

THE PHILADELPHIA TAX REVIEW BOARD:
AN EXPERIMENT IN MUNICIPAL
ADMINISTRATIVE LAW *

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The home rule charter adopted by the citizens of Philadelphia on April 17, 1951, created the framework for an agency which seems to be unique in modern municipal government—the Tax Review Board.¹ Subsequent municipal legislation defined the Board's powers and duties,² and, since the beginning of its operations, it has become a significant governmental instrument, aiding both city and taxpayer in their attempts to make sense out of the confusing and growing mass of municipal revenue-raising measures.

The proliferation of taxes and municipal charges—a proliferation produced by legislative attempts to meet ever-increasing costs—has embroiled municipal governments in more and more disputes with their citizen-taxpayers. Prior to the creation of the Tax Review Board, there was, in Philadelphia, no way to review or settle these

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¹ See PHILADELPHIA HOME RULE CHARTER §§ 3-100(f), -914, 6-207.

² Philadelphia, Pa., Tax Review Board Ordinance, Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 478-84, as amended. See note 9 *infra*.

disputes at the administrative tax-collection level. The city provided no machinery, no established procedures, no impartial knowledgeable persons for reviewing a bona fide claim. Indeed, allegations of unfair treatment and skulduggery were not lacking. The law had not been consistently developed through administrative decision-making. The business of tax collection was held in low repute in many respects.

Ironically, the law also dealt harshly with the taxpayer who in good faith sought court review of a questionable exaction imposed by his municipality. Formal litigation in court, the taxpayer's only remedy, was an unsatisfactory method of settling valid disputes. Anachronistic statutes and court decisions declared that the way to frame a reviewable case was for the taxpayer to refuse to pay all charges which he believed were improperly imposed; he would then be sued by the city.³ If he lost, he was obliged to pay interest and penalty exactions even if the claim had merit and had been asserted in good faith.⁴ Moreover, in a jurisdiction like Philadelphia, with heavy court backlogs and long delays, these extra charges were often augmented through no fault of the taxpayer. These disadvantages, added to the high cost in legal fees of fighting a case in court, explain why many taxpayers were deterred from contesting questioned tax bills and why the procedures for review were inequitable. A better system was needed to improve tax collection methods, to review contested cases, and to raise taxpayer morale.

The reform movement which gained control of Philadelphia government in the early 1950's reviewed many fields of municipal government, and among the initial remedies provided for the city's collection evils was a mandate in the new city charter that there be created a "Tax Review Board."⁵ The Board's precise role and duties were to be spelled out by the city council.⁶ Two years later council implemented the charter provision by creating a five-man Board,⁷ whose

³ Freedman, *Some Personal Reflections on the Establishment of the Philadelphia Tax Review Board*, 109 U. PA. L. REV. 663, 666 (1961). See also RHYNE, MUNICIPAL LAW 710 (1957).

⁴ Freedman, *supra* note 3, at 666-67.

⁵ PHILADELPHIA HOME RULE CHARTER §§ 3-100(f), -914, 6-207. A special edition published by the Charter Commission "as an aid to the officials and employees of the City who are charged with carrying out its provisions," *Preface* at xxi, contained annotations, including "sources" and "purposes" of each section, prepared by the legislative draftsman under the direction of the drafting committee as authorized by resolution of the Charter Commission. All references in this study to the charter are to this annotated edition.

⁶ PHILADELPHIA HOME RULE CHARTER § 6-207 provides: "The Tax Review Board shall perform such duties as the Council shall from time to time impose upon it."

⁷ Philadelphia, Pa., Tax Review Board Ordinance, Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 478-84, provided that the Tax Review Board should be composed of five members appointed by the mayor, at least one of whom shall be an accountant and one a lawyer. The charter had provided for a three-man Board,

members were to be appointed by the mayor and whose task it was to review decisions of the city's administrative officials affecting the liability of citizens for all municipal taxes and charges except property valuation.⁸

The charter provision and the Board's organic legislation⁹ are defective in certain fundamental respects. Perhaps the most basic defect is their failure to speak clearly on the Board's status: they fail to state whether the Board is to be simply an investigatory fact-finding executive agency to aid the city in tax administration, or, alternatively, whether it is to assume an independent adjudicatory function comparable to that of a municipal tax court, with power to bind the city by its decisions unless those decisions are set aside by a court.

Despite such ambiguities in its status, the Tax Review Board, in its first years of operation, has in fact assumed adjudicatory powers, has decided a vast volume of disputes between city and citizen, and has helped to foster uniformity in interpretation of the city's revenue laws and fair and efficient settlement of disputes coming before it. The Board has proved to be an appropriate forum for all classes of taxpayers, especially those at opposite ends of the spectrum of disputed cases—those who have claims too small to justify the time and expense exacted by litigation in the courts, and those whose claims pose complicated factual problems requiring long and careful attention and expert evaluation, expensive claims which would be difficult to litigate

composed of the director of finance, the city treasurer, and the city solicitor, with the right being left to council to increase the membership to five. PHILADELPHIA HOME RULE CHARTER § 3-914. The Board as initially constituted never met, never promulgated rules of procedure, never heard any petitions, and never took any action. The annotations to that section of the charter indicate that the draftsmen did not expect the Board to have a great volume of cases to review until council should define the scope of matters to be appealed to it, at which time the Board would be increased to five members. The annotation states: "At that time an accountant and a lawyer will be required to be members of the Board because the Board will be concerned with review of tax cases and any one of the three members originally constituting the Board may be replaced."

⁸ The original tax review board ordinance, Philadelphia, Pa., Tax Review Board Ordinance § 4, Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 479-80, imposed on the Board the duty of hearing and determining petitions for review of *any decision of an administrative officer* of the city fixing amounts payable, as well as determining appeals from and reviewing decisions of the revenue commissioner. This jurisdictional grant was modified in the 1956 codification of the tax review board ordinance, and the code now provides for the review of decisions relating to the liability of any person for unpaid money or claim collectible by the department of collections. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1702 (1956). This does not include questions relating to property valuation.

⁹ The original tax review board ordinance was amended in 1955 by Philadelphia, Pa., Ordinance of Dec. 27, 1955, 1955 PHILADELPHIA ORDINANCES 1142. In 1956 all laws of general application, including those relating to the Tax Review Board, were codified and revised. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES (1956). Since the code was adopted, the sections dealing with the Board, chapter 19, have been amended twice. Philadelphia, Pa., Ordinance of June 5, 1956, 1956 PHILADELPHIA ORDINANCES 278; Philadelphia, Pa., Ordinance of Feb. 27, 1957, 1957 PHILADELPHIA ORDINANCES 120.

before harried judges who are relatively unfamiliar with the intricacies of municipal tax laws. The Board's decisions are infrequently appealed to the courts and they are usually upheld when appealed. The agency has thus become an important source of municipal tax law. It may well suggest itself as a model for other municipalities. Yet, because of the ambiguity in the organic law creating the Board, there are many unresolved problems concerning its procedures and jurisdiction—indeed, its long-term role in Philadelphia's government.

THE BOARD'S CURRENT OPERATIONS

Taxes and Other Charges

Philadelphia now has an operating budget of \$281,666,698.¹⁰ It raises revenue to meet this expenditure through a multiplicity of taxes, rents, and other charges imposed on many diverse activities.

Taxes imposed by the state for the benefit of the city include those on real estate¹¹ and those on intangible personal property.¹² A state

¹⁰ Ordinance for Adopting the Operating Budget of 1961, Philadelphia, Pa., Nov. 30, 1960.

¹¹ The state legislature, PA. STAT. ANN. tit. 53, § 17031 (1957), authorized the city of Philadelphia to levy a tax for municipal purposes on all subjects of taxation specified in § 32 of the Act of April 29, 1844, Pa. Laws 1844, act 318, at 497, and to provide by ordinances a system for the assessment and collection of the authorized taxes. The 1844 act authorizing, *inter alia*, taxes on real property, was subsequently repealed in part, but its subject is presently covered by the General County Assessment Law, PA. STAT. ANN. tit. 72, § 5020.201 (Supp. 1960), which subjects real estate to taxation for city and county purposes. Pursuant to this statutory authority, annual municipal ordinances have been passed by Philadelphia's city council dealing with this subject. See, *e.g.*, Philadelphia, Pa., Ordinance of Nov. 30, 1953, 1953 PHILADELPHIA ORDINANCES 643-44, setting the rates of taxation for such property in accordance with authorization granted by the legislature in 1854, PA. STAT. ANN. tit. 53, § 17034 (1957). If city council should neglect to act in any year, it is provided by statute that the rate shall remain the same as that imposed for the previous year. PA. STAT. ANN. tit. 53, § 17035 (1957). Assessment in Philadelphia is the function of the Board of Revision of Taxes. PA. STAT. ANN. tit. 72, §§ 5341.1-21 (Supp. 1960). This Board was transformed from its original status as a county office into one of the city by the 1951 City-County Consolidation Amendment to the Pennsylvania constitution, PA. CONST. art. XIV, § 8, as interpreted by the Supreme Court of Pennsylvania in *Lennox v. Clark*, 372 Pa. 355, 93 A.2d 834 (1953). The collection of this tax is a task of the city's department of collections.

The anomalous status of the Board of Revision of Taxes derives primarily from the First Class City Home Rule Act of 1949, PA. STAT. ANN. tit. 53, §§ 13101-57 (1957), which precludes cities of the first class—of which Philadelphia is the only one—from exercising any powers contrary to, or in limitation or enlargement of, powers granted by acts of the general assembly which are applicable to that class of cities on the subjects of limiting rates and fixing proper subjects of taxation, or which provide for the assessment of real or personal property for taxation purposes. PA. STAT. ANN. tit. 53, § 13133 (1957). Thus, the state has authorized the city to levy a tax on real property and to impose any rate of taxation—or none—on such property; however, the city cannot modify the subject of taxation or even the assessment procedure.

¹² PA. STAT. ANN. tit. 72, § 4821 (Supp. 1960). In this act, the state legislature has imposed a tax on certain classes of intangible personal property held by Philadelphia residents. This tax is imposed for the benefit of the county (or city, under the consolidation amendment), and its assessment is a function of the Board of

enabling law¹³ has been used by the city council to impose a city income tax (consisting of levies on wages and net profits),¹⁴ an annual mercantile license tax,¹⁵ an entertainment tax,¹⁶ a realty transfer tax,¹⁷ a public parking lot tax,¹⁸ and a mechanical amusement device tax.¹⁹ In addition to these business taxes, the city council has imposed charges for licenses and permits for the "privilege" of conducting various activities—for example, auctioneering²⁰ and operating

Revision of Taxes. The collection of this tax is a function of the city's department of collections. The legislature likewise imposes a tax on almost the identical classes of intangible personal property for purposes of the school district of Philadelphia. PA. STAT. ANN. tit. 24, §§ 581.1-16a (1950), as amended, PA. STAT. ANN. tit. 24, §§ 581.1-16a (Supp. 1960). The Board of Revision performs the assessment function and the department of collections the collection task on behalf of the school district. See note 126 *infra* and accompanying text. Discounts for early payment and interest and penalties for late payments are specified. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1101 (1956). See Note, *Administration of the Intangible Personal Property Tax in Philadelphia*, 103 U. PA. L. REV. 391 (1954).

¹³ In 1932 the state legislature authorized cities of the first class to enact ordinances imposing taxes on persons, transactions, occupations, privileges, subjects, and personal property within the city limits, except such as are, or may become, subject to a state tax or license fee. PA. STAT. ANN. tit. 53, § 15971 (1957). This act has been designated as the "Sterling Act." Fifteen years later a more general enabling act gave similar powers to other communities and has been termed the "Tax Anything" Act. PA. STAT. ANN. tit. 53, § 6851 (1957), as amended.

¹⁴ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1500 (1956) imposes a wage and net profits tax, generically referred to as the city income tax. This is an annual imposition of 1.625% on income earned from wages, salaries, and like forms of compensation earned in Philadelphia or by Philadelphia residents wherever earned, and on net profits of businesses derived from Philadelphia or earned by Philadelphia firms. See 2 JOURNAL OF THE (PHILADELPHIA) CITY COUNCIL 1051, 1637-88 (1960). Interest, penalties, and costs for late payment of all taxes imposed under title 19 of the code, other than real estate and personal property taxes, are specified. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-508 (1956).

¹⁵ The mercantile license tax is composed of a \$3.00 annual license fee for each place of doing business in Philadelphia plus an annual imposition presently in the sum of three mills on each dollar of gross business attributable to all persons engaged in any trade, business, profession, vocation or in any manufacturing, commercial, service, or utility business or activity in Philadelphia. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1000 (1956).

¹⁶ The city requires a license for the producing of any form of entertainment in the sum of \$10.00 for each permanent place of amusement or a fee of \$1.00 per day for each temporary place of amusement, and imposes a tax upon the admission fee or privilege to attend or engage in any amusement. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-600 (1956).

¹⁷ The city also imposes a levy on the making, executing, issuing, or delivering of any document transferring title to real estate amounting to 1% of the value of the property represented by such document, payment of which must be evidenced by the affixing of a stamp to every such document. This is known as the realty transfer tax. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1400 (1956).

¹⁸ The public parking lot tax amounts to 10% of the gross receipts of lots in Philadelphia. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1200 (1956). This tax is imposed in addition to the annual license fee of \$10.00 imposed by the city. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 9-601(5) (1956).

¹⁹ The mechanical amusement device tax requires annual registration of every coin-operated mechanical device used for amusement or entertainment and payment of an annual tax of \$25.00 for each such device. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-900 (1956).

²⁰ An annual license tax of \$500.00 is imposed on every person engaged in that business. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-700 (1956).

bowling alleys.²¹ The city also imposes charges for the use of its water and sewer facilities.²² And municipal institutions such as hospitals and homes for the indigent impose charges for their services.²³

The valuation and assessment of the state-imposed real estate and personal property taxes²⁴ fall within the jurisdiction of the Board of Revision of Taxes—a vestige of county government lingering from the era when city and county were governed separately, and still more or less independent from the city. Initial property valuations are made by assessors employed by that agency, and disputes are reviewed by the Board of Revision, with appeal to the courts available.²⁵ However, *collection* of these taxes in the amount certified as due is a task of the department of collections—a large city executive agency which collects all revenues which may be due the municipality.²⁶ Appeals from the decisions of the department *affecting collection* of these property taxes, including interest and penalties imposed for nonpayment of any portion due, fall within the jurisdiction of the Tax Review Board.²⁷ But on appeals concerning personal property and real estate taxes, the Board has limited itself to the question of method or procedure of billing and enforcement of collections, or to the validity of the interest and penalties imposed for late payment or nonpayment; the Board has refused to

²¹ An annual tax of \$25.00 per alley is imposed on the operation of such a business. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-800 (1956). Similarly, the code in titles dealing with the regulation of various activities—such as the air pollution code, the building code, the fire code, the health code, the housing code, and those dealing with streets, zoning, and planning, and the regulation of businesses, trades, professions, and individual conduct and activities—enumerates numerous other activities for which licenses or permits are required, such as conducting barber and beauty shops, blasting, curb markets, junk yards, waste collecting, and so on.

