Washington and Lee Law Review

Volume 38 | Issue 4 Article 3

Fall 9-1-1981

Virginia Tax Procedures: Unfinished Business

J. Timothy Philipps

VIRGINIA TAX PROCEDURES: UNFINISHED BUSINESS

J. TIMOTHY PHILIPPS*

Virginia tax procedures have been aptly described as "more a matter of lore than statute."[1] The commonwealth's tax appeals procedure is a prime example: despite obvious problems with the current procedure, the General Assembly has failed to enact detailed legislation creating an adequate tax appeals procedure and, in fact, recently considered and rejected such legislation.

The time has come for the Virginia General Assembly to create an accessible, fair, and efficient tax appeals procedure. This article will first consider the historical development of Virginia tax procedures and describe the current commonwealth tax appeals procedure. Second, it will focus on serious problems at various levels of the present procedure, which themselves reveal the pressing need for procedural reform. Third, it will consider the desirability of a statewide independent tax appeals adjudication body and, finding a significant need for such an entity, will consider questions concerning its form and procedure.

I. Historical Background

The available materials concerning Virginia tax procedures consist of a sparse statutory framework,[2] no comprehensive published regulations, a few mostly old judicial decisions,[3] two law review articles,[4] and a

---

* Professor of Law, Washington and Lee University. B.S. 1962, Wheeling College; J.D. 1965, Georgetown University; LL.M. 1966, Harvard University. This article was made possible through a research grant from the Frances Lewis Law Center. The author wishes to thank Thomas R. Bender, a third-year student at Washington and Lee School of Law, for his assistance in the preparation of this article.

All nonpublished materials cited in this article have been placed on file in the office of the *Washington and Lee Law Review*, Lexington, Virginia.

[1] Letter from William L.S. Rowe, member, Practices and Procedures in the Collection and Administration of State Taxes Study Committee, to Author (May 20, 1981).

[2] VA. CODE §§ 58-28 to -48.5, §§ 58-1118 to -1159 (Repl. Vol. 1974 & Cum. Supp. 1981) contain most of the statutory material concerning Virginia tax procedure.

[3] *See, e.g.*, Commonwealth v. United Airlines, 219 Va. 374, 248 S.E.2d 124 (1978); Webster v. Department of Taxation, 219 Va. 81, 245 S.E.2d 252 (1978); Department of Taxation v. Lucky Stores, Inc., 217 Va. 121, 225 S.E.2d 870 (1976); Department of Taxation v. Progessive Community Club, 215 Va. 732, 213 S.E.2d 759 (1975); Winchester T.V. Cable v. State Tax Comm'r, 216 Va. 286, 217 S.E.2d 885 (1975); Golden Skillet Corp. v. Commonwealth, 214 Va. 276, 199 S.E.2d 511 (1973); Commonwealth v. Radiator Corp., 202 Va. 13, 166 S.E.2d 44 (1960); Commonwealth v. P. Lorillard Co., 129 Va. 74, 105 S.E. 683 (1921); Commonwealth v. Smallwood Mem. Inst., 124 Va. 142, 97 S.E. 805 (1919); Commonwealth v. Tradegar Co., 122 Va. 506, 95 S.E. 279 (1918); Union Tanning Co. v. Commonwealth, 123 Va. 610, 96 S.E. 780 (1918); Commonwealth v. Schmelz, 114 Va. 364, 76 S.E. 905 (1913); Johnson v. Trustees of Hampton Normal & Agric. Inst., 105 Va. 319, 54 S.E. 31 (1906).

[4] *See* Davis, *Ancient Simplicity is Gone: Procedural Aspects of Relief from Taxes*

great deal of oral tradition. The reasons for the basically unstructured nature of the commonwealth's tax procedures are, of course, speculative but the historical authority of the office of Virginia Tax Commissioner was clearly a significant factor. One individual, C.H. Morrissett, held the position from 1926 until 1969, more than forty years.[5] Not surprisingly, because of his long tenure in office and the basic one-party political structure in Virginia during those years, Commissioner Morrissett was accorded, and exercised, extraordinary influence over the development of Virginia tax law.

Prior to 1966, the Virginia Department of Taxation had never published comprehensive written regulations. Under the previous procedure, when a taxpayer challenged an assessment by the Tax Department in court, the Commissioner or one of his subordinates took the stand and testified as to the Department's interpretation of the law. As this procedure evolved, the courts eventually applied to such testimony the administrative law doctrine which accords "great weight" to published statutory interpretations of an administrative official. Thus, the mere testimony of the Commissioner as to his view of the law was accorded the great weight normally reserved for published regulations.[6]

Several decisions by the Virginia Supreme Court during this period reflect the great deference accorded to the Commissioner's view of the law. In *Richmond Food Stores, Inc. v. Richmond*,[7] a taxpayer used a letter from the Commissioner in the trial court to support his position that he should be taxed under a certain classification for purposes of a city license tax. The supreme court accepted the taxpayer's contention, and declared, "Mr. Morrissett is a recognized tax expert, and his views upon the question involved are entitled to the same careful consideration we would accord to a recognized text-writer upon a given subject."[8] In *Roanoke v. Michaels Bakery Corp.*,[9] the City of Roanoke claimed it had authority to tax the delivery trucks, furniture, and fixtures of a bakery as tangible personal property, while the commonwealth asserted the

---

Administered by the Virginia Department of Taxation, 9 U. RICH. L. REV. 121 (1974) [hereinafter cited as Davis]; Note, *Property Taxation in Virginia*, 11 U. RICH. L. REV. 589, 642 (1977) [hereinafter cited as *Property Taxation in Virginia*].

[5] *See* 1925-26 REPORT OF THE SECRETARY OF THE COMMONWEALTH at 8; 1968-69 REPORT OF THE SECRETARY OF THE COMMONWEALTH at 18.

[6] In federal tax law, judicial deference is accorded only to Treasury Regulations published in the Federal Register and subject to public notice and comment. It is not even accorded to published revenue rulings and procedures. *See* Stubbs, Overbeck & Assoc's v. United States, 445 F.2d 1142 (5th Cir. 1971). The Introduction to each edition of the Internal Revenue Bulletin contains the following statement: "Rulings and procedures in the Bulletin do not have the force and effect of Treasury Department Regulations . . . ." Moreover, the Internal Revenue Code prohibits according any precedential value to private letter rulings. *See* I.R.C. § 6110(j)(3); Rev. Proc. 80-20, § 17, 1980-1 C.B. 633.

[7] 177 Va. 592, 15 S.E.2d 328 (1941).

[8] *Id.* at 596, 15 S.E.2d at 329.

[9] 180 Va. 132, 21 S.E.2d 788 (1942).

right to tax it as intangible property. The Tax Commissioner testified that delivery trucks, furniture, and fixtures should be classified as intangible property. Despite the orthodox property law classification of these items as tangible property, the court accepted the Commissioner's view, stating "the practical construction given to a constitutional provision by public officials and acted upon by the people is . . . entitled to great weight."[10]

With the Tax Commissioner exercising this kind of authority with respect to his interpretations of the law, and without the benefit of any published regulations, taxpayers were in a very difficult position when they disputed an assessment made by the commonwealth.[11] A survey of reported Virginia Supreme Court decisions from 1945 to 1980, undertaken in connection with this article,[12] indicates a quite favorable attitude on the part of the court toward the Commissioner's position. Of the commonwealth tax cases, the supreme court decided sixty-nine per-

---

[10] *Id.* at 143, 21 S.E.2d at 793.

[11] In a Virginia tax case, the burden is on the taxpayer to prove that the assessment is contrary to law, or that the tax administrator abused his discretion and acted in an arbitrary, capricious, or unreasonable manner. Department of Taxation v. Lucky Stores, 217 Va. 121, 127, 225 S.E.2d 870, 874 (1976).

[12] A summary of the survey results follows:

A) Total number of cases: 85

commonwealth:	local:
36/85 (42%)	49/85 (58%)

B) Total trial court decisions reversed on appeal: 43/85 (51%)

commonwealth:	local:
20/36 (56%)	23/49 (47%)

C) Trial court decisions in favor of taxpayer: 43/85 (51%)

commonwealth:	local:
22/36 (61%)	21/49 (43%)

D) Trial court decisions in favor of taxpayer reversed on appeal: 24/43 (56%)

commonwealth:	local:
17/22 (77%)	7/21 (33%)

E) Trial court decisions in favor of taxing authority: 42/85 (49%)

commonwealth:	local:
14/36 (39%)	28/49 (57%)

F) Trial court decisions in favor of taxing authority reversed on appeal: 19/42 (45%)

commonwealth:	local:
3/14 (21%)	16/28 (57%)

G) Supreme court decisions in favor of taxpayer: 41/85 (48%)

commonwealth:	local:
11/36 (31%)	30/49 (61%)

H) Supreme court decisions in favor of taxing authority: 44/85 (52%)

commonwealth:	local:
25/36 (69%)	19/49 (39%)

cent in favor of the Commissioner and only thirty-one percent in favor of the taxpayer. The pattern was reversed in local tax cases. Sixty-one percent of the decisions favored the taxpayer while thirty-nine percent favored the taxing authority. Significantly, of twenty-two trial court decisions in favor of the taxpayer in commonwealth tax cases, seventeen were reversed by the supreme court on appeal. This could indicate a more favorable attitude toward taxpayers in the local circuit courts than in the supreme court.

Perhaps because of this judicial deference to the Commissioner's interpretations, and to his position in general, there were very few decided commonwealth tax cases in the supreme court—and presumably in the circuit courts also—prior to 1970.[13] The odds against a taxpayer winning a court test were such that, in most situations, it was wiser to settle or give in.[14] Apparently, most tax disputes during Commissioner Morrissett's tenure were decided by compromise and settlement rather than by litigation, and the procedures for settlement of dispute were extremely informal.

Several significant developments occurred, however, between 1966 and 1972. First, the Virginia General Assembly enacted the Retail Sales and Use Tax in 1966,[15] and the Department of Taxation issued regulations under it in that same year.[16] These were the first and only comprehensive regulations ever published with respect to a Virginia commonwealth tax. In addition, Virginia adopted the concept of conformity to the federal income tax as of 1972.[17] Finally, Commissioner Morrissett resigned in 1969 and was replaced by William H. Forst in 1971.[18] Commissioner Forst instituted a field audit staff for the Tax Department, which

---

[13] The survey revealed only 16 reported commonwealth tax cases in the Virginia Supreme Court during the 25 years from 1945 to 1970.

