

# Tax Administration and Procedure in Ohio

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For taxpayers and practitioners alike administrative requirements and procedures in taxation often constitute a hazardous maze. Many tax cases have been summarily dismissed because of failure to comply with some mandatory procedural requirement of the statutes. This is not only a distressing experience for the tax litigant and his representative, but it is often equally unsatisfactory to the tax official.

Indeed, the conscientious tax administrator seldom finds satisfaction in a decision which is based on technical procedural grounds alone. Not only is the taxpayer thus denied a review of his case on its merits, but the administrator loses the benefit of a decision which may serve as a useful precedent for other cases. Effective tax administration requires that important questions of tax law be litigated on the merits and that delays and impediments to final decisions be minimized.

For these reasons, the writer has thought that it might be appropriate and helpful to present a panoramic view of tax administration and procedure in Ohio. Such an undertaking, however, must be carefully circumscribed and delimited because there are many units of government that play some part in the processes of taxation. Hence, it is the writer's purpose to explain how tax administration is organized at the state level, and to discuss the methods and procedures for processing, reviewing and appealing the more important tax matters that fall within the jurisdiction of the state government. Consideration first will be given to internal organization and administrative policy of the Ohio Department of Taxation, after which methods and procedures before the Tax Commissioner, the Board of Tax Appeals and the Supreme Court of Ohio in respect of tax matters will be discussed.

## DEPARTMENTAL ORGANIZATION AND ADMINISTRATIVE POLICY

The function of the tax administrator is not legislative or judicial; it is ministerial. The Advisory Committee on the Administration of Internal Revenue recently called attention to the following statement by The Secretary of the Treasury in 1927: "The collection of revenue is primarily an administrative and not a

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judicial problem. As far as the federal income tax is concerned, a field of administration has been turned into a legal battlefield." The Committee then commented that "the legalistic approach to tax administration which was the cause of concern 20 years ago is even more evident today."

Whether or not this criticism may be justifiably directed either to federal or state tax agencies, it does serve to emphasize the importance of sound standards of tax administration. Indeed, effective tax administration is dependent upon the dual imperatives of simplicity and equality in the application of tax laws.<sup>1</sup> These imperatives, in turn, require (1) clear channels of authority and responsibility within the taxing agency, and (2) adequate machinery for impartial review of all tax determinations at the administrative level.

### *Channels of Authority and Responsibility*

From 1910 to 1939, Ohio tax laws were administered by a tax commission which consisted for a time of three members and later four members. Although technically the entire commission administered all taxes within its jurisdiction, in actual practice each member assumed responsibility for and exercised authority over particular taxes. In effect, the commission was a hydra-headed creature which exercised both administrative and quasi-judicial functions.

In 1939 the General Assembly abolished this commission and created in its place the Department of Taxation having a single Tax Commissioner and a three-member Board of Tax Appeals.<sup>2</sup> All functions, powers and duties which were vested in the old commission were transferred to the new department, but administrative and quasi-judicial functions were separated and the course of appellate procedure was modified. Determinations of the Tax Commissioner were made appealable first to the Board of Tax Appeals and thereafter, as of right, directly to the Supreme Court of Ohio.<sup>3</sup>

The Tax Commissioner is now empowered, inter alia, to make tax assessments, valuations, findings, determinations, computations

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<sup>1</sup> There are other requirements of sound tax administration. For a discussion of modern concepts, see *Standards of Tax Administration—The Point of View of the State Tax Administrator*, an address by C. Emory Glander, Proceedings of the Forty-First Annual Conference on Taxation, National Tax Association, 1948, p. 65.

<sup>2</sup> OHIO GEN. CODE §§ 1464 to 1464-12 inc. The Tax Commissioner and the members of the Board of Tax Appeals are appointed by the Governor with the advice and consent of the Senate, the former for a term of four years and the latter for terms of six years. OHIO GEN. CODE §§ 1464-5 and 1464-6.

<sup>3</sup> OHIO GEN. CODE §§ 5611, 5611-1, 5611-2.

and orders, and to review, re-determine or correct the same; to prescribe tax forms; to remit or refund certain taxes and assessments and to issue certificates of abatement; to revoke certain licenses; to adopt and promulgate rules; and to maintain a continuous study of all taxation and revenue laws of the state. In addition to these powers, the Tax Commissioner is authorized to organize the work of the Department of Taxation in such manner as, in his judgment, will result in the efficient and economical administration of the laws he is required to administer, and to create such divisions or sections of employees as he may deem proper.<sup>4</sup>