²² These are annual charges based on actual usage of water at a rate determined by the water department under standards established by the city council pursuant to the charter. PHILADELPHIA HOME RULE CHARTER § 5-801; PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 13-201 (1956). These are not taxes imposed under the authority of the enabling legislation, see note 13 *supra*, but rather are charges for services rendered by the city. Interest and penalties for late payment are provided. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1606 (1956).

²³ For a discussion of the nature of these charges, of the applicability to them of the statute of limitations, and of the applicability to them of the refund and compromise sections of the 1953 tax review board ordinance, see 1954 OPS. (PHILADELPHIA) CITY SOLICITOR 151 (Formal Opinion No. 140); 1954 OPS. (PHILADELPHIA) CITY SOLICITOR 43 (Formal Opinion No. 113).

²⁴ Including taxes imposed upon these classes of property for the benefit of the school district. See notes 123-25 *infra* and accompanying text.

²⁵ See PA. STAT. ANN. tit. 72, §§ 5341.1-21 (Supp. 1960); PA. STAT. ANN. tit. 72, § 4821 (Supp. 1960).

²⁶ PHILADELPHIA HOME RULE CHARTER § 6-206. The department of collections also acts as collection agent for taxes imposed for benefit of the school district and is authorized to file joint tax claims on behalf of the city and school district. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-506 (1956).

²⁷ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1702 (1956).

consider questions of assessment and valuation.²⁸ In fact, the 1953 tax review board ordinance specified that the Board should have no jurisdiction over matters within the jurisdiction of the Board of Revision;²⁹ however, this provision was omitted from the 1956 codification of Philadelphia's general ordinances.³⁰

The various business taxes imposed by the city—including the wage tax—are self-assessed by the taxpayer or his employer. The department of collections audits the returns, make assessments against those who fail or refuse to file, and bills and collects these taxes, as well as interest and penalties in appropriate cases. The department is authorized to accept installment payments of delinquent taxes and penalties.³¹ It is also empowered to enter compromises of tax and other claims where such compromise is "in the best interest of the City."³² However, no criteria have been enunciated for determining what compromises are in fact in the city's best interests.

Various other charges imposed by the city, ranging from water and sewer bills to license fees, are initially imposed by many different agencies; but responsibility for collecting these is also the job of the

²⁸ Discounts are provided by the city for early payment of real estate taxes, and penalties for late payment of such taxes. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1302 (1956). These adjustments are authorized by state law. PA. STAT. ANN. tit. 72, § 5511.10 (1950). Likewise, discounts and penalties are provided by the city with relation to the personal property taxes, PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1101 (1956), as authorized by the state, PA. STAT. ANN. tit. 72, § 4843.1(c) (1950). These penalties relate to collections; the personal property tax act also imposes a penalty of 12% to be added to the estimated assessment of taxable property where an individual fails to file a return or to include all taxable property. PA. STAT. ANN. tit. 72, § 4844 (1950). As to the Board's refusal to consider questions of assessment and valuation, see note 115 *infra*.

²⁹ Philadelphia, Pa., Tax Review Board Ordinance § 4(b), Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 479.

³⁰ See notes 112-19 *infra* and accompanying text.

³¹ However, if partial payments are made on account of any delinquent tax, such payment must be prorated between the principal sum of the tax and the penalties and interest accumulated on it. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-504 (1956). If the taxpayer specifies that a payment is to be applied to principal only, the city must so apply it if the payment is accepted. Letter from Leonard B. Rosenthal, Assistant City Solicitor, to Carlyle S. Robinson, Department of Collections, April 17, 1956.

³² The original tax review board ordinance gave to the revenue commissioner the power to consider petitions for the compromise of principal of any claim, including interest and penalties thereon, and to grant such petitions upon determination that the compromise was in the best financial interest of the city; his decision denying the compromise was made final but a decision granting it was made subject to approval by the Tax Review Board. Philadelphia, Pa., Tax Review Board Ordinance §§ 5, 8, Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 479-80. The code is less specific: it requires petitions for compromise of claims, including interest and penalties thereon, to set forth the facts which the petitioner believes warrant a finding that the compromise is in the best interest of the city; such petitions are to be considered by the department of collections and, if granted, shall become final only after approval by the Board. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1704 (1956). Originally, the code gave the taxpayer the right to appeal to the Board any decision by the department refusing to enter such a compromise, but this provision was repealed later in 1956 at the request of the Board, which took the position that codification should not result in revision—even though the specific revision was favored by the Board. See notes 133-34 *infra* and accompanying text.

department of collections.³³ Disputes over the amount claimed must ordinarily go to that department.³⁴

As can be seen, the department of collections, taking in a yearly revenue of approximately \$200,000,000, is engaged in a major financial operation which brings the city into contact with several million "customers."³⁵ The mere mention of the various taxes, charges, and procedures for collection should highlight the fact that the department, as the city's collection agent, is constantly confronted with questions and disputes over the application of the revenue ordinances to various transactions or, granting the applicability of the tax, over the amount due. For example, under the wage and net profits taxes, the courts have held that earned income is taxable but that passive income, derived solely from investment, is exempt.³⁶ The municipal tax laws abound with many problems requiring adjudications of an analogous nature.³⁷ Or consider the plight of the taxpayer who fails to file a return for the payment of a self-assessed tax. These taxes

³³ For example, the department is required by the charter to collect all fees and charges for issuance by the city of any licenses or permits, and assigns its employees to duty in the department of licenses and inspections to receive such fees or charges. See PHILADELPHIA HOME RULE CHARTER § 6-201(d). This procedure applies to those licenses imposed under provisions other than title 19 of the code. The latter are issued directly by the department of collections. See PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-501 (1956).

³⁴ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1702 (1956). This is not true, however, as to refusal of the department of licenses, through its chief of licenses division, to issue a license or permit under any section other than title 19 of the code. Such refusal may be appealed to the board of license and inspection review, which is a departmental board of the department of licenses and inspections, created by the charter. See PHILADELPHIA HOME RULE CHARTER § 5-1005. Thus, no question concerning the issuance of such licenses or permits falls within the jurisdiction of the Tax Review Board. However, taxpayers seeking refunds for such moneys must make claim on forms prepared by the department of collections, which are first submitted to the license division where they will be endorsed and forwarded to the department of collections. They are then treated like any other refund petition, and the department of collections' action becomes subject to Tax Review Board jurisdiction.

³⁵ See PHILADELPHIA DEP'T OF COLLECTIONS ANN. REP. (1959).

³⁶ See *Murray v. Philadelphia*, 363 Pa. 524, 70 A.2d 647 (1950); *Breitinger v. Philadelphia*, 363 Pa. 512, 70 A.2d 640 (1950); *Quaid v. Tax Review Bd.*, 188 Pa. Super. 623, 149 A.2d 557 (1959).

³⁷ Examples of such problems which the Board has faced or is facing are: whether the mercantile license tax is applicable to lawyers and other classes, see *Freedman*, *supra* note 3, at 667 n.24; whether certain wholesalers and manufacturers are entitled, under PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1003 (1956), to use the alternative method of tax computation provided in that section; and to what extent must a citizen's activities be associated with Philadelphia to render him liable for the payment of the mercantile license tax, PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES §§ 19-1001(5), (6), -1003 (1956), and the wage and net profits tax, PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1502(1) (1956). Likewise, broken water meters have often given rise to the problem of properly estimating usage for the purposes of computing water and sewer rental charges; in such situations, PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1604 (1956), authorizes the department of collections to compute the amount of water used according to such method of computation as the water department by regulation may prescribe.

accrue whether or not returns or bills are sent to taxpayers,³⁸ and many have sought relief from the heavy interest and penalties exacted for nonpayment. Similarly, taxpayers frequently seek relief from the imposition of charges for municipal services—such as hospital bills or rents for the use of water and sewer facilities—where the city has failed to send bills for many years.

In addition to the problem of deciding, in a fair fashion, disputes over liability for these taxes and charges, it has proved necessary for the city to devise methods for awarding refunds and entering into compromises with its citizens. Not only may taxpayers now test their liability under the taxing ordinances by paying the amount claimed and then seeking a refund, but they may also seek refunds for a variety of other reasons. Among these are double payment,³⁹ payment without liability,⁴⁰ overpayments resulting from a change in the form of a business or a termination of a business entity during a taxable year,⁴¹ excess payments of water and sewer rents resulting from erroneous readings of meters or from defective meters, payments for permits purchased but not actually used,⁴² or payments made to the wrong city agency.

The total picture evidences the need for a municipal agency which can resolve city-taxpayer disputes efficiently and fairly, with due regard to the public interest. This is the task of the Tax Review Board.

Functions of the Board

The Philadelphia Code of General Ordinances provides that the Board is to review, on petition of an aggrieved taxpayer, decisions of the department of collections concerning liability for the taxes, rents, licenses, and other charges which are the department's responsibility.⁴³ In fact this includes review of virtually all charges except questions relating to the valuation of real estate and personal property assessments. Any citizen may invoke the Board's jurisdiction, whether he has already paid the amount claimed and seeks a refund or whether

³⁸ The Personal Property Tax Act provides that no failure to assess or return property shall discharge the owner of taxable property of his liability for the tax. PA. STAT. ANN. tit. 72, § 4844 (1950). The registered or true owner of each tract of taxable property is liable for the real estate tax on such property. PA. STAT. ANN. tit. 72, § 5020-407(c) (1950).

³⁹ Resulting, for example, from withholding by the employer as well as payment by the individual employee.

⁴⁰ As, for example, in the case of a nonresident working for a local firm but actually employed outside the city.

⁴¹ As in the case of the mercantile license tax which is payable in advance.

⁴² Because, for example, of the cancellation of the job for which the permit was originally required.

⁴³ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1702 (1956).

he disputes, before payment, the amount claimed. Simple forms for filing the appropriate petitions⁴⁴ are supplied by the Board, and there are no fees. Within a period of a few months, the Board—which meets at least twice a week—will hear the dispute.⁴⁵ The hearing is an adversary-type proceeding—with the city, represented by one of its lawyers,⁴⁶ arrayed against the taxpayer with or without counsel,⁴⁷

⁴⁴ At the present time the Board, acting under the power granted by the PHILADELPHIA HOME RULE CHARTER §§ 8-406, -407, and the PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1701(2) (1956), has promulgated regulations providing for five types of petitions; three of these originate with the taxpayer; two of them reach the Board from the department of collections. Taxpayers wishing to obtain a review of a department decision concerning their liability for any sum claimed file a "petition for review" in duplicate with the Board. Tax Rev. Bd. Regs. art. 4, Feb. 5, 1954. These petitions must be filed within sixty days after the mailing of the notice of the amount claimed by the department. Taxpayers dissatisfied with the department's refusal of a refund may file a "refund appeal" petition in duplicate within ninety days after the mailing of the department's denial of the refund. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1703 (1956); Tax Rev. Bd. Regs. art. 5, Feb. 5, 1954. If the taxpayer does not deny liability for the amount claimed but merely seeks relief from interest or penalties or both, he may file in duplicate a petition for "waiver of interest and/or penalty." No specific authority for such petitions appears in the code. See also notes 133-48 *infra* and accompanying text. The Board forwards one copy of the petition to the revenue commissioner who heads the department of collections. Tax Rev. Bd. Regs. arts. 4, 5, Feb. 5, 1954. A second copy is forwarded to the law department, although the regulations do not specifically so require. No answer need be filed unless so ordered by the Board. Tax Rev. Bd. Regs. art. 8, Feb. 5, 1954.

If the department decides to grant a taxpayer's request for refund after the taxpayer has filed a petition with the department's refund section, it notes its approval on the petition and forwards it to the Board for approval. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1703 (1956); Tax Rev. Bd. Regs. art. 6, Feb. 5, 1954. Such approval is not necessary if the refund is granted because of overpayment resulting from duplication of payments or mathematical error in computation or other mechanical mistake such as typographical error. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1703(5) (1956). If a taxpayer seeks to compromise his liability, he must prepare a petition for presentation to the department. If approved, the department will originate a request for compromise approval to be presented to the Board. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1704 (1956); Tax Rev. Bd. Regs. art. 7, Feb. 5, 1954.

⁴⁵ The code requires that all matters coming before the Board shall be listed and heard within ninety days of filing. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1701(3) (a) (1956). It also provides that the Board shall consider each petition for review within a reasonable time. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1702(3) (1956), as amended, Philadelphia, Pa., Ordinance of June 5, 1956, 1956 PHILADELPHIA ORDINANCES 278. While no sanction is provided for failure to meet either of these requirements, there has been no appreciable docket delay in disposing of petitions. Uncontested petitions, such as those for refund and compromise approvals, excepting those which the Board decides initially to disapprove or modify, are generally acted upon within a few weeks. Contested petitions are generally scheduled for hearing within a few months, and decisions are generally rendered within a few days of hearing.

⁴⁶ The Board's regulations provide that the city may be represented by the revenue commissioner or other administrative officer or his duly authorized subordinate, or the city solicitor or any attorney-at-law duly designated by him. Tax Rev. Bd. Regs. art. 2(b), Feb. 5, 1954. As a matter of practice the city is usually represented by an assistant city solicitor regularly assigned to such hearings, and the department of collections may send a representative if factual testimony is needed.

⁴⁷ The Board's regulations provide that a taxpayer may be represented by himself or, in the case of an association, by an authorized officer, or by any other person duly authorized by the taxpayer. Frequently an attorney or accountant appears as the taxpayer's advocate.

and the Board sitting as an impartial forum. Basic rules of evidence are accorded due respect; a written transcript is taken;⁴⁸ an air of judicial formality obtains. In any case deemed important or difficult, the decision is explained by a "formal" opinion⁴⁹ which will be distributed not only to the parties but to other interested groups, legal periodicals, and reporting services.

During its first five years of operation, the Tax Review Board has disposed of a large quantity of taxpayer-city disputes which might otherwise have clogged court dockets or in which the taxpayers would have had no adequate remedy at all. Thus the most important function of the Board, both as to volume of cases and basic purpose, is its dispute-settling job—adjudicating disputed tax cases and interpreting tax law.

The Board's second function is to review refunds granted by the department and compromises negotiated between the department and taxpayers. Refunds and compromises become final only after they have been approved or modified by the Board.⁵⁰ This "watchdog" task, essentially one of auditing, is designed—and seems desirable—to prevent abuses of a kind once thought to exist in the city.

