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REMEDIES FOR DISPROPORTIONATE TAX ASSESSMENT IN KENTUCKY

BY GEORGE MUEHLENKAMP*

The purpose of this note is, as the title suggests, to consider the remedies available to a taxpayer to correct a disproportionate tax assessment. Although confined to a consideration of the problem as it exists in Kentucky, it is believed the solution suggested is generally applicable. The note must necessarily be limited in scope and will, in the main, be confined to ad valorem taxes imposed by a taxing unit larger than a municipality. This rather arbitrary exclusion of all city taxes, as well as those other than ad valorem, is necessitated by space restrictions and the fact that the problem of city taxes varies to a great extent, depending in part on the size and class of the city.

In an attempt to bring the problem into sharp focus, it appears helpful to divide the discussion into four phases: (1) The tax structure generally, as related to assessment and correction, (2) Correction of individual assessments, (3) Statutory correction of assessments as a whole, so as to equalize the burden of counties, (4) Suggested method of securing relief.

THE TAX STRUCTURE GENERALLY

In general, the process of assessment is undertaken by one of three agencies, the County Tax Commissioner, the County Board of Supervisors, or the Kentucky Tax Commission. Each of these will be considered separately, as well as the process of assessment, an understanding of which is essential in considering the remedial process.

a. County Tax Commissioner

In most instances the actual assessment is made either by the county tax commissioner or, more rarely, by the board of supervisors. The office of county tax commissioner apparently

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owes its existence to the restrictive nature of the Kentucky Constitution. That instrument provides for a *county assessor*,¹ who is ineligible to succeed himself, although this does not apply apparently to *city* assessors of cities of the first and second class who, by section 160 of the Constitution, are not "fiscal officers" ineligible to succeed themselves. Under authority of section 104 of the Constitution² the office of county assessor has been abolished and the duties given to a county tax commissioner,³ who is eligible for re-election.

Although the office created is described as *county* tax commissioner, it was held in *Talbott v Burke*⁴ that such officials are "state officers" serving both the Commonwealth and their respective counties. Another indication of the importance of this office is the provision in the statute that "The assessment made for state purposes shall be the basis for the levy of the ad valorem tax for county purposes."⁵ In addition, any *city* may adopt the assessment of the county tax commissioner.⁶

The county tax commissioner is authorized, "subject to the direction, instruction and supervision of the Department of Revenue, [to] make the assessment of all property in his county except as otherwise provided for. . . ."⁷ with the assessment to be at "fair cash value."⁸

b. *County Board of Supervisors*

The county board of supervisors, appointed by the county judge, consists of three members appointed from the county at large, unless the fiscal court orders that it be composed of one

¹ Ky. Const. sec. 99.

Ky. Const. sec. 104.

"The General Assembly may abolish the office of Assessor and provide that the assessment of property shall be made by other officers; but it shall have power to re-establish the office of Assessor and prescribe his duties. No person shall be eligible to the office of Assessor two consecutive terms."

Ky. R. S. (1946) sec. 132.370.

287 Ky 187, 190, 152 S.W 2d 586, 587 (1941)

⁶ Ky. R. S. (1946) sec. 132.280. The Fiscal Court has no authority to make or provide for assessments. *Jefferson County v. Young*, 120 Ky 456, 86 S.W 985 (1905) See also Ky. R. S. (1946) sec. 67.080.

⁷ Ky. R. S. (1946) sec. 132.285.

⁸ Ky. R. S. (1946) sec. 132.420 (1).

⁹ Ky. Const. sec. 172; Ky. R. S. (1946) secs. 132.190 (3), 132.450 (1).

member from each magisterial district in the county¹⁰ Normally they meet on the first Monday in February, but it is provided that no meeting shall be held until the "tax roll has been completed and the assessments of the county tax commissioner have become final in accordance with law."¹¹

c. Kentucky Tax Commission

The Kentucky Tax Commission is an agency of the Department of Revenue, consisting of the Commissioner of Revenue and two Associate Commissioners.¹² Among other powers and duties, the Commission makes certain assessments, such as those involving public utilities, public service corporations, franchises, etc.¹³ Since the incidence of assessment by this commission as well as appeal from its findings is relatively low, scant consideration of the remedial process need be given here. Suffice it to say that, if the commission acts within its scope, the taxpayer's remedy is exclusively statutory¹⁴ The statutory remedy provides that a taxpayer may petition the Department of Revenue for a review by the Commission¹⁵ and, if the decision on review be adverse, the taxpayer may then appeal to the Franklin circuit court.¹⁶ Although the statute states that the remedy there provided is exclusive, the court recognizes that an injunctive proceeding will be appropriate in a proper case, such as one involving a void assessment.¹⁷ Thus, in *City of Louisville v Martin*¹⁸ the court held that a mere error in judgment as to fair cash value would not authorize the court to interfere, but also pointed out that a mandatory injunction would lie in certain situations, as where the Commission did not act in good faith.

