

Alternative Methods of Appeal From Decisions of the Ohio Board of Tax Appeals

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The One Hundredth General Assembly has provided an alternative method of appealing from decisions of the Ohio Board of Tax Appeals. Amended House Bill No. 220, which became effective October 2, 1953, amends Section 5717.04 (5611-2), Revised Code, to grant an alternative appeal from decisions of the Board of Tax Appeals to the Supreme Court or to the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides.

With respect to a corporate taxpayer, the bill provides that the appeal from the Board is to the Supreme Court or to the court of appeals for the county in which the property taxed is located, or the county of residence of the agent for service of process, tax notices or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation or modification shall be by appeal to the Court of Appeals for Franklin County.

The direct appeal to the Supreme Court from decisions of the Board of Tax Appeals which was in effect from 1941 until the effective date of Amended House Bill No. 220, was a controversial provision. Criticism of the direct appeal to the Supreme Court was often made because of the sundry tax cases which were appealed to the Court. On occasion, mention was made in a judicial opinion that many of the tax cases appealed to the Supreme Court presented primarily questions of fact.¹ Disapproval was also voiced because the direct appeal forced the taxpayer to the expense of presenting his case to the Supreme Court. Agitation for a change of the direct appeal provision was reflected by the introducing in the Ninety-ninth General Assembly of House Bill No. 384, which would have amended Section 5611-2, General Code, to provide that proceedings to obtain reversal, vacation or modification of the decisions of the Board of Tax Appeals should be by appeal to the court of appeals for the county in which the property taxed is situated, or in which the taxpayer resided. This legislation was not enacted.

Apparently, the One Hundredth General Assembly felt that

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¹ Mead Corporation v. Glander, 153 Ohio St. 539, 93 N. E. 2d 19 (1950). At page 539, the Court stated: "This is another of the cases coming from the Board of Tax Appeals in which, under existing statutes, this court is called up to assume the role of a second administrative board of review and is required to pass largely on questions of fact."

the importance of tax cases justified the retention of the direct appeal to the Supreme Court from decisions of the Board of Tax Appeals, but that the taxpayer should be given a choice between an appeal to the Supreme Court or to an appropriate court of appeals. The provisions of Section 5717.04 Revised Code, in contrast with former Section 5611-2, General Code, permit a taxpayer to obtain judicial review of his tax case nearer his residence or center of business operations, for the alternative appeal may be taken to the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. For a corporate taxpayer, the appeal may be taken to the court of appeals in the county where the property taxed is situate, or the county of residence of the process agent, or the county in which the corporation has its principal place of business.

The evolution of judicial review of tax assessments in Ohio has taken the following pattern. Prior to 1939 the tax determinations of the then Tax Commission were appealable to the various common pleas courts.² From 1910 to 1939, the Ohio tax laws were administered by a Tax Commission which consisted for a time of three members and later four members. In 1939, the Tax Commission was abolished by the General Assembly and there was created the present Department of Taxation composed of a single Tax Commissioner and a three-member Board of Tax Appeals. All of the functions, powers, and duties which the law vested in the old Tax Commission were transferred to the Department of Taxation. However, the General Assembly separated the administrative and quasi-judicial functions by providing that final determinations of the Tax Commissioner were to be reviewed by the Board of Tax Appeals. Final determinations of the Tax Commissioner were made appealable first to the Board of Tax Appeals and then, as of right, directly to the Supreme Court of Ohio.³

The provision for an alternative appeal from decisions of the Board of Tax Appeals, either to an appropriate court of appeals or to the Supreme Court, presented certain problems in the drafting of Amended House Bill No. 220. One possible complication with respect to the alternative appeal method was created because of the conceivable situation where the taxpayer or other specified person⁴ would choose one method of appeal initially and then during the thirty-day appeal period change his mind and follow the alternative method. Then, too, the question arose as to what the situation would be when either the Tax Commissioner or the taxpayer decided to file a cross appeal. Many times in tax cases there

² Section 5611-2, General Code, as amended in 116 Ohio Law 123.

³ OHIO GEN. CODE, §§ 5611, 5611-1, and 5611-2.