The Board's third role—different from the adjudicatory and "watchdog" functions—is to serve as an instrument for providing equitable relief from interest and penalty exactions in cases where liability exists but where added charges against the taxpayer are, for some reason or another, deemed unjust.⁵¹

At its inception the Board was presented with many important substantive issues of interpretation of new tax measures, including a huge backlog of disputes which had been held for settlement pending implementation of the charter provisions creating the Board. Thus the Board adjudicated a number of fundamental questions of tax ordinance construction during its first years of existence. More recently, as might be expected, the tax liability issues raised before the Board

⁴⁸ As an economy move, the Board for several months dispensed with stenographic transcripts in hearings on petitions for waiver of interest or penalties.

⁴⁹ Where a case is considered to be governed by a prior decision of the Board or where the issue is not complex, the Board may simply render a written decision or an "informal" opinion which, after discussing the facts, merely refers to the governing precedent without setting out in detail the legal analysis. These opinions are sent to the taxpayer and appropriate city officials. Tax Rev. Bd. Regs. art. 12, Feb. 5, 1954. All decisions are rendered in executive session. Three members of the Board are necessary to constitute a quorum and to render decisions. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1701(1)(d) (1956), as amended, Philadelphia, Pa., Ordinance of June 5, 1956, 1956 PHILADELPHIA ORDINANCES 278.

⁵⁰ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES §§ 19-1703, -1704 (1956).

⁵¹ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1705 (1956). As to whether authority exists for the granting of such relief where liability for the principal charge is not denied, see notes 137-52 *infra* and accompanying text.

have become more and more factual.⁵² But when the department of collections decides, as it does periodically, to implement some new policy,⁵³ or when the city solicitor promulgates an opinion dealing with taxes or collection procedures,⁵⁴ or when a court passes on a previously unresolved tax issue,⁵⁵ a new flood of petitions on basic substantive issues may be expected.

In its first seven years the Board handed down 137 formal opinions. Many of these decisions dealt with problems of allocation under the mercantile license and income taxes⁵⁶ under which the Board is called upon to segregate business done within the city from business done elsewhere. Allocation involves not only factual determinations, but also legal conclusions—for example, whether services performed in the city for clients outside the city are taxable⁵⁷ and whether receipts from a foreign business can be attributable to its local office.⁵⁸

Another group of decisions developed a pattern of precedent in the complex area of whether a given business activity falls within the terms of a given tax.⁵⁹ A third major group of opinions has developed distinctions between “earned” and “passive” income, particu-

⁵² In its annual report for 1958, the Board noted that the number of formal opinions had declined “due to the fact that many questions regarding interpretation of the tax ordinance have already been clarified by prior rulings of the Board.” 1958 TAX REV. Bd. ANN. REP. 2.

⁵³ For example, initiating a policy of enforcement of the wage tax against residents employed on federal property.

⁵⁴ For example, a sudden influx of petitions dealing with personal property taxes occurred after the city solicitor rendered two opinions concerning procedure for obtaining refunds of personal property taxes where the Board of Revision of Taxes desires to “correct” assessments. 1956 OPS. (PHILADELPHIA) CITY SOLICITOR 126, 162 (Informal Op. Nos. 253, 253a).

⁵⁵ As, for example, occurred after the decision relating to the mercantile license tax. Freedman, *supra* note 3, at 667. Less frequently, new petitions result from action by the city council. This phenomenon is demonstrated by the large number of refund approval petitions in 1955 resulting from an ordinance authorizing refunds for some excess water and sewer charges during certain years prior to 1955. Philadelphia, Pa., Ordinance of Oct. 12, 1955, 1955 PHILADELPHIA ORDINANCES 770, as amended, Ordinance of June 29, 1957, 1957 PHILADELPHIA ORDINANCES 505.

⁵⁶ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES §§ 19-1000, -1500 (1956).

⁵⁷ See, e.g., Wilber E. Gehman, Docket No. 35.02-F889, Formal Op. No. 60-15, Nov. 28, 1960; Frommeyer & Co., Docket Nos. 35.04-G134, -G135, Formal Op. No. 60-6, Sept. 14, 1960; Manheim Laundry Co., Docket No. 40.02-A462, Formal Op. No. 57-9, March 7, 1957; Albright & Friel, Inc., Docket No. 40.02-545, Formal Op. No. 56-2, March 2, 1956. Cf. Harold E. Stassen, Docket No. 30.02-G722, Formal Op. No. 60-2, July 14, 1960 (whether taxpayer was domiciled in Philadelphia within meaning of income tax).

⁵⁸ See, e.g., Forrest Laundry, Docket No. 40.02-B554, Formal Op. No. 59-5, Feb. 10, 1959; Norton, Lilly & Co., Docket Nos. 30.02-A976, 40.02-A735, Formal Op. No. 57-25, Oct. 4, 1957; M. J. Kelly Co., Docket No. 40.02-A381, Formal Op. No. 57-4, Feb. 28, 1957.

⁵⁹ E.g., Marian Bank, Docket Nos. 30.05-G404, 35.05-G137, Formal Op. No. 60-7, Sept. 14, 1960; Nestle Co., Docket No. 40.04-B444, Formal Op. No. 59-4, Jan. 12, 1959; Penn Galvanizing Co., Docket Nos. 40.02-A498, -A501, Formal Op. No. 57-14, April 26, 1957; Slater System, Inc., Docket Nos. 40.02-A813, -A814, Formal Op. No. 56-16, July 25, 1956, Formal Op. No. 56-6, March 16, 1956.

larly with regard to income derived from real estate, stocks, and the sale of an interest in a business.⁶⁰ The state's appellate courts have declared that "passive income" from investment in real estate and stocks, and gain from the sale of "goodwill," are not taxable under Philadelphia's income tax ordinances;⁶¹ but the courts' rulings suggest that the income is "earned," and therefore taxable, if there has been some "business activity" connected with its production. For example, the superior court pointed out that profits from real estate, mortgages, and securities are not "earned" within the meaning of the ordinance unless the taxpayer is engaged in the real estate, mortgage, or security business.⁶² The Board's contribution has been to develop, case by case, more specific criteria to implement these generalizations.⁶³ A final major category of formal decisional activity has developed a body of law governing the collection of interest and penalties in cases where, although liability for the tax assessment is admitted, the imposition of these additional charges is challenged.⁶⁴

The vast majority of the Board's decisions are never appealed to the courts. As of December 31, 1958, only seventy-six cases out of the more than 10,000 petitions docketed, disposed of, and therefore ripe for appeal,⁶⁵ had been appealed to the courts of common pleas, and of this number only a small percentage ever reached the superior or supreme courts.⁶⁶ In all the appealed cases, the decisions of the Board seem to have been treated favorably both by the trial and appellate

⁶⁰ *E.g.*, Dr. Arthur Steinberg, Docket No. 30.02-6, Formal Op. No. 57-21, July 12, 1957, *supplementing* Formal Op. No. 55-21, Sept. 15, 1955 (involving income from royalties); Carl Metz, Docket Nos. 30.02-468, -519, Formal Op. No. 56-11, June 1, 1956; Thomas T. Patterson, Docket Nos. 30.02-218, 40.02-257, Formal Op. No. 55-5, April 5, 1955.

⁶¹ *Murray v. Philadelphia*, 363 Pa. 524, 70 A.2d 647 (1950); *Breitinger v. Philadelphia*, 363 Pa. 512, 70 A.2d 640 (1950); *Quaid v. Tax Review Bd.*, 188 Pa. Super. 623, 149 A.2d 557 (1959).

⁶² *Quaid v. Tax Review Bd.*, 188 Pa. Super. 623, 628, 149 A.2d 557, 559 (1959). To be taxable the gain must be earned from the operation of a business and not merely derived from the sale of an interest in that business. *Id.* at 629, 149 A.2d at 560.

⁶³ See *Congoleum Nairn, Inc.*, Docket No. 40.02-D256, Formal Op. No. 60-5, Aug. 11, 1960; cases cited note 60 *supra*.

⁶⁴ *E.g.*, Harry C. Dalton, Docket No. 30.05-C694, Formal Op. No. 59-3, Jan. 7, 1959. *Cf.* Edward E. Kelly, Docket No. 40.04-B416, Formal Op. No. 58-8, Oct. 21, 1958.

⁶⁵ See 1958 TAX REVIEW BOARD ANN. REPS. 3. The fact that there have been so few appeals may reflect taxpayers' satisfaction with the results and fairness of the decisions. A possible alternative—or concurrent—explanation is that the small amount involved in most cases makes the cost of appeal prohibitive. Of course, if the cost were prohibitive or the amount involved small, or both, there would be no practicable appeal even in the absence of a Tax Review Board.

⁶⁶ Since *Bell Appeal*, 396 Pa. 592, 152 A.2d 731 (1959), all appeals from common pleas review of Tax Review Board decisions are taken directly to the supreme court.

courts. A vast majority of its decisions have been affirmed,⁶⁷ and frequently the courts have approved the Board's reasoning without further opinion.⁶⁸ Similarly, decisions have often pointed out that great deference is to be accorded not only to the Board's factual findings but also to the legal principles enunciated by the agency.⁶⁹

Advantages of the Board's Operations

Analysis of the Board's decisions, observation of its procedures, and discussion of its operations with active practitioners lead to the conclusion that the Board makes its main contribution to municipal tax administration in the discharge of its adjudicatory function. These contributions are not limited to procedural improvements; consistent and logical development of the substantive law has also been enhanced.

Procedural Advantages

(1) *Economic Savings to Taxpayers*

The adjudicative procedure provided by the Board is inexpensive to the taxpayer. The Board imposes no filing fee, and, since the proceedings are informal, taxpayers may also save the expenses of securing professional representation and of presenting witnesses for purely formal proofs. The Board encourages stipulations and other devices to avoid the taking of formal testimony.

(2) *Prompt Disposition of Cases*

Adjudications are generally rendered by the Board shortly after the hearing.⁷⁰ Certainly, cases before the Board are, on the average, disposed of in far less time than comparable cases before the courts.

⁶⁷ In the seventy-six cases passed upon by the courts, the Board's action was ultimately reversed in only two (which governed one other in an appellate court and four others in which the lower court decision was not appealed); it was affirmed in fourteen (governing ten others) which went no higher than the common pleas courts and in two (governing two others) in the appellate courts. Four cases were withdrawn at the appellate level and one at the lower court level; two remained open in appellate courts and thirty-one in the lower courts.

⁶⁸ *E.g.*, *Abner Michaud v. Bruton*, Phila. Common Pleas No. 7, June Term 1957, No. 658, *affirming* Docket No. 80.04-91, Formal Op. No. 57-16, May 17, 1957; *In re National Sugar Ref. Co.*, Phila. Common Pleas No. 6, Dec. Term 1956, No. 6816, *affirming* Docket No. 100.04-527, Formal Op. No. 57-1, Jan. 21, 1957.

⁶⁹ *E.g.*, *Kelly v. Tax Review Bd.*, Phila. Common Pleas No. 6, March Term 1955, No. 2655, Docket No. 40.02-411, Formal Op. No. 55-11, April 13, 1955. *Cf. In re Hennessy*, Phila. Common Pleas No. 3, March Term 1955, No. 6534, *affirming* Docket No. 40.02-484, Formal Op. No. 55-13, May 11, 1955, in which the common pleas court held that the findings of the Board were conclusive. See also *Sharps v. Revenue Comm'r*, Phila. Common Pleas No. 3, June Term 1955, No. 9170, *appealing* Docket No. 30.02-507, Formal Op. No. 55-20, July 27, 1955, in which the common pleas court remanded the matter to the Board with directions for it to secure an expert opinion on the question of whether gain from the sale of a building was "earned as a result of business activities" or merely derived from passive ownership of property.

⁷⁰ See note 45 *supra*. The inconsistent requirements that the Board list and hear *all matters* within ninety days of filing and that the Board should consider each

(3) *Fair and Flexible Procedure*

Formal rules of evidence which are designed primarily to protect litigants by preventing inexpert juries from being misled are not necessary where the trier of fact is itself expert in the area. Thus, the Tax Review Board permits greater leeway in the presentation of evidence, as is the practice of most judges sitting without juries and most administrative agencies.⁷¹ At the same time, the Board has refused to abandon many traditional rules of legal procedure. Hearings are adversary in nature with full scope for cross-examination and confrontation. A record is made of the proceedings and the decisions of the Board are, of course, reviewable by the courts.

Substantive Advantages

(1) *Finality of Decision To Deter Wasteful Litigation*

As noted above, few of the decisions of the Board are appealed and, of those few, even fewer are reversed by the courts. Some of the matters in controversy may involve amounts too small to justify the expense and time involved in an appeal. As to questions of fact, review by the courts is limited, not only because of the normal deference given to findings of fact by the tribunal which is able to observe the demeanor of the witnesses and so to judge credibility, but also because the courts have recognized that the Board's flexible procedures are likely to result in accurate factual findings. Weight has also been accorded to the specialized knowledge and experience brought to taxation problems by the law and accounting members of the Board. It is

petition for review within a reasonable time probably stems from an oversight in the amendment of the code. When the provisions were originally codified, the department of collections was given the task of considering each petition for review within a reasonable time, PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES §19-1702(3) (1956), with its decision becoming final only after review, approval, or modification by the Board. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES §19-1702(4) (1956). When it became obvious that by poor draftsmanship the department had been given the task of considering petitions for review of its own decisions, the scheme was amended in the same year by transferring to the Board the tasks of considering the petitions for review of the revenue commissioner's decisions. Philadelphia, Pa., Ordinance of June 5, 1956, §2, 1956 PHILADELPHIA ORDINANCES 278, amending PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES §19-1702 (1956). This was accomplished simply by substituting for the phrase "Department of Collections" the term "Tax Review Board." As thus amended, the section still required that such petitions be considered "within a reasonable time."

⁷¹ For example, hearsay rules are frequently relaxed. Accountants are permitted to testify to facts and figures from books which they did not prepare and which were not prepared under their direction, thus eliminating the need for bringing in bookkeepers, other employees, and voluminous records to substantiate testimony. The cost to the taxpayer of compiling such records and producing such witnesses might easily exceed the amount in dispute. As the city may verify such testimony through audit and investigation, no harm is done to the public. When the city disputes the facts, the Board more strictly observes the rules of evidence.

a reasonable assumption that a substantial amount of litigation has been discouraged by the existence of an effective taxpayer remedy at the administrative level.

(2) *Improved Tax Administration at the Collection Level*

It is impossible, of course, to attribute any increase in tax revenues directly to the existence of the Board. On the other hand, it is safe to conclude that the Board has helped to improve tax enforcement procedures by its fair and uniform treatment, devoid of political favoritism.

