taxation. The bill remains in the House Committee.

I would be happy to respond to any questions you might have.

DISTRICT COURT
JUDICIAL DIST.

Dec 21 3 46 PM '93

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWO

STATE OF KANSAS, ex rel.,)
ROBERT T. STEPHAN, Attorney)
General, State of Kansas, Plaintiff,)
vs.)
THE HONORABLE JOAN FINNEY,)
Governor of the)
State of Kansas, et al., Defendants.)

Case No. 91 CV 954

ORDER OF DISMISSAL

NOW on this 14th day of December, 1993, comes on for consideration the motions for summary judgment filed in the above matter by the Plaintiff and by the Defendants. The Plaintiff appears by Terry D. Hamblin. The Defendants appear by David Prager, III.

THE COURT after reviewing the file and the motions, hearing the arguments of counsel, and being fully and duly advised in the premises finds and orders as follows:

1. The Plaintiff filed this action on July 12, 1991.
2. From September 19, 1991 to January 10, 1992, the Governor negotiated four tax compacts (the "Tax Compacts") with the Potawatomi, the Kickapoo, the Iowa, and the Sac and Fox Indian Nations (the "Indian Nations").
3. The Governor has the authority and discretion to negotiate compacts with the Indian Nations and to seek the Kansas Legislature's approval of them. State ex re. Stephan v. Finney, 251 Kan. 559, 836 P.2d 1169 (1992).
4. The pursuit of the Tax Compacts by the Governor is within her discretion. The U.S. Supreme Court has identified tax compacts as one way for the states to deal with the issue of state taxation of Indian reservation transactions.


Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,
498 U.S. 505, 514, 112 L.Ed 2d 1112, 111 S.Ct. 905 (1991).

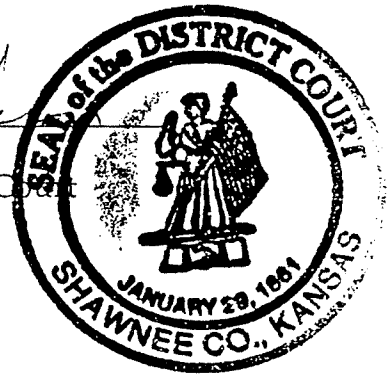
5. The Tax Compacts were submitted to the 1992 Kansas Legislature, which referred them for an interim committee study. During the 1993 Session, the Legislature took no action to either approve or disapprove the Tax Compacts.

6. Until the Kansas Legislature acts to either approve or disapprove the Tax Compacts, the issues raised by the Plaintiff's action are moot. There is no case in controversy. Kansas courts are without authority to render advisory opinions in cases found to be moot. NEA-Topeka, Inc. v. U.S.D. No. 501, 227 Kan. 529, 608 P.2d 920 (1980). Therefore, the Plaintiff's action should be dismissed.


WHEREFORE, this action is hereby ordered to be dismissed without prejudice.

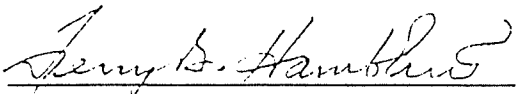
IT IS SO ORDERED.


Judge Fred S. Jackson
Shawnee County District Court



APPROVED BY:


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Terry D. Hamblin, Attorney for Plaintiff
Assistant Attorney General
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STATE OF KANSAS, COUNTY OF SHAWNEE, SS.
I hereby certify the above and foregoing to be
a true and correct copy, the original of which
is filed and entered of record in the court

Dated

12-21-93

CLERK of the DISTRICT COURT

By


DEPUTY

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION ELEVEN

ERIC PEDEN,)
for himself and all)
others similarly situated,)
Plaintiffs,)
vs.) Case No. 93 CV 415
STATE OF KANSAS,)
et al.,)
Defendants.)

LEGAL SERVICES

DIRECTOR

MEMORANDUM OF DECISION

The above captioned matter comes before the court on Defendant's Motion to Dismiss pursuant to K.S.A. 60-212(b)(1) and Plaintiffs' Motion for Class Certification. After careful consideration, the Court grants Defendant's Motion to Dismiss and overrules Plaintiffs' Motion for Class Certification.