There are presently eight administrative divisions, each headed by a division chief, under the jurisdiction of the Tax Commissioner in the main offices of the department in Columbus, namely: Corporation Franchise, Personal Property, Public Utilities, Motor Fuel, Inheritance, Sales and Excise, Research and Statistics, and Fiscal Affairs and Personnel. Two of these divisions are subdivided into sections each of which is managed by a supervisor. The Personal Property Tax Division consists of the Corporations, Intangible and Unincorporated Business, Financial Institutions, and Valuation Sections; while the Sales and Excise Tax Division includes three sections, namely, Audit and Assessment, Compliance, and Excise Tax. The last-named section supervises the Cigarette, the Beer and Malt Beverage, the Wine and Mixed Beverage and the Malt and Brewers Wort Taxes. In addition, the Tax Commissioner's organization includes an Administrative Assistant, a General Hearing Board, a Sales Tax Hearing Board, a Bureau of Tax Forms, two General Branch offices, one in Cleveland and one in Cincinnati, eight District Sales Tax offices, and a normal staff of approximately seven hundred employees.

The Board of Tax Appeals is both an administrative and a quasi-judicial body. Although it is part of the Department of Taxation, it is wholly independent in status. It is empowered, inter alia, to exempt property from taxation; to increase or decrease the aggregate value of real property for tax purposes; to exercise authority relative to actions of local taxing authorities in levying and collecting taxes, borrowing money, refunding indebtedness and expending money; to adopt rules; to remit taxes and penalties illegally assessed against real property; and to hear and determine appeals from county budget commissions, county boards of revision and the Tax Commissioner.<sup>5</sup> For the purpose of performing its administrative functions in respect of local governmental matters, the Board maintains a Division of County Affairs.

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<sup>4</sup> OHIO GEN. CODE § 1464-3.

<sup>5</sup> OHIO GEN. CODE §1464-1.

Both the Tax Commissioner and the Board of Tax Appeals possess all powers of an inquisitorial nature, including the right to inspect books, accounts, records and memoranda; to examine persons under oath; to issue orders or subpoenas for the production of books, accounts, papers, records, documents and testimony; to take depositions; to apply to a court for attachment proceedings as for contempt; and to administer oaths; together with other specified powers, duties, privileges and immunities.<sup>6</sup>

In general, it may be said that organization for tax administration in Ohio has been streamlined and modernized in accordance with sound administrative and business principles. There are clear channels of authority to and from both the Tax Commissioner and the Board of Tax Appeals; administrative and quasi-judicial functions have been properly separated; and final judicial determination of tax matters has been facilitated.

#### *Machinery for Administrative Review*

Notwithstanding the necessity and importance of judicial review, a high standard of tax administration requires adequate machinery for impartial review of all tax determinations at the administrative level. This means that there must be an opportunity for independent and impartial review before the taxpayer is required to appeal to quasi-judicial bodies or the courts.

Americans instinctively loathe administrative absolutism. It is a well-known fact that the growth of administrative agencies has met with widespread criticism; indeed there are many persons who look upon administrative law as a Machiavellian distortion of our legal system. Fair-minded men must disagree with that conclusion, of course, for administrative law has an established place in our jurisprudence. The difficulty is not with administrative law but with the way in which it sometimes operates. Much of the resentment toward administrative bodies stems from the suspicion that they fail to recognize the principle, inextricably imbedded in our judicial system, that every man has the right to a full and complete hearing. The paramount importance of an administrative hearing, not only because of legal necessity, but also because of the requirements of elementary fairness, was aptly expressed by the late Chief Justice Hughes. He described such a hearing as an "inexorable safeguard," and said that it is "essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process."<sup>7</sup>

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<sup>6</sup> OHIO GEN. CODE § 1464-2.

<sup>7</sup> *Morgan v. United States*, 304 U.S. 1, 15 (1933).

In tax administration, this means that all tax assessments, determinations, valuations and the like should be subject to an impartial review, in the first instance, by the tax administrator or tax assessor. From his final determination a right of appeal to an appellate body and to the courts should then be provided.

In Ohio all assessments, valuations and other preliminary tax determinations within the jurisdiction of the Department of Taxation are made under the direction of the division chiefs or section supervisors. In most instances, however, as a prerequisite to appeal to the Board of Tax Appeals, the taxpayer is required by law to apply to the Tax Commissioner for a review of the determinations previously made. This procedure contemplates that the Tax Commissioner take personal cognizance of the case and that he render a decision in accordance with the law and the facts as he finds them to be after appropriate hearing.