[14] The "great weight" rule remained entrenched in the supreme court until very recently. In Winchester T.V. Cable Co. v. Comm'r, 216 Va. 286, 290, 217 S.E.2d 885, 889 (1975), the court stated, "[C]onstruction of a statute by a State official charged with its administration is entitled to great weight." The court made no distinction between published and unpublished regulations in this regard. But, in Department of Taxation v. Champion Int'l Corp., 220 Va. 981, 992, 265 S.E. 2d 720, 726 (1980), the court finally distinguished between published and unpublished interpretations:

> The Department may not rely upon administrative policy not promulgated to the public. If the interpretation placed upon a statute by those charged with its enforcement has continued for a long period of time, it is presumed the legislature has acquiesced in the interpretation . . . But the presumption of legislative acquiescence presupposes knowledge of the administrative construction. Without publication of the construction placed upon the statute by the Department, no presumption of legislative acquiescence attaches.

Furthermore, the Commissioner, under recently enacted legislation, will specifically be denied the "great weight" presumption for unpublished interpretations after 1984. *See* text accompanying notes 25-35 *infra*.

[15] 1966 Va. Acts ch. 151, enacting VA. CODE §§ 58-441.1 to .51.

[16] *See* Virginia Sales, Receipts or Use Taxes, STATES AND LOC. TAXES (P-H) ¶ 22,100.

[17] 1971 Va. Acts, Spec. Sess. ch. 171, enacting VA. CODE §§ 58-151.01 to .41.

[18] 1971 REPORT ON THE SECRETARY OF THE COMMONWEALTH at 51.

previously had only an office audit staff.[19] The field audit staff concentrated largely on the sales and use tax. This augmented audit activity caused an increase in the number of disputes and, eventually, in the amount of litigation. Subsequently, the Tax Department expanded audit activity in the corporate income tax area as well, and the number of disputes in that area also increased.[20] Furthermore, although there is no empirical data to substantiate it, the feeling among some practitioners was that the Department became less willing to settle cases by compromise under the new Commissioner.

All of these developments converged to create a need for more regularized dispute settlement procedures. Although the very informal previous system had apparently satisfied both the Tax Department and taxpayers, the situation had changed drastically by the mid-1970's. Practitioners perceived an urgent need for improvement in Virginia's procedures, which led to the formation of a "State Tax Law Revision Task Force" in 1977. The Task Force was a joint project of the Committees on Taxation of the Virginia Bar Association, the Virginia State Bar and the Virginia Society of Certified Public Accountants. The Task Force, which studied several aspects of the procedural system, focused primarily on procedures for resolution of disputes and on the need to issue published regulations.

In December, 1978, the Task Force issued its report.[21] The Task Force perceived two basic defects in the procedural system: 1) the inadequacy of administrative and judicial refund procedures,[22] and 2) the lack of published regulations in conjunction with the "great weight" afforded unpublished interpretations of the Tax Department.[23] With respect to refund procedures, the Task Force suggested that the Tax Department institute a more regularized administrative dispute resolution procedure. The Task Force proposed that disputes which reach the courts be heard only by certain designated judges to be appointed by the supreme court.[24] The Task Force reasoned that, by limiting the hearing of tax

---

[19] The Tax Department added one hundred new auditors. Interview with William H. Forst, Virginia Tax Commissioner (June 23, 1981) [hereinafter cited as Forst Interview].

[20] *Id.*

[21] REPORT OF THE STATE TAX LAW REVISION TASK FORCE (Dec. 18, 1978) [hereinafter referred to as TASK FORCE REPORT].

[22] *Id.* at 2.

[23] *Id.* at 3-4.

[24] *Id.* at 13. The Task Force had considered and rejected two other dispute resolution procedures: 1) creation of a specialized tax court; and 2) designation of specific courts to hear all appeals from Tax Commissioner determinations. It rejected these alternatives because:

> [T]he Joint Task Force does not believe there is sufficient tax refund litigation to merit the expense of creating a separate tax court. The second alternative was seriously considered by the Joint Task Force and has the Joint Task Force's support. The only reason such a provision is not incorporated in the Joint Task Force's recommended statutes is that a similar proposal (House Bill 579 (1972))

cases to a certain few circuit judges, those judges would become expert in the tax law. Eventually, this proposal would result in those judges constituting a de facto tax court. The Task Force's other major recommendation was to limit the "great weight" doctrine for the Commissioner's administrative interpretations to those which had been published in a regulation of which the public had notice and the opportunity to comment.[25]

In the wake of the Task Force Report, the General Assembly created the "Practice and Procedures in the Collection of State Taxes Study Committee" to consider its recommendations.[26] The Study Committee met several times during 1979, and issued a report in early 1980.[27] The Study Committee originally focused on the problem of a lack of published regulations. During the course of the Study Committee's deliberations, however, the Tax Commissioner issued a response to the Task Force Report in which he suggested that the legislature create an independent Board of Tax Appeals.[28] The response detailed the proposal as follows:

> [A]s an alternative to the task force proposal the Department of Taxation recommends adding another step to the administrative process in the form of a Virginia Board of Tax Appeals. The members of the Board would be completely independent of the Department of Taxation—actually appointed by the Governor. The Board would hear and determine appeals from final rulings from the Department of Taxation. The Department proposes that Board hearings be public and that all proceedings before the Board be officially reported and all records of proceedings be judicial records. Decisions of the Board would be subject to judicial review.[29]

The Study Committee considered, and ultimately accepted, Commissioner Forst's proposed independent Board of Tax Appeals.[30]

House Bill 990, which was designed to implement the Study Committee's recommendations, was introduced in the General Assembly on

---

was previously considered and rejected by the General Assembly. The Joint Task Force, however, believes that allowing appeals only to certain circuit courts would produce many of the same benefits as a system whereby the trial judge in tax cases is designated by the Chief Justice of the Supreme Court.

Id. at 8.

[25] *Id.* at 2.

[26] *See* H.J. Res. 342 (1979).

[27] REPORT OF THE PRACTICES AND PROCEDURES IN THE COLLECTION AND ADMINISTRATION OF STATE TAXES STUDY COMMITTEE, H. Doc. No. 30 (1980) [hereinafter referred to as STUDY COMMITTEE REPORT].

[28] DEPARTMENT OF TAXATION'S RESPONSE TO THE "REPORT OF THE STATE TAX LAW REVISION TASK FORCE" 9-10 (1979) [hereinafter cited as RESPONSE TO TASK FORCE REPORT].

[29] *Id.* at 9.

[30] Minutes of Study Committee (September 27, 1979), at 7-12; Minutes of Study Committee (October 15, 1979), at 7-11.

February 4, 1980. One provision of the Bill precluded the Commissioner from depending upon administrative interpretations in litigation unless the interpretations had been published in the form of a regulation promulgated in accordance with the Administrative Process Act.[31] The Bill also contained a provision creating a Board of Tax Appeals, as suggested by Commissioner Forst. In addition to these proposals, the Study Committee recommended that the General Assembly revise the statute of limitations.[32] Finally, the Study Committee recommended that the General Assembly repeal the Commissioner's automatic right to a rehearing within six months after a circuit court decision,[33] and add definitions to the code to clarify its standing and limitations provisions.[34]

In the course of hearings by the House Finance Committee, various members of that Committee raised objections to the proposed Board of Tax Appeals. Consequently, the House Finance Committee deleted that part of the legislation. The General Assembly enacted most of the Study Committee's remaining recommendations. Most significantly, it enacted the proposed provision requiring publication of comprehensive regulations.[35] The Act substantially rewrote Chapter 22 of Title 58 of the Virginia Code, and constituted a momentous improvement in Virginia tax procedures. The General Assembly failed, however, to deal with the fundamental nature of the tax appeals process: the unfinished business.

II. Current Tax Appeals Procedure in Virginia

The basic law governing tax appeals appears in Chapter 22 of Title 58 of the Virginia Code. In typical case involving a tax administered by the Department of Taxation,[36] the taxpayer's first contact with the state will

---

[31] Virginia Administrative Process Act, VA. CODE § 9-6.14:1 to :21 (Cum. Supp. 1981).

[32] STUDY COMMITTEE REPORT, *supra* note 27, at 7. The Study Committee's recommended revisions of the statute of limitations were as follows: 1) give the taxpayer a three year statute of limitations from the date of mailing of notice of assessment to contest it either before the Tax Commissioner or the courts; 2) allow a taxpayer to file a protective claim for a refund which extends the limitations period to one year beyond the date the Commissioner makes a decision on the claim; and 3) make the limitations period run three years from the date the tax was due or paid (whichever is later) rather than from the December 31 after that date.
Id.

[33] *Id.* at 6.

[34] *Id.* at 7.

[35] 1980 Va. Acts ch. 633. In addition, the General Assembly reduced the time in which the Commissioner could exercise his automatic rehearing right from six months to twenty-one days from the time the circuit court order is certified to the Commissioner by the clerk. *See* VA. CODE § 58-1137 (Cum. Supp. 1981). The General Assembly also enacted the Study Committee's basic recommendations with respect to standing and limitations. *See id.* §§ 58-441.38, -1117.20.

[36] VA. CODE § 58-1117.20(4) (Cum. Supp. 1981) provides:

> "*Tax administered by the Department of Taxation*" shall include the State and local recordation and probate taxes, the writ tax, the income tax including the withholding and estimated taxes, the inheritance and gift taxes, the estate tax,

be through an auditor examining his records. The auditor will issue a report and review it with the taxpayer. If the taxpayer disagrees with the report, he can request a review by the auditor's supervisor. Normally, the supervisor will not change a report unless there is a clear error. The report then goes to the Field Services Division of the Tax Department which reviews the audit. There sometimes may be lengthy correspondence between the Field Services Division and the taxpayer at this stage. If the taxpayer and the Division still do not agree, the Division will issue an assessment for any amount of additional tax which it deems the taxpayer owes the commonwealth. At this point, the taxpayer may file, within 90 days, an application with the Commissioner for correction of the assessment.[37] The Tax Department may not collect the tax after it has been notified by the taxpayer of his intent to file such an application.[38]

Once the taxpayer files his application for correction of the tax assessment, the Commissioner is further stayed from collecting the tax until he has made a final determination concerning the correctness of the assessment.[39] Following the application, there may be informal contact between the taxpayer and the Department, and ultimately the Commissioner or his delegate may hold a hearing[40] on the taxpayer's application.[41] This hearing is a relatively informal proceeding held at Tax Department Headquarters in Richmond at which the taxpayer has full opportunity to present his arguments.[42] The taxpayer may or may not be represented by counsel at the hearing. Various personnel from within the Tax Department may be present. Normally, a representative of the relevant

---

the State license taxes, the State tax on intangible personal property, the State and local sales and use taxes, the State and local bank stock and bank franchise taxes, the State tobacco tax, the aircraft sales and use tax, the forest products tax, the egg promotion tax, the peanut excise tax, the slaughter hog and feeder pig tax, the soybean tax, the litter tax, the soft drink excise tax and the malt beverages tax.

