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Volume 74  
Issue 1 Number 1-2

Article 11

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August 1971

# West Virginia Tax Law--Hearing and Appeal Procedures

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## Recommended Citation

Thomas N. Chambers & Louis S. Southworth II, *West Virginia Tax Law--Hearing and Appeal Procedures*, 74 W. Va. L. Rev. (1971).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol74/iss1/11>

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## **West Virginia Tax Law — Hearing and Appeal Procedures\***

By

Thomas N. Chambers\*\*  
Louis S. Southworth, II\*\*\*

There has been a great deal of discussion in recent years over the need of a fair and equitable system of State taxation. We need not only a fair system of taxation but also a companion and equally fair system of corrective justice to assure that a taxpayer shall pay no more than the law requires. This need for a system of corrective justice rests upon the constitutional requirement that no person shall be deprived of life, liberty or property without due process of law.<sup>1</sup>

Each time our State has adopted a new tax it has generally provided some kind of disputes procedure. These procedures are not uniform and in many cases are seriously deficient. We are confronted, today, with a need to revise them and in the process of revision to decide upon and adopt a system of disputes procedure which in our collective judgment best serves the needs of the State and her citizens.

A key question today and a question which is pivotal to any system provided as a replacement is the extent to which a taxpayer shall have recourse to the courts to appeal from an assessment of the Tax Commissioner which he deems unfair and unjust.

### *Business & Occupation Tax Disputes Procedure*

While the procedural provisions of all of tax statutes deserve careful consideration, this article is limited to the business & occupation tax dispute procedure. It is probably the most important of our procedural provisions, not only because most State business tax

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\* This paper was originally delivered by Thomas N. Chambers at the 22nd Annual West Virginia Tax Institute, Pipestem, West Virginia, September 27, 1971.

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<sup>1</sup> U. S. CONST. amend V and XIV; W. VA. CONST., Art. III, § 10.

disputes involve this tax, but also because its procedures have, by and large, been adapted to other taxes.<sup>2</sup>

### a. *Historical Development*

The original business & occupation tax contained no pre-assessment administrative procedure, required payment of a disputed tax, and authorized suit for refund.<sup>3</sup> In 1925, the statute was amended to permit the appeal of an assessment to the Board of Public Works before payment in cases where a return had been filed. If the petition was denied or not permitted by statute, the taxpayer was required to pay the tax and bring suit for refund.<sup>4</sup> This statutory disputes procedure was continued by the Legislature when the law was extensively rewritten in 1933.

Surprisingly, it was not until 1950 that the West Virginia Supreme Court of Appeals considered the refund provisions of the business & occupation tax law,<sup>5</sup> and in *Hamill v. Koontz* held them unconstitutional as authorizing a suit against the State.<sup>6</sup>

<sup>2</sup> There are thirteen state administered taxes of general application (excluding property taxes) in Chapter 11 of the West Virginia Code, and seven of these, in varying degrees, provide dispute procedures modeled upon the procedures contained in the business & occupation tax article.

<sup>3</sup> Acts of the 35th W. Va. Leg. ch. 110, Reg. Sess. (1921).

<sup>4</sup> See Acts of the 37th W. Va. Leg. ch. 1, Ex. Sess. (1925).

<sup>5</sup> Apparently, prior to 1950, most state tax litigation transpired prior to payment through injunction suit, and the like, in both the state and federal courts. See *Walter Butler Bldg. Co. v. Soto*, 142 W. Va. 616, 633-634, 97 S.E.2d 275, 286 (1957) for a listing of such state court cases. For examples of federal cases, see *Dravo Contracting Co. v. James*, 16 F. Supp. 527 (1936) *rev'd.*, 302 U.S. 134 (1939), *on rem.* 114 F.2d 242 (4th Cir. 1940), and *United Artists Corp. v. James*, 23 F.Supp. 353 (1938) *aff'd.* 305 U.S. 410 (1939). Presently, the federal district courts are forbidden by statute, 28 U.S.C. § 1341, to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." For a recent effort to enjoin a state tax in the federal court, see *Paul Cline dba Bear Branch Coal Co. v. Haden*, Civil Action No. 71-177, pending in the United States District Court for the Southern District of West Virginia. Jurisdiction was alleged on the ground that the gasoline tax statute (W. VA. CODE ch. 11, art. 14 (Michie 1966)) does not provide for a State court remedy. A temporary restraining order was denied August 17, 1971.