But here some practical difficulties are encountered. It is physically impossible for the Tax Commissioner personally to conduct all hearings upon such applications for review.<sup>8</sup> To assist him in reviewing these matters is the function of the Sales Tax Hearing Board and the General Hearing Board both of which were created by and are directly responsible to the Tax Commissioner. It is their duty to conduct the hearings, take testimony and submit findings of fact and law to the Commissioner for his consideration and final action. All actions by the Tax Commissioner are embodied in written journal entries which are personally signed by him and bound in volumes, and which constitute the public record of the department. Such volumes are available for public inspection at the office of the Tax Commissioner during all business hours.

The Sales Tax Hearing Board confines its work to sales, use and excise tax matters exclusively. It consists of six members, who generally sit in pairs of two each, and a Secretary who assigns cases and supervises the disposition thereof. The General Hearing Board, which consists of four members who usually hear cases individually, is empowered to conduct hearings on matters of review in respect of personal property, corporation franchise, and public utility taxes. It likewise checks all final journal entries of the Tax Commissioner for legal sufficiency, works in close cooperation

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<sup>8</sup> The number of journal entries personally executed by the Tax Commissioner each year on matters of review indicates why this is so. As to sales and excise taxes there are some 2500 such entries each year; personal property taxes account for about 1000 entries; and there are well over 500 entries on review and correction of corporation franchise taxes, the granting and cancelling of gasoline dealers' licenses, and the administration of the inheritance and cigarette taxes. Altogether some 5500 actions of the Tax Commissioner are personally journalized by him annually.

with the Attorney General's Office on matters of litigation, and prepares digests of decisions of the Board of Tax Appeals and the Supreme Court for dissemination throughout the department and among the county auditors. It is the duty of all hearing board members to consider both sides of the controversy and to make impartial recommendations to the Tax Commissioner. Sometimes taxpayers or their counsel request hearings before the Tax Commissioner personally, and such request is granted wherever possible.

The objective to be achieved through these hearing boards will be readily comprehended. The review of a tax matter should be conducted in a neutral atmosphere. It is unfair to the taxpayer to require that his tax determination be reviewed by the particular official who made it, and it is unfair to that official to require him to sit in judgment on his own action. Taxpayers should feel that they are getting a fresh and impartial consideration of their tax problems, and assessing officials should be free to defend their own honest convictions. This is the essence of justice, whether in the courts or before administrative bodies.

As a result of this right of review at the administrative level, we have definitely reduced the volume of litigation in our Board of Tax Appeals and our Supreme Court.<sup>9</sup> In short, tax review at the administrative level, if simple and independent, saves time and money both for the state and the taxpayer, and it greatly strengthens the standards of tax adjudication.

#### PROCEDURE BEFORE THE TAX COMMISSIONER

With certain exceptions taxpayers are required, as a prerequisite to appeal to the Board of Tax Appeals, to apply to the Tax Commissioner for a review of the determination previously made by the administrative divisions of the Department. No such provision is made in the statutes pertaining to the cigarette, malt and brewers wort, or motor fuel taxes, or even for appeal to the Board of Tax Appeals. In these cases, however, the administrative determinations are final and thus appeal may be taken to the Board of Tax Appeals under the provisions of Section 5611, General Code. No consideration will be given herein to administrative procedure in respect of

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<sup>9</sup> The great majority of all taxpayers accept the final determination of the Tax Commissioner without appealing to the Board of Tax Appeals or the Ohio Supreme Court. In 1949, approximately 87 such cases were appealed to the Board of Tax Appeals and approximately 12 cases to the Ohio Supreme Court. Of course, the board considered many other matters, including appeals from budget commissions, the remission of taxes and penalties, and the exemption of real property. Altogether, approximately eleven hundred cases were filed with and decided by the board in 1949; and many of these matters, in turn, were appealed to the Ohio Supreme Court.

these taxes; or to the inheritance and estate taxes as to which Probate Courts are charged with primary responsibility for tax determination, and before whom the Tax Commissioner frequently occupies the position of a litigant on behalf of the state. In all other cases, however, there are specific statutory provisions for review and re-determination by the Tax Commissioner prior to appeal to the Board of Tax Appeals. Those most frequently invoked pertain to personal property, corporation franchise, sales and excise, and public utility taxes, each of which will now be considered separately.