In April of this year, the Plaintiffs brought this action against the State of Kansas seeking declaratory and injunctive relief. Plaintiffs also sought income tax refunds from the State of Kansas for the years since 1987. The Plaintiffs have alleged that K.S.A. 79-32,110 is unconstitutional because of provisions in the statute that create "a disparity between the top income tax rates charged to married taxpayers and those rates charged to single taxpayers."

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Attachment 3

This disparity allegedly violates the Plaintiffs' rights under the equal protection clause of the Fourteenth Amendment of the United States Constitution, and Article 11, § 2 of the Kansas Constitution.

In June, Defendant moved to dismiss the Plaintiffs' income tax refund claims for lack of subject matter jurisdiction due to failure to exhaust administrative remedies. The Defendant concedes that the Court can properly consider the Plaintiffs' claims for declaratory judgment and injunctive relief. At issue is whether the Court can properly consider Plaintiffs' claims for tax refunds. In considering this matter, the Plaintiffs and the Defendant cite the tax cases of Dean v. State, 250 Kan. 417 (1992) and Zarda v. State, 250 Kan. 364 (1992) extensively. In Dean an agencies interpretation of a statute was challenged as unconstitutional while Zarda challenged an agencies regulation implementing a statute. Both cases were dismissed in the District Court for lack of subject matter jurisdiction due to failure to exhaust administrative remedies. The Kansas Supreme Court affirmed these decisions. Plaintiffs have asserted that this case is distinguishable from Dean and Zarda in that they are challenging the statute directly and not any agency action, therefore exhaustion of administrative remedies is unnecessary.

However, the Zarda courts holding was broader than Plaintiffs assert. The Zarda court noted that the declaratory and injunctive

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claims could have been considered by the District Court, but claims for a tax refund were properly rejected. The Court said, "since the plaintiffs did not comply with (K.S.A.) 79-2005, they cannot seek recovery of their taxes directly in the district court. In Felton, we recognized that acts of an agency in its application of the statute are administrative in nature, and, as such, administrative remedies must first be exhausted." Zarda at 371. Although the Felton court declared the statute at issue unconstitutional, tax refund relief was only granted to the Plaintiffs that had protested payment of taxes under the statute. Felton Truck Line v. State Board of Tax Appeals, 183 Kan. 287 (1958) Protesting the payment of taxes was the proper administrative method to obtain a refund at that time. Just as in Felton the Plaintiffs must also follow proper administrative procedures if refund relief is to be granted. See also Dean at 427 and State ex rel Smith v. Miller, 239 Kan. 187, 191 (1980).

Further, the Kansas Supreme Court has considered a situation in which a statute was directly challenged. In Smith, the Court affirmed the dismissal of a suit seeking to declare K.S.A. 79-1435 and K.S.A. 72-7030 unconstitutional for failure to exhaust administrative remedies. The Court said;

Appellant maintains that it has no adequate administrative remedy because the relief prayed for in its petition is beyond the scope of the authority of either the County Board of Equalization or State Board of Tax Appeals. Linn Valley

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postulates that the doctrine that requires exhaustion of administrative remedies does not apply in this situation because such procedure would be clearly futile in that the BOTA does not have the authority to rule upon the constitutionality of statutes or provide the relief sought by way of mandamus and quo warranto. We do not agree with appellant's arguments. A party aggrieved by an administrative ruling is not free to pick and choose a procedure in an action in the district court in order to avoid the necessity of pursuing his remedy through administrative channels. Since the adoption of the act for judicial review and civil enforcement of agency action (K.S.A. 77-601 et seq.), it would appear that relief such as is sought here should be raised as new issues in the district court on appeal from the BOTA.

Smith at 190.