This article does not consider appeals concerning taxes administered by the State Corporation Commission which has both administrative and judicial powers and, accordingly, handles its own tax appeals. *See id.* § 58-1122 to -1129 (Repl. Vol. 1974 & Cum. Supp. 1981).

[37] *Id.* § 58-1118.

[38] *Id.* Upon receipt of notice of intent to file an application for correction of an assessment, the Commissioner must refrain from collecting the tax until the time for filing has expired, unless he determines that collection is in jeopardy. *Id.*

[39] *Id.* § 58-1119.

[40] There are no published regulations governing hearing procedures. The following description of hearing procedures summarizes interviews with Tax Department personnel and tax practitioners who have been involved in the process.

[41] A hearing is not necessary in order to obtain a formal ruling from the Commissioner. The current practice of the Department is to issue formal rulings for erroneous assessment appeals "as a result of correspondence without a hearing or an informal hearing at the request of the taxpayer or just a letter of application." Minutes of Study Committee (June 26, 1979), at 10.

[42] Because the facts are not in dispute in the majority of cases, the issues generally involve application of law to uncontested facts. TASK FORCE REPORT, *supra* note 21, at 6.

operating division will attend, along with a member of the Tax Policy Division, which has responsibility for the hearing and appeal process within the Department. The Commissioner usually is present at these hearings also. The form of the taxpayer's application for correction of the tax assessment varies from case to case. The application may be a relatively informal and brief document or it may be the equivalent of a legal memorandum or brief. Following the hearing, the Commissioner issues a decision in which he either upholds the Department's assessment or overturns it and determines the proper amount of tax due. After the decision, the Department will usually collect the tax promptly, since the statute authorizes collection after the Commissioner has made his final determination.[43]

Upon the Commissioner's adverse determination, the taxpayer has the option to apply to a local circuit court for correction of the assessment.[44] The Department of Taxation is the named defendant in such a case, and the proceeding is treated as an action at law, subject to the Rules of Court.[45] The taxpayer has no right to petition the circuit court unless he has paid the full amount of the tax alleged to be due.[46] Since the action in the circuit court is de novo, the taxpayer and the Commissioner must again present the complete case to the court, rather than merely presenting a record of the Tax Department hearing.[47]

To bring suit in local circuit court, a taxpayer need not first have exhausted his administrative remedy of a departmental hearing. A taxpayer may, at his option, forego application to the Commissioner for correction of an erroneous assessment, and proceed directly to the circuit court. If the taxpayer chooses this option, however, he will have to pay the assessed tax soon after the assessment. The Commissioner will not be prohibited from collecting the tax in the absence of an application to the Commissioner for correction of an erroneous assessment,[48] and payment of the tax is a prerequisite to the circuit court action.[49]

If a taxpayer elects to apply for an administrative determination prior to bringing suit in local circuit court, he should be wary of a potential procedural pitfall. The statute of limitations for proceeding in the circuit court continues to run even after the taxpayer has filed the administrative application. There is no provision which tolls the statute upon the filing of the application.[50] The statute does provide, however, that a taxpayer who has paid an assessment may preserve his right to proceed in the circuit court by filing a protective claim for a refund with

---

[43] VA. CODE § 58-1119 (Cum. Supp. 1981).

[44] *Id.* § 58-1130.

[45] *Id.*

[46] *Id.*

[47] Usually, a record of the Tax Department hearing would not even be made.

[48] *Id.* §§ 58-1118 to -1119.

[49] *Id.* § 58-1130.

[50] VA. CODE § 58-1130 (Cum. Supp. 1981) provides that the statute of limitations runs three years from the date of assessment of the tax.

the Commissioner.[51] This extends the time limitation to the end of one year after the date of the Commissioner's decision on such refund claim. Alternatively, the Commissioner and the taxpayer may agree on a waiver of the statute of limitations.[52]

If a circuit court issues a decision adverse to the Tax Commissioner, he has the right to file a petition for a rehearing. He must file the rehearing petition within twenty-one days from the time the court's order is certified by the clerk to the Commissioner.[53] The Commissioner's right to a rehearing has been criticized by some on the ground that the taxpayer has no similar right to a rehearing.[54] The Commissioner's rehearing right is apparently an historical remnant from the prior practice under which the Tax Department was not a party to the taxpayer's circuit court action, and the commonwealth's interests were represented by the local Commonwealth's Attorney. The rehearing gave the Commissioner an opportunity to present his arguments, thereby facilitating his oversight of commonwealth tax law.[55] Once the circuit court's decision is final, either the taxpayer or the Commissioner may appeal it to the Supreme Court.[56]

In addition to these procedures, a taxpayer may file an amended return in order to claim a refund.[57] The statute also authorizes the Tax Commissioner to take the initiative in correcting an erroneous assessment.[58] One old and obscure case recognized the possibility of a taxpayer bringing an action in assumpsit for refund of taxes paid under compulsion.[59] The General Assembly has, however, generally precluded taxpayers from obtaining injunctive relief against the assessment or collection of taxes.[60]

Local tax procedures follow the same basic pattern as state procedures.[61] When a taxpayer contests a property tax assessment, his reme-

---

[51] *Id.* § 58-1119.1.

[52] VA. CODE § 8.01-235 (Repl. Vol. 1974) provides that the statute of limitations is an affirmative defense and is no longer jurisdictional in the case of purely statutory remedies such as the § 58-1130 application for correction of an erroneous assessment. *See also* Commonwealth v. Columbian Paper Co., 143 Va. 332, 130 S.E. 421 (1925).

[53] VA. CODE § 58-1137 (Cum. Supp. 1981).

[54] *See* STUDY COMMITTEE REPORT, *supra* note 27, at 7; TASK FORCE REPORT, *supra* note 21, at 28-29. Both reports recommended abolition of the Commissioner's right to a rehearing. *Id.*

[55] *See* TASK FORCE REPORT, *supra* note 21, at 28-29 (calling the rehearing an "anachronism").

[56] VA. CODE § 58-1138 (Repl. Vol. 1974).

[57] *Id.* § 58-1118.1 (Cum. Supp. 1981).

[58] *Id.* § 58-1153 (Repl. Vol. 1974).

[59] Charlottesville v. Marks' Shows Inc., 179 Va. 321, 18 S.E.2d 890 (1942). The court denied the taxpayer relief, however, on the ground that merely stating that payment was made "under protest" did not amount to paying under compulsion. *Id.* at 332-34, 18 S.E.2d at 896-97.

[60] VA. CODE § 58-1158 (Repl. Vol. 1974); *see* Davis, *supra* note 4, at 132-33.

[61] For a more comprehensive treatment of procedures in cases involving local property taxes, *see Property Taxation in Virginia*, *supra* note 4, at 646-49.

dies consist of a hearing before the assessing body[62] and a hearing by a local Board of Equalization appointed by the circuit court.[63] The taxpayer or the locality may appeal a decision by the Board of Equalization to the local circuit court or city court of record.[64] As with state taxes, there is no requirement that the taxpayer exhaust his administrative remedies and the court proceeding is de novo.[65] Thus, the taxpayer is not required to appeal before either the assessing body or the Board of Equalization prior to filing the court application. There is no provision, however, for delaying collection of the disputed tax while the taxpayer is pursuing his remedies. While there also is no specific code provision for an appeal to the supreme court from the local court, such appeals have been allowed in the case of both the taxpayer and the taxing authority.[66]

In summary, the taxpayer has informal administrative remedies available at both the commonwealth and local level, along with a formal application to a court for correction of an erroneous assessment. Although a further appeal to the supreme court is also available, few taxpayers reach that stage.[67] Furthermore, it usually would be worthwhile for a taxpayer to pursue the judicial remedies only in cases where there are substantial amounts involved. Therefore, most of the activity with respect to disputes procedures probably takes place at the administrative level on an informal basis.

III. Critique of Current Procedures

The 1980 legislation, especially its requirement that the Tax Department publish comprehensive regulations, accomplished substantial improvement in Virginia tax procedures.[68] The dispute resolution procedures themselves, however, remain substantially unchanged.

On the positive side, Virginia's current system for administrative review is flexible and allows taxpayers easy access to Tax Department officials. The administrative procedures are informal and often do not require that the taxpayer be represented by counsel. These procedures reduce the taxpayer's cost of contesting an assessment at the administrative level, and allow a desirable degree of give and take between the Department and the taxpayer in resolving disputes. Moreover, the informal administrative procedures enable the parties to fully air the issues, cull out the irrelevant ones, and focus their attention—and the later at-

---

[62] VA. CODE § 58-792.01 (Cum. Supp. 1981).

[63] *Id.* § 58-776.4; §§ 58-895 to -914 (Repl. Vol. 1974 & Cum. Supp. 1981).

[64] *Id.* § 58-776.4 (Cum. Supp. 1981); § 58-907 (Repl. Vol. 1974); § 58-1145 (Cum. Supp. 1981).

[65] *See* text accompanying notes 44-49 *supra.*

[66] *See, e.g.*, Smith v. City of Covington, 205 Va. 104, 135 S.E.2d 220 (1964) (taxpayer); Commonwealth v. Schmelz, 116 Va. 62, 81 S.E. 45 (1914) (taxing authority).

[67] Only 85 commonwealth and local tax cases involving § 58-1130 or § 58-1145 applications were reported by the Virginia Supreme Court between 1945 and 1980. *See* note 12 *supra.*

[68] *See* VA. CODE § 58-48.6 to .8 (Cum. Supp. 1981).

tention of a court—on the more relevant issues. Apparently, the Tax Department and the taxpayer are able to agree to a statement of facts in most instances so that only the legal issues are contested.[69] Coupled with the extremely flexible administrative procedures and the easy availability and helpfulness of Tax Department personnel to taxpayer representatives,[70] it is obvious that these aspects of the system should be maintained.