In addition to this rather limited range of assessment, the Department of Revenue is charged with supervision and control over the work of county tax commissioners in the assessment

¹⁰ Ky. R. S. (1946) sec. 133.020.

¹¹ Ky. R. S. (1946) sec. 133.030.

¹² Ky. R. S. (1946) sec. 131.020 (2).

¹³ Ky. R. S. (1946) secs. 131.030, 131.090.

¹⁴ Ky. R. S. (1946) sec. 131.125; *Reeves v. Fries*, 292 Ky 450, 166 S.W 2d 965 (1942).

¹⁵ Ky. R. S. (1946) sec. 131.110 (b).

¹⁶ Ky. R. S. (1946) sec. 131.120.

¹⁷ *Reeves v Service Lines, Inc.*, 291 Ky 410, 164 S.W 2d 593 (1942).

¹⁸ 284 Ky 490, 144 S.W 2d 1034 (1940).

process.¹⁹ The influence of the Commission is also felt at a lower level since they have the duty of equalizing the assessments by county or taxing district,²⁰ and the power to order a reassessment in an assessment district.²¹ This phase of the Commission's operation will be considered at more length below

d. *The Process of Assessment*

The process of assessment properly begins "as of July 1," the date of assessment.²² Between that date and September 1, the owner must list the property or have it listed with the county tax commissioner of the county where the property is located.²³ Where property is in the hands of a guardian²⁴ or a personal representative,²⁵ he should list it. The owner's listing is, however, not the assessment, but only evidence from which the assessment may be made.²⁶

If the property owner fails to list his property the county tax commissioner lists it²⁷ (although provision is made in certain instances for the taxpayer to list omitted property with the county court clerk)²⁸ and, in such case, he need not give notice to the taxpayer. But the taxpayer must still go to the board of supervisors before seeking the assistance of the court²⁹ since he is charged with notice that the tax commissioner will make the assessment, and thus may acquaint himself with the assessment, inasmuch as the books are open for inspection between January 15 and February 1.³⁰ If the taxpayer fails to list *part* of his property the commissioner may list and assess the omitted part, but he must then give notice of the assessment.³¹ If, however, he

¹⁹ Ky. R. S. (1946) sec. 132.420.

²⁰ Ky. R. S. (1946) sec. 133.150 et seq.

²¹ Ky. R. S. (1946) sec. 132.660.

²² Ky. R. S. (1946) sec. 132.220 (1)

²³ *Ibid.*

²⁴ *Webber v Comm.*, 265 Ky 696, 97 S.W 2d 422 (1936)

²⁵ *Comm. v. Camden*, 142 Ky 365, 134 S.W 914 (1911).

²⁶ *Ky River Coal Corp. v. Knott County Board of Sup'rs.*, 245 Ky. 822, 54 S.W 2d 377 (1932)

²⁷ Ky. R. S. (1946) sec. 132.220 (2).

²⁸ Ky. R. S. (1946) sec. 132.310.

²⁹ *Breathitt County Board of Sup'rs. v. Ware Cannel Coal Co.*, 297 Ky 117, 179 S.W 2d 225 (1944).

³⁰ Ky. R. S. (1946) sec. 133.045.

³¹ *Ball v P V & K. Coal Co.*, 235 Ky. 445, 31 S.W 2d 707 (1930), *Boske v Lous Marx & Bros.*, 161 Ky 460, 170 S.W 1175 (1914).

refuses to list his property, the assessment is made by the board of supervisors³² or the county court.³³ It should be noted that this applies only when the taxpayer *refuses* to list the property, and not when he merely *fails* to do so, for in the latter situation the commissioner acts.³⁴

The assessment by the tax commissioner is required to be "at its fair cash value, estimated at the price it would bring at a fair voluntary sale. " ³⁵ as determined " from his knowledge, from information in property schedules and from such other evidence as he may be able to obtain." ³⁶ In addition to making original assessments, the commissioner may increase an assessment but, here also, notice to the taxpayer is required.³⁷ Finally, if all others have failed to list the property for tax purposes, the statute³⁸ provides that the Department of Revenue shall cause a listing of all property omitted by county tax commissioners, boards of supervisors, Kentucky Tax Commission, or any other assessing authority

After completing the tentative assessment of all property before December 1, the commissioner files a recapitulation with the Department of Revenue.³⁹ The Department makes an examination, and may correct the assessments from data obtained from any source⁴⁰ or, on complaint of owners of not less than 10% of the taxable property in the assessment district or for any other just reason, may order a reassessment.⁴¹ The corrected tentative valuation is completed by January 15, and between then and February 1, the rolls are open for inspection in the county tax commissioner's office, unless the time is extended

³² Ky. R. S. (1946) sec. 132.570.