⁴ OHIO REV. CODE, § 5717.04.

are various points at issue in the litigation. The taxpayer may appeal from the decision of the Board of Tax Appeals on some issue or issues decided adversely to him and the Tax Commissioner may file a cross appeal on issues resolved in favor of the taxpayer.⁵ In other instances the cross appeal has been taken by the taxpayer.⁶

In order to obviate these complications referred to, the Senate Judiciary Committee⁷ amended the bill⁸ by setting forth the traditional principle that the court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal. Another amendment made by the Senate Judiciary Committee was necessitated because of the use of the term "taxpayer" in Amended House Bill No. 220. Since the bill refers to the term "taxpayer" in prescribing in what appropriate court of appeals the appeal may be brought if the taxpayer or other proper person desires not to appeal directly to the Supreme Court, the question was raised as to whether such term was adequately inclusive.

Section 5711.01 (5366), Revised Code, provides that the term "taxpayer" excludes all financial institutions, dealers in intangibles or public utilities as so defined in Title LVII, Revised Code, except to the extent they may be required to file returns as fiduciaries. Hence, in order to insure that financial institutions, dealers in intangibles and public utilities were included within the term "taxpayer" for appeal purposes, the Senate Judiciary Committee provided that any person required to return any property for taxation was a taxpayer under Section 5717.04, Revised Code.

Identical procedural requirements are set forth in Amended House Bill No. 220 for perfecting an appeal from a decision of the Board of Tax Appeals either to the appropriate court of appeals or to the Supreme Court. The procedural requisites of Section 5717.04, Revised Code, are jurisdictional, for the Supreme Court has held that where a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred.⁹

The General Assembly, in enacting Amended House Bill No. 220, prudently provided that the scope of judicial review of decisions of the Board of Tax Appeals would be the same whether the appeal was taken to a court of appeals or directly to the Supreme Court. In this respect, the bill provides:

If upon hearing and consideration of such record and evi-

⁵ *Fyr-Fyter Co. v. Glander*, 150 Ohio St. 118, 80 N. E. 2d 776 (1948).

⁶ *C. F. Kettering, Inc., v. Glander*, 155 Ohio St. 356, 98 N. E. 2d 793 (1951).

⁷ Senate Journal, p. 4, May 28, 1953.

⁸ Amended House Bill No. 220.

⁹ *American Restaurant & Lunch Co. v. Evatt*, 147 Ohio St. 147, 70 N. E. 2d 93 (1946). See also *Oliver v. Evatt*, 144 Ohio St. 231, 58 N. E. 2d 381 (1944); *Kenny v. Evatt*, 144 Ohio St. 369, 59 N. E. 2d 47 (1945).

dence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

Prior to the enactment of Amended House Bill No. 220, Section 5611-2, General Code, provided, and the Supreme Court so interpreted the statute to mean, that the court could reverse, vacate, or modify the decision of the Board only when the court was of the opinion that such decision was unreasonable or unlawful.¹⁰ It would seem that the One Hundredth General Assembly, as well as past General Assemblies, has felt that only a limited judicial review of decisions of the Board of Tax Appeals is necessary because of the provision in Section 5717.02 (5611), Revised Code, for a *de novo* hearing before the Board. The Supreme Court held that a full administrative appeal from an order of the Tax Commissioner to the Board of Appeals was contemplated by Sections 5611 and 5611-1, General Code.¹¹ The court has further announced that the rule usually applied by the courts that the action of a public officer within the limits of the jurisdiction conferred by law is presumed to be valid and in good faith, is not applicable in an appeal from the Tax Commissioner to the Board of Tax Appeals.¹² The Supreme Court has also held that, although the Board of Tax Appeals exercises quasi-judicial functions, it is an administrative body.¹³

Because of the provisions of the statute,¹⁴ which, prior to the enactment of Amended House Bill No. 220, provided that the Supreme Court could reverse the Board of Tax Appeals only if the Court found such decision unreasonable or unlawful, the Supreme Court has taken the view that the General Assembly intended to import good faith and verity to the decisions of the Board of Tax Appeals.¹⁵ The provision, therefore, in Amended House Bill No. 220, for a limited judicial review of decisions of the Board of Tax Appeals by either the appropriate court of appeals or the Supreme Court, is consistent with prior legislative provision and judicial interpretation thereof. Thus, the General Assembly has provided for the same type or scope of judicial review irrespective of whether the appeal is taken directly to the Supreme Court or in the alternative to an appropriate court of appeals.