Nevertheless, the ultimate decision at the administrative level is made by the Tax Commissioner, who is also the officer charged with enforcement. Such a combination of enforcement and adjudication functions in the same office is normally undesirable.[71] It is most difficult for anyone to be both prosecutor and judge, and, even if it were possible for one to combine these functions satisfactorily, the appearance of impartiality on the part of the decision-maker is severely compromised. The appearance of impartiality is important from the standpoint of taxpayer confidence in the system and remains so, even if in fact the combination of these conflicting functions results in no unfairness.[72] Therefore, even given the desirability of retaining the present administrative appeal procedure, there remains a need for review by an impartial, independent body at some stage.

If the taxpayer elects to pursue the judicial remedy for correction of an erroneous assessment, he has the advantage of appearing in a local court. The taxpayer is subject to less expense than if he had to appear in a distant place, and is permitted to wage the judicial contest in more familiar surroundings. Some taxpayers believe that they receive better treatment at the hands of the local court than they would in a distant one.[73] However, the judicial proceeding has more numerous, and perhaps more serious, problems than the administrative proceeding. First, before a taxpayer may apply to a court for correction of an erroneous

---

[69] *See* TASK FORCE REPORT, *supra* note 21, at 6.

[70] *See* Minutes of Study Committee (June 26, 1979), at 5.

[71] *See* Kray, *California Tax Court: An Approach to Progressive Tax Administration*, 37 S. CAL. L. REV. 485, 488 (1964) [hereinafter cited as Kray]; Hellerstein, *Judicial Review of Property Tax Assessments*, 14 TAX L. REV. 327, 349 (1959). Tax Commissioner Forst has recognized the desirability of separating the enforcement and adjudication functions:

> [Mr. Forst] noted one of the points made today was that a taxpayer should not pursue an administrative appeal before the person making the ruling being appealed. He felt there should be another body to hear the administrative appeal to determine impartially whether the Department has interpreted the law or their regulations correctly.

Minutes of Study Committee (September 27, 1979), at 7; *see also* Federal Administrative Procedure Act, 5 U.S.C. § 554(d)(2) (1977).

[72] "[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. 698, 701-02 (1913).

[73] Taxpayers' preference for a local court was a factor in the Study Committee's deliberations. As Mr. Rowe noted, "[M]any people refuse to give up the right to sue before 'their judge in their local circuit court.'" Minutes of Study Committee (June 26, 1979), at 9.

assessment, the taxpayer must pay the tax alleged to be due.[74] Therefore, unlike the federal dispute process, there is no opportunity for the Virginia taxpayer to contest the tax before an independent, impartial forum prior to having to pay the amount in dispute. The Virginia procedure can present a substantial hardship to a taxpayer suddenly faced with an assessment, especially in the case of smaller businessmen. The tax collector already begins any dispute with a substantial advantage: in the tax law, the taxpayer is presumed guilty until he proves himself innocent.[75] It does not seem fair or even necessary in most cases to add to this advantage the power to require payment of the tax prior to adjudication before an independent tribunal.

Cases which reach the judicial level are spread out over thirty-one different circuit courts throughout the commonwealth.[76] The circuit courts publish few written opinions, and the individual courts operate on a fairly independent basis. This judicial self-reliance contributes to a lack of consistency in decision-making among the circuits. Additionally, because of the fact that there are few written opinions, a body of law and precedent has not been established. The 1980 reforms, which require the Commissioner to publish all orders and written opinions by the circuit courts in commonwealth tax cases,[77] may alleviate this problem to some extent. The 1980 reforms, however, will not entirely eliminate the inconsistency problem, just as it has not been eliminated at the federal level where appeals from the United States Tax Court are also spread out over several circuits. Moreover, the publication requirement applies only to commonwealth tax cases, so that the problem remains unabated with respect to local tax cases.

The current tax appeals procedures in Virginia also present an opportunity for forum shopping by taxpayers in commonwealth tax cases.[78] For example, a trade association may finance a court challenge to a particular Tax Department policy by singling out a test case which involves only one of its member taxpayers. This gives the association the opportunity to pick the best case and the most favorable forum in which to contest the policy. In order to avoid inconsistency among circuits, the Tax Department then has to treat itself as bound by the decision in that particular case, or in the alternative, be forced into a position of applying

---

[74] VA. CODE § 58-1130 (Cum. Supp. 1981).

[75] *See, e.g., id.* § 58-48.8(A), § 58-1130; Department of Taxation v. Lucky Stores, Inc., 217 Va. 121, 225 S.E.2d 870 (1976); Union Tanning Co. v. Commonwealth, 123 Va. 610, 96 S.E. 780 (1918).

[76] 1980 REPORT OF THE SECRETARY OF THE COMMONWEALTH at 150-57.

[77] VA. CODE § 58-48.7(3) (Cum. Supp. 1981).

[78] VA. CODE § 8.01-261(13b) (Cum. Supp. 1981) controls the venue in actions for correction of erroneous assessment under VA. CODE § 58-1130 (Cum. Supp. 1981). It provides for venue in any one of the counties or cities: "(1) Wherein the taxpayer resides; (2) Wherein the taxpayer has a registered office, or regularly or systematically conducts business; (3) Wherein the taxpayer's real or personal property involved in such a proceeding is located; (4) The Circuit Court of the City of Richmond." *Id.* § 8.01-261(13b).

one policy in that particular jurisdiction and another policy throughout the rest of the commonwealth.[79] The present system, therefore, promotes a lack of a uniform statewide tax policy which presents considerable difficulties of administration. The Governor's Commission on Reform of the Property Tax System recognized this problem back in 1974:

> [T]he results of cases on different facts and in different courts are often impossible to apply consistently to taxpayers all over the State. Even where there is no direct conflict in the interpretation of a single set of facts, there are completely different points of view and emphases. In order to derive some consistency the Department is forced to appeal any case which it is unable to apply consistently to all taxpayers, or unable to live with, regardless of its monetary significance. As it would be unfair for the Department to settle any case in which a general principle applicable to many taxpayers is involved, this present system is unduly burdensome both to the taxpayer and the Department; the taxpayer contemplating court action must be prepared to go all the way to the Supreme Court, and the Department must spend untold hours on cases involving miniscule sums.[80]

Furthermore, because any given circuit judge is unlikely to have a substantial number of tax cases, the opportunities for circuit judges to develop expertise in the tax area are extremely limited. This situation leads to unnecessary and avoidable effort on the part of attorneys in educating the judges and on the part of the judges in educating themselves in tax cases. There are presently 114 circuit judgeships in Virginia.[81] With the cases spread out among so many judges, it is obvious that the opportunities for any given judge to develop tax expertise are extremely limited.[82]

The problem is aggravated by the fact that the subject of state and local taxation historically has been neglected by most law schools. Some constitutional law courses may contain a smattering of state and local tax material when considering the commerce clause. Few law schools, however, devote any substantial resources to a discrete course in state and local taxation.[83] Most attorneys and circuit judges, therefore,

---

[79] GOVERNOR'S PROPERTY TAX REFORM STUDY, REFORMING THE VIRGINIA PROPERTY TAX, VOLUME II, at 124-125 (1974) [hereinafter referred to as PROPERTY TAX REFORM STUDY].

[80] *Id.* at 124.

[81] 1980 REPORT OF THE SECRETARY OF THE COMMONWEALTH at 150-57.

[82] *See* PROPERTY TAX REFORM STUDY, *supra* note 79, at 124: "As there are no specialized courts . . . it is necessary to provide a complete education in tax for each judge who tries a tax case. As only a tiny portion of any circuit court's business is tax litigation, it is understandable that most judges are not well versed in the law."

[83] The DIRECTORY OF LAW TEACHERS 1980-81 (West) lists only 17 full-time professors currently teaching state and local taxation who have over five years experience in doing so. Even at schools which do teach this subject, it is often an ignored elective.

graduate from law school with little, if any, knowledge of state and local taxation.

Another criticism of the current tax appeals procedures in Virginia is that the formality of circuit court proceedings make it expensive for a taxpayer to dispute an assessment. In situations where the assessment is not large, the circuit court proceeding is probably too expensive, leaving the taxpayer with no independent tribunal to consider his case. Finally, with the increased audit activity that has occurred over the past ten years, more taxpayers have been brought into the enforcement mechanism, and it is inevitable that smaller claims will increase in number.[84] Some means must be devised to take account of this phenomenon.

The same kinds of criticism can be made with respect to local tax procedures, specifically the property tax. Local tax procedures provide a mechanism for administrative appeal by means of an objection to the assessing officer or body and also to a Board of Equalization.[85] However, appeals from the Board of Equalization[86] are subject to the same basic defects as procedures at the commonwealth tax level regarding lack of expertise, inconsistency, and formalism.

Virginia tax procedures can therefore be characterized as flexible, informal, and expensive at the administrative level. Additionally, in the case of commonwealth taxes, the administrative procedure incorrectly assigns both enforcement and decision-making responsibilities to the Virginia Tax Commissioner. The Boards of Equalization for property taxes are not subject to this objection, and they may be developing sufficient expertise on account of the requirement, first enacted in 1975, that they receive education in assessment practices through the State Tax Commissioner.[87] On the judicial level, however, the system is subject to the objections that it is formal, expensive, has not established a body of precedent, and leads to inconsistent results and policies statewide. A further significant defect of the current Virginia tax procedure is its requirement that taxpayers pay the tax alleged to be due prior to contesting the assessment. Finally, the current system does not facilitate the development of expertise on the part of the judges, permits forum shopping by taxpayers, and is wasteful of the resources of the taxpayers, the Tax Department, and the judiciary.

IV. A Proposed Virginia Board of Tax Appeals

A. *Desirability of a Board of Tax Appeals*

Taxpayers want and deserve a fair, efficient, convenient, and inexpensive means of disputing tax assessments. The best way to accomplish

[84] *See* Minutes of Study Committee (June 26, 1979), at 1 (noting that more "small" taxpayers are challenging assessments).

[85] VA. CODE § 58-792.01; § 58-895 to -914 (Cum. Supp. 1981).

[86] *See id.* § 58-907 (Repl. Vol. 1974); § 58-1145 (Cum. Supp. 1981).

