



Volume 76 | Issue 1

Article 3

November 1973

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Recommended Citation

J. T. Philipps, *VEPCO--The Need for a Revised Tax Appeals Procedure in West Virginia*, 76 W. Va. L. Rev. (1973).

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ERRATA (Vol. 76, No. 1)

VEPCO—THE NEED FOR A REVISED TAX APPEALS PROCEDURE IN WEST VIRGINIA

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The *VEPCO* case cites in this article were taken from the advance sheets of the Southeastern Reporter. The case does not appear in the corresponding bound volume. Therefore, this page of corrected cites should be detached and placed opposite page 1 of Volume 76, Number 1, in order to facilitate effective use of Professor Philipps' article for research purposes.

Footnotes

⁸200 S.E.2d 848 (W. Va. 1973).

¹⁰200 S.E.2d at 850.

²⁵200 S.E.2d at 851.

²⁶*Id.* at 850-51.

²⁷*Id.* at 852-53.

³⁰200 S.E.2d at 852-53.

³¹*Id.* at 852.

³²*Id.* at 853.

West Virginia Law Review

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VEPCO—THE NEED FOR A REVISED TAX APPEALS PROCEDURE IN WEST VIRGINIA

J. TIMOTHY PHILIPPS*

I. INTRODUCTION

Taxpayer representatives say Chicken Little was right;¹ the West Virginia Supreme Court of Appeals says that circuit court judges should not hear evidence in tax cases;² and the State Tax Department says good tax collectors also make good tax judges.³ The common focus of these three seemingly disparate and perhaps hyperbolic statements is the process in West Virginia for taxpayer appeals from assessments by the taxing authority, a process so tortuous in its history as to exasperate such an eminent scholar as Professor Kenneth Culp Davis,⁴ and the defects of which have recently been crystallized by the decision in *Virginia Electric & Power Co. v. Haden*.⁵ Although the deficiencies in the process had been recognized before *VEPCO*,⁶ that case brought them to a head, and makes some modification in the process at either the legisla-

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John Frederick Rist III, third year law student, was my assistant in preparation of this article and contributed substantially to its completion.

¹Statement of Mr. Stephen D. Tanner, C.P.A. at Twenty-Fourth Annual West Virginia Tax Institute, Sept. 13, 1973. The context of Mr. Tanner's remark was a panel discussion concerning revised State business tax regulations.

²See *Virginia Electric & Power Co. v. Haden*, 198 S.E.2d 130 (W. Va. 1973).

³*Cf.* the position taken by the Tax Department in *Virginia Electric & Power Co. v. Hayden*.

⁴See Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers*, 44 W. VA. L.Q. 270 (1938). See also Note, *Extent of Judicial Review of Tax Determinations in West Virginia*, 50 W. VA. L.Q. 75 (1946).

⁵198 S.E.2d 130 (W. Va. 1973) [hereinafter referred to as *VEPCO*].

⁶See Chambers & Southworth, *West Virginia Tax Law—Hearing and Appeal Procedures*, 74 W. VA. L. REV. 135 (1972).

tive or administrative level essential if West Virginia taxpayers are to be assured fair and impartial consideration of their tax appeals.

II. THE BACKGROUND

The origin of the problem lies in article V, §1 of the West Virginia constitution, which explicitly requires a separation of powers in State government.⁷ The West Virginia court has taken this provision quite literally, and a series of cases in the property tax area illustrates the difficulties this has caused insofar as tax appeals are concerned.⁸

The West Virginia Code provides for an appeal to the circuit court from decisions of the county court concerning valuation when the county court is acting as a board of equalization and review for property tax purposes,⁹ and in certain instances for a subsequent appeal to the West Virginia Supreme Court of Appeals.¹⁰ Over the years, the contention has been made that valuation of property is not a judicial function and therefore the court, under the separation of powers provision, can have no authority to substitute its judgment as to valuation for that of the county court.¹¹ The West Virginia court has taken inconsistent positions on this question. In the earliest cases the Supreme Court of Appeals decided that the action of a court in reviewing a valuation placed on property by the taxing authority was non-judicial. Therefore, it held that it was without jurisdiction to review a question of valuation.¹² Subse-

⁷W. VA. CONST. art. V, §1:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

⁸This discussion does not purport to be an exhaustive analysis of all the cases. Its purpose is merely to exemplify some of the difficulties the West Virginia court has had in applying article V, §1, especially in tax cases.

