

MINUTES OF THE SENATE ASSESSMENT AND TAXATION COMMITTEE

The meeting was called to order by Chairperson David Corbin at 10:50 a.m. on February 12, 2003, in Room 519-S of the Capitol.

All members were present except:

Committee staff present: Chris Courtwright, Legislative Research Department
April Holman, Legislative Research Department
Gordon Self, Revisor of Statutes Office
Shirley Higgins, Committee Secretary

Conferees appearing before the committee: David Patton, Kansas Board of Tax Appeals
Joan Wagon, Acting Secretary, Department of Revenue
Richard Greene, Attorney at Law
Linda Terrill, Attorney at Law

Others attending: See attached list.

SB 115—Reducing membership of board of tax appeals to three members

David Patton, Chairman of the Board of Tax Appeals (BOTA), testified on his own behalf, not on behalf of BOTA. He expressed his support of the reduction in membership, observing that Board will hear the same number of cases whether there are five or three members. He noted that currently 90 percent of the cases filed are either settled or stipulated to and are not tried, therefore, the number of trial cases have dramatically diminished. However, the cases which BOTA does try are much larger and more serious than they were in the past. For this reason, Mr. Patton opposes the reduction in the qualifications for board members. In his opinion, the qualifications should be increased rather than reduced. In support of his recommendation, he noted that the number of complaints and the controversy which surrounded BOTA in the past have been dramatically reduced during the past four years when the Chairman of BOTA has been a lawyer rather than a lay person. He also believes that it is important that attorneys serve on the Board because attorneys must adhere to the rules of judicial ethics. He noted that most cases the Board hears involve complex legal questions, and the members must act as both the judge and the jury. He pointed out, if there are no attorneys on the Board to consider legal documents, the Board will send the case to a staff attorney for a decision.

Mr. Patton also suggested that the time has come for a filing fee system to be instituted for BOTA, especially for the larger cases filed which involve millions of dollars and take a great deal of the Board's time. He requested that legislation be introduced to allow the Board to develop regulations allowing the imposition of filing fees. He believes that the filing fees would generate approximately \$300,000 in revenue for BOTA.

Senator Goodwin expressed the concerns of citizens in rural areas who fear that it is possible that all three members could be from urban areas, and the rural community will not be represented. In response, Mr. Patton noted that he is from Dodge City, but two current non-attorney Board members are from urban areas. He reiterated that three members will be just as effective as five.

Senator Allen asked who requested the introduction of **SB 115**. Senator Corbin explained that, although Senator Lee requested the introduction of the bill, the concept was recommended by the Governor's task force. Joan Wagon, Acting Secretary, Department of Revenue, spoke on behalf of the Governor's legislative staff. She reported that she visited with the Governor and members of her staff on February 10. The Governor supports the bill because of the fiscal savings involved and also because it would make BOTA more efficient as discussed by Mr. Patton. Ms. Wagon emphasized that it is very important that BOTA functions well because it is a court of record. She noted that the Governor is willing to give up the opportunity to appoint two BOTA members and to retain three Graves appointees and in order to accomplish a budget saving.

CONTINUATION SHEET

MINUTES OF THE SENATE ASSESSMENT AND TAXATION COMMITTEE at 10:50 a.m. on February 12, 2003, in Room 519-S of the Capitol.

Richard Greene, an attorney from Wichita, testified in opposition to the portion of **SB 115** which removes the membership qualifications for BOTA. He maintained that deletion of the requirements will result in an inferior tribunal, salaries that are excessive for the remaining positions, and an erosion in public confidence in the system of tax appeals in Kansas. He argued that BOTA membership should consist of highly qualified and experienced lawyers because the Board is required to conduct hearings involving complex issues of law and must at all times observe applicable rules of procedure, rules of evidence, and applicable statutes founded on principles of law. He also pointed out that the salaries of BOTA members parallel the salary structure for district judges. He could find no reason to pay in excess of \$90,000 per year to a person who is required to have no more than minimal appraisal training as specified in the bill. He urged the Committee to amend the bill by restoring lines 19 through 24 to the extent that at least two of the three members must be practicing attorneys. (Attachment 1)

Linda Terrill, an attorney from Overland Park whose practice is exclusively in the field of state and local taxation, testified in support of reducing the number of BOTA members but in opposition to the removal of the requirement that BOTA members be attorneys. She suggested that, if the language requiring BOTA members to be attorneys is removed, the salary of members should be lowered to the level of an entry level civil servant for a state job which has no job qualifications. She pointed out that the Legislature originally tied BOTA salaries to that of a district court judge because that is the function BOTA members perform. She commented that, if the bill becomes law, this will be the only area of the law where records prepared for appeal will be done by a non-lawyer. She suggested that, if the lawyer requirement is removed, taxpayers should be permitted to bypass BOTA and appeal directly from the local level or from the Department of Revenue to district court. In conclusion, she reasoned, if the state cannot afford the luxury of a state agency to handle tax litigation, it would be preferable to sunset it and move the cases to district court rather than try to run it under circumstances where competency would likely suffer. (Attachment 2)

Senator Corbin asked Mr. Patton what the professions of the current five BOTA members are. Mr. Patton said three are attorneys, one is former mortgage broker, and one is a former government worker. Senator Corbin also confirmed that Mr. Patton recommends that two of the three members be attorneys.