[87] *Id.* § 58-33.1 (Cum. Supp. 1981).

this goal is to institute a statewide independent tax adjudication body. As long ago as 1974, the Governor's Commission on Reform of the Property Tax System recognized the desirability of such an entity:

> While the study on which this report is based is not concerned with tax matters other than property tax assessments, attention is directed to the absence of machinery for administrative appeals in other forms of taxation. It is suggested that, in conjunction with the establishment of a state appellate agency to hear appeals on matters of property assessments, consideration be given to giving it jurisdiction over appeals in other categories of tax matters.[88]

The creation of a Board of Tax Appeals was also one of the major recommendations of the Study Committee.[89] While the Task Force turned down the idea of a separate Tax Court or Board of Tax Appeals, it did recommend the designation of specific circuit court judges to hear tax cases, a procedure which, if put into effect, would have resulted in a de facto tax court.[90] All three of these studies have concluded that vesting sole jurisdiction in tax cases in the local circuit court is inadequate, and two have specifically recommended creation of a Board of Tax Appeals. Nevertheless, the idea has not found its way into enactment. The opinion has been expressed that House Bill 990 embodied changes too dramatic to be accomplished in one year.[91] Since the Study Committee apparently believed the requirement for publication of regulations was the most important and pressing aspect of that legislation, the proposal for a Board of Tax Appeals was quietly dropped.[92] However, many of the same defects in the system which led to the prior proposals remain today.

Most of the remaining criticisms of the Virginia tax dispute resolution process could be answered by the creation of an independent tax adjudication body. This body might be either a full-blown court that is part of the judicial system, or an independent agency in the executive branch.[93] In whichever form, an independent tax adjudication body

---

[88] PROPERTY TAX REFORM STUDY, *supra* note 79, at 106; *see also id.* at 123-25.

[89] STUDY COMMITTEE REPORT, *supra* note 27, at 6.

[90] TASK FORCE REPORT, *supra* note 21, at 7-8.

[91] Forst Interview, *supra* note 19.

[92] *Id.*

[93] A 1978 study by the Federation of Tax Administrators indicated that as of that time two states, Oregon and Hawaii, and the District of Columbia had created a tax court as part of the judiciary. FEDERATION OF TAX ADMINISTRATORS, STATE TAX REVIEW AGENCIES: ORGANIZATIONS AND PRACTICES 4 (1978) [hereinafter referred to as FTA REPORT]. Since then, New Jersey has abandoned its board of tax appeals and created a tax court. N.J. STAT. ANN. 2A:3A1-15 (Cum. Supp. 1981) (West). Twenty states—Arizona, Delaware, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Washington, and Wisconsin—had independent boards of tax appeals. FTA REPORT, *supra*, at 10. Another 11 states—Alabama, Arkansas, Colorado, Georgia, Illinois, Mississippi, New Mexico, Oklahoma, Rhode Island, Texas and West Virginia—had set up specialized divisions within

would present several improvements in current policy. First, the Board would hear only tax cases and, unlike the present situation with respect to circuit courts, would be able to build up a considerable expertise in the commonwealth and local tax area. Because all their cases would involve tax matters, the members of the Board would quickly develop proficiency in the subject. This tax expertise would result in better, and more expeditious, decisions. This would also eliminate the waste of resources which now occurs.

Second, under the proposal, tax appeals would be decided by one entity, instead of being spread out to all of the different circuits. This would lead to more consistent decision-making since decisions would come from the same source and have effect statewide. This would result in more uniform statewide tax policy. A closely related benefit of an independent tax appeals procedure is the opportunity which the Board would have to build up a substantial body of precedent. Currently, few written decisions emanate from the circuit courts.[94] A Board of Tax Appeals, however, if required to write findings of fact and conclusions of law for each decision, would soon build up a body of case law precedent which would be invaluable to practitioners.

Third, a statewide Board of Tax Appeals, if given exclusive jurisdiction in tax cases, would eliminate the opportunity for forum shopping currently available to taxpayers. The Board would further promote uniform application of the law to all taxpayers, and eliminate the current advantage of taxpayers with the resources to engage in this practice.

Fourth, a Board of Tax Appeals, if given authority to institute a small claims procedure, would provide a forum for a convenient, informal, and impartial hearing to taxpayers in small disputes. Under present procedures the only informal hearing is within the Tax Department itself, and this procedure ultimately cannot be wholly impartial since the adjudication and enforcement functions are not separated.

Fifth, although it is not a unique feature of a Board of Tax Appeals, a Board's procedures could be set up to eliminate the current requirement that the taxpayer pay the assessment prior to contesting it before an independent tribunal. A taxpayer would not be forced, as now, to part

---

their tax enforcement agencies which are charged with the specific function of administrative review. *Id.* at 32. Four states—California, Nevada, New York, and Wyoming—had hybrid systems. *Id.* at 2. These involve appeals to other state agencies which differ from a board of tax appeals or tax court in that the agency also has administrative duties with respect to the tax system in addition to deciding tax appeals. That is, their principal statutory functions are other than review of tax cases. The remainder of the states, among them Virginia, had neither a tax court, an independent board of tax appeals, nor any prescribed specialized review procedures within the tax collecting agency itself.

[94] The 1980 legislation requires circuit court decisions to be published by the Tax Commissioner. VA. CODE § 58-48.7(A)(3) (Cum. Supp. 1981); *see* text accompanying note 77 *supra*. However, there is no requirement that a circuit court decision contain a written opinion. *See* VA. CODE § 58-48.7(A)(3) (Cum. Supp. 1981).

with his money prior to an independent adjudication that he really owes it. The opening of the taxpayer's purse would no longer be subject to the unreviewed decision of the tax administrator. Finally, all of these five factors would result in promoting the "image of justice" among taxpayers by providing the kind of expert, impartial, and convenient forum that they perceive to be truly capable of giving them a fair opportunity to contest tax assessments.

Nevertheless, several objections have been raised to the creation of a Board of Tax Appeals in Virginia. Most of these objections were voiced in opposition to the Board of Tax Appeals proposed under House Bill 990 in 1980.[95] The first objection was that a Board of Tax Appeals would become a special interest entity, catering to tax practitioners and denigrating the State Tax Commissioner's authority. This objection was apparently raised because the idea for a Board of Tax Appeals was perceived by some as emanating from the tax bar and accountants through the Joint Task Force. In fact, however, the Board of Tax Appeals was suggested to the Study Committee by the Tax Commissioner.[96] While it is true that tax practitioners have a strong interest in the occurrence of some kind of dispute resolution reform, taxpayers have an even stronger interest in it. Moreover, to turn down the idea on the ground that lawyers would then be running the system is similar to arguing there should not be an independent judiciary because, after all, judges are usually lawyers. Perhaps this argument can best be explained as stemming from a basic mistrust of attorneys held by many laymen.

A second objection to the Board of Tax Appeals was that there would not be a large enough case load for such a board to merit its creation. The answer to this argument is that presently there are eighty-five cases pending in the Tax Department, and twenty-five cases before the circuit courts involving appeals from commonwealth taxes.[97] There are enough cases to require the part-time employment of three Assistant Attorneys General assigned to the Tax Department.[98] Furthermore, if the Board of Tax Appeals' jurisdiction was to include property tax cases, the case load would at least double in number. A recent study indicates that, in states having boards of tax appeals or tax courts which include property tax appeals in their jurisdiction, property tax cases usually make up

---

[95] This summary concerning objections raised to the proposed Board of Tax Appeals was gleaned from interviews with Tax Commissioner Forst, Mr. E.A. Dore, Director of Tax Policy Division, Department of Taxation, and Mr. William L.S. Rowe. Commissioner Forst and Mr. Rowe were both members of the Study Committee.

[96] RESPONSE TO TASK FORCE REPORT, *supra* note 28, at 9; *see* text accompanying notes 28-29 *supra*.

[97] Letter from E.A. Dore, Director of Tax Policy Division, Department of Taxation, to Author (September 21, 1981) [hereinafter cited as Dore Letter]. These totals do not, of course, take into account any backlog effect caused by cases pending for a long period of time.

[98] Forst Interview, *supra* note 19.

the majority of cases heard.[99] This certainly would be true in Virginia, since the commonwealth currently requires property revaluations at periodic intervals.[100] Additionally, the very existence of an independent board would encourage taxpayers who might otherwise concede an assessment to file an appeal. Some persons might find increased litigation an undesirable result. However, if tax litigation is kept down merely because of the lack of a convenient forum, it could hardly be said that taxpayers are receiving fair treatment.

Even if the case load were insufficient for a full-time Board of Tax Appeals, a part-time board could be effectively utilized. Several states, including Virginia's neighbors—Maryland, Kentucky, and North Carolina—utilize part-time boards.[101] The most difficult problem posed by a part-time Board of Tax Appeals is the potential conflicts of interest by the Board members who are also tax practitioners. This is a perplexing problem, and there may be no completely satisfactory solution. One answer might be to choose the Board from among persons not engaged in tax practice.[102] As a consequence, members initially would lack the expertise advanced as one of the principal advantages of a Board of Tax Appeals. However, this inexperience would probably be overcome within a fairly short time. Presumably, it would be possible to prohibit members to engage in tax practice while on the Board. In the event that tax practitioners were selected, it would of course be necessary to prohibit any member from hearing a case in which he or any member of his firm was involved. Ultimately, it would necessarily depend upon the discretion and honor of the Board members to avoid even the appearance of impropriety.[103] Of course, the most obvious solution is simply to have a full-time Board.

The third and final objection to the creation of a full-time Board of Tax Appeals was simply that it would not be worth the expense. This objection is closely related to the case load argument. It basically rests on the premise that, given the presumed current public opinion favoring a reduction in the size of government, the present is not an appropriate time to create a new agency. Obviously, this is a matter upon which reasonable people can differ. However, by relieving the circuit courts of the burden of hearing tax cases, the creation of a full-time Board of Tax Appeals would eliminate the waste of resources in the present system. The Board would provide a forum in which the adjudicators have sufficient expertise to eliminate the necessity of educating a judge anew in each case. Furthermore, the cost of a Board might not be excessive. Having one full-time Board member would be roughly equivalent in salary

---

[99] FTA REPORT, *supra* note 92, at 24.

[100] *See* VA. CODE § 58-776 to -778.1 (Cum. Supp. 1981).

[101] FTA REPORT, *supra* note 92, at 14.

[102] Forst Interview, *supra* note 19.