⁹W. VA. CODE §11-3-25 (1966). Disputes concerning property valuation are initially considered by the county court acting as a board of equalization and review. W. VA. CODE §11-3-24 (1966).

¹⁰W. VA. CODE §11-3-25 (1966).

¹¹See generally Davis, *supra* note 4.

¹²See, e.g., Pittsburgh, Cinc., & St. L. Ry. v. Board of Pub. Works, 28 W. Va. 264, 268 (1886) (act of valuation characterized as being "ministerial" in nature); Mackin v. County Court, 38 W. Va. 338, 341; 18 S.E. 632, 633 (1893) (valuation characterized as "legislative"). A logical incongruity of these cases is that, although they denied jurisdiction in the supreme court to consider questions of valuation, they upheld such jurisdiction in the circuit courts. In *Mackin* the court distin-

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quently, however, the court assumed jurisdiction to decide a question of valuation without consideration of the separation of powers issue,¹³ and continued to do so in several succeeding cases.¹⁴ However, in one of these it did question the power of the Legislature to "clothe this court with authority and duty of reviewing assessments," and stated that "we have submitted to it because of long practice."¹⁵

guished the situation of the two courts by stating:

Now there is a difference between the Supreme Court of Appeals and Circuit Courts in respect to their capacity to have conferred upon them such jurisdiction. While as I have above sought to show, this Court could not be given such jurisdiction, because its appellate functions are confined to judicial matters, yet it is different with Circuit Courts, since section 12, Art. VIII, of the constitution after conferring upon them certain supervisory, original and appellate jurisdiction adds the clause: "They shall also have such other jurisdiction, whether supervisory, original, appellate or concurrent, as is or may be prescribed by law." I think this clause authorizes the legislature to confer upon the Circuit Court the right to entertain this appeal. The presence of this very important court among the people in every county; its readiness, facility and competency in the hearing and trial of matters by witnesses, juries and otherwise;—the obvious necessity of a power in the legislature to render available and useful its functions in the administration of government by charging it with jurisdiction of additional matters, as time and expediency may suggest;—the whole cast, structure, and purpose of this court, as seen in the constitution—tell us that we ought not to give a narrow construction to this clause. To do so would defeat the purpose of the convention, which framed the constitution, and cramp the usefulness of the Circuit Courts. Besides this, there is the plain act of the legislature giving the appeal to the Circuit Court.

Id. at 348-49, 18 S.E. at 635-36.

But if circuit courts are part of the judiciary, why should not the same separation of powers principles apply to them as to the supreme court? *See also* *Norfolk & W. Ry. v. Board of Pub. Works*, 124 W. Va. 562, 568-69, 21 S.E.2d 143, 146 (1942), making a similar distinction between the circuit courts and the supreme court.

By contrast, in *Wheeling Bridge & Term. Ry. v. Paull*, 39 W. Va. 142, 147, 19 S.E. 551, 552 (1894) the supreme court, ordering a circuit court to consider a question of valuation, flatly declared, "The ascertainment of the values of property is strictly judicial . . ." This statement was expressly disavowed by the court in *Norfolk & W. Ry., supra*.

¹³*Liberty Coal Co. v. Bassett*, 108 W. Va. 293, 150 S.E. 745 (1929).

¹⁴*See Crouch v. County Court*, 116 W. Va. 476, 181 S.E. 819 (1935); *West Penn Power Co. v. Board of Review and Equalization*, 112 W. Va. 442, 164 S.E. 862 (1932); *Cochran Coal & Coke Co. v. Board of Equalization and Review*, 110 W. Va. 556, 158 S.E. 906 (1931); *Central Realty Co. v. Board of Review*, 110 W. Va. 437, 158 S.E. 537 (1931).

¹⁵*West Penn Power Co. v. Board of Review and Equalization*, 112 W. Va. 442, 446, 164 S.E. 862, 863 (1932). The "long practice" had apparently been followed only since 1929. *See Davis, supra* note 4, at 277.

Later cases considered the separation of powers question more closely, and, although acknowledging that the Supreme Court of Appeals has jurisdiction to consider questions of valuation, set strict standards for review of circuit court decisions on valuation.¹⁶ The present status of the law appears to be that the Supreme Court of Appeals will consider the question of valuation but will not overturn a decision of the circuit court unless it is "either not supported by substantial evidence, or is so palpably wrong as to amount to a *mala fides* purpose to disregard the constitutional principles of uniformity of taxation"¹⁷

Obviously, the court has found the problem a vexing one, as well it might, since any attempt to classify the exercise of governmental powers into neat categories must necessarily degenerate into a futile exercise in semantics. Reality does not admit of such precise classification.¹⁸

¹⁶See, e.g., *Norfolk & W. Ry. v. Board of Pub. Works*, 124 W. Va. 562, 568, 21 S.E.2d 143, 146 (1942):

For the purpose of taxation, it [valuation] is primarily an executive or administrative function with which the courts will not interfere unless shown plainly to have been abused. [citation omitted] This Court . . . can only view the matter of valuation for the purposes of taxation to the extent that that may be done in the exercise of its judicial power.