<sup>6</sup> 134 W. Va. 439, 59 S.E.2d 879 (1950). The West Virginia Supreme Court of Appeals held:

In attempting to authorize a suit against the tax commissioner to recover any tax improperly collected, the legislature exceeded its constitutional power and the statute, Chapter 33, Section 8, Acts of the Legislature, 1933, First Extraordinary Session, Michie's Annotated Code, 1949, 11-13-8, to the extent that it undertakes to authorize such suit, is invalid as violative of Article VI, Section 35, of the Constitution of this State.

*Id.* at 447, 59 S.E.2d at 884.

### b. *The Current Dispute Procedure*

In 1955, the Legislature replaced the unconstitutional refund statute (and administrative appeal to the Board of Public Works) with our present disputes procedure which provides for the filing of a petition for reassessment with the Tax Commissioner and for an informal hearing and decision by him with a right of appeal of the decision to the Circuit Court—all prior to payment of the tax.<sup>7</sup> In *Walter Butler Bldg. Co. v. Soto*,<sup>8</sup> the West Virginia Supreme Court of Appeals held that the provision for a prepayment appeal to the circuit court did not constitute a suit against the state as did the former refund statute considered in *Hamill*.<sup>9</sup>

There was another and perhaps more significant constitutional issue in the *Butler Bldg. Co.* case involving the doctrine of separation of powers. A sharp controversy has recently arisen over the correct interpretation to be given the supreme court's holding on this issue.

In *Butler Bldg. Co.*, the Judge of the Circuit Court of Kanawha County held that the appeal provisions of the statute were unconstitutional under the separation of powers provisions of the West Virginia constitution. His rationale was that in empowering the circuit court to determine "anew" all questions presented to it upon appeal from the Tax Commissioner's administrative decision,<sup>10</sup> the Legislature was investing the court with non-judicial powers, i.e., powers properly belonging to another branch of government. The West Virginia Supreme Court of Appeals reversed, holding that the statute merely vested in the circuit court the power to determine judicial questions. As thus construed, the supreme court said the separation of powers doctrine was not violated by the appeal statute. The supreme court has not addressed itself to this issue since.

The issue which has recently arisen is simply this — Does the statute provide for an informal administrative hearing, with a trial de novo in the Circuit Court of all judicial questions, or is the ad-

<sup>7</sup> W. VA. CODE ch. 11, art. 13, §§ 7b, 8 (Michie 1966); Acts of the 52d W. Va. Leg. ch. 165 Reg. Sess. (1955).

<sup>8</sup> 142 W. Va. 616, 97 S.E.2d 275 (1957).

<sup>9</sup> 134 W. Va. 439, 59 S.E.2d 879 (1950). The Supreme Court of Appeals stated in *Butler Bldg. Co.*, 142 W. Va. at 632, 97 S.E.2d at 286, that the prepayment appeal procedure is "substantially the same as" the declaratory judgment procedure approved in *Douglass v. Koontz*, 137 W. Va. 345, 71 S.E.2d 319 (1952).

<sup>10</sup> W. VA. CODE ch. 11, art. 13, § 8 (Michie 1966) provides that the Circuit Court "shall hear the appeal and determine anew all questions . . . on appeal . . . ."

ministrative process a more formal adjudication of the tax dispute (with attendant consequences of administrative finality) and the court procedure merely a judicial review of the administrative findings upon the record made in the administrative hearing? A subsidiary issue might be, what is a "judicial" question in a tax dispute?

### c. *Recent Developments*

We believe that it is accurate to say that the State Tax Department, and Kanawha County Circuit Court Judge Frank L. Taylor, presently take the view that the procedure provides for administrative finality, with judicial review only upon the record made before the Tax Commissioner. The position held is one only recently taken by the Tax Department and by Judge Taylor.