³³ Ky. R. S. (1946) sec. 132.580; *Clark v. Belknap*, 11 Ky L. Rep. 791, 13 S.W. 212 (1890)

³⁴ *Lowther v. Moore*, 191 Ky 284, 229 S.W. 705 (1921)

³⁵ Ky. Const. sec. 172; Ky. R. S. (1946) secs. 132.190 (3) 132.450 (1) Actually, assessors generally have disregarded this strict requirement and treated it as only requiring uniformity at proportionate values. *Prestonsburg Water Co. v. Prestonsburg Board of Sup'rs.*, 279 Ky 551, 131 S.W. 2d 451 (1939)

³⁶ Ky. R. S. (1946) sec. 132.450 (1)

³⁷ Ky. R. S. (1946) sec. 132.450 (2) *Ball v. P V & K. Coal Co.*, 235 Ky 445, 31 S.W. 2d 707 (1930) *Negley v Henderson Bridge Co.*, 107 Ky. 414, 54 S.W. 171 (1899).

³⁸ Ky. R. S. (1946) sec. 132.330 et seq.

³⁹ Ky. R. S. (1946) sec. 133.040.

⁴⁰ *Ibid.*

⁴¹ Ky. R. S. (1946) sec. 132.660.

by the Department of Revenue.⁴² After the inspection period, the tax rolls are delivered to the county court clerk, who makes a second recapitulation of this final assessment.⁴³ Finally, when the board of supervisors meets, the commissioner's books are delivered to them by the county court clerk.⁴⁴

CORRECTION OF INDIVIDUAL ASSESSMENTS

After the assessment is made the taxpayer who is seeking relief must begin by filing a letter with the county court clerk between the following January 15, the date on which the tax rolls are opened for inspection, and the date the board of supervisors meets, the first Monday in February, stating the reasons for his appeal.⁴⁵ On a hearing of the matter the taxpayer has the burden of proof and must show cause for correction.⁴⁶ In addition, the board of supervisors may, on its own initiative, increase an assessment, assess unlisted property, or correct erroneous assessments,⁴⁷ but the board must notify the property owner and provide a date for a hearing.⁴⁸ After the board has conducted a hearing a taxpayer's statutory method of securing relief follows one of two courses. Within 30 days after adjournment of the board, either he or the taxing agency may appeal to the circuit court of the county where the property is located⁴⁹ or to the Kentucky Tax Commission,⁵⁰ either of whom conducts a hearing de novo and fixes the value.⁵¹ If the appeal is to the circuit court the taxpayer may next appeal to the Court of Appeals, while if the appeal is to the Kentucky Tax Commission he may appeal to the Franklin Circuit Court⁵² and thence to the Court of Appeals.

If the complaint of the taxpayer is based solely on an

⁴² Ky. R. S. (1946) sec. 133.045.

⁴³ Ky. R. S. (1946) sec. 133.046.

⁴⁴ Ky. R. S. (1946) sec. 133.030 (1).

⁴⁵ Ky. R. S. (1946) sec. 133.120 (1).

⁴⁶ *Hyden v. Breathitt County Board of Sup'rs.*, 244 Ky. 505, 51 S.W. 2d 441 (1932)

⁴⁷ Ky. R. S. (1946) sec. 133.120 (2)

⁴⁸ *Ibid.*

⁴⁹ Ky. R. S. (1946) sec. 133.120 (4).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² As provided by Ky. R. S. (1946) sec. 131.120.

excessive valuation, the statutory remedy is exclusive, and a failure to pursue that remedy will bar his action.⁵³

In addition to the statutory process other remedies will, under certain circumstances, be allowed. It has already been pointed out that where the Tax Commission makes a void assessment injunctive proceedings will lie.⁵⁴ So, too, an injunction will be granted in the case of an illegal tax levied by any other assessing agency *City of Lancaster v Pope*⁵⁵ although dealing with a city tax, cites many cases to support the unequivocal statement that “ the illegality of a tax is regarded as a sufficient reason for enjoining its collection at the suit of a single plaintiff, whether the tax be upon personalty or realty ”⁵⁶

The requirement of notice is strict, and it has been held that a taxpayer, even though he may know of the notice, need not appear if the board fails to notify him in strict compliance with the statute, but if he does appear he waives the strict requirement.⁵⁷ Thus, notice given by posting it on the property of the taxpayer is effective only as to that particular tract and such other as is contiguous, and is wholly ineffective as to tracts owned by the same taxpayer which are not contiguous.⁵⁸ It would appear from this that notice may be valid as to one and void as to another tract simultaneously. Also, where the statute allows service of notice, in case the taxpayer is out of the county, to be delivered to some person over 16 years of age at the residence of such person, or by posting a copy of the notice on the front door of the residence, *Burnside Supply Co. v Burnside Graded Common School*⁵⁹ held that service on the wife of the taxpayer in the latter's store, while he was absent but in the county, was void. Of course this would be true also where the

⁵³ *Royer Wheel Co. v. Taylor County* 104 Ky. 741, 47 S.W. 876 (1898).