### *Personal Property Taxes*

In respect of personal property taxes, both tangible and intangible, the pivotal statute is Section 5394, General Code. The taxpayer's right of review under this section is limited to three situations: (1) where property has been assessed which is not listed in or which has been omitted from a return, (2) where any item or class of taxable property listed in a return is assessed in excess of the value thereof as so listed, and (3) where a claim duly made for deduction from net book value of accounts receivable, or depreciated book value of personal property used in business, so listed, is disallowed.<sup>10</sup>

In any such case, the jurisdiction of the Tax Commissioner may be invoked by the filing of an application in writing for review and re-determination of the assessment previously made. Such application must be filed within thirty days after the mailing of the notice of the assessment to the taxpayer.<sup>11</sup> Thereupon the taxpayer is entitled to a hearing at a place not more than fifty miles from his residence or, if he gives written consent, at the office of the Tax Commissioner in Columbus.

Upon the hearing, the commissioner may make such correction in the assessment as he may deem proper or he may affirm the assessment. He is required to transmit a certificate of his determination to the taxpayer and, if no appeal is taken or upon the final determination of an appeal, he must also transmit a copy of such certificate to the Auditor of State or to the proper county auditor. The commissioner's decision is final as to all taxable property

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<sup>10</sup> *Wright Aeronautical Corp. v. Glander*, 151 Ohio St. 29, 84 N.E. 2d 483 (1949). As to the basis of listing and assessing personal property see OHIO GEN. CODE §§ 5388 and 5389.

<sup>11</sup> OHIO GEN. CODE § 5394 specifically requires that notice of the assessment be given to the taxpayer in the three situations described and provides: "The mailing of the notice herein prescribed shall be prima facie evidence of the receipt of the same by the person to whom such notice is addressed."

listed in the return and constitutes to that extent his final determination.<sup>12</sup>

The statute contains no provision as to the form or contents of the application for review and re-determination of property taxes, and none has been specified by the Tax Commissioner. Although the hearing generally is informal in nature, the commissioner's decision is embodied in a formal journal entry which contains findings of fact or law or both, and which becomes a part of the public record of the department.

### *Corporation Franchise Taxes*

For the purpose of assessing corporation franchise taxes, the Tax Commissioner is required to determine the value of the issued and outstanding shares of stock of every corporation required to file the annual report and the proportion thereof properly allocable to Ohio for purposes of taxation.<sup>13</sup> Section 5500, General Code, provides that any corporation may be heard upon the question of the correctness of the determination of the value of its stock, or of the proportion of such value allocated to Ohio.

The procedure is similar to that applicable to personal property taxes. Application for review and correction must be filed with the Tax Commissioner in writing within thirty days from the receipt by the complaining corporation of the statement from the Treasurer of State showing the value, or the proportionate value, of the shares of stock upon which the franchise fee is charged and the amount of the fee.<sup>14</sup>

The Tax Commissioner is empowered to make such correction of the determination as he may deem proper, and to certify the same to the Auditor of State who is required to correct his records and duplicates in accordance therewith. Although the statute does not make specific provision for a hearing, the same is afforded and the action taken by the Tax Commissioner is journalized as in other cases. Likewise, although there is no specific provision for appeal from the Tax Commissioner's findings under this Section, it is un-

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<sup>12</sup> OHIO GEN. CODE § 5394 further provides that "nothing herein shall be so construed, nor shall the final judgment of the board of tax appeals or any court to which such final determination may be appealed be deemed to preclude the subsequent assessment in the manner authorized by law of any taxable property which such taxpayer failed to list in such return or which the assessor has not theretofore assessed." Note also § 5395.

<sup>13</sup> OHIO GEN. CODE § 5498. This section applies both to domestic and foreign corporations.

<sup>14</sup> See OHIO GEN. CODE § 5499 as to the fee charged and the certification thereof.



doubted that appeal does lie because such findings are necessarily final.<sup>15</sup>

### *Sales and Use Taxes*

While the Ohio Sales Tax is primarily a consumers' tax, vendors are collectors thereof for the state and have certain legal liabilities in respect thereof. Sales tax assessments representing deficiencies are made against vendors in some cases and against consumers in others, but in either event written notice thereof must be served personally or by registered mail. Section 5546-9a, General Code, provides that such assessments shall become conclusive unless the vendor or consumer to whom the notice of assessment is directed shall, within thirty days after service thereof, file a petition for re-assessment.<sup>16</sup>

Such petition must be in writing and must be verified under oath by the vendor, consumer, or his duly authorized agent having knowledge of the facts. It must set forth with definiteness and particularly the items of the assessment objected to, together with the reason for such objections. In order to assist the vendor or consumer in meeting the statutory requirements, a special form of petition for re-assessment has been prescribed by the Tax Commissioner, but its use is not mandatory. The practitioner may devise his own form and, if it meets the statutory requirements, it will be acceptable.

The Tax Commissioner is required to assign a time and place for hearing the petition for re-assessment and to notify the petitioner by registered mail. The assessment and penalties thereon become due and payable within three days after notice of the finding made at the hearing has been served either personally or by registered mail upon the party assessed.