The court stated it would not overturn a valuation unless it is plainly shown that evidence has "been arbitrarily and unjustifiably ignored. . . ." *Id.* at 567, 21 S.E.2d at 146. Moreover, the taxpayer must show that he has suffered "material prejudice." *Id.* at 570, 21 S.E.2d at 148.

In *Western Md. Ry. v. Board of Pub. Works*, 141 W. Va. 413, 423, 90 S.E.2d 438, 445 (1955), the court declared that a reviewing court would not "interfere with the conclusions reached by an assessing body, unless the assessment made is clearly illegal or grossly and palpably wrong on the facts." See also *Bankers Pocahontas Coal Co. v. County Court*, 135 W. Va. 174, 62 S.E.2d 801 (1950); *Western Md. Ry. Co. v. Board of Pub. Works*, 124 W. Va. 539, 21 S.E.2d 683 (1942).

¹⁷*In re Southern Land Co.*, 143 W. Va. 152, 162, 100 S.E.2d 555, 560-61 (1957). Subsequently, in the same opinion the court declared:

The ascertainment of the value of property for purposes of taxation is primarily an executive or administrative function, with which the courts will not and cannot interfere, unless the assessment upon which the proposed taxation is based is without substantial evidence to support it, or is in violation of the due process clause of the West Virginia Constitution, Article III, Section 10, or in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In all other cases where taxation is not unlawfully made in contravention of a statute or provision of the United States or West Virginia Constitutions, this Court is without jurisdiction.

Id. at 163, 100 S.E.2d at 561.

¹⁸The term "reality" here is used in the sense of that which is discovered by the mind, not made up by it.

III. THE VEPCO CASE

It was in this context of confusion over proper application of the separation of powers requirement to tax appeal procedures that *VEPCO* acquired its significance. The taxpayer was a public utility supplying power to various states including West Virginia. It had a generating station located in West Virginia from which it transmitted electricity to customers in Virginia, North Carolina, and West Virginia.¹⁹ The Tax Commissioner had assessed additional business and occupation tax, contending, *inter alia*,²⁰ that the taxpayer was liable under the manufacturing category on the electricity it produced for out-of-state consumption.²¹ The measure of the tax in this situation is the value in West Virginia of the product manufactured.²² Accordingly, it was necessary to place a value on the electricity in question. The taxpayer had petitioned for reassessment of the tax, and the Commissioner had denied the petition.²³ In making his decision on this petition, the Commissioner had relied solely upon evidence from his auditor to determine the valuation question.

The taxpayer, on its appeal to the circuit court,²⁴ contended that this procedure denied it due process, whereupon the Commissioner moved to remand the case to himself for a fuller hearing on the valuation issue. Taxpayer then moved to strike the Commissioner's motion to remand.²⁵ The circuit court denied the Commissioner's motion and found for the taxpayer on the substantive issues. The Commissioner then appealed to the West Virginia Supreme Court of Appeals.²⁶

¹⁹198 S.E.2d at 132.

²⁰Several substantive issues were involved in *VEPCO*, but for purposes of this discussion only the tax appeals procedure will be considered.

²¹See W. VA. CODE ANN. §11-13-2b (1966). The years in question were 1962-66. The case presented questions of both constitutional law and statutory interpretation. The statute was amended in 1971, making it clear that the Legislature intended to impose a tax in such situations. See W. VA. CODE ANN. §11-13-2b (1973 Cum. Supp.).

²²W. VA. CODE ANN. §§11-13-2, -2b (1973 Cum. Supp.).

²³See W. VA. CODE ANN. §11-13-7b (1966). For discussion of this procedure see Part IV *infra*.

²⁴See W. VA. CODE ANN. §11-13-8 (1966). For discussion of this procedure see Part IV *infra*.

²⁵198 S.E.2d at 133. The reasons for this maneuver are not entirely clear. Perhaps the taxpayer reasoned that its due process argument would carry the day if the case remained in its present posture, with no additional evidence on valuation being heard; and in the event that additional evidence was heard it may have preferred to present it to the circuit court rather than the Commissioner.