⁵⁴ *Reeves v Service Lines, Inc.*, 291 Ky. 410, 164 S.W. 2d 593 (1942).

⁵⁵ 156 Ky. 1, 160 S.W. 509 (1913)

⁵⁶ *City of Lancaster v Pope*, 156 Ky. 1, 4, 160 S.W. 509, 511 (1913).

⁵⁷ *Ward v. Wentz*, 130 Ky. 705, 113 S.W. 892 (1908).

⁵⁸ *Lowther v. Moore*, 191 Ky. 284, 229 S.W. 705 (1921).

⁵⁹ 260 Ky. 482, 86 S.W. 2d 160 (1935).

assessor. rather than the board, increased the assessment without notice, and an injunction would lie.⁵⁰

It should be noted that irregularities as distinguished from illegalities in actions by the assessing body will not entitle a taxpayer to an injunction, because there the statutory remedy is exclusive.⁵¹ An example of illegality is the assessment of constitutionally exempt property,⁵² or assessment of unlisted property by the board without notice.⁵³ Where the board makes a higher valuation than the property is actually worth, but the proceedings are regular, there can be no injunctive relief.⁵⁴ It is only when the valuation by the assessing body is so excessive as to amount to spoliation that collection may be enjoined, since the tax is then illegal.⁵⁵ A very sound reason exists for this seemingly arbitrary rule, as pointed out by the Court of Appeals "If taxpayers, upon a mere opinion of excessive valuation, can prevent by injunction, the collection of the revenues due to the State or county, confusion and inconvenience would speedily result therefrom."⁵⁶ Assuming that the taxpayer is actually entitled to equitable remedies, the Court of Appeals will not refuse to hear him because the amount of the tax involved is less than \$200.00.⁵⁷

It would appear, then, that the individual taxpayer is fairly well protected against discrimination if the question is one of correction of an assessment in order to equalize his property with other property in the same county or taxing district. If he is alert to his rights, and if the corrective officials perform their duty, the statutory remedy adequately safeguards

⁵⁰ *Boske v. Louis Marx & Bros.*, 161 Ky 460, 170 S.W 1175 (1914).

⁵¹ *Mossett v. Newport & C. Bridge Co.*, 106 Ky 518, 50 S.W 63 (1899)

⁵² *Ky & W Va. Power Co. v. Holliday* 216 Ky. 78, 287 S.W 212 (1926) *Ryan v. City of Louisville*, 133 Ky 714, 118 S.W 992 (1909)

⁵³ *Durbin v. Ohio Valley Tie Co.*, 151 Ky. 74, 151 S.W 12 (1912).

⁵⁴ *Sanford v. Roberts*, 193 Ky 377, 236 S.W 571 (1922) *Johnson v. Bradley-Watkins Tie Co.*, 120 Ky. 136, 85 S.W 726 (1905)

⁵⁵ *Ky Heating Co. v. City of Louisville*, 174 Ky. 142, 192 S.W 4 (1917)

⁵⁶ *Royer Wheel Co. v. Taylor County* 104 Ky. 741, 744, 47 S.W 876 (1898).

⁵⁷ *Buckner v. Clay* —Ky—, 206 S.W 2d 827 (1947) *Breathitt County Board of Sup'rs. v. Ware Cannel Coal Co.*, 297 Ky. 117, 179 S.W 2d 225 (1944) *Burnside Supply Co. v. Burnside Graded Common School*, 260 Ky 482, 86 S.W 2d 160 (1935)

his interests. If the taxing officials act beyond their authority the taxpayer still has a remedy by equitable proceedings.

EQUALIZATION AMONG COUNTIES

A more difficult problem presents itself in a situation where the county as a whole is assessed higher than another county in the state, although the individual's property is not over-assessed as compared with other property in the same county so that there exists an inequality between the assessments in different parts of the state. We have already seen⁶⁸ how the state assessment is also the county assessment and may be the city assessment. If, then, the assessment in "A" county is higher in proportion to actual cash value than is the assessment in "B" county, it is obvious that the taxpayers in "A" county are bearing a heavier burden of the tax load than their neighbors in "B" county. It is proposed to examine the requirements as to state-wide uniformity of assessment, the actuality of such uniformity, and the method, if any, available for correction.

Three sections of the Kentucky Constitution are important in this connection, and their applicable provisions are as follows:

Section 171. "Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

Section 172. "All property not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law."