From the time of *Butler Bldg. Co.*, until recently, business & occupation tax disputes were handled in the following manner. Upon the filing of a petition for reassessment, an informal hearing was conducted by the Tax Commissioner or by a hearing examiner appointed by him.<sup>11</sup> In addition to the taxpayer and his representatives, the hearing was attended by an Assistant Attorney General assigned to the Tax Division and by representatives of the Business Tax Division involved and a representative of the auditing staff or division. The Assistant Attorney General acted as the advocate of the State in upholding the assessment. Since February, 1970, representatives of the Attorney General's office no longer attend administrative hearings and the role formerly filled by the State's attorney is now filled by tax analysts assigned to the Tax Department. The hearing was and is conducted much like a conference, and the witnesses are not sworn. Prior to May, 1971, the proceedings were not recorded unless special request was made by either party and this was rarely done. Briefs could be filed by the parties. The administrative decision, generally, was a one page written notice or letter affirming, modifying or reversing the assessment. The reasons for the Commissioner's actions were not stated.

Two changes of significance have been made recently in this administrative procedure. First, the notice of decision has been expanded to include findings of fact and conclusions of law. Opinions occasionally exceed thirty or more pages in length. Second, beginning May 14, 1971, the hearings have been recorded by the use of

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<sup>11</sup> A full-time hearing examiner was first appointed in 1964. Currently, most hearings are conducted by the examiner.

microphones and a disk recorder. Normally, the recording is not transcribed unless an appeal is taken.

From the time of *Butler Bldg. Co.*, and until recently, cases have been handled in a de novo manner upon appeal to the circuit court.<sup>12</sup> The assessment was introduced and under the statute constituted "prima facie evidence" of the tax due. Similar use of such words in federal tax law have been construed to mean that the burden of proof is placed upon the taxpayer.<sup>13</sup> The circuit court would receive evidence by way of stipulated facts, oral testimony and exhibits, or through a combination thereof, following which it would render its decision.<sup>14</sup>

An indication that this past practice was beginning to change was found in two opinions by Judge Taylor in which he held as to penalties that the issue before him upon appeal from the Tax Commissioner's decision imposing penalties was not "reasonable cause"

<sup>12</sup> Cases may be appealed to the circuit court of the county in which the activity taxed was engaged, or in which the taxpayer resides, or to the Circuit Court of Kanawha County. W. VA. CODE ch. 11, art. 13 § 8 (Michie 1966).

<sup>13</sup> *United States v. Ettelson*, 159 F.2d 193 (7th Cir. 1947); *Western Express v. United States*, 141 F. 28 (8th Cir. 1905).

<sup>14</sup> In the following cases it affirmatively appears from an examination of court files that evidence was received by the Circuit Court of Kanawha County, upon business & occupation tax appeals, under W. VA. CODE ch. 11, art. 13, § 8 (Michie 1966), as follows:

<u>File No.</u>	<u>Style of Case</u>	<u>Nature of Evidence</u>
M-8	J. D. Moore, Inc. v. Hardesty	Stipulations and oral testimony
3040	Amherst Barge Co. v. Battle	Stipulations, exhibits and oral testimony
3908	Owens Illinois Glass Co. v. Battle	Stipulations
5246	Associated Universities, Inc. v. Battle	Stipulations, exhibits and oral testimony
5461	Baton Coal Co. v. Battle	Exhibits and oral testimony
5656	United Fuel Gas Co. v. Battle	Stipulations
6297	Chicago Bridge & Iron Co. v. Battle	Stipulations and exhibits
6301	Bethlehem Mines Corp. v. Battle	Stipulation, exhibits and oral testimony
7005	H. H. Robertson Co. v. Battle	Oral testimony

Indeed, it may reasonably be assumed that evidence was taken in all cases throughout the state, since the assessment is always offered by the state as "prima facie evidence" and prior to May 14, 1971, an administrative record did not exist in the usual case.