(3) *A Consistent Body of Tax Law*

Perhaps the most important function which the Board serves is that of providing an authoritative forum for the interpretation and application of tax law. Many troublesome tax problems have been settled. Because of the small number of appeals and an increasing judicial deference to board opinions, the principles on which these disputes have been resolved have developed into established precedents. And an acceptance of these precedents by the courts has increased the Board's authority as an interpreter of municipal tax law.

(4) *Expertise at the Municipal Level*

In its adjudicative role the Board serves a valuable function in passing on questions of fact as well as in the construction of pertinent municipal tax measures. To these tasks it brings an expertise based on familiarity and professional background; in creating a record, determining the credibility of witnesses, weeding out frivolous arguments, and abstracting the issues in controversy, the Board assists the courts by framing for them a readily reviewable case, whether that review be broad or narrow. And in addition to providing citizens with a convenient forum, at little cost to the city,⁷² the Board provides helpful insights into the practical application of the taxing measures.

THE BOARD'S CURRENT STATUS

Despite the Board's acknowledged value to tax administration in a city of two million people, there are fundamental problems yet to be solved concerning its future status. One of these is whether the Board—which has, *de facto*, acted as an independent adjudicatory

⁷² The Board's annual budget is approximately \$50,000. In addition, the city provides office space and the services of an assistant city solicitor who attends hearings, prepares briefs, and argues appeals.

body and "made law" just as any other court or agency does—has, *de jure*, the power to bind the city by its adjudications.⁷³ The question reduces itself to concrete terms when the touchy problem of the Board's relation to Philadelphia's chief legal officer—the city solicitor—is considered.

The Charter specifies that the function of the solicitor's "law department" is to furnish legal advice to all "officers, departments, boards and commissions concerning any matter or thing arising in connection with the exercise of their official powers or performance of their official duties,"⁷⁴ and makes it the "duty" of any city agency "requiring" legal advice to refer the issue to the law department.⁷⁵ In fact, it is "unlawful for any officer, department, board or commission

⁷³ Both the home rule charter and its history are vague as to the extent of the Board's powers and the nature of its duties. PHILADELPHIA HOME RULE CHARTER § 3-100(f) created the Board as a departmental board in the department of collections. The annotations state that all of the departmental boards are "connected, for the purposes of fiscal administration, with those departments to which their functions are most closely related." Although the Tax Review Board is not designated an "independent board"—*i.e.*, one "whose activities are not closely related to any particular department or are of such importance as to merit independent status"—this does not eliminate the possibility that the Board is to be independent of the department of collections in matters other than "fiscal administration." Moreover, the annotations to PHILADELPHIA HOME RULE CHARTER § 6-207 reveal that the charter's framers contemplated an agency to which taxpayers might "appeal decisions of the executive branch" concerning their tax liability, so that tax disputes could be resolved "quickly and with the least expense to the taxpayer and the City."

Some of those instrumental in the creation of the Board differ as to the source of the idea and whether a municipal tax court was specifically contemplated. The chairman of the drafting committee, who as state attorney general had been a member of the State Board of Revenue and Finance, believes that the Board was inspired by the state agency. Interview With William A. Schnader, in Philadelphia, Pa., April 14, 1958; see Administrative Code of 1929, PA. STAT. ANN. tit. 71, §§ 115, 322 (1942); Fiscal Code of 1929, PA. STAT. ANN. tit. 72, § 504 (Supp. 1960). The legislative draftsman of the Charter Commission's staff, who had experience with the federal Board of Tax Appeals, suggests that the framers were attempting to create an agency modeled after the Board of Tax Appeals of the United States. Interview With Paul Wolkin, in Philadelphia, Pa., March 19, 1958. And the first director of finance under the charter has expressed yet another view: "Clearly in the mind of many of the members of the Charter Commission . . . was the thought that we were planning against the day that the Board of Revision would be abolished and this agency would take over the appeal and review functions in reassessment of real and personal property." Memorandum From Lennox L. Moak to Stanford Shmukler, note 1, July 20, 1959, on file at the Institute of Legal Research, University of Pennsylvania, Philadelphia, Pa.

Because of controversy among the charter's draftsmen as to assigning a specific role to the Board, the charter was intentionally vague. The problem of implementing the charter mandate fell to City Solicitor Abraham L. Freedman, who in his prefatory comments to this Article has indicated his recognition of the need for an effective procedure to mediate disputes between citizen and sovereign taxing power. See Freedman, *Some Personal Reflections on the Establishment of the Philadelphia Tax Review Board*, 109 U. PA. L. REV. 663 (1961). His views are embodied in the form of the original tax review board ordinance, which is not restricted to defining the scope and functions of an agency whose primary purpose would be to adjudicate tax disputes. On the contrary, the ordinance outlined a two-step procedure by which the taxpayer first sought relief from the revenue commissioner and then was entitled to board review or approval of the commissioner's decision.

⁷⁴ PHILADELPHIA HOME RULE CHARTER § 4-400.

⁷⁵ PHILADELPHIA HOME RULE CHARTER § 8-410.

to engage any attorney to represent him or it in any matter or thing relating to his or its public business without the approval in writing of the City Solicitor.”⁷⁶

It can thus be seen that the solicitor is, indeed, the city's chief law officer—not only its advocate, but in a sense, so far as city officials are concerned, the final tribunal to interpret the principles of law governing the performance of the various municipal agencies. This centralization and subordination of all city government to the solicitor's power to interpret the law has been examined and confirmed by one court in an interesting case, which, however, fell outside the tax field.⁷⁷ But would the Tax Review Board, like other boards, be “required” to “take its law” from the solicitor if a direct conflict between them should arise?

The city's Code of General Ordinances provides,⁷⁸ as did the original tax review board ordinance,⁷⁹ that the law department shall act as the legal adviser to the Tax Review Board. The department also acts as legal adviser to the department of collections.⁸⁰ Acting in this latter capacity a city lawyer has always appeared before the Board; he has been treated by the Board as one of the parties—as counsel to an agency whose decision is being reviewed independently. While the ordinances seem, literally, to place the city solicitor in the anomalous position of having responsibility to supervise the agency before which he also appears as a partisan advocate,⁸¹ the solicitor has, so far, refrained from exercising that responsibility.

If the charter “requires” the Board to request the opinion of the law department on every “legal issue” which arises before it, *City Planning Comm'n v. Dunlap* implies that the Board would be compelled to follow the advice given. Such an interpretation would reduce the Board to a mere finder of fact—a sort of blue-ribbon jury for tax disputes. Such an interpretation would also require someone—Board or solicitor—to determine in the first instance whether a particular issue involved questions of fact or of law, or, more realistically,

⁷⁶ *Ibid.*

⁷⁷ *City Planning Comm'n v. Dunlap*, Phila. Common Pleas No. 5, June Term 1956, No. 1802.

⁷⁸ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1701(1)(c) (1956).

⁷⁹ Philadelphia, Pa., Tax Review Board Ordinance § 4(c), Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 480.

⁸⁰ PHILADELPHIA HOME RULE CHARTER §§ 4-400, 8-410. See also Tax Rev. Bd. Regs. art. 2(b), Feb. 5, 1954.

⁸¹ See *Sharps v. Revenue Comm'r*, 10 Pa. D. & C.2d 463, 476 (C.P. 1956), where the court seemed unaware of the Board's actual independence from control by the law department; cf. *Merchants' Warehouse Co. v. Gelder*, 349 Pa. 1, 36 A.2d 444 (1944).

of both; someone would have to unravel the jurisdictional issues, an operation which might in itself lead to much litigation.

In practice, the Board has, since its creation, enjoyed excellent rapport with the law department.⁸² The issue of who speaks the final word on tax adjudication at the municipal level has simply been left in abeyance for the time-being. By informal agreement the assistant solicitor who appears before the Board has been an advocate only. The city's law officer has never attempted to control the Board's determinations on questions of law, and his briefs or memoranda of law filed in specific cases have been given the same consideration as those filed on behalf of the taxpayer.

Nevertheless, the present solicitor has expressed his personal opinion that the Board lacks the power to render decisions on questions of law which would be binding on the department of collections in the face of a contrary official opinion by the law department.⁸³ But both the Board and the solicitor seem agreed that the issue of who has the ultimate power is open to serious question.⁸⁴

A second "jurisdictional" problem which has confronted the Board is the extent to which it may pass on the constitutional validity of the tax legislation upon which the cases before it are based. Can the Board declare a tax unenforceable if it concludes that the legislation is unconstitutional?⁸⁵ Can it pass upon the validity of rules and regu-

⁸² See Freedman, *supra* note 73, at 668-69. Mr. Freedman's successor as city solicitor is David Berger, who was one of the original members of the Board and has served as its chairman and vice chairman. The first chairman was Professor Paul W. Bruton, a tax law specialist whose judicial temperament and intellectual stature were major factors in obtaining for the Board its *de facto* status as an independent adjudicatory agency and in establishing the fine rapport with the law department. The incumbent chairman, Helen S. Chait, a former deputy city solicitor, has maintained the high level of cooperation between both agencies.

⁸³ Interview With David Berger, in Philadelphia, Pa., Nov. 19, 1957.

⁸⁴ In *L.J.W. Realty Corp. v. Philadelphia*, 390 Pa. 197, 201 n.2, 134 A.2d 878, 881 n.2 (1957) (the *Second Realty Transfer Tax Case*), the supreme court noted the statement in the Board's opinion, *City Stores Co.*, Docket No. 80.04-34, Formal Op. No. 56-18, July 25, 1956, that the Board viewed itself as lacking power to pass on the validity of city ordinances; the court, however, gave no indication of its own conclusion on the subject. Although the Board has refused to pass on the validity of ordinances, see, e.g., *C. J. Devine & Co.*, Docket Nos. 40.04-485, 110.04-17, Formal Op. No. 55-22, Dec. 1, 1955, it has on many occasions interpreted ordinances and applied them as so interpreted. E.g., *Harry C. Dalton*, Docket No. 30.05-C694, Formal Op. No. 59-3, Jan. 7, 1959; *Mount Vernon Corp.*, Docket Nos. 40.02-658, -659, Formal Op. No. 56-15, July 18, 1956, *aff'd*, 11 Pa. D. & C.2d 479 (C.P. 1957) (whether mass production and sale of prefabricated houses constitutes manufacturing within mercantile license tax); *James A. Quaid*, Docket No. 30.02-351, Formal Op. No. 55-3, Jan. 27, 1955, *rev'd*, 188 Pa. Super. 623, 149 A.2d 557 (1959) (whether sale of nonresident partner's share to remaining partner constitutes income under Philadelphia income tax).

⁸⁵ The Board has questioned whether a municipal agency can declare a state statute to be invalid, *C. J. Devine & Co.*, Docket Nos. 40.04-485, 110.04-17, Formal Op. No. 55-22, Dec. 1, 1955, *appeal dismissed*, Phila. Common Pleas No. 4, Dec. Term 1955, No. 2686, *aff'd*, 184 Pa. Super. 297, 134 A.2d 238 (1957), and has noted that city council did not specifically give authority to the Board to pass on the validity of taxes levied by council. See, e.g., *Second Realty Transfer Tax Case*, *supra*

lations promulgated by the department purportedly interpreting such legislation?⁸⁶ The issue is important to taxpayers who may find their right of appeal to the courts irretrievably lost for failure to exhaust their administrative remedies.⁸⁷ It is also significant in measuring the Board's independence from, and its authority over, decisions of other city agencies. The code is silent on the issue,⁸⁸ and the courts have by-passed it.⁸⁹

note 84; Manheim Laundry Co., Docket No. 40.02-A462, Formal Op. No. 57-9, March 7, 1957; Albright & Friel, Inc., Docket No. 40.02-545, Formal Op. No. 56-2, March 2, 1956. *But cf.* Norton, Lilly & Co., Docket Nos. 30.02-A976, 40.02-A735, Formal Op. No. 57-25, Oct. 4, 1957. The Board has, on the other hand, interpreted the code as repealing an earlier ordinance, but refused to pass on the validity of that code section. Holmes Elec. Protective Co., Docket No. 90.04-8, Formal Op. No. 59-13, July 9, 1959. On appeal the common pleas court held the code section invalid. Phila. Common Pleas No. 3, June Term 1959, No. 3248. In Harry C. Dalton, Docket No. 30.05-C694, Formal Op. No. 59-3, Jan. 7, 1959, the Board construed the code's penalty provisions and rejected a contention that its interpretation would result in unconstitutional retroactivity.

⁸⁶ While the Board has refused to rule on the extent of the rulemaking power of the revenue commissioner, it has interpreted his regulations as inapplicable to a specific set of facts on the ground that to hold otherwise would cast doubt on the validity of the regulations. See Fred M. Simon, Docket No. 30.04-17, Fred M. Simon, Jr., Docket No. 30.04-18, Richard K. Simon, Docket No. 30.04-19, Formal Op. No. 54-11, Dec. 9, 1954, *on rehearing*, Formal Op. No. 55-14, May 13, 1955. In the following cases the regulations were held to be a reasonable interpretation of the ordinance in question: Dr. Arthur Steinberg, Docket No. 30.02-6, Formal Op. No. 57-21, July 12, 1957, *supplementing* Formal Op. No. 55-21, Sept. 15, 1955; Insurance Situs Cases, Docket Nos. 40.01-856 to -860, -867, -898, -905, Formal Op. No. 56-9, April 25, 1956, *on rehearing*, Formal Op. No. 56-29, Nov. 16, 1956; Slater System, Inc., Docket Nos. 40.02-813, -814, Formal Op. No. 56-6, March 16, 1956.

⁸⁷ See *Boulevard Rink, Inc. v. Philadelphia*, Phila. Common Pleas No. 4, Dec. Term 1959, No. 189; *cf. Philadelphia v. Sam Bobman Dep't Store Co.*, 189 Pa. Super. 72, 149 A.2d 518 (1959). See also 1954 OPS. (PHILADELPHIA) CITY SOLICITOR 25 (Formal Op. No. 108), which concludes that decisions of the department of licenses and inspection could not be appealed to the courts until reviewed by the Board of License and Inspection Review, inasmuch as the department decision does not become final until so reviewed.

⁸⁸ Note, however, that Philadelphia, Pa., Tax Review Board Ordinance § 5(a), Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 480, provided that the commissioner had the right to grant refunds of taxes paid under "an invalid law." This provision could be interpreted to mean that the commissioner had power to make an initial determination as to the validity of taxing laws, with his decision subject to review by the Tax Review Board. A more likely interpretation, however, is that he was directed to grant refunds after a law had been judicially declared by a competent court to be invalid. At any rate, the provision was omitted in the codification.