Section 174. "All property whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution;"

While it is true that these sections do not require, in terms, that the ratio of assessments to value must be uniform throughout the state, it is thought that such was the intent of the

⁶⁸ *Supra*, n. 6.

framers of the Constitution, and that this interpretation is supported by the court. The report submitted to the Constitutional Convention by the Committee on Revenue and Taxation shows that section three of that report corresponds with the present section 171 of the Kentucky Constitution, while section four of the same report is almost identical with section 172 of the Constitution as adopted.⁶⁹ The chairman of that committee, in explaining their recommendations, said "You all know that Assessors in different localities fix different standards of value, thereby imposing on different communities, different rates of taxation. " ⁷⁰ The framers of the Constitution appear to have had no difficulty in realizing that equality of burden is impossible without equality of assessment, and attempted to insure such uniformity

The courts also seem to understand that uniformity of taxation means uniformity of burden and not simply uniformity of rate. In *Eminence Distillery Co. v. Henry County Board of Sup'rs.*⁷¹, the court quotes the above sections of the Constitution and points out

"These sections not only require that, the rate of taxation upon all property shall be uniform, but it just as emphatically demands and requires that the burden of taxation upon all property shall be equal. In order that taxes levied shall be lawful and have the sanction of the Constitution, it is essential that, the burden which it imposes shall have the necessary virtue of equality, as that it shall be uniform."⁷²

Does this "uniformity" refer only to uniformity of rate, or does it also require practical uniformity of assessment? The court seems to have thought the latter, when it made the statement that "Whenever the tax assessing authorities have systematically disregarded the imperious demands of the Constitution and Statutes, that all property shall be assessed at its fair cash value, by adopting a general level of proportionate values, everybody must have been treated alike."⁷³ An even more emphatic assertion appears in *Lang v Commonwealth.*⁷⁴

⁶⁹ 2 DEBATES, CONSTITUTIONAL CONVENTION (1890) p. 2372.

⁷⁰ 2 DEBATES, CONSTITUTIONAL CONVENTION (1890) p. 2384.

⁷¹ 178 Ky. 811, 200 S.W. 347 (1918).

⁷² *Id.* at 818, 200 S.W. at 350.

⁷³ *McCracken Fiscal Court v. McFadden*, 275 Ky. 819, 825, 122 S.W. 2d. 761, 764 (1938).

⁷⁴ 190 Ky. 29, 226 S.W. 379 (1920)

"That the burdens of taxation must be uniform, and to be uniform must have the essential of equality, and must bear alike upon all property within the limits of the unit wherein it is lawful to levy taxes for a purpose, there can be no doubt, *whether that unit be the state, county or a municipality.*"⁷⁵ (italics added)

If uniformity means uniformity of burden within the taxing unit, if the taxing unit, for some taxes at least, be the state, if the state and county assessment is the same, and if assessments in various counties vary greatly, it is obvious that the resulting burden of taxation is not uniform. The writer is of the opinion that there is a clear duty imposed on the assessing officials, no matter what their sphere of activity to secure practical uniformity of assessment. The Constitution, by section 172, requires assessment "at its fair cash value." and, while the courts recognize that absolute equality cannot be attained⁷⁶ and that assessors may disregard the strict requirement of "fair cash value," treating it as requiring uniformity at a general level of proportionate values in assessing various classes of property,⁷⁷ the constitutional and legislative intent is still clear.

It is this very condonation of uniformity at a proportionate level, rather than uniformity at "fair cash value" as the Constitution requires, or uniformity at a uniform proportionate level, which produces the discrimination. If the assessors of "A" county, for example, are conscientious and endeavor to secure a fair assessment, their efforts may produce a uniform assessment at, say, 90% of fair cash value. Meanwhile the assessors of "B" county, with an eye fixed on the forthcoming election, have assessed their voters uniformly at 25% of fair cash value. The inevitable result is that the taxpayers of "A" county are shouldering part of the rightful burden of the citizens of "B" county. One would be naive, indeed, to believe that such conditions do not exist. As early as 1888 Judge Bennett stated

⁷⁵ *Id.* at 34-35, 226 S.W. at 382.

⁷⁶ "A contention that absolute equality could be attained or that such is necessary would be the mere musing of a dreamer." *Eminence Distillery Co. v. Henry County Board of Sup'rs.*, 178 Ky. 811, 819, 200 S.W. 347, 350 (1918) accord, *Swift Coal & Timber Co. v. Board of Sup'rs. of Letcher County* 223 Ky. 461, 3 S.W. 2d 1067 (1928).

⁷⁷ *Prestonsburg Water Co. v. Prestonsburg Board of Sup'rs.*, 279 Ky. 551, 131 S.W. 2d 451 (1939) where an assessment was reduced by the court to the prevailing level of 60% of fair cash value, despite the claim that the property was assessed at less than full value.