(the ground for waiver expressed in the penalty statute), but merely whether the Tax Commissioner abused his discretion in failing to waive the penalties.<sup>15</sup> In *United Fuel Gas Co.* the court said that “[t]he determination of whether there was reasonable cause for failure to return or remit the taxes is an administrative question, not to be determined anew.”<sup>16</sup>

In *Baton Coal Co.* Judge Taylor refused to find an abuse of discretion while in *United Fuel Gas Co.*, he held that the Commissioner did abuse his discretion. In both cases, the court took evidence on the issue. The supreme court reversed *Baton Coal Co.* on the merits; hence, the penalty issue became moot and was not decided. In *United Fuel Gas Co.*, the court affirmed the nullification of penalties, but it is difficult to ascertain whether it did so because of abuse of discretion or because it found ample evidence of “reasonable cause” as both terms are used in the court’s opinion.<sup>17</sup>

More recently, the Circuit Court of Kanawha County has ordered several tax appeals remanded to the Tax Commissioner due to the lack of a record. In one such remand order, the circuit court said:

This Court, after mature consideration, is of the opinion that it can only hear judicial questions on appeals from administrative decisions of the tax commissioner and cannot take new evidence offered either by the State or the appealing taxpayer on appeal which was not presented to the tax commissioner for his consideration at the administrative level.<sup>18</sup>

By this order, Judge Taylor has reversed some thirteen years of practice in his court as to the taking of evidence in tax appeals, and

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<sup>15</sup> *Baton Coal Company v. Battle*, Civil Action No. 5467, decided February 4, 1966, *rev'd.* 151 W. Va. 519, 153 S.E.2d 522 (1967); *United Fuel Gas Company v. Battle*, Civil Action No. 5461, decided January 24, 1967, *rev'd. in part and affirmed in part*, 153 W. Va. 222, 167 S.E.2d 890 (1969), *cert. den.*, 396 U.S. 116 (1969). It cannot realistically be said that penalties should stand on any different footing than the assessment of a tax. The Commissioner has no greater discretion in assessing penalties than he does in assessing tax. Penalties “shall be collected at the same time and in the same manner and as a part of the tax.” W. VA. CODE ch. 11, art. 13, § 11 (Michie 1966).

<sup>16</sup> *United Fuel Gas Company v. Battle*, Civil Action No. 5461, decided January 24, 1967.

<sup>17</sup> *United Fuel Gas Company v. Battle*, 153 W. Va. 222, 275-76, 167 S.E.2d 890, 918-20 (1969).

<sup>18</sup> *Security Chemicals, Inc. v. Haden*, Civil Action No. 9779, order entered December 16, 1970. *See also Pennzoil United, Inc. v. Haden*, Civil Action No. 10428, order entered June 4, 1971.

the process begun in *Baton Coal Co.* and *United Fuel Gas Co.* of a judicial review rather than a new trial in the case of penalties has been extended to embrace the entire scope of a tax appeal.<sup>19</sup> These decisions by Judge Taylor undoubtedly account for the recently initiated practice by the Tax Commissioner, of recording tax hearings.

d. *Ramifications of the Disputes Procedure as Presently Interpreted*

Two questions of utmost importance arise from Judge Taylor's view of the administrative process and the recent changes in administrative procedure.

1. First, if Judge Taylor is correct, what is the significance of his rulings in the presentation and handling of tax controversies?
2. Second, "Is he correct?"; is the circuit court hearing limited to a judicial review upon the administrative record?

(1) *The Significance of Recent Developments*

By limiting the judicial process to a review upon the record made before the Tax Department, Judge Taylor has shifted the major battleground to the administrative agency. The administrator becomes the trier of the fact and as the late Chief Justice Hughes observed, not infrequently "finality as to facts becomes in effect finality in law."<sup>20</sup> It is only prudent, therefore, that tax practitioners proceed in the handling of future tax disputes before the Tax Department on the premise that Judge Taylor is (or may be) correct.

Drafting the petition for reassessment, which must be done within thirty days of assessment, becomes very important. It, rather than the notice of appeal, in effect, becomes the initial pleading and frames the issues. Normally, the courts upon review will not consider issues which were not considered below.<sup>21</sup>

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<sup>19</sup> It should be noted that in remanding *Security Chemicals* to the Tax Department to make up a record Judge Taylor has injected another new element in the tax appeal procedure, for the statute makes no provision for a remand. W. VA. CODE ch. 11, art. 13, § 8 (Michie 1966) states that: "The court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the Tax Commissioner. . . . The court shall render its decree thereon and a certified copy of said decree shall be filed by the clerk of said court with the tax commissioner who shall then correct the assessment in accordance with said decree."