Jack Glaves, an attorney from Wichita, stood in support of the testimony offered by Mr. Greene and Ms. Terrill. He reiterated that BOTA occupies a very unique position as a tax court where the facts are determined and the law is applied. He observed that it makes no more sense to not have lawyers presiding over BOTA than to not have lawyers as district and appellate judges. He cited a case in which the Kansas Supreme Court determined that BOTA is a paramount, pre-eminent authority in the area of taxation.

There being no others wishing to testify, the hearing on **SB 115** was closed.

Due to the lack of sufficient time, Senator Corbin announced that the report by Acting Secretary Wagnon on the post audit reviewing factors affecting the recent steep drop in corporation income tax receipts would be re-scheduled for a future meeting.

The meeting was adjourned at 11:45 a.m.

The next meeting is scheduled for February 13, 2003.

SENATE ASSESSMENT AND TAXATION COMMITTEE
GUEST LIST

DATE: February 12, 2003

NAME	REPRESENTING
Russell Cron	KDOR
Mark Beck	KDOR
Nick Kramer	KDOR
Mark Leonard	Kansas, Inc.
Kyle Kessler	DOB
Chap & Peter	KTN
Condon Neman	Intern Sen. Allen
Tony Folsom	BOTA
Tom Bruno	CPAK
BJ McCandless	myself
Bill Brady	Ks Gov't Consulting
Julie Heit	Hear Law Firm
Michael S. Dini	KFB
Natalie Bright	WIBA
Jack Graves	Dahr - PH + KM
Bob Kuchniel	KIDBA
Richard D. Greene	self
Linda Terrill	self

RICHARD D. GREENE

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WRITTEN TESTIMONY OF RICHARD D. GREENE

TO: Members of the Senate Committee on Assessment & Taxation

RE: Senate Bill No. 115

DATE: February 12, 2003

I appear today to express my opposition to that portion of the referenced Bill that would remove membership qualifications for the State Board of Tax Appeals. In summary, the deletion of these requirements will result in an inferior tribunal, salaries that are excessive for the remaining positions, and an erosion of public confidence in the system of tax appeals in Kansas.

I. Background and Experience.

I am a practicing attorney associated with the firm Morris, Laing, Evans, Brock & Kennedy, Chtd., which has offices in Wichita and Topeka. For nearly 28 years, I have maintained an active practice before the Board of Tax Appeals, and for the last several years more than 75% of my practice has been the prosecution of tax matters before the Board. I appear before the Board in both sales tax matters and property tax matters, and I represent some of the state's largest taxpayers, including industrial facilities, refineries, gas processors, natural gas pipelines, and commercial property.

II. Experienced Lawyers are Required for the Work of BOTA.

As recognized by the Kansas Supreme Court, the State Board of Tax Appeals is "the paramount, lawfully constituted taxing authority in this state." *Wirt v. Esrey*, 233 Kan. 300, 314, 662 P.2d 1238 (1983). Our current system of tax protests and appeals directs all such matters to the Board of Tax Appeals for a hearing of record. *See, e.g.*, K.S.A. 79-2005. In performing its function as the tribunal of record for tax protests and appeals, BOTA is required:

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Attachment 1

- to understand and apply a complex, disjointed, and often confusing group of applicable statutes which govern standing, appeal procedure, imposition criteria, exemption eligibility, fair market value standards, and related matters;
- to apply recognized rules of statutory construction in the interpretation and application of all tax statutes, which rules are set forth in statutory and decisional case law;
- to apply these statutes in a manner that avoids constitutional implications, or is consistent with constitutional mandate;
- to understand and apply the Uniform Standards of Professional Appraisal Practice, as required by K.S.A. 79-505 and 506, and which standards are themselves often ambiguous and confusing;
- to conduct its hearings consistent with the rules of evidence in Kansas, as embodied in K.S.A. 60-401 *et seq.* and applicable decisional law;
- to follow controlling precedent or stare decisis decisions of the appellate courts in Kansas, K.S.A. 74-2433(a); and
- to consistently enforce taxpayer safeguards contained in the Taxpayer Bill of Rights, K.S.A. 79-3268.