When considering the Plaintiffs' claims, the Court must determine if a full and adequate remedy exists. Smith, at 187. According to Zarda and Smith, the Legislatures 1980 tax procedure reforms set up a procedure to deal with all types of tax cases. In the case at bar, such remedies exist. The Director of Taxation examines tax returns and after he makes a decision the taxpayer can get a hearing. K.S.A. 79-3226. Decision's of the Director can be appealed to the Board of Tax Appeals. K.S.A. 74-2438. An appeal from BOTA would then be brought directly to the Kansas Court of Appeals in an income tax case. K.S.A. 74-2426(c)(3). The reforms channel income tax refund issues through BOTA then to the Court of Appeals. At the Court of Appeals level, constitutional issues can be raised on appeal from BOTA. In addition, in the case at bar the Plaintiffs are not being denied a ruling on the constitutional issues raised in

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the District Court.

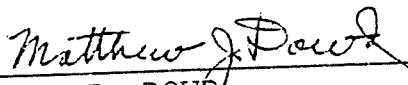
Judge Adrian Allen of another division of this judicial district, reached a similar decision in the recent cases Barker and Corcoran vs. State of Kansas, 89 CV 666 and Lober vs. State of Kansas, 89 CV 1100. While these cases involved a different tax, the principle of exhaustion of administrative remedies is identical and is discussed in detail in Judge Allen's opinion of December 17, 1993. This Court reaches the same conclusion regarding the proposed refund of income tax.

The Court is afforded substantial discretion when deciding on class certification. Connolly v. Frobenius, 2 Kan. App.2d 18, Syl. 3 (1978), Helmley v. Ashland Oil, Inc., 1 Kan. App.2d 532, 535 (1977). "There may be instances where such a denial (of class certification) would be proper, even though the statute would otherwise seem to allow the class." Connolly at 24. In the case at bar, the only claims of relief remaining are for declaratory and injunctive relief. These claims when adjudicated will be determinative for all those who would be in the class. Plaintiffs have argued that necessity or need is not a requirement for class certification. While this may be true on the statutes face it is none the less something a court in its discretion could properly consider. Even the commentator plaintiffs cite notes that a court is "rarely" reversed for such a determination, based in part on need.

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The Plaintiff has exhibited no compelling need for certification of a class. There is nothing that can be accomplished by class certification that cannot be handled by ordinary litigation procedures.

For the reasons set forth above, the Court grants Defendants' Motion to Dismiss for lack of subject matter jurisdiction Plaintiffs' claims for a tax refund and overrules Plaintiffs' Motion for Class Certification. The foregoing Memorandum of Decision shall serve as the Order of the Court, no further journal entry being required.


MATTHEW J. DOWD
DISTRICT JUDGE
DIVISION ELEVEN

Dated this 4 day of Jan, 1994.

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BARKER v. KANSAS

Background

In 1989 the United States Supreme Court ruled in *Davis v. Michigan Dept. of Treasury* that states could not tax federal civil service retirement benefits while exempting state and local government retirement benefits. Shortly after *Davis* was decided a lawsuit was filed in Kansas challenging the taxation of military retirement pay under the Kansas Income Tax Act. For many years Kansas had taxed nondisability military retired pay but exempted state and local government retirement benefits. The lawsuit was certified as a class action with the Plaintiff Class consisting of over 14,000 military retirees residing in Kansas who have paid state income tax on their retirement pay.

Although the taxation of military retired pay was upheld by both the trial court and the Kansas Supreme Court, the Supreme Court of the United States in 1992 invalidated the tax and remanded the case to the Kansas Supreme Court. The Kansas Supreme Court subsequently remanded the case to Shawnee County District Court where it originated. Shortly after the issuance of the United States Supreme Court decision, the Kansas Legislature enacted Senate Bill No. 215 (1992) exempting all types of federal retirement benefits, including nondisability military retired pay, from Kansas income tax.

Recent Court Rulings

Several issues were raised by the parties on remand. Plaintiffs sought refunds of all income taxes paid by members of the Plaintiff Class during years 1984-1991 and an award of attorney's fees pursuant to 42 U.S.C. § 1988. Defendants sought to have the Plaintiff Class decertified and to have plaintiffs' refund claims dismissed for lack of subject matter jurisdiction.