<sup>20</sup> *Crowell v. Benson*, 285 U.S. 22, 57 (1932).

<sup>21</sup> See *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.06 (1958).



The hearings are, as previously noted, conducted differently than in the past. Although the present statute states that the hearings are to be informal, the hearings are recorded. Witnesses, however, are now sworn. The protections provided in the contested case provisions of the State Administrative Procedures Act are not applicable to tax hearings.<sup>22</sup>

There are, however, considerations far more significant than the hearing procedures. While one may invoke, upon due process grounds, "the rudimentary requirements of fair play,"<sup>23</sup> this affords to taxpayers small solace indeed for, however currently or fairly the procedure is conducted, we are now confronted with the situation where the taxpayer's adversary is also the judge.

Taxpayers and tax practitioners are accustomed in federal tax disputes and, until now, in state tax disputes, to a full judicial de novo re-examination of tax liability. But, if Judge Taylor is correct, we are now relegated in state tax cases to a subservient administrative hearing conducted by an examiner appointed by the Tax Commissioner, with judicial review only upon the administrative record.

In lieu of the statutory direction to the circuit court to "determine anew all questions submitted to it on appeal," the court presumably would apply the judicial criteria normally used in the review of administrative findings, *i.e.*, to reverse if contrary to law, or if the administrative finding is clearly erroneous upon the whole record or if the Commissioner's action was arbitrary or capricious or characterized by abuse of discretion.

A recent law review article criticized prior procedural reform proposals in California as deficient "because they fail to provide for a trial de novo before an independent judicial court with original jurisdiction to umpire conflicts in the tax area between the government and individual taxpayers."<sup>24</sup> The author stated:

<sup>22</sup> W. VA. CODE ch. 29A, art. 5, § 5 (Michie 1966).

<sup>23</sup> *Morgan v. United States*, 304 U.S. 1, 14-15 (1938). For West Virginia cases holding that "due process" extends to administrative officers and tribunals, see *Smith v. Bd. of Education*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Sept. 21, 1971); *State ex rel. Ellis v. Kelly*, 145 W. Va. 70, 112 S.E.2d 641 (1960); *State ex rel. Burchett v. Taylor*, 150 W. Va. 702, 149 S.E.2d 234 (1966).

<sup>24</sup> Kray, *California Tax Court: An Approach to Progressive Tax Administration*, 37 S. CAL. L. REV. 485, 488 (1967).

[W]hen controversies are resolved by an appellate division within the tax agency, this agency arm in effect sits in judgment upon itself and the taxpayer appears before an authority acting as both judge and prosecutor. Department employees identify admirably with the governmental institution that shelters them, just as corporate employees become imbued with the spirit of the corporate enterprise; such employees of the agency acquire thereby a vested interest in supporting agency decisions. As a consequence, taxpayers feel their best interests will be served by an easily accessible, independent appellate body and in establishing such separate departments, states have acknowledged the wisdom of this theory and the significance of improved taxpayer morale.<sup>25</sup>

Under the existing statute, the hearing examiner is delegated only the power to "hear." The determination of tax liability is made by the Tax Commissioner. Under present procedure either the hearing examiner or tax analyst prepares the proposed administrative decision and after internal coordination between and among the hearing examiner, tax analyst, and Business Tax Division, the decision is presented to the Commissioner for signature. The proposed decision is not served on the taxpayer, and, accordingly, he has no opportunity to argue his cause directly before the person who actually decides the case, *i.e.*, the Tax Commissioner.

In *Mazza v. Cavicchia*, Chief Justice Vanderbilt, of the New Jersey Supreme Court, held that the failure to serve the hearing officers' proposed findings on the aggrieved party prior to the administrator's decision was a denial of due process.<sup>26</sup> However, this decision has not generally been followed and seemingly the weight of authority is that prior service of such proposed findings is not constitutionally required.<sup>27</sup>

Legal requisites aside, the role accorded the hearing examiner in the administrative process in other areas exceeds the role given him under the West Virginia statute in question. Focusing on this

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<sup>25</sup> *Id.*

<sup>26</sup> 15 N.J. 498, 502-03, 105 A.2d 545, 547 (1954).