[103] *Cf.* ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon Nine.

cost to adding one circuit judge. House Bill 990, which proposed a part-time Board composed of three members, set a salary of $14,000 for the Chairman of the Board, and salaries of $12,000 each for the other two members.[104] The Bill projected a first year cost of $131,300 and a second year cost of $116,530 for the Board.[105] It is, of course, a political judgment whether that amount of cost would be worth the undisputed improvement which the Board would bring about. However, it can hardly be asserted that a cost of around $130,000 a year to resolve disputes in a system which brings in over two billion dollars at the state level[106] and over 1.4 billion dollars at the local level[107] is inordinant, especially since the Board would bring about a more efficient, accessible, and speedier procedure than currently exists. The ultimate question is whether the interests of fairness and equity to taxpayers in Virginia justify such an expenditure. The question answers itself.

B. *Characteristics of a Board of Tax Appeals*

Once the need to create an independent tax adjudication body is settled, several further decisions must be made regarding the structure of that body. Initially, it must be decided whether to create a tax court that is a full-fledged part of the judicial branch or whether to create a Board of Tax Appeals that is an independent agency within the executive branch.

Only three states—Hawaii, Oregon, and New Jersey—and the District of Columbia have so far opted for a state tax court which is part of the judicial system.[108] The original Model State Tax Court Act promulgated by the National Conference of Commissioners on Uniform State Laws created a tax adjudication agency denominated a "tax court" in section one of the Act.[109] Although it was apparently intended to be part of the judiciary, the judicial status of the "tax court" was nevertheless left unclear.[110] The Revised Model State Court Act explicitly provides that full judicial status is intended.[111] In presenting the Revised Act, the

---

[104] House Bill 990 § 3(a) (1980).

[105] *Id.*

[106] VIRGINIA DEPT. OF TAXATION, ANNUAL REPORT 1979-1980, at 7.

[107] *Id.* at 33 (Table 3.4), 41 (Table 5.2).

[108] *See* note 93 *supra.*

[109] Model State Tax Court Act, 1957 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 234-39.

[110] *See id.* at 232-33; Commentary on Revised Model State Tax Court Act, 24 TAX LAW. 952 (1971).

[111] Revised Model State Tax Court Act § 1, 24 TAX LAW. 947, 947 (1971). The Model Acts are the result of work by the Committee on State and Local Taxation of the ABA Section of Taxation. Over the past several years, the Committee has worked toward adoption of legislation creating specialized independent tax adjudication bodies by the states. The Revised Model Act was adopted by the ABA House of Delegates following the 1971 annual meeting of the ABA. *See* Report of the Committee on State and Local Taxes, 25 TAX LAW. 622 (1972). Most recently, a Task Force of the Committee on State and Local Taxes recom-

Committee on State and Local Taxes of the American Bar Association (ABA) Section on Taxation argued that the court approach was superior because a court, as compared to an administrative tribunal, would appear more independent and impartial to the public.[112] The Committee further argued that giving a tax court judicial status would give its judges enhanced status and regular judicial tenure.[113] This, in turn, would foster taxpayer confidence in the efficacy of the tax adjudication process. Finally, the Committee believed that a true court would eliminate any need for tax cases to be heard in the regular trial courts of the state, and would permit direct reviews of tax court decisions by the state's appellate courts.[114]

These arguments for placing the independent tax adjudication body within the judicial branch are not compelling in Virginia's situation. First, the foreseen elimination of tax cases from circuit court review could be accomplished just as easily through an administrative Board of Tax Appeals in the executive branch, if it were considered desirable. Such a procedure is currently used in appeals in workers' compensation cases.[115] Secondly, there is no reason why the General Assembly could not establish statutory terms for the members of the Board, setting their terms at whatever number of years the General Assembly deems appropriate. Thirdly, the accomplishment of public perception of the independent status of the adjudication body may be achieved through a proper understanding of the power of semantics. In Minnesota, for example, the tax adjudication body is a part of the executive branch. However, the Minnesota legislature recently enacted legislation designating a "tax court" to be "an independent agency of the executive branch of the government," and giving its members the title of "judge."[116]

An administrative tax Board offers potential advantages which are not possible with a judicial tax court. For example, a Board might be able to provide for appearances by persons other than attorneys, such as certified public accountants, on behalf of taxpayers. Currently, in hearings before the Tax Commissioner, persons other than attorneys may make appearances on behalf of taxpayers.[117] There is certainly precedent

---

mended renewed activity encouraging adoption of such legislation by the states. *See* REPORT OF THE TASK FORCE ON THE MODEL STATE TAX COURT ACT TO THE SUBCOMMITTEE ON STATE AND LOCAL TAXATION OF THE ABA SECTION OF TAXATION (May 11, 1978).

[112] Explanation of Revised Model State Tax Court Act, 24 TAX LAW. 945, 946 (1971).

[113] *Id.* at 947.

[114] *Id.* at 946:

> While most independent quasi-judicial tribunals are equally as impartial, they do not have the same public confidence as a full fledged court. Since most people believe that courts protect the citizen, they look to the courts, not to other bodies, to protect them from improper tax levies. Their expectation of justice is at the judicial level.

[115] VA. CODE § 65.1-94 (Repl. Vol. 1980).

[116] 1977 Minn. Laws ch. 307, enacting MINN. STAT. ANN. § 271.01 to .22.

[117] Dore Letter, *supra* note 97. Non-lawyer representation before certain administrative agencies apparently does not constitute unauthorized practice of law in Virginia.

for permitting persons other than attorneys to appear before a tax adjudication body. The United States Tax Court admits persons who are not attorneys into practice before it upon taking a written examination.[118] In addition, an administrative Board rather than a court may facilitate appointment of nonlawyer members.[119] This might be especially desirable if the Board has jurisdiction over property tax valuation cases, since it would then be possible to appoint an expert in valuation techniques. Finally, and most important from a practical standpoint, creation of an administrative Board rather than a court appears to be a less radical change from the current situation and, therefore, stands a better chance of legislative acceptance. This may have been an unspoken reason why

---

Although the Virginia Rules of Court do not directly address the issue, it appears it would be possible to have non-lawyer representation before the Board of Tax Appeals. The Virginia Supreme Court has defined the practice of law in part as follows:

> Specifically, the relation of attorney and client exists, and one is deemed to be practicing law, whenever . . . (3) One undertakes, with or without compensation, to represent the interest of another before any *tribunal*, . . . otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions. . .

Va. Rules of Court Part Six, Section I; 216 Va. 1062 (1976) (emphasis added).

In 1976, the Virginia State Bar submitted to the court a proposed Unauthorized Practice of Law (UPL) Advisory Opinion requesting a crucial definition of the word "*tribunal.*" The Bar requested that the definition include administrative or executive tribunals, departments of the executive branch, a state board, a board of tax appeals, an officer or agency hearing tax appeals under Chapter 22 of Title 58, a board of equalization of real estate assessments and "any other individual, board or agency charged under the Constitution or laws of the Commonwealth of Virginia with the responsibility of resolving rights or duties of a citizen of the Commonwealth." *See* 28 VA. BAR NEWS, at 42-43 (Aug. 1979).

The Virginia Supreme Court rejected such an extensive definition and stated in Unauthorized Practice Considerations (UPC) 1-1:

> The term "a tribunal, judicial, administrative, or executive, established under the Constitution or laws of the Commonwealth of Virginia," shall include, in addition to the courts and judicial officers of Virginia, the State Corporation Commission, of Virginia and its various divisions, the Industrial Commission of Virginia, and the Alcoholic Beverage Control Board. Such term does not include a tribunal established by virtue of the Constitution or laws of The United States, to the extent that the regulation of practice before such tribunal has been pre-empted by federal law.

29 VA. BAR NEWS, at 12 (Aug. 1980).

The court's rejection of the Bar's proposal casts some doubt on the court's desire to control the practice of law before administrative agencies, and a board or an agency designed to hear tax appeals that is not a part of the judicial system. *See* 30 VA. BAR NEWS, at 29 (Aug. 1981). Congress has permitted most of its administrative agencies to determine on their own the public interest to be served by the admission of non-lawyers to practice before such agencies. *See* 5 U.S.C. § 555 (1976). By rejecting the Bar's proposal, the court may have felt that a similar rule should be tried in Virginia. *See* 30 VA. BAR NEWS, at 39 (Aug. 1981).

[118] United States Tax Court Rule 200(a)(3).

[119] *See, e.g.*, KY. REV. STAT. § 131.320 (Cum. Supp. 1981) (requiring that two of its Board members be from "general business"); MICH. COMP. LAWS ANN. § 209.102 (Cum. Supp. 1980) (requiring that "[s]uch Commissioners shall have had at least 5 years experience in the assessment or appraisal of real and personal property"); N.H. REV. STAT. ANN. § 71-B: 1 (Supp. 1977) (prohibiting more than one attorney member).

the Study Committee proposed an administrative Board. No serious consideration of the judicial court concept appears in the Study Committee's minutes. Apparently, the members simply took it for granted that the administrative Board was the most desirable route.

Regardless of the foregoing, there is ultimately little need to choose between a court and an administrative Board in Virginia. In some states, there are state constitutional limitations which restrain the legislature from creating a full-fledged judicial tax court, possessing the characteristics concerning judge selection, terms of office, and modes of appeal thought desirable.[120] But, by reason of the broad powers given the General Assembly with respect to creation of courts by the Virginia Constitution,[121] that body has unrestrained power to create a tax court possessing the characteristics it deems appropriate. The General Assembly could create a tax court and, by designating it as being other than a "court of record," provide it with characteristics unconstrained by the otherwise applicable requirements set forth in the Virginia Constitution. The Virginia Constitution provides that "[t]rial courts of general jurisdiction, appellate courts, and such other courts as shall be so designated by the General Assembly shall be known as courts of record."[122] Constitutional restrictions with respect to appointment of judges and their qualifications apply only to courts of record,[123] and there is explicit authority for the General Assembly to "provide for additional judicial personnel, such as judges of courts not of record," and to "prescribe their jurisdiction and provide the manner in which they shall be selected and the terms for which they shall serve."[124]

One difference between an administrative Board and a court would be the power, or lack of power, of the body to formulate its own rules of procedure. If a court is created, the Virginia Supreme Court would have authority to make the rules governing its practice and procedures.[125] By contrast, an administrative Board of Tax Appeals could be left free to make its own rules of procedure. Thus, a Board could accomplish the same basic procedural improvements as could a judicial court. Moreover, an administrative Board of Tax Appeals may even have some additional advantages of flexibility in the areas of representation and rules of practice. Along with the pragmatic consideration that a Board would prob-

---

[120] *E.g.*, ALA. CONST. art. 6, §§ 153-154; ARIZ. CONST. art. 6 §§ 12 & 22; COLO. CONST. art. 6, §§ 11 & 13; FLA. CONST. art. 5, § 8; IDAHO CONST. art. 5, § 2; ILL. CONST. art. 6, §§ 12 & 16.