“ it is a fact known by all, that for years past the grossest inequalities have existed in the value fixed upon all kinds of property by the county assessors; and that the county boards of supervisors have failed to correct the evil. In some counties, it is said that assessors secure their elections by pledges made to assess the property in the county or certain kinds of it, at a low value.”⁷⁸

It was to correct this obvious injustice that a state agency was created. Applicable portions of the statute follow

“The Kentucky Tax Commission shall equalize each year the assessments of the property among the counties. It shall with such information that it may obtain from any source determine the ratio of the assessed valuation of the property to the fair cash value. The Kentucky Tax Commission shall have power to increase or decrease the aggregate assessed valuation of the property of any county or taxing district thereof or any class of property or any item in any class of property. The Kentucky Tax Commission shall fix the assessment of all property at its fair cash value. When the property in any county or any class of property in any county is not assessed at its fair cash value, such assessment shall be increased or decreased to its fair cash value by fixing the percentage of increase or decrease necessary to effect the equalization.”⁷⁹

The statute appears to be so worded as to be mandatory rather than merely directive. Cooley points out that when statutory provisions are merely for guidance or to secure order, they usually are not mandatory, unless accompanied by negative words. But if the provisions are intended for the protection of the citizen, and to prevent a sacrifice of his property, they are not directory, but mandatory and must be followed, or the acts done will be invalid.⁸⁰ Obviously, these provisions are intended for the protection of the citizen and so can fairly be construed as mandatory. If the statute is indeed mandatory, and if the Tax Commission actually fulfills the duty imposed by the statute, the inevitable result will be an approximate uniformity of assessment throughout the state, either at fair cash value or at the same ratio to fair cash value. The taxpayer has a right to expect that this result will be reached. It has been stated that town and county Boards of Supervisors “ are to the tax-

⁷⁸ Spalding v. Hill, 86 Ky. 656, 661, 7 S.W. 27, 28 (1888).

⁷⁹ KY. R. S. (1946) sec. 133.150.

⁸⁰ 2 COOLEY, TAXATION (4th ed. 1924) Chap. 10, sec. 510, pp 1136-1137.

payers of the towns and counties what this [State] Board is to the different counties of the state, only the law has invested them with greater powers.”⁸¹ If, then, the commission has a duty to act, the next question becomes whether the evidence indicates that they actually have acted. An examination of available statistics makes it clear that they have not.

The Bureau of Business Research at the University of Kentucky shows in chart form the ratio of assessed value to selling price of recently transferred parcels of realty in Kentucky cities.⁸² It shows an assessment ratio ranging from 82.5% for first class cities to 48.2% for fifth class cities. Figures compiled by the Department of Revenue for 1945 show the final assessment ratio for lots, on a county-wide basis. Here, too, the discrepancy is revealing, both as to 1945 figures, and those for a five year average. The state ratio for 1945 is 48.0%, while for individual counties, the ratio ranges from Wayne county with 25.0% and Magoffin county with 25.1% up to Martin county with 98.2% and Wolfe county with 112.7%. Of the four larger counties of Campbell, Fayette, Jefferson and Kenton, Kenton is lowest with a figure of 38.5% and Jefferson highest with 81.1%. The five year average for the state shows 59.6%, while for the same period the counties show Perry at 42.1%, Magoffin 42.3% and Wolfe 99.7%. Of the four larger counties Fayette shows a five year average of 58.9% and Jefferson 84.2%.

The report of the Kentucky Department of Revenue⁸³ reveals rather interesting figures which indicate the operational efficiency of the state equalization body. Their figures show the “Percentage Raises Ordered by the Kentucky Tax Commission to Equalize Real Estate Assessments Made by the County Tax Commissioners.”⁸⁴ An examination of these figures for the year 1945 for town lots, the same basis used in the earlier analysis herein, shows that Wayne county, which began with a ratio of 25.0% was raised 20%, while Magoffin county, which originally

⁸¹ *Russell v. Carlisle & Litsey* 10 Ky L. Rep. 25, 26, 8 S.W. 14, 15 (1888).

⁸² *Ky. City Finances* (1946) UNIV. OF KY. BUREAU OF BUSINESS RESEARCH BULL. No. 12, Table 21, p. 127.

⁸³ APPENDIX TO 29TH ANNUAL REPORT, KY. DEPT. OF REV. (1946-47)

⁸⁴ APPENDIX TO 29TH ANNUAL REPORT, KY. DEPT. OF REV. Table VII, p. 20 (1946-47).

had a ratio of 25.1% was raised 15%. On the other hand, Simpson county, which began with a ratio of 27.9%, Carlisle county with 27.9%, and Daviess county with 28.6%, were not raised at all. Wolfe county, which originally had a ratio of 112.7%, was raised by the Department an additional 10%.

It is interesting to note that during 1942, an election year, no increases at all were made, the Department's report saying, "As an experiment the Kentucky Tax Commission in 1942 agreed with the county tax commissioners not to make any blanket raises for that assessment year."⁵⁵ In 1943, 49 raises were ordered, in 1944, 31 raises, in 1945, 24, and in 1946, another election year, just 6 increases were ordered. There are 120 counties in the state.

These figures seem to indicate that the statutory mandate is not being complied with and that corrections, even when made, fail to effect the intended equality of burden. It must be remembered that a disproportionate assessment does not necessarily involve an excessive assessment, since if one county is assessed at 70% and another at 40%, the result is disproportionate, even though neither is excessive.