<sup>27</sup> See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 11.09 (1958); *Gonzales v. United States*, 364 U.S. 59 (1960).

point in 1941, the Report of the Attorney General's Committee on Administrative Practice, observed:<sup>28</sup>

In most of the agencies the person who presides is an adviser with no real power to decide. . . . He may simply be a monitor at the hearing with power to keep order and supervise the recording of testimony but little or none to make rulings or to play a real part in the final decision of the case. . . . Or he may have substantial power to rule at the hearing. . . . The Committee. . . has been impressed with the fact that as the conduct of the hearing becomes divorced from responsibility for decision two undesirable consequences ensue. The hearing itself degenerates, and the decision becomes anonymous.

Let us make it clear that we are not critical of the existing administrative hearing procedure if that procedure is what we think it to be — a preliminary informal process, with a *de novo* judicial review. But, if administrative finality attaches thereto, as would be the case under Judge Taylor's views, then we conclude that a subservient hearing process is inadequate.

As an informal procedure, the present Petition for Reassessment procedure fulfills a useful function. After all, the Tax Commissioner goes to the circuit court armed with a statutory declaration that his assessment is *prima facie* correct. He ought to do something to earn his presumption.

As Professor Davis observed: "[E]ven where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."<sup>29</sup>

Thus, if our present tax hearing becomes, in effect, the trial court, a need will exist for an informal process whereby the bulk of the controversies can be resolved in a less formal way.

Finally, if the administrative hearing is the place where the evidence is taken, it would seem highly doubtful that certified public

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<sup>28</sup> 1941 REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PRACTICE at 46.

<sup>29</sup> 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 4.11 (1958).

accountants or any tax practitioner other than an attorney can represent clients in such hearings.<sup>30</sup>

(2) *New Trial or Judicial Review of Administrative Findings: Is Judge Taylor Correct?*

It is clear beyond argument that the Legislature intended to grant taxpayers aggrieved by a ruling of the Tax Commissioner the right to appeal the determination of tax liability to the circuit court and to receive a new trial in that court. The statutory words are that "[t]he court shall hear the appeal and determine anew all questions. . . ."<sup>31</sup>

Anew means de novo, over again, afresh or a second time.<sup>32</sup> The primary definition of de novo is "anew."<sup>33</sup> Thus, when the court makes a determination anew under the appeal statute, the determination should be made de novo, as if the question had never been decided by the Tax Commissioner.

The question of statutory meaning is well revealed by comparing the existing hearing and appeal statutes with a proposed revision thereof, contained in the Committee Substitute for H.B.

<sup>30</sup> The "Definition of the Practice of Law" adopted by our State Supreme Court, effective July 11, 1961, includes the representation of "[t]he interest of another before . . . any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures." 145 W. Va. at XIV, XVI (1961).

In *W. Va. State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959), the W. Va. Supreme Court of Appeals held that the representation of claimants at hearings before the Workmen's Compensation Commissioner and his duly appointed trial examiners and the preparation of notices of appeal to the Workmen's Compensation Appeal Board constituted the practice of law and that one so engaged may be enjoined if he is not licensed to practice law. Further, the court held that the Compensation Commissioner could not under his general rule-making power permit such practice by regulation since such would be "void as a legislative encroachment upon the inherent power of the judicial department of the government." *Id.* at 535, 109 S.E.2d at 439.

If the administrative tax hearing is or becomes the proceeding in which the evidence is taken then it would appear to be clear that the preparation of a Petition for Reassessment and the representation of taxpayers at the hearing constitutes the practice of law, as defined by the West Virginia Supreme Court of Appeals.

<sup>31</sup> W. VA. CODE ch. 11, art. 13, § 8 (Michie 1966).

<sup>32</sup> *In re Farlin*, 350 Ill. App. 328, 112 N.E.2d 736 (1953); *Wilson v. Morris*, 369 S.W.2d 402, 407 (Mo. 1963). *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964); *Foster v. Carsen School Distr.* No. 301, 63 Wash.2d 29, 32, 385 P.2d 367, 369 (1963).