²⁶*Id.* at 131-32.

On the procedural issue the West Virginia court held that the circuit court in the exercise of its "inherent powers" should have remanded the case to the Tax Commissioner for further proceedings to determine valuation.²⁷ In so doing, the court construed the statutory provision authorizing appeals to the circuit court, providing that the circuit court "shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the tax commissioner."²⁸ Relying on *Walter Butler Building Co. v. Soto*,²⁹ it declared that "the primary purpose of the Legislature in enacting such provision was to permit judicial review and determination of the validity of the tax commissioner's ruling"³⁰ It went on to say this meant the court could consider only "judicial questions,"³¹ and then held that, as a consequence, the circuit court could not take evidence in appeals from decisions of the Tax Commissioner. In such cases, the circuit court is limited to reviewing the record of the hearing before the Tax Commissioner. The separation of powers requirement would prohibit any other procedure in the circuit court, even if sanctioned by the Legislature.³² The proper procedure here, therefore, was to remand the case to the Commissioner to take further evidence on the valuation question. Any subsequent appeal to the circuit court would be a review on the record only.

²⁷*Id.* at 134-35.

²⁸W. VA. CODE ANN. §11-13-8 (1966).

²⁹142 W. Va. 616, 97 S.E.2d 275 (1957). In this case, the court upheld the constitutionality of the statute.

³⁰198 S.E.2d at 134.

³¹*Id.* at 133.

³²*Id.* at 135:

We deduce from the above-quoted language and from the cited authorities that a hearing and determination anew, as provided in said Section 8, means that the circuit court shall make a judicial determination of the correctness of the administrative decision, but that it does not permit such court to receive new evidence in making a determination of the issue. To allow the circuit court to determine an issue on evidence not considered at the administrative hearing would cast the court in the role of performing an executive function. Under the acknowledged principle of separation of powers this cannot be permitted. Thus, the circuit court must decide the case on the evidence in the record as it was received or it must return the case to the Tax Commissioner for the further presentation of evidence on values.

The court cited three other cases as authority: *Sims v. Fisher*, 125 W. Va. 512, 25 S.E.2d 216 (1943); *Danielly v. City of Princeton*, 113 W. Va. 252, 167 S.E. 620 (1933); *Hodges v. Public Serv. Comm'n*, 110 W. Va. 649, 159 S.E. 834 (1931). None of these was a tax case.

IV. CONSEQUENCES OF VEPCO

The VEPCO decision was not totally unexpected, and its possible consequences had been anticipated.³³ In West Virginia there is no generalized procedure, applicable to all taxes, for appealing assessments by the Tax Commissioner.³⁴ Each separate tax statute contains whatever appeal procedure is applicable to it.³⁵ However, several of the taxes take the procedure set out in the business and occupation tax as their model.³⁶ For this reason, and also because most of the reported cases have arisen under that tax, this discussion, will for the most part, be confined to the business and occupation tax.

The procedure currently in effect requires the Commissioner to give the taxpayer written notice of any assessment made pursuant to statutory power given him to assess additional taxes when he determines an insufficient amount has been returned or paid.³⁷ The statute does not, however, specify what this notice shall contain. As a result, the Commissioner can comply with the statute by supplying the skimpiest of notices.

The taxpayer then has thirty days in which to petition for reassessment. The statute requires that the petition contain certain specified information concerning the reasons for the taxpayer's protest. It then provides for an "informal" hearing "conducted by an examiner designated by the tax commissioner."³⁸ Evidence may be taken at this hearing and briefs may be presented subsequent to the hearing.³⁹ The taxpayer may appear *pro se* or be represented by another.⁴⁰ Proceedings at the hearing are recorded by machines, but are not normally transcribed unless an appeal is taken.⁴¹ The statute requires the Commissioner to give notice in

³³See Chambers & Southworth, *supra* note 6.

³⁴However, there is a generalized procedure for securing refunds. W. VA. CODE ANN. §11-1-2a (1973 Cum. Supp.).

³⁵*E.g.*, W. VA. CODE ANN. §11-13-7b to -8a (1966) (business and occupation tax).

³⁶*E.g.*, W. VA. CODE ANN. §11-15-24a to -24c (1966) (sales tax).

³⁷W. VA. CODE ANN. §§11-13-7; 11-13-7b (1966).