SUGGESTED METHOD OF SECURING RELIEF

There remains the question of whether any action can be brought to compel the state body to act. The immediate objection is likely to be that their actions are a matter of discretion, and as such cannot be controlled. It is admitted that the writ of mandamus is granted for the purpose of compelling action by public officials, and not for the purpose of controlling their judgment or discretion and that, therefore, when a tax official or board has acted in good faith in assessing property for the purpose of taxation, mandamus normally will not lie to review their decision or to compel them to make a new assessment.⁵⁶ However, it is just as true that actions may be maintained to compel state officers or agencies to perform a duty imposed upon them by law, or to refrain from doing something that the

⁵⁵ APPENDIX TO 29TH ANNUAL REPORT, KY. DEPT. OF REV. p. 8.

⁵⁶ Southern Pacific Co. v. Comm., 134 Ky. 410, 120 S.W. 309 (1909).

law directs them not to do.⁸⁷ It is not contended that the court should function as the equalization board, nor that they should substitute their opinion of value for that of the assessing officials, it is contended that the court, functioning as a court, has the power and duty to compel the equalization board to function as an equalization board, i. e., compel them to exercise their judgment.

The writer of this note has been unable to discover any cases in this state where the court has attempted to compel the state equalization body to revise their equalization figures, indeed the issue seems never to have been presented squarely before the court. Nonetheless, it is submitted that such action is not only possible, but highly proper. The court has stated that the board "is only limited by the purpose and spirit of the law"⁸⁸ Clearly, the purpose and spirit of the law is equality of burden for property owners throughout the state. In *Ray v. Armstrong*⁸⁹ the court recognized the possibility that the state board might not fulfill their function, although in that case no action was allowed. There a taxpayer, after the board had increased the valuation in Jefferson county by 12%, sought to enjoin the county court clerk from extending the raise on the assessor's books, on the ground that the board failed to increase many other counties where it was conceded that property was assessed at less than value. In refusing the injunction the court held that the petition was too general and that "The allegations may be true, and Jefferson county may have still been raised only to its proper equalization rate."⁹⁰ In *City of Louisville v. Martin*⁹¹ the State Tax Commission made a blanket assessment on whiskey of \$18.00 per barrel for state, county, municipal and district taxation. The court refused to mandatorily enjoin the commission to reassess the whiskey in conformity with the Constitutional and statutory requirement, on the grounds that (1) There is a presumption of proper discharge of duty by the

⁸⁷ *City of Louisville v. Martin*, 284 Ky 490, 144 S.W 2d 1034 (1940) *Board of Councilmen v State Highway Comm.*, 236 Ky. 253, 32 S.W 2d 1008 (1930)

⁸⁸ *Russell v. Carlisle & Litsey* 10 Ky. L. Rep. 25, 27, 8 S.W 14, 15 (1888).

⁸⁹ 140 Ky 800, 131 S.W 1039 (1910).

⁹⁰ *Ray v. Armstrong*, 140 Ky. 800, 805, 131 S.W 1039, 1042 (1910).

⁹¹ 284 Ky. 490, 144 S.W 2d 1034 (1940).

commission, (2) The commission is invested with broad discretion, and mere errors of judgment will not authorize interference, (3) Mandamus will be granted to compel action, but not to control the judgment. It should be noted, however, that in this case there was no evidence of non-equalization.

If we turn to decisions in other states it becomes readily apparent that a writ of mandamus to compel proper equalization is not outside the realm of possibilities. In an Arkansas case arising in the Federal court⁸² the plaintiff had a judgment against a county for the cost of erecting a new courthouse, which judgment the county could not pay because of lack of funds. The property in the county was assessed at 50% of true value, as was other property in other counties in the state. The court, after citing the Constitutional and statutory requirements of "true market value," equality and uniformity, held that the plaintiff might have a writ of mandamus to compel increase in valuation in the county, even though this would make the assessment in that county higher than the other counties of the state. While the result in this case was to make the assessments disproportionate, rather than to equalize them, it does indicate that the court may order the equalizing body to make changes. In a recent Michigan case the court was emphatic in stating that "equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a State tax, it must be uniform over all the State, if a county, town, or city tax, it must be uniform throughout the extent of the territory to which it is applicable."⁸³ And again "County equalization is made without regard to variations between boards of supervisors of different counties in applying the rule of true cash value, and does not necessarily result in uniformity of valuation as between counties. The purpose of state equalization is to correct improper application of the true cash value rule and resulting variations in assessments, as between counties."⁸⁴

⁸² U. S. ex rel. Falls City Construction Co. v. Jimmerson, 222 Fed. 489 (C.C.A. 8th, 1915) *cert. denied*, 239 U. S. 641.