BOTA is often required to conduct hearings involving complex issues of law which may consume days or weeks and which ultimately require that BOTA hear, understand, and determine credibility and weight of expert witnesses in accounting, finance, economics, industry regulation, multi-state allocation, and other difficult issues, while at all times observing applicable rules of procedure, rules of evidence, and applicable statutes, all of which are founded on principles of law.

Once the comprehensive scope and important duty of BOTA is understood, it is quite clear that its membership should consist of highly qualified and experienced lawyers, who have requisite training in such matters of law, and who are experienced in the application of such legal principles to tax practice in Kansas. To suggest that

the membership requirements for BOTAs should be reduced rather than enhanced is to suggest that we don't really need brain surgeons for brain surgery. This legislature, in promulgating the current statutory scheme for taxation in Kansas, should be among the first to recognize the importance of highly-qualified individuals to interpret and apply such statutes in the State Board of Tax Appeals. The reduction or elimination of membership requirements is destined to create an inferior tribunal that is not in the interest of either taxpayers or taxing authorities in this state.

III. Current Salaries for BOTAs Members are Commensurate with More Qualified, Not Less Qualified, Members.

The current salary structure for members of BOTAs parallels the salary structure for district judges in Kansas. K.S.A. 74-2434. The establishment of salaries on a par with district courts was a legislative acknowledgment that BOTAs serve in a function similar or equivalent to our district courts in being the initial tribunal of record in significant legal matters. The salaries were also intended to be adequate for the recruitment of persons whose qualifications might be similar to that of a district judge. The elimination of the membership requirements in SB 115 would be completely inconsistent with current salary structures as well as prior legislative policy. Either the membership requirements should be restored, or the salary structure should be revisited. There is very little reason, particularly in our current budget predicament, to pay in excess of \$90,000 per year to a person who is required to have no more than minimal "appraisal training" specified in the current Bill.

IV. An Inferior Board of Tax Appeals will Erode Confidence in the State's System of Tax Protests and Appeals.

My clients spend significant amounts of money and effort in presenting cases to the Board of Tax Appeals just as if we were before district courts in Kansas. We make complicated evidentiary presentations, we retain expert witnesses, we comply with rules of evidence, and we submit comprehensive briefing on legal issues. To expend such effort and cost before a Board of Tax Appeals that has inadequate legal training is to assure that the result will most assuredly not be consistent with applicable law, thus requiring unnecessary appeals, and additional expense. Taxpayers across Kansas are entitled to know that their cases will be heard by persons with adequate credentials to apply the law in any required determination. If BOTAs are not as credentialed as district courts, it can become an irrelevant first step, with unnecessary cost and delay to taxpayers.

V. Conclusion.

The Board of Tax Appeals in Kansas plays a critical role in tax equity and policy. Its functions are founded upon and intertwined with legal principles. Experienced lawyers are required to serve in this capacity, will earn the salaries parallel to district court judges, and will maintain public confidence in the tax protest and appeal process in Kansas. Elimination of membership requirements as currently proposed in SB 115 is a step in the wrong direction.

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**Senate Committee on
Assessment & Taxation
SB 115**

Thank you for allowing me to appear today. My name is Linda Terrill. I am currently a private practice attorney whose practice is exclusively in the field of state & local taxation. We represent taxpayers in contested sales & income taxes cases and in matters of property taxation. We also represent the Finney & Meade County Appraiser's office and on occasion represent other counties who need an attorney in a valuation case. Prior to that I served in various capacities for 3 former members of the Kansas House of Representatives, including two years as the Administrative Aide to the Chairman of the Ways & Means Committee. I left that to become the General Counsel for the Board of Tax Appeals. I served there for two years prior to going into private practice. I tell you that because I worked in this building when a Governor proposed the first billion-dollar budget and I think I understand the implications of being a billion short. Hopefully my experience as General Counsel for BOTA will be of some assistance to you in your deliberations of this bill.

I have always supported reducing the number of members of BOTA from 5 to 3. I have also appeared in support of a Tax Court. Neither idea has yet to become law. It does seem that the \$100,000 plus salaries of BOTA members combined with today's economics has provided impetus to the idea of reducing the number of members.

However, what troubles me is the removal of the requirement that BOTA members be attorneys. Before you assume that I am here in a self-serving mode, let me assure you that my position on this bill will not benefit

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me personally. In fact, I will likely be more successful under the proposal in the form it is in now. But, it is wrong and I'm compelled to say why even if it will be harder to get an objection sustained at BOTA after I'm done.