<sup>33</sup> WEBSTER'S THIRD INTERNATIONAL DICTIONARY 602 (1963); BLACK'S LAW DICTIONARY 483 (4th ed. 1951).

1078, proposed during the 1971 Regular Session of the Legislature.<sup>34</sup> This change was not adopted, but if Judge Taylor is correct, the same result will have been reached without legislation.

Returning to the Supreme Court decision in *Butler Bldg. Co.*, the argument was made that by empowering the circuit court to determine anew all questions, the Legislature had conferred upon the court administrative (non-judicial) power contrary to that part of the West Virginia Constitution relative to the division of the powers of government, which declares that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others. . . ."<sup>35</sup>

Citing its duty to give a constitutional construction to a statute where possible, the court in *Butler Bldg. Co.* placed a judicial gloss on the words of the statute. It said that the Legislature intended by the words "determine anew all questions" to authorize the court to review and determine only "judicial questions."<sup>36</sup> At no place in its opinion did the supreme court say that the circuit court may not determine such questions anew or that it may not receive evidence. Neither did the supreme court say that the taking of evidence or fact finding are non-judicial powers. To the contrary, these are functions which courts perform every day.

The supreme court defined "judicial questions" to be questions such as the "validity of the assessment and the liability of the taxpayer for the tax assessed. . . ."<sup>37</sup> The court noted that these questions "follow and result from the preliminary administrative action of the State Tax Commissioner in assessing and fixing the amount of the tax," and further stated:

That action by the State Tax Commissioner and his action upon the petition of the taxpayer for reassessment

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<sup>34</sup> Comm. Substitute for H.B. No. 1078, 1971 W. Va. Leg., Reg. Sess., would have amended the administrative hearing provisions, W. VA. CODE, ch. 11, art. 13, § 7(b) (Michie 1966), to expressly provide that "an appropriate record shall be made for review upon any appeal." It would have amended the appeal provision, W. VA. CODE ch. 11, art. 13, § 8 (Michie 1966), to substitute for the present "determine anew all questions" language a direction that "the court shall hear the appeal in equity and review all questions." Neither provision had been contained in the original House bill, were not the subject of a public hearing, and were later deleted from the bill.

<sup>35</sup> W. VA. CONST., Art. V, § 1.

<sup>36</sup> 142 W. Va. at 624, 625, 627, 97 S.E.2d at 281, 282.

<sup>37</sup> *Id.* at 626, 97 S.E.2d at 282.

of the tax involve the exercise by the State Tax Commissioner of an administrative function; but these matters are not expressly or by necessary implication committed to or vested in the court for determination on appeal. . . .<sup>38</sup>

The Tax Commissioner is authorized by statute to "investigate and determine. . . the tax liability of the taxpayer and make an assessment therefor."<sup>39</sup> The exercise of his discretion in singling out a specific taxpayer for investigation or in making an assessment against him is not the action which is challenged in court. The validity or correctness of the assessment is the judicial issue, and the resolution of this issue may properly involve fact finding.

The confusion which has recently arisen over the meaning of the *Butler Bldg. Co.*, case as to the taking of evidence and fact finding in the circuit court may be attributed to the fact that in each of the cases discussed and distinguished in *Butler Bldg. Co.*, which involved an unconstitutional delegation of non-judicial powers or duties upon the courts, a trial de novo was also conferred. However, in those cases it was not the award to the litigants of a trial de novo in the circuit court which was fatal of itself; rather it was the attempt to confer or impose upon the court a discretionary legislative or executive function.

The reason for holding that non-judicial functions may not be reviewed de novo, observes Professor Davis, is not that a court is lacking in qualifications to make findings of fact from conflicting evidence, but that a court may be lacking in qualifications to exercise a function that is deemed non-judicial.<sup>40</sup> This clearly is the basis upon which Judge Haymond distinguished the separation of powers cases in *Butler Bldg. Co.* The issue upon appeal of an assessment by the Tax Commissioner is not the Commissioner's discretion; rather, it is the correctness of the assessment of tax liability. The ascertainment of facts in a tax controversy brings into question no discretionary action on the part of the taxing authority. It is an indispensable part of the determination of the validity of the assessment and the liability of the taxpayer to pay it.