⁸⁹ In *Tax Review Bd. v. C. J. Devine & Co.*, 184 Pa. Super. 297, 304, 134 A.2d 238, 242 (1957), the superior court implied that it was unimportant that the Board had failed to express any judgment on an issue of constitutionality, since the lower court and the superior court could and did deal with it. On the other hand, in *Boulevard Rink, Inc. v. Philadelphia*, Phila. Common Pleas No. 4, Dec. Term 1959, No. 189, where the only issue involved was one of constitutional proportions, the court must have regarded the Board's judgment as carrying some weight; were this not so, the requirement that the taxpayer exhaust his administrative remedies would have been a vain ritual, for there is little in logic that would compel a litigant to plead his case before a tribunal which had no power to decide it. See DAVIS, ADMINISTRATIVE LAW § 190, at 631-32 (1951). See also 1956 OPS. (PHILADELPHIA) CITY SOLICITOR 56 (Formal Op. No. 191), in which the solicitor concluded that the Board of License and Inspection Review, a departmental review board created by the charter, has no right to decide constitutional issues and that the charter did not, and could not, give such agency the right to decide the validity of ordinances and regulations. It might be suggested that where a taxpayer contends that a statute is unconstitutional on its face, as was the claim in the *Devine* and *Boulevard Rink*

A related problem—again showing the uncertainty of the Board's adjudicatory status—is whether the city has standing to appeal from the agency's decisions. Since the creation of the Board, the city has never attempted to appeal an adverse judgment; the issue is yet to be raised; and the city code is ambiguous on the point.⁹⁰ If the purpose of the Board is simply to look over disputed charges imposed by the city's collection officials, to correct improper calculations, to reduce interest and penalties, and to make factual findings, then, arguably, the city should have no right to question the Board's decisions, for the Board would in fact be making the city's decisions. But if the Board is viewed as having the power to make binding determinations of law, free from the control of the city solicitor, then the city should be authorized to appeal from board decisions when its officials believe these decisions are wrong. Lacking an appeal the city might be bound by bad decisions, or, alternatively, it might seek to ignore them;⁹¹ in

cases, the Board may not have the power to declare invalid the entire act of the legislature or of council without such power having been expressly provided by the legislature; where, however, the question is whether the application of a taxing measure might result in an unconstitutional extension of the taxing power of the city, then the Board possesses the right to refuse to apply it in such a manner. This suggested distinction stems from the direction by council in the code that "nothing contained in this Title [Finance, Taxes and Collections] shall be construed to empower the City to levy or collect any tax not within the taxing power of the City under the Constitution of the United States or the Constitution or laws of this Commonwealth." PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-510 (1956). Since the Board has no right to refuse to apply a tax measure in the manner directed by council, whether or not it considers that measure valid, it cannot undertake to determine whether it is valid. But since the council has indicated that it does not intend its valid measures to extend beyond its constitutional powers, the Board, if faced with the question of determining whether a specific activity falls within the tax measure, must consider whether the effect would be to render it unconstitutional. For a possible incipient distinction on these lines, see Norton, Lilly & Co., 189 Pa. Super. 91, 149 A.2d 672 (1959). In Holmes Elec. Protective Co., Docket No. 90.04-8, Formal Op. No. 59-13, July 9, 1959, the Board specifically noted the distinction between passing on the constitutionality of legislation and of its applicability to the particular facts.

⁹⁰ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1706(2) (1956), provides that decisions of the Board, except those pertaining to compromises and waiver of interest or penalty which are made conclusive under § 19-1706(1), may be appealed "to any court of competent jurisdiction within thirty days after the mailing of notice of such decision or action to the petitioner or his attorney by the Tax Review Board." (Emphasis added.) But § 19-1701(3)(d) provides that notice of board decisions should be provided not only to the petitioner but also "to the Department of Collections and any other City agency affected thereby." These two provisions, taken together, might be regarded as implying that only the petitioner has a right of appeal.

⁹¹ For example, if the city solicitor should disagree with a decision of the Board, he could render a formal opinion or an "advance ruling" to the department of collections reaching a conclusion contrary to that of the Board, and advise the department to comply with his opinion rather than that of the Board. City Planning Comm'n v. Dunlap, Phila. Common Pleas No. 5, June Term 1956, No. 1802, suggests that the department is required to follow the solicitor's opinion where the department is obliged to seek his advice as to its official duties. Query whether the creation of the Board has relieved the department of the duty to seek advice from the law department about legal issues which might arise in tax collection affairs and whether it is thus relieved of the effect of the *Dunlap* decision. Compare *Merchants' Warehouse Co. v. Gelder*, 349 Pa. 1, 36 A.2d 444 (1944) (state executive officials exercising quasi-judicial function not bound by conclusions of attorney general).

either event, taxpayers and the public interest in fair tax administration would suffer.

In my opinion, the most important function of the Board—one which it has creditably fulfilled—is adjudicating tax disputes, both as to fact and law. It seems appropriate, therefore, that its power to do so, free from the control of the city's legal representative, should be specifically spelled out by the legislature, and that the Board's value in deciding questions of constitutionality of application of tax laws should be given legislative recognition. And, conversely, the right of the city's collection agency, through the city solicitor, to question the Board's decisions by appeal to the courts should be specifically recognized.

A MUNICIPAL TAX COURT?

The complex revenue structure of the city, giving rise to a large volume of taxpayer disputes, evidences the need for some agency to interpret and unravel the many provisions of the tax laws; it is this need which the Board has been filling by operating as a *de facto* municipal tax court. To insure that this need continues to be satisfied, the organic legislation creating the Board should be modified to define and broaden its adjudicatory jurisdiction;⁹² to provide that appeals from its decisions be taken directly to an appellate court;⁹³ to define and limit the scope of court review of its decisions;⁹⁴ to modify the

⁹² Its jurisdiction should include matters presently within the realm of the Board of Revision of Taxes and the school district. See notes 113-20 *infra* and accompanying text.

⁹³ The code presently provides that appealable matters may be appealed to "any court of competent jurisdiction." See note 90 *supra*. However, nothing in the code or statutes specify the court or courts to which these appeals should be taken. As a matter of practice, appeals are taken to the courts of common pleas, regardless of the amount of the controversy. This is true even though the municipal court has jurisdiction of civil cases involving less than \$5,000. PA. STAT. ANN. tit. 17, § 693 (Supp. 1960). The common pleas courts have broad jurisdiction under the state constitution and appropriate legislation, PA. CONST. art. V, §§ 1, 6, PA. STAT. ANN. tit. 17, §§ 251, 282 (1930), and have promulgated the following rule: "Unless otherwise provided by law, by the rules or by special order of the court, the practice and procedure in appeals from administrative agencies of the City of Philadelphia . . . from which appeals are allowed by law, shall be taken and prosecuted in the same manner as provided in Rules 1 to 13 of these rules . . ." PHILA. C.P.R. 1*(a).

⁹⁴ At the present time the Pennsylvania Rules of Civil Procedure, which are deemed to govern appeals from administrative agencies, provide: "Appeals shall be heard by the court upon the record and the exceptions filed thereto. No question shall be heard or considered by the court which was not raised at the hearing before the agency, except (a) questions involving the validity of a statute or the procedure before the agency; (b) questions involving the jurisdiction of the agency over the subject matter of the adjudication; and (c) questions which the court is satisfied that the appellant could not, by the exercise of due diligence, have raised before the agency. If, upon the hearing before the court it is satisfied that any such additional question should be so raised it shall remand the record to the agency for further hearing on the additional question." PA. R. CIV. P. 8. When first enacted, the tax review board ordinance provided that findings of fact should be final and conclusive and not the subject of further review by any court. Philadelphia, Pa., Tax Review

composition of the Board and the qualifications and tenure of its members in order that its membership might be insulated from executive pressure and partisan politics; and to curtail or eliminate its nonadjudicatory functions. In order to make the Tax Review Board a municipal tax court in law as well as in fact, legislation and action at both the state and local levels would be required.⁹⁵ The concept of a municipal agency with adjudicatory functions in tax matters is unique,⁹⁶ although there are counterparts at the federal⁹⁷ and state levels.⁹⁸

Constitutional Questions

There seems to be little doubt that the legislature could constitutionally denominate the Tax Review Board a "court" and could invest it with judicial powers.⁹⁹ The state constitution specifically gives the legislature the power to establish new courts¹⁰⁰ and limits this power only by a provision which states:

All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction and powers of all courts

Board Ordinance §10, Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 483. This provision was omitted from the code. At the present time nothing is said in the code or the rules of civil procedure about the scope of review: although it is not *de novo*, the courts have rendered varying degrees of deference to decisions by the Board. Cf. cases cited notes 67-69 *supra*; *Sharps v. Revenue Comm'r*, 10 Pa. D. & C.2d 463, 474-76 (C.P. 1956).

⁹⁵ Those measures dealing with the composition of the Board, qualifications of its members, in some respects its jurisdiction, its procedures, the extent of appeals from its decisions, and so forth, could be achieved by councilmanic action. For an expression of a judicial opinion that ordinances passed under the home rule charter have, within limits, the effect of statutes, see *Philadelphia v. Sam Bobman Dep't Store Co.*, 189 Pa. Super. 72, 81-82, 149 A.2d 518, 523 (1959). However, those measures relating to the court to which appeal should be taken, the scope of that appeal and the deference to be given to the Board's decisions, the right to pass on the constitutionality of statutes and ordinances, the right to pass upon matters affecting state-levied taxes such as the property and school district taxes, would require action by the state legislature.

⁹⁶ Letter From Board of Municipal Finance Officers to Bernard L. Segal, Sept. 12, 1959, on file at the Institute of Legal Research, University of Pennsylvania, Philadelphia, Pa. However, on the local level, the home rule charter also created two other departmental boards with review functions, both within the department of licenses and inspections: the Board of License and Inspection Review and the Zoning Board of Adjustment. See PHILADELPHIA HOME RULE CHARTER §§ 5-1005, -1006. Also on the local level is the Board of Revision of Taxes, which reviews decisions of valuation made by assessors in the assessment of property. However, this review is merely a method for establishing a final valuation—it is not a device for adjudicating controversies between citizens and the agency responsible for the decision in issue.

⁹⁷ The Tax Court of the United States, see INT. REV. CODE OF 1954, §§ 7441-93.

⁹⁸ The Board of Revenue and Finance, see PA. STAT. ANN. tit. 72, §§ 501-06 (1949), as amended, PA. STAT. ANN. tit. 72, §§ 503-05 (Supp. 1960).

⁹⁹ Cf. note 160 *infra*. But cf. 1956 OPS. (PHILADELPHIA) CITY SOLICITOR 57-58, in which the solicitor concludes that an interpretation of § 5-1005 of the home rule charter granting to the Board of License and Inspection Review the power to pass on constitutional issues or the validity of ordinances or regulations might violate PA. CONST. art. V, § 1, which vests the judicial power in specified courts.

¹⁰⁰ PA. CONST. art. V, § 1.

of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of such courts, shall be uniform; and the General Assembly is hereby prohibited from creating other courts to exercise the powers vested by this Constitution in the judges of the courts of common pleas and orphans' courts.¹⁰¹

These limitations have not prevented the legislature from exercising a wide range of discretion when dealing with the state's judicial system.¹⁰² For example, the legislature may deal separately and specially with the courts of Philadelphia County and of Allegheny County,¹⁰³ and, indeed, it has done so in establishing the Municipal Court of Philadelphia¹⁰⁴ and the Allegheny County Court.¹⁰⁵ Nor has the "same grade or class" limitation been troublesome—the municipal court and the county court have simply been viewed as courts of novel grades or classes.¹⁰⁶ Thus, as far as Philadelphia is concerned, the first limitation on the legislature's power—that legislation dealing with, and that the organization and jurisdiction of, courts of the same grade or class must be uniform—prohibits only the creation of a court with jurisdiction substantially identical to that of the courts of common pleas (or other existing courts), but with a differing organic structure.¹⁰⁷

The only legislative attempt to establish a judicial body which has run afoul of the constitutional limitations was the Family Court Act of 1937.¹⁰⁸ There the Supreme Court of Pennsylvania concluded that:

¹⁰¹ PA. CONST. art. V, § 26.

¹⁰² Cf. Klaus, *The Pennsylvania Habeas Corpus Act of 1951, Its Effect on Philadelphia Procedure*, 26 TEMP. L.Q. 32, 36 (1952): "The interpretation of the doctrine of separation of powers . . . indicates a further clouding of an already nebulous doctrine. That the doctrine itself is firmly established in Pennsylvania cannot be doubted. But *Com. v. Andrews, Com. v. Hopkins*, and *Com. v. Green* have succeeded in developing a rule of law allowing the legislature almost full discretion in dealing with the jurisdiction of the courts . . ."

¹⁰³ PA. CONST. art. V, § 6, makes a special provision for the common pleas courts of Philadelphia and Allegheny counties, and the supreme court has recognized the general assembly's right to legislate on the basis of the constitutional classification. See *Gottschall v. Campbell*, 234 Pa. 347, 352-57, 83 Atl. 286, 288-89 (1912); *City of Wilkes-Barre v. Meyers*, 113 Pa. 395, 6 Atl. 110 (1886).

¹⁰⁴ PA. STAT. ANN. tit. 17, §§ 681-701 (1930), as amended, PA. STAT. ANN. tit. 17, §§ 681-704 (Supp. 1960), *Gerlach v. Moore*, 243 Pa. 603, 90 Atl. 399 (1914).

¹⁰⁵ PA. STAT. ANN. tit. 17, §§ 621-55 (1930), as amended, PA. STAT. ANN. tit. 17, §§ 625-47 (Supp. 1960), *Gottschall v. Campbell*, 234 Pa. 347, 83 Atl. 286 (1912).

¹⁰⁶ See *Gerlach v. Moore*, 243 Pa. 603, 610-11, 90 Atl. 399, 401 (1914); *Gottschall v. Campbell*, *supra* note 105.

¹⁰⁷ "[W]e expressly ruled that for court purposes Allegheny County was in one legislative class and Philadelphia in another, and, in effect, that the jurisdiction of a court need only be uniform with that of other courts of the same grade in the county or counties constituting the class in question" *Gerlach v. Moore*, 243 Pa. 603, 611-12, 90 Atl. 399, 401 (1914) (Moschzisker, J., concurring).

¹⁰⁸ Pa. Laws 1937, act 107. The act provided, *inter alia*, that the family court should have all the powers of a court of record possessed by the courts of common pleas and quarter sessions of the peace; that judges of the family court might be called upon to sit in courts of common pleas, quarter sessions, and general jail delivery; and that the judges of the family court should receive a salary of \$14,000 per year—the same as that received by judges of the courts of common pleas.