My testimony will throw out alternatives that can be summarized as follows. If you are going to remove language requiring members to be attorneys, you should also lower the salaries to whatever you would pay an entry level civil servant for a state job that has no job qualifications. You could probably take the salary of one member and divide it amongst the three members, saving approximately \$400,000 rather than \$200,000. Pass an "opt-out" law to permit taxpayers to go directly to court. Or abolish the agency altogether and save \$2,000,000.

How did I get to these suggestions?

Let's talk about the first one. If you reduce the qualifications, you should reduce the salaries. The legislature tied BOTA salaries to that of a District Court Judge, because that is the function they perform. If you remove the qualifications that they be attorneys, then you need to disconnect the salaries from the District Court Judge. It is an obvious point. Does anyone recall looking for employment after high school and finding a Want Ad advertising a \$100,000 state job with no qualifications necessary? In fact, you need more qualifications to teach kindergarten in this state than you will need to be a BOTA member. It's been a while since I looked at the pay scale for teachers, but I don't imagine there's an entry-level Kindergarten teacher position offering \$100,000.

The second suggestion is an opt-out provision permitting taxpayers to appeal directly from the local level or the Department of Revenue to district court, bypassing BOTA. I make this suggestion for the simple reason that what I do is try tax cases. They are just like any other litigation. The rules of civil procedure apply, as do the rules of evidence. There are witnesses, direct examination and cross-examination. For the same reason that you want to see a doctor when you're ill, I want an experienced attorney ruling on a Motion in Limine, an objection to foundation or an a summary judgment motion. When you are in law school, you take a minimum of one year of Civil Procedure and one year of Evidence. If you want to be a trial attorney, you take more. All you will be leaving me with is a BOTA with members that have taken an appraisal course. I can assure you that taking a PVD course on mass appraisal of residential homes does not help you

address a complicated evidentiary issue. They are very important, because at the end of the trial you must take that record up on appeal. There is no re-trial. No new witnesses. No more evidence. This is the only area of the law where the record prepared for appeal will be done by a non-lawyer. So, if taxpayers have major litigation, let them appeal directly to district court if you are going to remove the lawyer requirement.

Finally, I do understand that there will be some language remaining in the statute books that will require BOTA members to take appraisal classes. But, quite frankly that is counter-productive. It encourages BOTA members to substitute their judgment as to value in property tax appeals, rather than to hear evidence, weigh it and rule on it acting like an appraiser rather than a judge. Secondly, all property tax cases are predominantly local money, as you know. Why the emphasis on one part of the BOTA workload? The General Fund is comprised largely of sales and income tax receipts. The amount of dollars at issue in a sales or income tax appeals are typically in the millions of dollars from the General Fund while residential property tax appeals usually have less than \$500 of local property taxes at issue. Yet, there is no requirement that a BOTA member have any experience in these fields and the issues are very complex.

For instance, assume you have a Leavenworth, Kansas company that takes a phone order from an Illinois business to deliver a product to their Kansas City, Missouri location. The Leavenworth company has plants in Kansas & Missouri, but the buyer is closest to the plant in Johnson County. The Johnson County plant loads up the product and drives it to the Missouri customer. How does taking an appraisal course help you to decide 1) where the sale took place. Did the sale occur in Illinois, Kansas or Missouri? And 2) was the transaction a sales or use tax transaction.

If an out of state company has sales into Kansas but no property or payroll, how do you determine if they have nexus to audit them for corporate income taxes? If there is nexus for the one company, can you get an allocable share of income for related companies? I know there are lawyers behind me that know, but they didn't learn the law in an appraisal class.

Finally, can life exist without BOTA?

BOTA is an agency that can best be described as a matter of luxury. It was created to siphon tax litigation out of the District Courts and put it all

into a quasi-judicial agency. BOTA does nothing but hear tax litigation. One litigated case after another. They do not regulate anyone. They are not over county appraisers. They are the only state agency that is solely quasi-judicial. They are a court in the administrative wing of government, rather than in the judicial wing. However, if Kansas cannot afford the luxury of a state agency to handle tax litigation, the same cases could be tried in the District Courts.

Before the cries of the sky falling, I would suggest that you could run residential tax appeals through the Department of Revenue. They have an appeals system now and the expertise in PVD. Tax exemptions, appeals from the Director of Tax & the Director of PVD would all go to Shawnee County. Finally, commercial property tax appeals could be heard in the District Court in the county where the property is located. If you remove residential appeals from the workload of BOTA, there are relatively few cases. In fact, I know BOTA maintains current information concerning how many of each type of case is filed at BOTA and the amount of taxes at issue. The amount of taxes at issue for DT & PVD vastly exceed, if I recall, the total of all of the rest.

So, my point is that if you cannot afford the luxury of this agency, it would be preferable to sunset it and move the cases to district court rather than to try and run it where competency would likely suffer.

Thank