³⁸W. VA. CODE ANN. §11-13-7b (1966). The Tax Department currently employs a full-time hearing examiner who conducts most of the hearings. Chambers & Southworth, *supra* note 6, at 138 n.11.

³⁹Proposed W. Va. Bus. & Occup. Tax Reg. §2.3 (1974).

⁴⁰*Id.* The Tax Department does not require that the taxpayer's representative be an attorney. There is some question, however, whether such an appearance by a non-attorney would constitute unauthorized practice of law, particularly in light of VEPCO. See Chambers & Southworth, *supra* note 6, at 144-45.

⁴¹Chambers & Southworth, *supra* note 6, at 138-39.

writing of his decision on the petition within a reasonable time. This notice has recently been expanded by the Commissioner to include findings of fact and conclusions of law.⁴²

If the taxpayer is dissatisfied with the decision of the Commissioner he can appeal to the circuit court.⁴³ Prior to *VEPCO* there had been some question concerning the scope of review in the circuit court. As previously noted, the statute provides that the "court shall hear the appeal and determine anew all questions submitted to it on appeal"⁴⁴ The plain meaning of this language would seem to require a trial de novo, and this was apparently the construction given it until fairly recently.⁴⁵ However, a short while ago, the Kanawha County Circuit Court began to take the position that it was limited to review of the record made at the Tax Commissioner's hearing and could not grant a de novo trial.⁴⁶ This position was severely criticized by some commentators and members of the tax bar,⁴⁷ but was ultimately accepted by the West Virginia Supreme Court of Appeals in *VEPCO*.

What is the taxpayer's situation following *VEPCO*? The opinion clearly stated that the appeal to the circuit court should be heard solely on the record and that the court cannot hear new evidence. The opinion did not discuss explicitly the standard of review, but a usual corollary of review on the record is that the reviewing court will not overturn the decision of a lower tribunal unless such decision is clearly erroneous or is not supported by substantial evidence on the record as a whole.⁴⁸ If this standard is applied, the hearing by the Tax Commissioner, in effect, takes the place of a lower court trial.

The deficiencies in this procedure are obvious. The hearing is conducted and the decision is made by employees of the Tax Department. The Tax Commissioner or his delegates act both as

⁴²*Id.* at 138.

⁴³W. VA. CODE ANN. §11-13-8 (1966):

An appeal may be taken by the taxpayer to the circuit court of the county in which the activity taxed was engaged, or in which the taxpayer resides, or in the circuit court of Kanawha county, within thirty days after he shall have received notice from the tax commissioner of his determination

⁴⁴*Id.*

⁴⁵Chambers & Southworth, *supra* note 6, at 138-41.

⁴⁶*Id.*

⁴⁷*See, e.g., id.* at 141-49.

⁴⁸*See* K. DAVIS, ADMINISTRATIVE LAW TREATISE §29.01 (1957).

prosecutor and judge. No matter how objective they may attempt to be, it is difficult to see how employees of the Tax Department can afford a taxpayer the independent, impartial hearing that minimal fairness requires.⁴⁹ The natural identification of an employee is with the institution employing him.⁵⁰ Such identification may not necessarily or even likely be conscious. Nevertheless, it seems almost certain to exist. Furthermore, even if Tax Department employees were able to perform the mental gymnastics necessary to afford impartial hearings, the difficulties involved in such a process would be so manifest that taxpayer morale would very likely suffer.⁵¹

Stated simply, a process in which the functions of revenue collector, prosecutor, and judge reside in the same office is grossly deficient both from the standpoint of fairness and also its capacity to convey to the public an image of justice.⁵² An office whose functions conflict so patently cannot, even with the purest of intentions, convey the image of fairness and impartiality which an adequate appeal process requires.

The situation, as a result of *VEPCO*, is one in which the taxpayer's only opportunity for a full hearing is before an office whose interests inherently conflict with the function of deciding his case impartially. Before the courts he is limited to a hearing on the record made before the Tax Commissioner, with the court presumably applying the exacting traditional standard of upholding the administrative decision unless it is clearly erroneous or not supported by substantial evidence. The Tax Commissioner has, in effect, become the tax judge as well as the tax collector. Clearly, as the situation stands, West Virginia taxpayers are left with an inadequate appeal process.

⁴⁹The same criticism can be made of the county court's reviewing property tax assessments. See Hellerstein, *Judicial Review of Property Tax Assessments*, 14 *Tax L. Rev.* 327 (1959). The county court is interested in raising revenue, but is also expected to decide taxpayer protests impartially.