[T]he Family Court Act provides for a court and for judges of the same class or grade as the common pleas As the Constitution limits the common pleas of Philadelphia to three judges and as the Family Court Act provides for a court of the same class or grade but with four judges, the Act is in conflict with section 26 of the fifth article requiring that such courts "so far as regulated by law, and the force and effect of the process and judgments of such courts, shall be uniform."¹⁰⁹

The second constitutional limitation—that no other courts may be created to exercise the constitutional powers of the judges of the common pleas and orphans' courts—has proven scarcely more debilitating to the legislature's wide discretion. It does not refer to the jurisdiction of those courts but rather to the powers held by their judges, "for example, the power of sitting in oyer and terminer."¹¹⁰ The limitation "does not directly vest any powers in the courts of common pleas which may not be taken away by law."¹¹¹

Inasmuch as the Tax Review Board, as a municipal tax court, would possess jurisdiction limited solely to matters related to the tax laws, it does not seem that such a court could be regarded as "of the same grade or class" as any existing court. And having escaped the strictures of that limitation, it could then be structured in any way that the legislature should see fit. Nor would vesting the Board with jurisdiction over tax matters contravene the second constitutional limitation, for that provision relates not to the jurisdiction of existing courts but rather to the powers of the judges of those courts.

Jurisdictional Problems

There exist within the governmental framework agencies with adjudicatory functions similar to those of the Board, with the result that activities are duplicated and the forums in which taxpayers must seek relief are multiplied. The success of the Board, deriving from its expertise and its general acceptance by practitioners, leads to the conclusion that some of these adjudicatory tasks could be transferred to the Board. There also exist agencies to which could be transferred some of the Board's other functions, thereby increasing its value in adjudication without endangering existing safeguards in the city's revenue structure.

¹⁰⁹ Commonwealth *ex rel.* Margiotti v. Sutton, 327 Pa. 337, 348, 193 Atl. 250, 255 (1937). See also Commonwealth *ex rel.* Kelley v. Brown, 327 Pa. 136, 193 Atl. 258 (1937).

¹¹⁰ Gottschall v. Campbell, 234 Pa. 347, 358, 83 Atl. 286, 290 (1912).

¹¹¹ *Ibid.*

Property Taxes and the Valuation Function

The Board of Revision's assessment function¹¹² embraces not only the valuation of property, both real and personal, but also the determination of taxability,¹¹³ such as deciding whether a person is a resident, whether specific forms of personal property fall within the classes enumerated in the tax act, and whether proper procedures have been followed. Once all the administrative and court remedies provided by the legislature in the assessment and personal property tax laws¹¹⁴ have been exhausted, the Board of Revision certifies to the department of collections the assessment multiplied by the current rate, which is the tax due. When the department thereafter makes an attempt to collect the tax, the taxpayer could raise issues before the Tax Review Board, collaterally attacking the decision of the Board of Revision. In several instances where this was done, the Tax Review Board refused to review the assessment on grounds of lack of jurisdiction.¹¹⁵ Under existing legislation, the city would seem to have no power to permit its agency to review a state-imposed tax.¹¹⁶ The only

¹¹² See PA. STAT. ANN. tit. 72, §§ 5341.1-.21 (Supp. 1960). In counties other than Philadelphia, the assessment boards are known by other names. See PA. STAT. ANN. tit. 72, § 5452.1 (1950) (for counties of second class: Board of Property Assessment, Appeals, and Review); PA. STAT. ANN. tit. 72, § 5342 (1950) (for counties of third class: Board for Assessment and Revision of Taxes); PA. STAT. ANN. tit. 72, § 5453.102 (1950) (for counties of fourth to eighth classes, a "board for the assessment and revision of taxes"). See generally General County Assessment Law, PA. STAT. ANN. tit. 72, §§ 5020-1 to -602 (1950), as amended, PA. STAT. ANN. tit. 72, §§ 5020-201 to -518.1 (Supp. 1960).

¹¹³ This function of the Board of Revision is especially important with regard to the personal property tax. See Note, 103 U. PA. L. REV. 391, 395-406 (1954).

¹¹⁴ See notes 24-25 *supra* and accompanying text.

¹¹⁵ Henry P. Schneider, *deceased*, Docket Nos. 60.04-26 to -29, Formal Op. No. 58-10, Dec. 3, 1958; Anna A. McManus, Docket No. 70.02-45, Formal Op. No. 56-19, July 25, 1956; Frances I. Marshall, Docket No. 70.02-44, Formal Op. No. 56-14, July 18, 1956. The original tax review board ordinance, Philadelphia, Pa., Tax Review Board Ordinance § 4(b), Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 479-80, specifically provided that the Board should not have jurisdiction over any matters within the jurisdiction of the Board of Revision of Taxes. This provision was omitted from the codification. While no legislative history is available to explain the omission, the first chairman of the Tax Review Board recalls discussing this problem with the assistant city solicitor who prepared this portion of the code, and who expressed the opinion that since the Board did not possess the power, it was mere surplusage to state that fact in the code. Interview With Paul W. Bruton, in Philadelphia, Pa., Aug. 26, 1959. Cf. 1952 OPS. (PHILADELPHIA) CITY SOLICITOR 133 (Formal Op. No. 57), in which the solicitor concluded that the Board of License and Inspection Review has no jurisdiction to hear appeals in zoning matters, since to do so would involve a collateral attack on decisions of the Zoning Board of Adjustments. See also Henry P. Schneider, *supra*.

¹¹⁶ The taxes on real estate and personal property are both imposed under state law, with their incidence and manner of assessment and collection specified by the general assembly, even though the actual rates for the real estate tax are established by the city council, and even though the proceeds of both taxes are for the benefit of the county. See notes 11-12, 25 *supra*. The city council of Philadelphia presently performs all of the functions formerly performed by the county government in accordance with the City-County Consolidation Amendment, PA. CONST. art. XIV,

present jurisdiction of the Board would seem to be a review of action by the department of collections, and this action does not include valuation.¹¹⁷

Over the past half century there have been numerous attempts to abolish the Board of Revision of Taxes.¹¹⁸ In conjunction with efforts to complete city-county consolidation, there have been demands for the Board's abolition and for the assumption of its powers by some appropriate agency of the city. If the Board of Revision should be abolished, the initial valuation functions would still have to be carried out by assessors; the review functions might best be assigned to a body of men experienced in the field of real estate valuation.¹¹⁹ For a variety of reasons, the Tax Review Board might be well advised to stay out of the field of reviewing valuations.¹²⁰ Accordingly, review of valuation decisions should be for the courts or a special board of experts. But all remaining decisions, such as those concerning taxability or interest and penalties, would be peculiarly within the expertise of the Tax Review Board; that Board would thus be the most logical repository for the functions of reviewing the decisions of any substitute assessing body relating to such problems.

§ 8. See PA. STAT. ANN. tit. 53, §§ 13151-57 (1949). However, the Home Rule Enabling Act, PA. STAT. ANN. tit. 53, § 13133 (1957), specifically prohibits the city from exercising any powers contrary to, or in limitation or enlargement of, powers granted by acts of the general assembly which provide for the assessment of real or personal property and persons for taxation purposes. Thus, despite a judicial intimation that ordinances passed by the city under the home rule charter have the status of acts of the general assembly, see *Philadelphia v. Sam Bobman Dep't Store Co.*, 189 Pa. Super. 72, 149 A.2d 518 (1959), it does not seem to be within the power of city council to modify assessment procedures relating to the property taxes.

¹¹⁷ See text following notes 27-30 *supra*.

¹¹⁸ See *Commonwealth ex rel. Truscott v. Philadelphia*, 380 Pa. 367, 111 A.2d 136 (1955); *Clark v. Meade*, 377 Pa. 150, 104 A.2d 465 (1954); *Freedman*, *supra* note 73, at 663-64.

¹¹⁹ Valuation of real estate involves an ultimate value judgment which, although subjective, is based on recognized principles of appraisal. At the present time, any taxpayer aggrieved by a valuation decision of an assessor is entitled to a hearing before the Board of Revision, whose decision is in turn subject to *de novo* review in the courts of common pleas. But ideally, such a reviewing board should be composed of men possessing expertise in real estate valuation, and could be authorized to serve the functions of creating a record, passing on the credibility of witnesses, including appraisers testifying for the taxpayers, and abstracting the issues for possible court review.

¹²⁰ Review of valuation of real estate requires an expertise not usually possessed by lawyers, accountants, and tax specialists; such expertise as is possessed by members of the Tax Review Board relates to interpretation of tax legislation and would be of little value in making judgments in the real estate area. If the body of experts selected to replace the Board of Revision is given the functions suggested in note 119 *supra* (similar to those of the Tax Review Board), then no advantage would be derived from subjecting that body's decisions to review either by the Tax Review Board or by the court of common pleas. And to vest the reviewing function in the Tax Review Board would burden its dockets with multitudinous appeals and might subject it to improper political pressures and temptations—always a danger when subjective determinations are involved.

Overlapping and Duplicated Functions

Licenses and Fees

The department of licenses and inspection makes initial determinations of liability for the various licenses and fees imposed under city ordinances, including those imposed for amusement permits and mercantile licenses. Its decisions are subject to review by the Board of License and Inspection Review.¹²¹ However, liability for the mercantile license fee is imposed only upon those liable for the tax itself,¹²² as determined initially by the department of collections, and is therefore subject to review by the Tax Review Board. To date there has been no appreciable conflict of jurisdiction. On the other hand, the Board of License and Inspection Review possesses no particular expertise with respect to the subjects of the ordinances which it applies—that is, those pertaining to auctions, bowling alleys, and mechanical amusement devices. Liability for such permits involves generally the same type of issues as are involved in any other municipal tax or charge regularly considered by the Tax Review Board. It would seem appropriate, therefore, to transfer to that body the task of passing upon these problems.

School Taxes

The state legislature imposes for the benefit of the school district of Philadelphia a real estate tax,¹²³ a personal property tax,¹²⁴ and a general business tax,¹²⁵ all of which have counterparts in the city's tax system. The real estate and personal property taxes are assessed by the Board of Revision and are collected by the department of collections on behalf of the school board.¹²⁶ However, the school revenue commissioner is nominally responsible for the collection of the school taxes and his office has its own solicitor who makes decisions as to liability

¹²¹ PHILADELPHIA HOME RULE CHARTER § 5-1005.

¹²² The code requires "every person desiring to engage in or to continue to engage in any business" to procure a mercantile license for each place of business from the department of licenses and inspections. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1002(1) (1956). It also requires the payment of an annual mercantile license tax by every person engaged in any business. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1003 (1956). Decisions as to who is subject to the latter provision are made by the department of collections.

¹²³ PA. STAT. ANN. tit. 24, § 6-655 (1949). These are collected in conjunction with the county tax on such property. See note 11 *supra*.

¹²⁴ PA. STAT. ANN. tit. 24, §§ 581.1-.16a (1950), as amended, PA. STAT. ANN. tit. 24, §§ 581.1-.16a (Supp. 1960). See note 12 *supra*.

¹²⁵ PA. STAT. ANN. tit. 24, § 584.1 (Supp. 1960). This is a counterpart of the mercantile license tax.

¹²⁶ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-506 (1956).

for these taxes without always consulting the law department and without always agreeing with the latter's conclusions.

These decisions of the school revenue commissioner do not come within the jurisdiction of the Tax Review Board. Thus, while questions of liability for the general business tax involve issues identical to those involved in the mercantile license tax cases, taxpayers must argue their petitions in two different adjudicatory bodies and face the possibility of two different conclusions. Sound principles of administrative practice would justify submitting all such issues to one reviewing agency. Under the existing charter and laws, the Tax Review Board probably could not pass upon school district tax problems, inasmuch as the school district and its taxes are creatures of the general assembly; the same problems of jurisdiction arise as are presented in connection with taxes assessed by the Board of Revision.¹²⁷ But if the Tax Review Board serves a valuable function for the city, then it could—if properly authorized—serve the same valuable function for the school district at small additional cost.

The Auditing or "Watchdog" Functions

The Board has not and probably cannot under existing legislation serve as effectively as a "watchdog" over the department of collections' disbursements from the public treasury as it does as an adjudicator of taxpayer-city disputes. From the beginning of its operations on January 1, 1954, until December 31, 1958,¹²⁸ the Board received 7,625 requests for approval of refunds. In few instances did the Board schedule a hearing on these requests; it is estimated that in less than two per cent did the Board modify the request, and seldom did it totally reject the request. Infrequently has Board action been invoked to prevent the department from establishing a financially unsound precedent or from disbursing funds where not authorized by law. The most important action, both financially and precedentially, was that taken in the *Insurance Situs* cases.¹²⁹ In those cases, insurance agents who had included in their mercantile license tax returns premiums for risks located outside the city requested the department for refunds of the amount collected on such risks. The department, advised informally by an assistant city solicitor, recommended granting such refunds. In a preliminary examination of the petition for approval—

¹²⁷ See note 116 *supra*.

¹²⁸ See the annual reports of the Board from 1954 to 1958.

¹²⁹ A number of petitions raised the same issue and were disposed of by the Board in one proceeding. *Insurance Situs* Cases, Docket Nos. 40.01-856 to -860, -867, -898, -905, Formal Op. No. 56-9, April 25, 1956, *on rehearing*, Formal Op. No. 56-29, Nov. 16, 1956.

which involved substantial sums of tax—the Board felt that the law did not justify the refunds and sent the approval request back to the department for further clarification. The assistant city solicitor persisted in his position and the approval request was again forwarded to the Board; a hearing was held and the request was denied. The taxpayers appealed, but the Board's action was affirmed in the court of common pleas.¹³⁰

The insurance cases are an atypical example of the exercise of the auditing function, inasmuch as the Board does not investigate or confirm the facts but merely reviews the intended application of the law—an application advocated by both the law department and the department of collections, as well as the taxpayer. This type of Board action fits more closely into the category of adjudicating than it does into auditing—even though it must be conceded that it was the Board's watchfulness which provided the opportunity for adjudication.

The failure of the Board to schedule hearings or to modify a substantial number of refund requests may not reflect its full influence as a watchdog, for in many instances the Board, on discovering some apparently incorrect decision by the department, returns the request for departmental reconsideration, informally indicating that it would probably reject the request. The department is then free to modify its decision, entering a compromise with the taxpayer if appropriate, or refusing refund and permitting the taxpayer to file a petition for appeal from its decision. Since the taxpayer can be then fairly sure of the Board's position on the legal issue involved, it is usually to his advantage to enter into any compromise proffered by the department or to attempt to prove that there are other facts which place him outside the Board's tentative conclusion.

Even considering these circumstances, however, the Board's role is limited. In passing on these requests, the Board is not normally performing an adjudicatory task.¹³¹ Although adjudication is somewhat similar—in that the Board must determine in part whether the department has correctly interpreted and applied the tax measure to the facts before it, the Board must also recognize that the facts and analysis of the law presented to it represent an *ex parte*, and unavoid-

¹³⁰ The appeals filed in several common pleas courts were consolidated and were disposed of by Court of Common Pleas No. 1 without an opinion. Phila. Common Pleas No. 1, Dec. Term 1956, Nos. 1367, 1372.