[121] VA. CONST. art. VI, § 1:

> The judicial power of the Commonwealth shall be vested in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish.

[122] *Id.*

[123] *Id.* art. VI, § 7.

[124] *Id.* art. VI, § 8.

[125] Article VI, § 5 of the Virginia Constitution states, "[t]he Supreme Court shall have the authority to make rules governing the course of appeals and the practice and procedures to be used in the courts of the commonwealth . . ." The provision makes no distinction between a court of record and a court not of record.

ably be more acceptable politically, an independent administrative Board of Tax Appeals would probably be the preferable course in Virginia.

The next question is whether there should be a full-time or a part-time Board. The principal advantage of a full-time Board is that it would largely obviate the conflict of interest problem inherent in a part-time Board. Given the present potential case load, however, it appears that there may not be justification for having more than one member of a full-time Board.[126] This would prevent the diversity that could be achieved through a multi-member, part-time Board. Oregon currently has one full-time judge,[127] but does have a provision for appointment of part-time personnel.[128] The Study Committee recommended a part-time Board, apparently on the ground that there was not a sufficient case load to presently justify even one full-time member.[129] This insufficient case load, along with the diversity of experience and geographical representation which a part-time Board would permit, most likely overcomes the objection to a part-time Board with respect to conflict of interest problems. This is especially so in view of the possibility of appointing a part-time Board consisting of nontax practitioners to obviate any possible conflict of interest problems.[130] However, if the inclusion of local taxes in the Board's jurisdiction, or any other factor, resulted in sufficient case load to warrant creation of a multi-member, full-time Board, that would be the preferable course to follow.

Board members should be appointed for a period of approximately six years, with staggered terms to allow for continuity. A six year term is the predominant period provided for in other states.[131] Since the Board would be a part of the executive branch, it would be appropriate to provide for appointment by the Governor with confirmation by the General Assembly. This is also the predominant practice in states which have a tax court or a Board of Tax Appeals.[132] Members' salaries should be set

---

[126] *See* text accompanying notes 97-100 *supra.*

[127] OR. REV. STAT. § 305.452 (1977).

[128] *Id.* § 1.600. *See generally* Roberts, *An Introduction to the Oregon Tax Court*, 9 WILLAMETTE L.J. 193 (1973). Because of a shortage of state government funds, the Oregon legislature eliminated all funds for judges pro tempore in a special session in September, 1980. Letter from Carlisle B. Roberts, Oregon Tax Court Judge, to Author (Aug. 6, 1981).

[129] STUDY COMMITTEE REPORT, *supra* note 27, at 16.

[130] *See* text accompanying note 102 *supra.*

[131] FTA REPORT, *supra* note 93, at 14.

[132] A summary of provisions in the states having either a tax court or independent board of tax appeals follows:

State	No. of judges	Full or Part-Time	Tenure	How Appointed
Arizona	Div.(I) 3	Part-time	6 years	Governor
Delaware	5	Part-time	3 years	Governor
Hawaii	1	Full-time	at the pleasure of chief judge	Appointed by chief judge

at an amount commensurate with the amount of caseload and the qualifications required to serve as a member of the Board. With respect to the latter, there is no current agreement whether a statute should prescribe qualifications for appointment to the Board. Under one alternative, the General Assembly could provide for the Governor to choose

State	No. of judges	Full or Part-Time	Tenure	How Appointed
Idaho	3	Part-time	3 years	Governor, confirmed by Senate
Iowa	3	Part-time	6 years	Governor, confirmed by Senate
Kansas	5	Full-time	4 years	Governor, confirmed by Senate
Kentucky	3	Part-time	4 years	Governor, confirmed by Senate
Louisiana	3	as required	6 years	Governor
Maryland	5	Part-time	6 years	Governor
Massachusetts	5	Full-time	6 years	Governor, confirmed by Executive Council
Michigan	3	Part-time	6 years	Governor, confirmed by Senate
Minnesota	3	Full-time	6 years	Governor, confirmed by Senate
Missouri	2	Full-time	6 years	Governor, confirmed by Senate
Montana	3	Full-time	6 years	Governor, confirmed by Senate
New Hampshire	3	Full-time	6 years	Supreme Court
New Jersey	11*	as required*	5 years*	Governor, confirmed by Senate
North Carolina	3-4	Part-time	4 years	ex officio; Governor
Ohio	3	Full-time	6 years	Governor, confirmed by Senate
Oregon	2	1 Full-time 1 Part-time	6 years	Full-time elected; Part-time appointed by Supreme Court.
Pennsylvania	5	Part-time	during term of office	ex officio
Washington	3	Full-time	6 years	Governor, confirmed by Senate
Wisconsin	5	Chairman-Full-time Others-Part-time	6 years	Governor, confirmed
D.C.	1	Full-time	at pleasure of Chief Judge	appointed by Chief Judge

FTA REPORT, *supra* note 93, at 14.

* New Jersey has since adopted a tax court as part of the judicial branch. The tax court consists of no less than six but no more than 12 full-time judges who serve for a term of seven years. *See* N.J. STAT. ANN. §§ 2A:3A1-15 (Cum. Supp. 1981) (West).

from a list of possible appointees selected by the Virginia Bar or some other professional group, as is done in Oregon.[133] The qualification requirements in other states vary.[134] Some states require that there be a certain number of attorneys or accountants on the board. Others place regional limitations on membership. Still others have no limitation written into the statute. New Jersey's statute is one of the more stringent and requires that the members be "admitted to the practice of law in this State for at least 10 years, and . . . chosen for their special qualifications, knowledge and experience in matters of taxation."[135]

Another likely controversy is whether the circuit courts should retain concurrent jurisdiction to hear tax cases. It is probable that substantial opposition to divesting the circuit court of jurisdiction would exist if such a proposal were made. Apparently, many attorneys and taxpayers believe that they are likely to fare better in their own local circuit courts than they would in a statewide Board of Tax Appeals.[136] That this may not be a misplaced belief is indicated by statistics concerning pro-taxpayer circuit court decisions which have been reversed by the supreme court on appeal since 1945.[137] The Study Committee's recommended solution to this problem was to allow the circuit courts to retain their jurisdiction, but to continue the requirement that the taxpayer pay the full amount of the assessment prior to proceeding in the circuit court. At the same time, the Committee proposed permitting the taxpayer to contest the tax in the Board of Tax Appeals, and to appeal an adverse Board decision to the courts, prior to paying the tax.[138] The Committee apparently hoped to strike a compromise with those who wished to retain circuit court jurisdiction over tax cases while, at the same time, encouraging taxpayers to use the Board of Tax Appeals by permitting them to contest an assessment without first paying the tax.

While political realities ultimately may require that circuit courts retain concurrent jurisdiction to hear tax cases, such a compromise weakens the potential improvements available through creation of a Board of Tax Appeals. To the extent that the circuit courts retain jurisdiction, the advantages of consistency, of uniform statewide tax policy, and of expertise on the part of the forum would be diminished. As the Governor's Commission on Reform of the Property Tax System noted, "the effectiveness of the review procedure is undermined if any alternate procedure, challenge or review is permitted in local courts, as local judges will not always be in agreement, and as a circuit court's decision has effect in only one circuit."[139] Furthermore, the opportunity for tax-

---

[133] OR. REV. STAT. § 305.452.

[134] *See* FTA REPORT, *supra* note 93, at 16.

[135] N.J. STAT. ANN. § 2A: 3A-13 (Cum. Supp. 1981) (West).

[136] *See* text accompanying note 73 *supra*.

[137] Seventeen out of 22 commonwealth tax cases decided in favor of the taxpayer have been reversed on appeal by the Virginia Supreme Court since 1945. *See* note 12 *supra*.

[138] STUDY COMMITTEE REPORT, *supra* note 27, at 15 & 17.

[139] PROPERTY TAX REFORM STUDY, *supra* note 79, at 23.

payer forum shopping would remain in commonwealth tax cases. Therefore, the ideal resolution would be to vest exclusive jurisdiction in the Board of Tax Appeals.

A related question regarding a Board of Tax Appeals is the nature of appeals from its decisions. Undoubtedly, both the taxpayer and the Commissioner should have the right to appeal an adverse Board decision to a court. The Study Committee proposed that appeals from the Board's decisions be taken on a record to the local circuit court.[140] There appears little doubt that any proceedings beyond the Board stage should be appealed on a record taken at the Board hearing. There should be no de novo proceedings beyond the Board, in order to eliminate the wasted resources inherent in having two de novo proceedings. The basic issue is whether or not there should be an appeal to the circuit court or whether appeals should be taken directly to the Virginia Supreme Court. Most commentators have taken the position that the additional appeal to the circuit court would add an unnecessary layer to the process.[141] Generally, they reason that appeals from the Board should be to the same court to which appeals from trial courts of general jurisdiction are taken.[142] Since Virginia currently has no intermediate appellate court, appeals would go directly to the supreme court. This suggestion may, of course, be impractical in light of the supreme court's case load. On the other hand, it may be that the number of appeals in tax cases to the supreme court would not increase greatly, if at all, if there were appeals directly from the Board to the supreme court, since appeals in tax cases now go to the supreme court from the circuit courts. Barring a very substantial increase in litigation resulting from the very existence of a Board of Tax Appeals, the appeals would simply be coming from the Board rather than from the circuit courts. In fact, the creation of a Board may reduce the number of appeals. The Board, by its nature, would be an expert tribunal. Hence, its decisions would probably be less likely to be overturned as erroneous than circuit court decisions.

While the theoretically ideal situation would be to bypass the circuit courts, thereby retaining consistency and the other benefits of a unitary tribunal, this may be impractical given the supreme court's present

---

[140] STUDY COMMITTEE REPORT, *supra* note 27, at 18.