⁵⁰See Kray, *California Tax Court: An Approach to Progressive Tax Administration*, 37 *S. CAL. L. REV.* 485, 488 (1964).

⁵¹In the words of Dean Roscoe Pound: "[T]hat the public believe justice is done is no less important than that it be done with the greatest possible precision." Pound, *Justice According to Law*, 13 *COLUM. L. REV.* 696, 701-02 (1913).

⁵²The concept of separation of functions is embodied in the Federal Administrative Procedure Act, 5 U.S.C. §554(d)(2) (1970), which provides that an agency employee who presides at reception of evidence in an administrative adjudication shall not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."

V. SEPARATION OF THE TAX COLLECTION AND TAX ADJUDICATION FUNCTIONS

A. Constitutional, Legislative, and Administrative Alternatives

Clearly the functions of tax collection and tax adjudication ought to be separated. The scope of judicial review prescribed by *VEPCO* would be adequate, provided the taxpayer was afforded the opportunity for an independent and impartial hearing at some earlier stage.⁵³ There seem to be three possible alternatives for achieving this.

From a theoretical standpoint, the ideal proposal would be establishment of an independent tax court to be part of the judicial branch. This is the course followed by Oregon,⁵⁴ a state whose demographic characteristics are not greatly dissimilar from West Virginia.⁵⁵ However, this probably could not be done without a constitutional amendment, since the West Virginia constitution does not specifically authorize a tax court as part of the judiciary.⁵⁶ Furthermore, in the absence of a constitutional amendment, a judicial tax court would presumably be subject to the same separation of powers limitations on judicial review as are placed on the circuit courts by *VEPCO*.

⁵³See Hellerstein, *supra* note 49, at 349:

The nature and scope of judicial review, it is submitted, must depend on the character of the review provided in the administrative process. If the taxpayer is given a fair hearing to review the action of the assessor before a competent, impartial, and independent review board, where he is given adequate opportunity to present his evidence and make his arguments, then it is hard to see why the courts should do more than consider what are typically regarded as problems of law, errors of method, and impropriety in procedure. On the other hand, if the review offered in the administrative proceeding is a perfunctory, rubber-stamp type of hearing, conducted by the taxing agency itself, or by other departments or persons in the executive branch of government with responsibilities for budgets or tax collections, or other persons who because of the nature of their duties are likely to tend to favor the administration, then there is considerable justification for a broad scope of judicial review.

⁵⁴ORE. REV. STAT. §§305.405-.555 (1971). This is also the approach taken by the Model State Tax Court Act approved by the National Conference of Commissioners on Uniform State Laws. The Model Act is published in *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 234-39 (1957).

⁵⁵See generally, *TAX FOUNDATION OF AMERICA, FACTS AND FIGURES ON GOVERNMENT FINANCE* 131-62 (1973).

⁵⁶See W. VA. CONST. art. VIII, §1:

"The judicial power of the State shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, *in such inferior tribunals as are herein authorized* and in justices of the peace." (emphasis added).

An alternative to a judicial tax court would be establishment by the Legislature of an independent administrative board of tax appeals. This could presumably be accomplished constitutionally, since the board of tax appeals would basically take over the adjudication functions now performed by the Tax Commissioner, and it has not been suggested that performance of these functions by an administrative body would suffer any constitutional infirmities from a separation of powers standpoint.

A third and less desirable course, but one which would probably not require legislation, would be for the Tax Commissioner to establish within the Tax Department an independent adjudication office to which authority to decide appeals would be delegated.⁵⁷ The mechanics of creating such an office would admittedly be difficult, since the adjudication office would still be part of the Tax Department, and therefore not totally independent. However, such an office would certainly be an improvement over the present situation,⁵⁸ and the mechanics of providing at least a measure of independence should not be insurmountable.⁵⁹

B. Characteristics of an Independent Tax Adjudicatory Body

Regardless of which of these alternatives might be chosen, certain characteristics should be present in any system entrusted with the adjudication of taxpayer appeals. Since an independent administrative board of tax appeals appears most feasible constitutionally and practically, the necessary characteristics of such a board will be examined.⁶⁰

First, the board of tax appeals should have jurisdiction over

⁵⁷How far the Commissioner could go in so delegating his decision-making authority raises additional questions. It would not seem to be in the interest of taxpayers to challenge such a delegation, however, and it is highly unlikely that the Commissioner would challenge his own delegation.

⁵⁸The present system of employing a full-time hearing examiner does not stand up to scrutiny on the question of independence and impartiality. The hearing examiner lacks true independence and other Tax Department employees are also involved in the decision-making process.