¹³¹ Normally there is no "dispute" to adjudicate and no adversaries, since both taxpayer and department of collections presumably agree that the refunds should be granted. In the *Insurance Situs* cases, for example, both the taxpayer and the department, advised by the city solicitor, felt that the refunds should be granted. It was the Board, at the suggestion of one of its members, which reviewed the legal ramifications and requested the taxpayer and the city to present argument justifying the right to the refunds.

ably self-serving, statement by the agency whose decision is to be reviewed. The Board has no staff to investigate the validity of the facts set forth in the taxpayer's petition or in the department's request for approval, nor do the taxpayer or his witnesses appear before the Board, unless a hearing is scheduled by the Board. Furthermore, the charter and the code provide no adequate standard for guiding the Board in determining whether to approve a department request. And the ordinance is silent as to whether the Board, in refusing approval, must find that the department was arbitrary or capricious, or only that the department was incorrect, in its ruling that there had been a mistake of fact or law, or that the law under which the tax was paid was invalid.¹³²

Similarly, the Board has played a smaller role in approval of compromises than in its adjudicatory function. The Code of General Ordinances, requiring only that the petitioner set forth facts which warrant a finding that the compromise is "in the best interest of the City,"¹³³ sets forth no specific standards for the department to consider in granting or withholding approval. Nor has the Board itself attempted to define more explicitly what is in the city's best interest. The Board does not have the facilities to investigate the accuracy of the facts set forth in the petition; the most it can do is review the validity of the facts on their face. And seldom is a hearing held. The net result of this activity (or lack of it), added to the denial of power to the Board to review refusals of compromise, is to place in the department of collections an essentially unpoliced power. Refusals, of course, are completely uncontrolled; and the department's agreements on compromise are controlled only so far as it is possible to do so on the basis of a statement of facts adopted by department and taxpayer. Even should the Board lay down more specific criteria—such as whether liability is questionable, whether collectibility is in doubt, whether litigation will prove more costly than the revenue it could pro-

¹³² When first enacted, the tax review board ordinance instructed the revenue commissioner to grant refunds in whole or in part upon a determination that the sum has been paid "under a mistake of law or fact or under an invalid law." Philadelphia, Pa., Tax Review Board Ordinance § 5 (a), Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 48. This requirement was omitted in the codification and no standard was substituted for it. In the argument of the case of *Sharps v. Revenue Comm'r*, 10 Pa. D. & C.2d 463 (C.P. 1956), the assistant city solicitor stated that the omission was inadvertent. The requirement was restored by Philadelphia, Pa., Ordinance of Feb. 27, 1957, 1957 PHILADELPHIA ORDINANCES 120.

¹³³ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1704(1) (1956). See note 32 *supra*. The omission from the code of the word "financial" which appeared in the phrase "best financial interests of the City" in the original ordinance resulted from a request by the Board, with the approval of the department of collections and the law department, to permit the Board to consider matters such as doubtful liability, collectibility, public relations, and the equities on the side of the taxpayer. Interview With Emanuel S. Wolfson, in Philadelphia, Pa., Jan. 5, 1961.

duce, and whether litigation would be such a hardship on the taxpayer as to subject tax enforcement to justified criticism—it could currently enforce such criteria in only a limited number of situations.

If the Board is properly to perform the pre-audit function of reviewing refund and compromise requests, several legislative changes are necessary. Adequate standards should be provided, although they might be of a general nature. For example, in contested refund *appeal* cases, the Board applies a test analogous to the doctrine of unjust enrichment—it will grant a refund petition where the taxpayer has made a payment to which the City was not legally entitled, whether paid under mistake of fact or law, under an invalid ordinance or regulation, or under an improper interpretation of the law. A similar standard would seem proper in the case of requests for refund *approval*. As to compromises, the power to review refusals of compromises should be given to the Board. The factors to be considered in determining what is “in the best interest of the City” should be illustrated, if not enumerated. And the task of the Board in applying those standards should be set forth. Should it be sufficient for the Board to limit its inquiry to the nature and extent of the department’s investigation of the petitioner’s allegations, and, if satisfied that the department has adequately investigated the facts so as to protect the city from dishonest petitioners, grant the petition? Or should the Board be required to hold a hearing and receive sworn testimony as to the facts allegedly justifying the refund or compromise? The latter alternative would probably be a meaningless gesture and an unnecessary expense, inasmuch as the facts would be uncontested and an appeal—necessitating a reviewable record—is unlikely. Finally, there is a large volume of compromise approval requests, and most likely there would be a similar volume of appeals from refusals; many in both categories involve small amounts of money. Accordingly, to prevent cluttering the Board’s docket with items of little moment, a monetary limit should be imposed below which such petitions would not require review.¹³⁴

To the extent that the Board’s watchdog function involves review of the legality of refund payments or the disposition of legal questions involved in refunds, it is related to its adjudicatory function. But to serve as an effective auditor, the Board would have to play a much more active role than it does at present—a role which could substantially increase its burden and clog its dockets. Moreover, other officials in the city framework—the city comptroller and the director of finance

¹³⁴ For example, it has been estimated that if the Board were freed of the responsibility for auditing petitions involving less than \$250.00, more than one-half of the current petitions would be included in this category. Interview With Emanuel S. Wolfson, in Philadelphia, Pa., Jan. 5, 1961.

—already perform an audit function with a special audit staff.¹³⁵ It would require little, if any, extension of the functions of either of these officials to include within their jurisdiction the auditing of refunds and compromises, not only from the accounting standpoint but also from the legal where necessary: the task could probably be performed effectively by an attorney attached to the office of the comptroller. While this attorney would not necessarily have the Board's specialized knowledge and expertise, and while his decisions would not have precedential value, few refund or compromise cases which have been before the Board have required special expertise or have resulted in the establishment of precedent.¹³⁶

The Board's Equitable Clemency Function

The Governing Ordinances

All of the ordinances under which municipal taxes are imposed provide heavy penalties and interest for nonpayment of taxes when due.¹³⁷ While the original tax review board ordinance established a procedure by which a taxpayer could test the validity of taxes whether or not he had paid the levy, it also provided that the filing of a petition for review should not stop the accrual of interest¹³⁸—a provision designed to encourage payment of taxes while the dispute was pending. However, the ordinance went even further: it gave the department of collections and the Board the right to consider the validity of interest or penalties accrued on the principal amount of the tax or charge.¹³⁹ And in 1955 council gave the Board the additional power to abate in whole or in part valid penalties or interest or both, where, in the opinion of the Board, the taxpayer "acted in good faith without negligence and with no intent to defraud or evade the tax."¹⁴⁰

In the codification of the ordinance the following year, council spelled out a procedure for petitioning the department solely for relief

¹³⁵ PHILADELPHIA HOME RULE CHARTER §§ 3-201, -204, -1000, 6-100. Section 8-410 provides that before the law department can render any opinion interpreting any appropriation ordinance or ordinance authorizing the expenditure of money, it shall notify the city comptroller and afford him an opportunity to present his views.

¹³⁶ On the other hand, to repose in a single individual, not at the cabinet level, the power to audit such a large volume of small monetary transactions could lead to temptation and corruption.

¹³⁷ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-508 (1956).

¹³⁸ Philadelphia, Pa., Tax Review Board Ordinance § 6(a), Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 48. See PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1702(4) (1956).

¹³⁹ Philadelphia, Pa., Tax Review Board Ordinance §§ 4(a)(1)-(4), 1953 PHILADELPHIA ORDINANCES 478. The corresponding provisions in the code are PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES §§ 19-1702(1), -1703(1), -1704(1) (1956).

¹⁴⁰ Philadelphia, Pa., Ordinance of Dec. 27, 1955, 1955 PHILADELPHIA ORDINANCES 1142.

from interest and penalty, without questioning the validity of the principal charges.¹⁴¹ The code removed the test of good faith, lack of negligence, and intended evasion, and instead required only that the petitioner set forth and certify facts which would warrant a finding that the waiver of interest or penalty would be "just and equitable and not prejudicial to the best interest of the City."¹⁴² A scant six months later, however, council reinstated the former tests of good faith, lack of negligence, and no intent to defraud.¹⁴³ As it now reads, the code permits the Board to grant relief from harsh interest and penalty exactions where it is satisfied that the petitioner is not intentionally or negligently attempting to deprive the city of revenue.

The Board's Role

The Board's role in determining whether to grant equitable relief from these harsh penalties brings into play considerations quite different from those involved in its adjudicatory function. Here, precedent and stare decisis are of little, if any, value. Whereas the inquiry in adjudicating is whether the taxpayer falls within the taxing provisions or their exemptions, the inquiry in dispensing clemency is whether it is unfair to penalize the taxpayer for some admitted deficiency in making a payment required by law.

No specific legislative authority currently exists for a petition designed solely to test the validity of interest and penalty impositions; that specific authority did exist for six months but then was removed from the code. A literal reading of the current provisions suggests that the validity of interest and penalty exactions can be questioned only on a petition for review or appeal disputing the principal charge.¹⁴⁴

¹⁴¹ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1705 (1956).

¹⁴² PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1705(1) (1956).

¹⁴³ Philadelphia, Pa., Ordinance of June 5, 1956, 1956 PHILADELPHIA ORDINANCES 278, amending PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1705 (1956). This was done at the request of the Board. For a discussion of the legislative history and effect of this section, see Edward E. Kelly, Docket No. 40.04-B406, Formal Op. No. 58-8, Oct. 21, 1958.

¹⁴⁴ The code, in § 19-1705, provided a procedure for seeking relief from interest and penalties without questioning the validity of the basic charges; but in 1956, the amendment to the code provided simply: "Upon any petition for review or any appeal, the Tax Review Board may abate in whole or in part interest or penalties, or both . . ." Philadelphia, Pa., Ordinance of June 5, 1956, 1956 PHILADELPHIA ORDINANCES 278. (Emphasis added.) The code also provides that petitions for review, refunds, and compromise relating to disputes over money or claims collectible by the department, shall include but not be limited to "any tax, water or sewer rent, license fee or other charge, and interest and penalties thereon." PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES §§ 19-1702(1), -1704(1) (1956). (Emphasis added.) A literal reading of these sections leads to the conclusion that the Board can act only when a petition for review or refund appeal petition is filed. If council intended the Board to hear such matters independently of disputes relating to the principal claimed, it should have omitted the emphasized portion of § 19-1705. Or it could have used the disjunctive "or" instead of the conjunctive "and" in the remaining sections.

The Board, however, has exercised its rulemaking power¹⁴⁵ to provide a form of petition questioning only penalties and interest. Prior to the introduction of this type of petition, the Board's dockets were crowded with petitions for review and refund appeals in which there was no substantial dispute over the principal charges, but which were filed as the only means to obtain relief from the heavy interest and penalty exactions. It was impossible for the Board to distinguish between true contested petitions and those seeking equitable relief. With the new petition, hearings can be more efficiently scheduled and more directly oriented toward the real issues in controversy. Moreover, the making of a written transcript is not normally necessary where relief is sought only from interest and penalties; where such cases are readily identifiable, costs can be saved by dispensing with the services of the official stenographer.

Since interest charges are designed to reimburse the city for not having the use of money to which it is ultimately held entitled, there seems to be no valid reason for granting relief, regardless of good faith or intent, except perhaps where the taxpayer's failure to pay the tax can be attributed to reliance on a prior board or court decision which has been overruled or modified since the accrual of the tax. On the other hand, penalties are designed to discourage nonpayment of taxes when due; they mount rapidly, can become oppressively heavy, and bear a pejorative connotation.¹⁴⁶ Therefore, there is ample justification for granting relief from penalties when the standards of good faith, care, and good intent are met. To date the Board has had little difficulty in distinguishing petitions filed in good faith from those filed merely to delay ultimate payment; petitions which set forth at least prima facie grounds for review or appeal, which disclose reliance upon competent advice, or which disclose honest and open negotiations with the city are generally considered to be filed in good faith. Nonetheless, the first chairman of the Board expressed a desire for legislative clarification of the criteria upon which relief should be granted.¹⁴⁷

Legislative Clarification

In seeking legislative clarification of the provisions governing relief from penalties, it is important to distinguish between two purposes for

¹⁴⁵ Pursuant to authorization in PHILADELPHIA HOME RULE CHARTER §§ 8-406, -407, council has given the Board the right to make rules and regulations to implement the code chapter dealing with the Board. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1701(2)(a) (1956). The regulations were promulgated in 1954; although no formal amendments have been made, the regulations have been substantially amended in practice.

¹⁴⁶ Penalties are also intended to equalize the cost of collection of delinquent taxes, which mounts with the period of delinquency.

¹⁴⁷ Interview With Paul W. Bruton, in Philadelphia, Pa., Aug. 26, 1959.

which they are imposed. First is the encouragement of full, honest, and timely disclosure of tax liability. Penalties for failure to make disclosure should be in the form of additions to the tax base, with heavier penalties for wilful failure to file a return or to include taxable items than for negligent failure to do so.¹⁴⁸ If such penalties were imposed under municipal taxing ordinances, then the only task of the Board would be the adjudicatory one of determining whether there had been negligence or wilful attempt to evade taxation. A second purpose for imposing penalties is to encourage prompt payment of taxes. These penalties should mount as long as delinquencies continue and should be imposed in addition to interest. As to such penalties the Board should determine whether there has been negligence, fraud, or intent to evade ultimate payment; if lateness is justifiable, then relief should be granted.

Under present provisions of the law, there is some doubt as to whether the tax collecting authorities have the right to grant relief from interest and penalty impositions when payment is delayed, even if they deem lateness to be excusable. The department has taken the position that since the function of waiving interest and penalties has been given to the Board, it does not exist in the department. On the other hand, it has been suggested that this power coexists in the department as a corollary to its tax collection duties.¹⁴⁹ At the present time the only way the taxpayer can prevent interest and penalties from accumulating is to pay the full amount of principal due; partial payment will not suffice. Once a tax has become delinquent the department may not accept partial payment of the principal without allocating a portion of the payment to the interest and penalties due thereon;¹⁵⁰ in some instances, however, the department will accept payment in full of the delinquent principal, and this will toll the running of further interest and penalties while the taxpayer petitions the Board for relief of interest and penalties already accrued. The required allocation of partial payments may be especially burdensome to the financially embarrassed taxpayer, for the department will not enter into a compromise simply because of financial hardship unless there is doubt as to the taxpayer's liability or unless the taxpayer has ceased to do business as an entity. This often penalizes an honest taxpayer who makes full disclosure of

¹⁴⁸ The legislature has provided for such increases to the tax base in the case of persons who fail to file personal property tax returns, or who do not return all of their taxable property therein. A twelve percent penalty is added to the tax base in such instances. PA. STAT. ANN. tit. 72, § 4844 (1950). See Note, 103 U. PA. L. REV. 391, 408, n.101 (1954). Likewise, the federal income tax imposes a 25% addition to the tax base for negligence and a 50% addition for fraud. INT. REV. CODE OF 1954, §§ 6651(a), 6653(b).