If the taxpayer or any other proper party chooses to appeal to

¹⁰ Clark v. Glander, 151 Ohio St. 229, 85 N. E. 2d 291 (1949).

¹¹ Bloch v. Glander, 151 Ohio St. 381, 86 N. E. 2d 318 (1949).

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ OHIO GEN. CODE, § 5611-2.

¹⁵ Bloch v. Glander, *supra*, note 11.

an appropriate court of appeals, any further appeal to the Supreme Court will be on questions of law only. Amended House Bill No. 220 provides that any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases. If the alternative method of appealing to the appropriate court of appeals from a decision of the Board is chosen, the appellant may take an appeal to the Supreme Court from the decision of the court of appeals only in accordance with Section 2505.28 (12223-28, Revised Code. Section 2505.29 (12223-29), Revised Code, provides that, except as to the judgment or final order of the court of appeals, or a judge thereof, in cases involving questions under the Constitution of the United States, or of this state, and in cases which originated in the court of appeals and except as to proceedings of administrative officers as may be provided by law, no appeal shall be filed in the Supreme Court in cases over which it has jurisdiction without its leave, or that of a judge thereof. Undoubtedly the provisions of Section 2505.29, Revised Code, which require leave of the Supreme Court to appeal from a decision of the appropriate court of appeals except in certain cases, will be given due consideration before the taxpayer or any proper party decides to appeal from a decision of the Board of Tax Appeals to an appropriate court of appeals, rather than to the Supreme Court as of right.

An interesting aspect of the alternative appeals now provided from decisions of the Board of Tax Appeals relates to cases involving questions under the Ohio Constitution. The application for exemption of the Cincinnati Metropolitan Housing Authority¹⁶ is illustrative of the situation where cases involving constitutional questions are appealed directly to the Supreme Court from a decision of the Board of Tax Appeals. In that case, the Court was confronted with the question as to whether Sections 5356 and 1078-36, General Code, declaring property of housing authorities to be public property and exempt from taxation, were violative of Section 2, Article XII of the Ohio Constitution. In a per curiam opinion, it was stated that although a majority of the members of the Court were of the opinion that Sections 5356 and 1078-36, General Code, were unconstitutional, two members of the Court did not concur in that view. The property in question was held to be exempt from taxation under the referred to statutory provisions, because five members of the Supreme Court may not declare a statute unconstitutional since Section 2, Article IV of the Constitution provides no law shall be held unconstitutional by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of a court of ap-

¹⁶ 155 Ohio St. 590, 99 N. E. 2d 761 (1951).

peals declaring a law unconstitutional and void.

Thus, when a direct appeal is taken to the Supreme Court from a decision of the Board of Tax Appeals involving a constitutional question, a statute may not be declared unconstitutional without the concurrence of at least all but one of the judges of the Supreme Court. If, however, the appeal from a decision of the Board is taken to the appropriate court of appeals and such court declares a statute unconstitutional, then in the appeal as of right to the Supreme Court from the decision of the court of appeals, the Supreme Court may, by a majority of its members,¹⁷ affirm the judgment of the court of appeals declaring the law unconstitutional and void. When the constitutionality of a statute is upheld by a court of appeals, six judges of the Supreme Court are required to hold the law violative of the Constitution.¹⁸

¹⁷ OHIO CONST. Art. IV, § 2, also provides in part that: "Whenever the judges of the supreme court shall be equally divided in opinion as to the merits of any case before them and are unable for that reason to agree upon a judgment that fact shall be entered upon the record and such entry shall be held to constitute an affirmance of the judgment of the court below."

¹⁸ *Barker v. Akron*, 98 Ohio St. 446, 121 N. E. 646 (1918).