⁵⁹One model might lie in the appointment of an officer similar to the independent judicial officers utilized by some federal agencies. *See, e.g.*, 39 U.S.C. §204 (1970) (Judicial Officer to adjudicate disputes with the United States Postal Service).

⁶⁰What is said here about an administrative board of tax appeals would also apply in the main to a judicial tax court or an independent tax adjudication office established by the Tax Commissioner.

all state and local taxes, including property taxes.⁶¹ This would permit a uniform statewide system of appeals for all taxes. Hearings before the Tax Commissioner, or in the case of property taxes before the county court, should be retained as informal administrative proceedings. However, appeals to the board of tax appeals from determinations in such proceedings should be held *de novo*.⁶² There would thus be opportunity for an independent, impartial hearing at which all evidence could be presented. In addition, provision should be made to insure that the taxpayer is fully and adequately informed of the reasons for the additional assessment against him. This would not necessarily mean that the Tax Commissioner would be required to give away his case prior to appeal, but a minimum of disclosure insuring that the taxpayer knows why he is being assessed additional taxes should be mandatory.

There should also be a requirement for the board to make written findings of fact and conclusions of law,⁶³ and to publish decisions of precedential value.⁶⁴ The latter requirement would aid the tax bar by facilitating development of a body of case law considerably more complete than now seems possible.⁶⁵

The board of tax appeals should be established as an independent entity within the executive branch with a permanent office and adequate staff. It should be empowered to hold hearings throughout the State.⁶⁶ It should further have authority, within

⁶¹For the purposes of the property tax, questions of valuation are now decided initially by the county court acting as a board of equalization and review, W. VA. CODE ANN. §11-3-24 (1973 Cum. Supp.), and questions of classification and taxability are decided by the Tax Commissioner, W. VA. CODE ANN. §11-3-24a (1966).

⁶²*See, e.g.*, MODEL STATE TAX COURT ACT §9 (1957): "All proceedings before the court shall be *de novo*." Oregon has a similar provision. ORE. REV. STAT. §305.425 (1) (1971).

⁶³*See, e.g.*, MODEL STATE TAX COURT ACT §14 (1957); ORE. REV. STAT. §305.435 (1971).

⁶⁴*See, e.g.*, MODEL STATE TAX COURT ACT §17:

"The court shall provide for the publication of its decisions which are of general public interest in the form it deems best adapted for public convenience." Oregon's provision is substantially identical. ORE. REV. STAT. §305.450(1).

⁶⁵Currently, most of the law is found in the statutes themselves, in regulations promulgated by the Tax Commissioner, and in cases decided by the Supreme Court of Appeals. Some circuit court opinions are also available. A body of case law developed by a board of tax appeals would contribute substantially to the available materials, much as decisions of the United States Tax Court contribute to the federal tax law.

⁶⁶*See, e.g.*, MODEL STATE TAX COURT ACT §5 (1957) ORE. REV. STAT. §§305.475, .480 (1971).

broad statutory guidelines, to promulgate its own rules of practice and determine the manner in which it shall conduct hearings.⁶⁷

One of the main advantages of a board of tax appeals is that it would be a body specializing in tax matters. This would allow the board to develop an expertise in tax matters which is now difficult for any State court of general jurisdiction to acquire. Accordingly, qualifications for appointment to the board should be set to assure attainment of this expertise.

One problem that might arise in this area is that the case load of the board might not be sufficient to merit appointment of even one full-time member.⁶⁸ This would necessitate appointment of a part-time board of one or more members. If a part-time board was established, care would have to be taken to guard against potential conflicts of interest in the members, who presumably would be tax practitioners also.⁶⁹

Another question is the procedure for appeals from decisions of the board. These, of course, would, under *VEPCO*, have to be heard solely on the record. The best thinking seems to be that appeals from such a board should be directed to the highest court in the jurisdiction since appeal to an intermediate court would probably provide too many layers of appeal.⁷⁰ However, there may be constitutional problems with such a procedure in West Virginia.⁷¹

⁶⁷It has been suggested that such a board should follow the Rules of Practice and Procedure of the United States Tax Court, since most tax practitioners are familiar with these. On the other hand, in the case of West Virginia, it may be that the State's own rules of practice and procedure would be more appropriate. The Model Act leaves this question undecided. MODEL STATE TAX COURT ACT §9 (1957).

⁶⁸Chambers & Southworth, *supra* note 6, at 149 n.46. Oregon's Tax Court has one full-time member. See ORE. REV. STAT. §305.452 (1971).