¹⁴⁹ Interview With Paul W. Bruton, in Philadelphia, Pa., Aug. 26, 1959.

¹⁵⁰ PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-504(1) (1956). *But see* note 31 *supra*.

his liability but is unable to pay his tax at the time due. If he survives the financial straits and is finally able to pay, he must pay full interest and penalty, without hope of relief from the department.¹⁵¹ On the other hand, if a taxpayer fails to file a return at a time when he is financially embarrassed, he is frequently able to make arrangements with the department for payment of the principal due without interest and penalties should a subsequent audit disclose his liability.

A large amount of the Board's time is taken up with the disposition of cases of this type. Moreover, the "technical staff" of the department of collections, on behalf of the revenue commissioner, currently performs a somewhat similar function, determining in which cases the taxpayers should be granted relief in the form of a compromise of liability. While those decisions are subject to review by the Board, the initial decision by the technical staff is based at least partly on the equities involved. It would be only a slight extension of the staff's duties to grant it the power and responsibility to waive interest and penalties in compliance with any legislative standards which might be adopted. The Board could then serve as a "watchdog" in reviewing these decisions as well. This suggestion is not novel: the code as first enacted imposed on the department the function of waiving interest and penalties, with its decisions subject to review by the Board and the right reserved to the taxpayer to appeal to the Board the department's refusal of waiver.¹⁵² The power to abate interest and penalties was later that year transferred to the Board. To return it to the department now would probably result in a more efficient use of the time of both Board and department and a more logical division of the duty to solve problems within the tax collecting authority.

Possible Advisory Functions

Advice to Government

It has been suggested by at least one observer of municipal government that there is a need for a body of experts with specialized

¹⁵¹ This was the position taken by the department and repudiated by the Board in Brookman, Docket Nos. 33.05-G789, 35.05-G790, 40.05-E414, Formal Opinion No. 60-12, July 1, 1960. There, taxpayers contended that they had made full disclosure of their mercantile, net profits and wage withholding tax liability, but were unable to pay the taxes when due because of other debts, including state and federal taxes, taking priority. These debts resulted in termination of the partnership, with one of the partners continuing the business and assuming all liabilities. Within a few years and as soon as able, he paid the principal charges, and sought relief from the interest and penalties. The department, through the technical staff, refused relief, contending that it had no power to waive interest and penalties and that, if it were to treat this as an offer of compromise, it did not consider it to be "in the best interest of the City." On petitions for waiver, the Board abated the penalties on all taxes and one-half of the interest on the net profits taxes.

¹⁵² PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1705 (1956) (as originally enacted).

knowledge of municipal revenue problems to serve as an advisory board to the executive and legislative branches.¹⁵³ To this board the city council and the mayor could turn for advice on the practicality of imposing new forms of taxation or for suggestions as to procedural reforms. The advisory body could also reflect the views of practitioners on tax and fiscal matters.

Providing advice to the legislative and executive branches on matters of general tax and fiscal interest brings into play political considerations which have no place in rendering judicial—or quasi-judicial—adjudications of specific tax disputes between citizen and sovereign. If a need exists for such a body on a continuing basis,¹⁵⁴ the Tax Review Board—with its expertise in tax law and practice—would seem to be the logical group to fill the need. However, in acting as a political sounding board, the members must be aware that they are wearing different hats than when they fill their other roles, and they must be careful to doff those hats when they return to their other functions.

In empowering the Board to render opinions on general fiscal matters when requested by the mayor or other governmental agencies, or to volunteer such opinions when matters justifying such action come to its attention, city council must be careful to assure the ability to distinguish among the various hats worn by the board members. The ordinance should make clear that in rendering such opinions the Board may invoke political as well as judicial considerations and that the opinions are advisory only, having no binding effect as to any present or future dispute. Even these safeguards, however, might not prevent the mixing of the Board's adjudicatory functions with political considerations; any step taken, therefore, toward charging the Board with an advisory duty must be taken only after long and thoughtful investigation.

Advice to Taxpayers

Apart from the above suggestion, an adjudicative agency possessing the expertise of the Tax Review Board could be granted the additional power to render—where requested by specific taxpayers—advisory opinions or declaratory judgments¹⁵⁵ based on agreed or

¹⁵³ Interview With Lennox L. Moak, in Philadelphia, Pa., Sept. 2, 1959.

¹⁵⁴ An alternative would be *ad hoc* committees called together by the mayor or the council. It would seem that a continuing body would have many advantages over such an *ad hoc* system: it would eliminate the need for locating citizens possessing the required expertise and willing to serve; it would facilitate the speed with which advice could be given; and it would have daily, first-hand contact with the fiscal and tax problems of the city, so that it could initiate suggestions without specific directives from mayor or council.

¹⁵⁵ Apparently the Board does not now have such power, as it is empowered to act only to review decisions of the department by which a taxpayer is aggrieved and to approve refunds and compromises.

hypothetical facts and posing contested issues of law.¹⁵⁶ These decisions would have the same effect as a previous adjudication by the Board, provided it could be proved that the actual facts fit the hypothetical ones on which the decision is based. This could prove valuable, for example, to individuals or industries desiring to locate in Philadelphia but unsure of their tax liability should they do so. These decisions would be rendered under the same safeguards as are other adjudications by the Board and would represent only a slight extension of the Board's present function.

Judicial Review of Board Adjudications

As indicated throughout this Article, the Board's primary value lies in the development of its power to adjudicate tax controversies. The Board has developed its own procedures for making a record and for deciding factual and legal issues—the common pleas courts can add little to the adjudicatory process.¹⁵⁷ If review of board decisions is taken solely on the basis of the record created before the Board, the task of review can be performed equally well by an appellate court. The dockets of the common pleas courts are already overcrowded; the additional burden on these courts probably outweighs the small saving resulting from discouraging frivolous appeals to appellate courts by the interposition of additional hurdles for the taxpayer to surmount. And the risk of nonuniform decisions is substantial where appeals are allowed to seven separate common pleas courts composed of twenty-one judges.¹⁵⁸ It seems, therefore, that a more efficient procedure would result if appeals from the Board went directly to a state appellate court—most likely, the superior court.¹⁵⁹

¹⁵⁶ The law department will now render advance rulings to taxpayers where, in the opinion of the department, such a ruling would not be inconsistent with sound tax administration. These rulings bind the city. The department of collections will give informal interpretive "advance opinions," but such opinions have no binding effect.

¹⁵⁷ Their decision on review is based entirely on the record created before the Board. See note 94 *supra*.

¹⁵⁸ Even the three judges comprising a common pleas court do not always agree. For example, in *Manheim Laundry Co.*, Docket No. 40.02-A462, Formal Op. No. 57-9, March 7, 1957, Supplemental Opinion, June 3, 1957, the Board refused to allocate receipts, for purposes of computing the mercantile license tax, from routes outside the city. On appeal, one judge of the common pleas court remanded, directing that an allocation formula be adopted. Phila. Common Pleas No. 1, June Term 1957, No. 3049. On remand, the Board complied but noted that in all other cases it would adhere to its prior ruling. When returned to the common pleas court, the remaining two judges, sitting *en banc*, affirmed without opinion this repudiation of its former decision. When an opinion was necessitated by a further appeal to the supreme court, the common pleas court *en banc* adopted the opinion of the Board as its own.

¹⁵⁹ *E.g.*, it is provided by statute that decisions of the state Public Utility Commission are appealable directly to the superior court. PA. STAT. ANN. tit. 66, § 1431 (Supp. 1960). This statutory authority removes PUC cases from the rule of Bell Appeal, 396 Pa. 592, 152 A.2d 731 (1959).

Composition, Tenure, and Qualifications of Board Members

If the Tax Review Board is to adjudicate factual and legal controversies relating to municipal taxes and charges, then it is advisable to select board members with a background in those and allied fields. At least the majority of the members should be "learned in the law."¹⁶⁰ This is not, however, to suggest that accountants have nothing to add. In many instances, accountants may be better versed in factual problems, especially those involving accounting practice, than are attorneys. Therefore, it seems wise to continue to have accountant members on the Board;¹⁶¹ they should be restricted, however, to minority membership and should at least be certified.¹⁶²

Since its inception the Board has been meeting only twice a week, with a few additional meetings. Nevertheless, it has been able to dispose of approximately 2,500 petitions each year after the initial year of operations;¹⁶³ it suffers from little or no backlog or docket delay. This workload has, however, been increasing annually, as taxpayers and their representatives become more aware of the cheap, easy, efficient, and fair method provided for contesting tax liability. Keeping the Board's workload down is important because it would seem most desirable that service on the Board be a well-compensated part-time position.¹⁶⁴ Qualified men probably could not be attracted on a full-time basis unless the salary offered were far higher than the city could afford to pay. The Board has thus far attracted a number of public-spirited and qualified men who could never have afforded to take the post had it prevented them from carrying on their private practices.¹⁶⁵

¹⁶⁰ However, this qualification is not a constitutional requirement. See *Merchants' Warehouse Co. v. Gelder*, 349 Pa. 1, 36 A.2d 444 (1944). Magistrates and justices of the peace need not be learned in the law. PA. CONST. art. V, §§ 11, 12. Nor has such a qualification always been one for a common pleas judgeship. PA. CONST. art. V, §§ 4, 5, 15.

¹⁶¹ The code, as amended, requires only that one of the Board's members be an accountant and one an attorney. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1701(1)(a) (1956).

¹⁶² The Board could also call on consultants from other fields in connection with its nonadjudicatory roles. For example, economists and fiscal experts could make a valuable contribution in determining the efficacy of new forms of taxation; businessmen could assess the effect of such forms of taxation and new tax policies and procedures; specialists in local government and administration might suggest new means of safeguarding the public fisc.

¹⁶³ See the annual reports of the Board from 1954 to 1958.

¹⁶⁴ Under the code, as amended, each member of the Board receives \$50.00 for each meeting or hearing which he attends, but not more than \$5,000 in any one year. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1701(8) (1956). Some members attend more than 100 meetings a year; however, the meetings seldom take a full day and the members have no expenses.

¹⁶⁵ Since members are not prohibited from engaging in private practice, it would seem wise to enact some conflict-of-interest law or regulation which would control the contacts of members of the Board or their associates with the parties or matters before the Board. While such a regulation might deter specialists from seeking membership on the Board, it would probably not prevent the city from obtaining the services of fully qualified men.

Perhaps the salary should be re-evaluated; the current figure of fifty dollars per meeting is not unreasonable, but it may be less than qualified men could obtain as consultants. But equally important in attracting qualified members is the opportunity for public service,¹⁶⁶ and it is in maintaining this incentive that the part-time nature of the Board's operations becomes important.

To insulate the Board from political pressures and to insure continued nonpolitical adjudications, a method of selection should be adopted similar to the "Pennsylvania Plan," a technique currently being urged as the best method for the selection of judges.¹⁶⁷ The present six-year term should be lengthened to prevent political considerations from influencing appointments. Presently terms are staggered,¹⁶⁸ but this does not effectively prevent a new mayor from "packing" the Board inasmuch as he probably would have the right to appoint a completely new membership.¹⁶⁹ In practice, reappointments have been virtually automatic, politics have not yet posed serious problems, and the appointees have been well qualified. To insure continuance of this record, the tenure of board members should be similar to that of members of the judiciary.

CONCLUSION

In the few years of its existence, the Tax Review Board has more than justified the city's annual expenditures for its operations. It has proved valuable to the citizen-taxpayer, the tax practitioner, and the

¹⁶⁶ Mayors Clark and Dilworth have appointed well-qualified persons to the Tax Review Board. The reform movement which they headed, however, may be losing vitality. See REICHLY, *THE ART OF GOVERNMENT* 45-49 (1959). If this is so, the problem of insulating the Board from political pressure and of attracting men of high caliber and character may become acute.

¹⁶⁷ Under this plan, a nonpartisan commission nominates a panel of qualified persons; from the panel, the appointing power selects the appointee; after the appointee has served a short trial period, his name is submitted to the voters on a separate ballot without party designation for approval or rejection. If approved, the appointee serves for the remainder of his term and may run again, unopposed, for another term. If the appointee is rejected, a new appointee is selected in the same manner. See Harris, *The Pennsylvania Plan*, 62 *DICK. L. REV.* 217, 221 (1958).

¹⁶⁸ The original tax review board ordinance provided for staggered terms, with two members to be appointed for two years, two for four years, and two for six years, with all subsequent appointments being for six years. Philadelphia, Pa., Tax Review Board Ordinance § 1(b), Sept. 9, 1953, 1953 PHILADELPHIA ORDINANCES 478. The code provides for six-year terms. PHILADELPHIA, PA., CODE OF GENERAL ORDINANCES § 19-1701(1)(a) (1956).

¹⁶⁹ "Except as expressly otherwise provided in this Charter, all appointed officers and all members and all officers of boards and commissions shall serve at the pleasure of the appointing power and until their successors are qualified." PHILADELPHIA HOME RULE CHARTER § 3-404. The charter does not elsewhere provide specifically for the terms of appointment of the Board; in fact, it provides for the replacement of the original members when provided by council, § 3-914, but does not give council the right to specify terms of office. If a mayor not in political agreement with his predecessor were elected, the Board could become a political football. It is therefore suggested that the charter be amended to eliminate the power of the mayor to remove members of the Board during their terms, except for cause.

city's fiscal operations by providing a forum for quick, efficient, and fair disposition of citizen-sovereign tax disputes. The Board's value as an adjudicatory agency and as an impartial dispenser of equitable clemency has far outweighed the deficiencies in the performance of its auditing function. While there are areas of needed improvement or clarification relative to jurisdiction, structure, procedure, and roles, these require legislative action and are not attributable to any inherent failure on the part of the Board.

The Board today is held in high esteem by both courts and practitioners. In my opinion, this results in large measure from the high level of competence and impartiality set by the Board under its first chairman and continued by his successors. The quality of the members appointed to the Board has been generally high and, in carrying out their duties, they have devoted energy far in excess of monetary compensation received.

To insure the continued success of the Board, it is incumbent upon the state legislature and the city council to insulate the Board from political pressures to the greatest extent possible; to establish adequate and clear standards for the Board's guidance; to clarify and delimit its functions—in short, to apply the lessons learned in the first few years of the Board's operations.

The field of municipal tax collection is not the only governmental area in which there is a need for an administrative agency to adjudicate disputes between government and citizen. Licensing, zoning, urban planning, development and redevelopment, building restrictions, condemnations, and other forms of regulation of citizen activities give rise to similar types of conflicts and to the consequent need for an agency to resolve them. Nor is Philadelphia unique in facing these problems. The experience of the Tax Review Board should serve as a working model for other municipal agencies and other municipalities facing similar problems arising from the growing complexities of modern municipal government.