On December 17, 1993, the Shawnee County District Court granted defendants' motion to dismiss plaintiffs' refund claims. The court ruled that plaintiffs had failed to pursue and exhaust their administrative remedies which provide a full, adequate and complete remedy for tax refund relief. Accordingly, the court determined it lacked subject matter jurisdiction over the issue of refunds.

1/12/94
House Taxation Committee
Attachment 4

Current Status of Litigation

There are several issues that remain pending before the district court.

1. Plaintiffs have sought a permanent injunction to prevent the Kansas Department of Revenue from initiating any assessment, collection or enforcement proceedings to collect tax on military retired pay for tax years 1984-1991. The court is presently considering this matter.

2. The court has not yet ruled on defendants' motion to decertify the Plaintiff Class.

3. The court has indicated that it will defer ruling on plaintiffs' motion for attorney's fees.

4. Plaintiffs have stated that they intend to file a motion to alter or amend the court's December 17, 1993 decision and to appeal the dismissal of their refund claims.

The Issue of Income Tax Refunds

Since the district court dismissed plaintiffs' refund claims on jurisdictional grounds, there has been no ruling on the substantive question of whether plaintiffs are entitled to receive refunds. The ultimate determination of this issue will depend, in large part, upon application of the principles announced by the United States Supreme Court on June 18, 1993 in *Harper v. Virginia Dept. of Taxation*.

In *Harper*, the Virginia Supreme Court had previously ruled that the *Davis v. Michigan* decision did not apply retroactively and Virginia was therefore not required to refund taxes collected from federal civil service and military retirees in years prior to 1989. The Supreme Court reversed this ruling and stated that *Davis* applies retroactively. The Court emphasized, however, that Virginia was not necessarily required to pay refunds. Whether refunds are due, the Court said, is a question of state law which the Virginia courts must address. The case was remanded to the Virginia Supreme Court for this purpose.

Harper states that the first question to be asked in determining the appropriate remedy is whether a state provides an adequate "predeprivation process," such as a statute authorizing taxpayers to bring suit to enjoin the imposition of a tax prior to its payment or allowing taxpayers to withhold payment and raise their objections to the tax at a hearing or enforcement proceeding. Kansas does have a statute permitting taxpayers to "enjoin the illegal levy of any tax, . . . the collection thereof, or any proceeding to enforce the same." [See K.S.A. 60-907(a)]. This statute and other predeprivation remedies available under Kansas law may constitute adequate relief under *Harper* so that the state would not be required to pay refunds.

If a state has no predeprivation remedy or if its predeprivation remedy is determined to be inadequate, a state is then obligated to provide what the Supreme Court has characterized as "meaningful backward-looking relief" to rectify the unconstitutional deprivation. Such relief consists of either full refunds to those burdened by the unlawful tax or some other means of creating in hindsight a nondiscriminatory tax scheme. One example of the latter option would be a retroactive assessment of tax on state and local government retirement benefits for all prior years at issue.

In the event it is determined that refunds must be paid, the state is prepared to offer evidence in support of the position that only the discriminatory portion of the tax, not the full amount of tax paid by military retirees, should be refunded. Since a portion of the pension benefits received by KPERS retirees includes previously taxed employee contributions, KPERS benefits are not entirely tax-exempt. To the extent that KPERS benefits include previously taxed income, the tax on the corresponding portion of military retired pay is not discriminatory and should not be refunded.

Administrative Proceedings

Many military retirees have filed amended returns or refund claims with the Kansas Department of Revenue for one or more of the tax years at issue. The Department has denied these claims. Some retirees have appealed the denial of their claims to the Director of Taxation. An Administrative Hearing Officer designated by the Director will decide these appeals and determine whether refunds are due. The Hearing Officer's order can be appealed to the Kansas Board of Tax Appeals and a final order of the Board can be appealed to the Kansas Court of Appeals.

Kansas law provides for a three year statute of limitations on income tax refund claims. Claims filed for the 1990 tax year would be timely if filed on or before April 15, 1994. Claims for tax year 1991 would be timely if filed on or before April 17, 1995.