⁶⁹The conflict of interest problems inherent in a part-time board are obvious. However, if the case load in West Virginia is in fact too light to merit a full-time board, *VEPCO* still would seem to leave a part-time board as the only practical alternative to the present unsatisfactory situation.

⁷⁰See MODEL STATE TAX COURT ACT §19 (1957); ORE. REV. STAT. §305.445 (1971); Kray, *supra* note 50, at 512.

⁷¹See W. VA. CONST. art. VIII, §3, conferring jurisdiction on the Supreme Court of Appeals. The question is whether the court would be exercising either the "appellate" or "original" jurisdiction conferred by that section. The West Virginia court now directly reviews decisions of the Workmen's Compensation Commission. W. VA. CODE ANN. §23-5-4 (1973 Cum. Supp.). Therefore, perhaps a similar provision for appeals from the board of tax appeals would be valid.

C. Small Claims Procedure

Finally, Oregon's tax court statute has introduced a procedure which would merit special consideration in the establishment of any board of tax appeals in West Virginia. That is a provision for a small claims division.⁷² The taxpayer who qualifies for the small claims procedure may elect either it or the regular procedure. Once this election is made, it is irrevocable.⁷³ Judgments under the small claims procedure are not appealable, and they are not considered to be judicial precedents for any case.⁷⁴

The Oregon statute requires that when an additional assessment or other determination or order of the Tax Department is sent to the taxpayer, a notice of his right to appeal to the small claims division be sent at the same time.⁷⁵ The taxpayer may then fill out a simple form available from the county clerk and file it with the court. This constitutes the commencement of his action.⁷⁶ A hearing is held at which the taxpayer may represent himself⁷⁷ or be represented by another. Hearings are informal, and the judge is granted broad discretion in the admission of evidence.⁷⁸ To qualify for the small claims procedure the amount in controversy may not exceed \$250.⁷⁹ This amount is probably too low. It was placed in the statute at its inception in 1962 and, apparently, has not been changed since. A more reasonable figure would be \$1,500. This is the amount for the small claims procedure in the United States Tax Court.⁸⁰

⁷²ORE. REV. STAT. §§305.515-.555 (1971). Another interesting feature of the Oregon statute is that it provides for reimbursement to an individual taxpayer of costs, attorney fees, and other expenses of litigation in income tax cases where the taxpayer prevails. ORE. REV. STAT. §305.447 (1971).

⁷³ORE. REV. STAT. §305.530 (1971).

⁷⁴ORE. REV. STAT. §305.555 (1971).

⁷⁵ORE. REV. STAT. §305.525 (1971).

⁷⁶ORE. REV. STAT. §305.535 (1971); Kray, *supra* note 50, at 516.

⁷⁷If the taxpayer represents himself, an orientation is provided to assist him in presenting his case. Kray, *supra* note 50, at 516.

⁷⁸ORE. REV. STAT. §305.545 (1971):

"The hearing in the small claims division shall be informal, and the judge may hear such testimony and receive such evidence as he deems necessary or desirable for a just and equitable determination of the case"

⁷⁹ORE. REV. STAT. §305.515(3)(a) (1971). In cases involving determination of the value of property, the value as determined by the collecting agency cannot exceed \$25,000 in the case of real property or \$10,000 in the case of personal property.

⁸⁰INT. REV. CODE OF 1954, §7463. This amount was raised from \$10000 by Pub. L. No. 92-512, §203(b) (Oct. 20, 1972), effective Jan. 1, 1974.

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A small claims procedure would be necessary for any board of tax appeals if all taxpayers are to receive fair consideration of their tax disputes. Equity demands that all taxpayers, not only those whose tax liabilities make it worthwhile to retain attorneys and engage in protracted litigation, should have their tax disputes heard by an independent, impartial tribunal. Given the expense involved in contesting tax claims under regular procedures, it simply is not worthwhile for many taxpayers to express what may be valid objections to tax assessments. A small claims procedure would go far to ameliorate this problem.

VI. CONCLUSION

VEPCO has crystallized the problems involved with the presently existing tax appeal procedures in West Virginia. The ruling in that case makes it plain that short of an amendment to article V, §1 of the West Virginia constitution, the only way taxpayers will be able to obtain truly impartial determinations of their tax disputes is by establishment of an independent tax court or board of tax appeals, which includes a small claims division. Working models exist for such an entity. The idea has been successful elsewhere. There is no substantial reason why it cannot work in West Virginia.