Professor Davis indicates that while the scope of judicial review of administrative action ranges from zero to one hundred per cent,

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<sup>38</sup> *Id.* at 625, 97 S.E.2d at 281.

<sup>39</sup> W. VA. CODE ch. 11, art. 13, § 7 (Michie 1966).

<sup>40</sup> 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 29.10 (1958).

court review of a federal tax case handled by the Internal Revenue Service is “[a]n example of something approaching one hundred per cent substitution of judgment. . . .”<sup>41</sup>

In the area of federal income, estate and gift taxes a taxpayer may obtain a de novo judicial review of a tax deficiency in either the United States Tax Court, the Court of Claims or the United States District Court, the only difference being that the District Court and Court of Claims are available only upon prior payment of the tax. The American Bar Association has recently proposed that even this distinction be abolished so that federal taxpayers will have a full and free choice of judicial forums.<sup>42</sup>

There is nothing inherently non-judicial about the determination of tax liability. To echo Professor Davis:<sup>43</sup>

If the separation of powers clause prevents the Court from substituting its judgment for that of the [Tax Commissioner] on fact questions, then the separation of powers clause of the West Virginia constitution, so interpreted, violates the Fourteenth Amendment of the Constitution of the United States, as interpreted by the Federal Supreme Court, and is therefore unconstitutional!

### Conclusion

In the state tax arena, no less than the federal, taxpayers should have the right to an independent adjudication of tax controversies.

In supporting our present system of providing a new trial in the circuit court, we do not mean to imply that it would be unconstitutional for the Legislature to adopt an administrative procedure which limited later court consideration to a judicial review upon the record made.<sup>44</sup>

The issue, when the statute confers upon the court only a limited power of review, is normally one of whether due process has been satisfied, rather than whether the separation of powers doctrine

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<sup>41</sup> K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 29.01 FN1 (1958).

<sup>42</sup> See 23 THE TAX LAWYER 965 (1970).

<sup>43</sup> Davis, *Judicial Review of Administrative Action in West Virginia — A Study in Separation of Powers*, 44 W. VA. L.Q., 270, 292 (1938).

<sup>44</sup> See *Phillips v. Commissioner*, 283 U.S. 589 (1931); *Anderson National Bank v. Lueckett*, 321 U.S. 233, 246-47 (1944); *Helvering v. Mitchell*, 303 U.S. 391, 402 (1938).

has been violated, in reverse, i.e., by conferring judicial power upon the executive or legislative branch of government. Only California seems to have adopted this line of reasoning.<sup>45</sup>

Thus, we see a need for an enlarged informal administrative conference procedure, desirably prior to assessment and free of adjudication overtones.

We would recommend, also, that the hearing and appeal procedures in the various tax articles be made more uniform, possibly through enactment of a separate disputes procedure article in chapter 11 of the West Virginia Code. However, the right of a taxpayer feeling aggrieved by an assessment of the Tax Commissioner to appeal that assessment to the circuit court and there to receive a new trial upon all matters of tax liability should be preserved.<sup>46</sup>

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<sup>45</sup> 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 1.09 (1958).

<sup>46</sup> An alternative between a subservient administrative hearing and a new trial in the circuit court would be to establish a Tax Court or Board of Tax Appeals within the Executive Department independent of the tax commissioner.

In 1957, the National Conference of Commissioners on Uniform Laws, acting upon the suggestion of the American Bar Association, drafted a model State Tax Court Act. Several states such as Ohio, Wisconsin, Oregon and the District of Columbia, have established a Tax Court or Board of Tax Appeals.

The United States Tax Court handles with a single, one week trial calendar all federal income, estate and gift tax cases brought by West Virginia residents in that forum in a year. The State Tax Department advises that while over 100 hearings per year are held in business tax matters only 35 appeals were lodged in the circuit courts of this state in the past 17 months (7 of these were from inheritance tax assessments). Accordingly, it does not seem that the present volume of cases requires the creation of a West Virginia Tax Court unless such is the only way that a truly independent determination of tax liability can be granted.