[141] *See* Model State Tax Court Act § 19; Revised Model State Tax Court Act § 21, 24 TAX LAW. at 951; Explanation of Revised Model State Court Act, 24 TAX LAW. at 946; Kray, *supra* note 71, at 512 n.129. Kray quotes from PENNIMAN & HELLER, STATE INCOME TAX ADMINISTRATION 45 (Public Adm'n Serv., 1959) as follows:

> [P]roposals for court reform often emphasize that too many possibilities for judicial appeal may defeat rather than promote justice. Few would wish to give final decision to a single court, but the existence of several layers of appeals may merely mean undue delay in settlement and excessive costs for both the taxpayer and the state. Likewise, too many appeals opportunities in tax cases may chiefly benefit the taxpayer with a poor case.

[142] *See* Explanation of Revised Model State Tax Court Act, 24 TAX LAW. at 946.

situation. If this were considered an overriding factor, then the next best solution would be to provide for a record appeal to the circuit court from the Board. Of course, should an intermediate appellate court ever be created in Virginia, this would be the logical forum to which appeals would be taken.

The next issue is whether or not the Board should have jurisdiction over local as well as commonwealth taxes. The Study Committee dealt only with commonwealth taxes administered by the Department of Taxation. Therefore, its proposed Board was given jurisdiction only over those taxes.[143] There may be difficulties with giving the Board jurisdiction over local taxes because of local government budget procedures. Local governments must have a reasonable idea of what their tax base is in order to perform their budget-making duties. An appeal to a statewide Board may cause difficulties by delaying the setting of the tax base. However, the latest statewide study of the property tax system specifically suggested that there be a statewide Board of Tax Appeals to review property tax assessments and legal issues relating to property taxes.[144] Jurisdiction over local taxes would certainly increase the number of cases heard, thereby counteracting the argument that there are not enough cases to warrant a full-time Board of Tax Appeals.[145] The Board would also contribute to a more uniform application of the property tax throughout the commonwealth.

One desirable aspect of a Board of Tax Appeals is the potential creation of a small claims procedure which would allow taxpayers in small disputes to have an independent and impartial hearing of their case. As matters currently stand, a taxpayer who is financially unable, or for whom it is not worth the expense, to take his case to the circuit court is effectively denied an impartial forum. The only inexpensive hearing is with the Tax Commissioner who is also the chief enforcement officer for the commonwealth. As the ABA Committee on State and Local Taxes recognized in its Explanation of the Revised Model State Tax Court Act:

> Many Taxpayers feel, rightly or wrongly, that without [an independent determination of the tax case] they are at the mercy of the tax administrators. Without [a small claims division], the bar

---

[143] *See generally* STUDY COMMITTEE REPORT, *supra* note 27. Because of the unique character of the commonwealth's Corporation Commission, the Study Committee did not consider taxes administered by that body. The procedures with respect to those taxes have not aroused any substantial dissatisfaction, and accordingly, this article does not address them.

[144] *See* PROPERTY TAX REFORM STUDY, *supra* note 79, at 23:

> [I]t is recommended that a statewide Board of Review be established for quasi-judicial review of assessments and legal problems involving property tax. Two types of procedure should be permitted, an informal low-cost appeal before one judge, and a formal three judge proceeding for more important questions. Appeal should be permitted to the Supreme Court on Writ of Error.

[145] *See* text accompanying notes 99-100 *supra*.

> is left with either representing taxpayers in small cases without compensation or refusing to help the taxpayer obtain justice. Further, in smaller cases now, the tax authorities have to wear two hats—judge and prosecutor—with the attending problems and cross purposes.[146]

The United States Congress enacted legislation several years ago authorizing a small claims procedure for the United State Tax Court in response to this very type of argument.[147] This procedure should be available to taxpayers in cases below a designated amount in dispute. The amount should be high enough to make the small claims procedure available in a substantial number of cases. The current jurisdictional amount for the United States Tax Court small claims procedure is $5,000 for any one taxable year in the case of the income tax.[148] The jurisdictional amount for states that have instituted a small claims procedure varies widely. Oregon's jurisdictional amount is $500, for example, while New Jersey's is $2,000.[149]

The taxpayer should be informed of the small claims procedure and given the opportunity to opt for it prior to the institution of an appeal. The procedure should be nonprecedential in nature; that is, the decision would not be a precedent for any other case. It should be informal so that taxpayers find it practicable to represent themselves if they so choose. There should be no appeal from this small claims procedure. In other words, it should be a one-level proceeding in which the taxpayer presents a case which is decided with the least possible amount of procedural formality. Requiring the taxpayer to forego an appeal in order to take advantage of this special procedure should not be burdensome, since the very reason for it is to reduce expenses and keep the proceedings as simple as possible. Because there would be no appeal, though, it may be necessary to permit the Commissioner to object to the small claims procedure in appropriate cases, since the use of the procedure would preclude an appeal not only by the taxpayer, but also by the Commissioner.

The small claims procedure would eliminate the present problem of taxpayers perceiving that it is simply not worth the cost to fight a tax assessment. If great sums are not at stake, it is often more expedient to give in to the taxing authority than to fight it. On the other hand, it has been suggested that a small claims procedure is not necessary at this time, because there are few cases where it would be utilized.[150] The reason given is that the two taxes at the commonwealth level most likely

---

[146] 24 TAX LAW. 945, 947 (1971).

[147] I.R.C. § 7463; *see* PROPOSALS FOR A SMALL CLAIMS TAX COURT 17-20 (Amer. Enterprise Inst. 1969).

[148] I.R.C. § 7463(a).

[149] OR. REV. STAT. § 305.515; N.J. STAT. ANN. § 2A: 3A-5 (Cum. Supp. 1981) (West).

[150] Forst Interview, *supra* note 19.

to involve small claims are the personal income tax and the retail sales tax. Basically, Virginia follows the decisions of the federal authorities in personal income tax matters. Therefore, these claims generally are decided at the federal rather than the commonwealth level. With respect to the retail sales tax, the argument is made that most of these cases simply involve errors in recording the total amount of sales which are picked up on an audit. Therefore, the issue is strictly factual and mechanical, leaving little room for dispute. This argument may have some merit. At the same time, however, the availability of the small claims procedure would certainly boost taxpayer morale, thus enhancing their perceptions of the fairness and availability of the tax disputes resolution system.[151] Moreover, if local taxes, especially property taxes, were within the jurisdiction of the Board, many small assessment disputes would certainly find their way into the small claims procedure. Furthermore, a small claims procedure would eliminate cases which do not require "full-scale" treatment from the Board's regular docket.[152] It would provide a convenient, informal, and inexpensive method for the resolution of these types of cases. The small claims provision in Oregon seems to have worked quite well. There is no reason why it would not work equally well in Virginia.[153]

Another issue likely to arouse controversy is whether the taxpayer should be required to pay the tax alleged to be due prior to contesting it before the Board. The requirement of full payment prior to court review is one of the major defects of the present system. It places the taxpayer in the position of having to pay prior to an independent decision of his case. The tax should not be payable prior to the decision of the Board and resolution of any appeal from the Board's decision. An exception might be made in cases where the Commissioner determines that collection is in jeopardy. It also may be appropriate to require the taxpayer to post a bond for payment of the tax, especially in property tax cases where regular collection of the tax is a prime requirement for the orderly administration of local governments. Aside from these exceptions,

---

[151] *See* Kray, *supra* note 71, at 512 n.132, quoting Dane, *The Experience of Massachusetts*, PROCEEDINGS OF THE NATIONAL ASSOCIATION OF TAX ADMINISTRATORS 25th ANNUAL CONFERENCE 40 (1958):

> We must always bear in mind that taxpayers' morale is a sine qua non of effective tax administration. The more a tax appeal tribunal takes on the attributes of a court and the less it looks like the same old rapacious tax wolves dressed up in sheeps clothing, the more public acceptance its decisions will have.

[152] *See* FTA REPORT, *supra* note 93, at 8 and 27.

[153] The New Jersey legislature, in its more recent tax court legislation, included small claims procedures with a jurisdictional amount of $2,000. N.J. STAT. ANN. § 2A:3A-5 (Cum. Supp. 1981) (West). It is significant to note that while the original Model State Tax Court Act did not include a small claims procedure, the Revised Act, presumably the result of more refined thinking on the subject, does provide for a small claims procedure. Revised Model State Tax Court Act §§ 25-33, 24 TAX LAW. at 951-52.

however, the taxpayer should not be required to pay prior to full, independent, and impartial review of the assessment.

Finally, the taxpayer should probably be required to exhaust his administrative remedies before the Commissioner prior to proceeding to the Board of Tax Appeals. Some taxpayers may consider this a futile effort, and it is true that in situations where the lines are clearly drawn this will be the case. Nevertheless, the administrative remedy does provide an informal and flexible procedure for taxpayers and the Commissioner to air their differences, and settle ones on which they can agree. At the same time, those issues which cannot be settled become more narrowly delineated. The administrative remedy is therefore a valuable part of the procedure and its utilization should be maximized. However, proceedings before the Board should not be on any record made of the administrative proceeding. Hearings before the Board should be de novo, in order to assure the taxpayer of a full hearing on all the issues in dispute before an impartial tribunal.

Relatively noncontroversial features of the Board should be a requirement that it publish findings of fact and conclusions of law in all its regular—nonsmall claims—decisions. This would build up the body of precedent which is now so sorely lacking. The Board should also have the authority to make and publish its own rules of procedure to assure the existence of rules compatible with the peculiarities of commonwealth and local tax litigation, and should be authorized to hold hearings at locations throughout the commonwealth. This would follow the lead of the United States Tax Court in bringing the forum to the taxpayer.[154]

V. Conclusion

Present Virginia tax procedures need to be significantly restructured in order to assure Virginia taxpayers a competent, fair, and impartial consideration of their tax appeals. The Virginia General Assembly should be encouraged to create a statewide Board of Tax Appeals. Adoption of such a body, and careful consideration of the related administrative, resource, and jurisdictional questions, should provide Virginia taxpayers with a much-improved tax appeals procedure.

---

[154] The recent New Jersey legislation provides for courtrooms and offices for the tax court located in two designated cities—Trenton, and Newark—and for chambers or offices in other appropriate locations throughout the state as "may be from time to time necessary to accommodate taxpayers or the calendar of the tax court." N.J. STAT. ANN. § 2A: 3A-2 (Cum. Supp. 1981) (West).