⁸³ Huron-Clinton Metropolitan Authority v. Boards of Sup'rs. of Wayne, etc. Counties, 304 Mich. 328, — 8 N.W. 2d 85, 88 (1943).

⁸⁴ *Id.* at — 8 N.W. 2d at 89.

That a mandamus will lie is clearly proved by the action of the Iowa court in a case almost squarely in point with the problem here presented.⁶⁵ There the state commission had made some original assessments and also acted as a board of equalization. The plaintiff, an individual taxpayer, appeared before the board and protested that the commission had made the original assessments too low, and had failed to equalize among counties, some counties being assessed at 100% of actual value, and others at 50%. The commission adopted the novel position that such practice was authorized since it was a custom of long standing (a position which some taxpayers in this state might well consider our own board to have taken) When the commission failed to heed the taxpayer's protests he sought action in the courts, and was there more successful. In answer to the argument that a taxpayer had no standing to question the action (or non-action) of the board, the court states

"If the state has any interest in this case it is that its officers perform their duties. The defendants are violating a legislative command of the State to assess and tax all property at its actual value. Their failure to comply with this mandate imposes an unfair and disproportionate share of the tax burden of the State upon the plaintiff and those in like situation, and permits others to escape their equitable share of that burden."⁶⁶

Commenting on the position of the board that they were doing what others before them had done, the court dismisses that attempted justification by saying

" they have no right to disregard this legislative injunction, because they deem it unwise or inexpedient, or because others in their position in the past have so violated the law. Under the law and the facts they may be compelled by mandamus *not only to act, but to so act as to bring about a certain result*, that is, the valuation of property at its actual value."⁶⁷ (italics added)

After considering other possible remedies, and deciding that they are inadequate, and in answer to the frequently advanced contention that mandamus will not lie to compel a choice of judgment, the court, citing Ruling Case Law, held that

⁶⁵ Pierce v. Green, 229 Iowa 22, 294 N.W 237 (1940).

⁶⁶ *Id.* at — 294 N.W at 245.

⁶⁷ *Id.* at — 294 N.W at 248.

"A public officer or inferior tribunal may be guilty of so gross an abuse of discretion, or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined, or to act at all, in contemplation of law; and in such a case a mandamus would afford a remedy where there was no other adequate remedy provided by law."⁸⁸

Assuming the improbable, that the Kentucky board has no knowledge of existing conditions, it would appear that a taxpayer from one of the more heavily burdened counties ought to lay the foundation for his appeal to the courts by making an appearance before the board and protesting their methods. After having done so, he will be in a position where he can seek the assistance of the court.

CONCLUSION

In conclusion, it appears that the individual taxpayer and property owner has fairly adequate machinery available to correct an individual assessment. If he is alert to his possibilities and statutory rights, he is likely to secure a fair assessment, by appeal to the local board of supervisors. If the assessing officials act outside their authority, he has a remedy available through the courts.

The process of correction of assessments on a county-wide level so as to equalize the burden among the different counties, on the other hand, appears burdensome and inadequate. While the machinery for correction theoretically exists, it requires but little perspicuity to conclude that in operation the result is far from equitable. It is not within the purview of this note to outline a remedy, or even a partial cure. Certain it is that the machinery as a whole is badly in need of an overhaul, in view of the fact that many cities are already taxing at the constitutional limitation⁸⁹ and the state meets the cry for expanded

⁸⁸ *Id.* at — 294 N.W. at 249.

⁸⁹ *Ky. City Finances* (1946) UNIV. OF KY. BUREAU OF BUSINESS RESEARCH BULL. No. 12, at p. 130.

Some idea of the urgency of the problem faced by municipalities can be gathered from two newspaper stories appearing on the same day. The (Ky.) *Courier-Journal*, Feb. 12, 1948, sec. 2, p. 2, col. 1, states that the Attorney General's office declared it would be illegal for the city of Newport to tax "gaming interests" in order to meet a pending financial crisis in that city. The *Lexington (Ky.) Leader*, Feb. 12, 1948, p. 1, col. 5, reports that at a meeting of the

services with the answer that revenues will not permit. Whether the solution lies in actual full value assessment (theoretically required now), closer supervision of local assessment (also theoretically required now¹⁰⁰), or a state agency to handle all assessments, state, county, and local, is a problem for the legislature and existing enforcement agencies. In the absence of corrective measures undertaken in his behalf, it is suggested that the taxpayer might himself move to correct the condition, or at least call attention to his plight, by action to compel the existing agencies to act.

Kentucky chapter of Public Administrators, the Lexington Finance Director stressed the need for a re-assessing in that city, pointing out that the assessor "does the best he can, but it's not good enough." At the same meeting the newspaper reports, the City Finance Director of Louisville declared that property there "is notoriously under-assessed," and that the entire problem is complicated by "too many politicians—there's your difficulty—they get in our way"

¹⁰⁰ KY. R. S. (1946) secs. 131.140 (3), 132.420.

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