Specific provision is made in the statute for an appeal to the Board of Tax Appeals as provided in Section 5611, General Code.<sup>17</sup>

The review of use tax assessments by the Tax Commissioner is also controlled by Section 5546-9a, General Code, pursuant to the provisions of Section 5546-37 of the Use Tax Act.

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<sup>15</sup> OHIO GEN. CODE § 5611 provides for appeal to the Board of Tax Appeals from final determinations by the Tax Commissioner.

<sup>16</sup> The Sales Tax Act will be found in §§ 5546-1 to 5546-24a inclusive; the Use and Storage Tax Act in §§ 5546-25 to 5546-48 inclusive.

<sup>17</sup> There is also a provision in OHIO GEN. CODE § 5546-9a whereby, after the expiration of appeal time, a copy of the Tax Commissioner's final entry may be filed in the office of the county clerk of courts and a judgment entered thereon by the clerk in favor of the state.

*Public Utility Taxes*

The procedure in respect of public utility property taxes is more extensive and complicated. Generally speaking it may be said that utilities have three opportunities for a hearing at the administrative level.

Section 5426, General Code, grants to utilities other than express, telegraph and telephone companies, upon written application, the right to be heard before the assessment of their property. In other words, a hearing is afforded before any action whatever is taken by the Department of Taxation. Section 5427 grants these utilities the additional right, between the assessment and certification dates, to make application for correction of the assessment or valuation of their property. Similar rights are extended to express, telegraph and telephone companies by Sections 5453 and 5454, and to sleeping car, freight line and equipment companies by Sections 5466 and 5467, General Code.<sup>18</sup>

After certification to the proper officer, any public utility may be heard by the Tax Commissioner, pursuant to Section 5517, General Code, upon the question of the correctness of any determination, finding or order. This procedure likewise is described as review and re-determination, and application therefor must be filed in writing within thirty days from the date of mailing of the certification complained of to the public utility.<sup>19</sup>

The statute provides for hearing at the office of the Tax Commissioner in Columbus and specifies that upon such hearing he may make such correction in his determination, finding or order as he may deem proper. His decision in the matter is final and subject to appeal as provided in Section 5611, General Code.

In addition to property taxes, public utilities in Ohio are subject to an excise tax upon their gross receipts or earnings. Here again, the utility is granted the right to three hearings. The first is before gross receipts have been determined under Section 5479, General Code. The second opportunity is between the dates fixed for determination of the amount of the gross receipts and the dates fixed for certification of such amount to the Auditor of State pursuant to Section 5480. The third opportunity arises under Section 5517,

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<sup>18</sup> OHIO GEN. CODE § 5468 describes the levy applicable to sleeping car, freight line and equipment companies, not as a property tax, but as "a sum in the nature of an excise tax." The Supreme Court of Ohio, however, referring to §§ 5462 *et seq.*, has stated that "a study of the provisions of those sections demonstrates that the tax there imposed is not a franchise tax but a property tax." *Pullman Co. v. Evatt*, 144 Ohio St. 295, 58 N.E. 2d 766 (1944).

<sup>19</sup> Mailing of the certification to the public utility is *prima facie* evidence of the receipt of the same by the public utility to which it is addressed. Compare note 11, *supra*.

after certification, as in the case of property taxes.

### *Miscellaneous Other Taxes*

The excise tax known as the Grain Handling Tax<sup>20</sup> is reviewable and appealable in the same manner as personal property taxes generally, as provided in Section 5545-25, General Code.<sup>21</sup>

Assessments in respect of wine, beer, malt beverages and mixed drinks<sup>22</sup> are reviewable in the same manner as sales and use taxes,<sup>23</sup> pursuant to Section 6212-59, General Code.

In the same manner, assessments under the Cigarette Use and Storage Tax Act<sup>24</sup> are reviewable in the same manner as sales and use taxes, pursuant to Section 5874-22c, General Code.

### *Tax Refunds and Certificates of Abatement*

Contrary to the impression held by some persons, erroneous or illegal taxes which have been paid are not irretrievable in Ohio. The several taxing statutes not only provide for refunds of illegal or erroneous tax payments, but the department presently adheres to a liberal refund policy. On his own motion, where the statute grants the discretion, the Tax Commissioner orders the refund of taxes illegally assessed or erroneously overpaid. Likewise it is his practice to advise taxpayers to file claims for refunds where they do not realize that they have made errors or that circumstances have arisen which make a refund possible.

This policy, which is both legislative and administrative in origin, immeasurably strengthens the sometimes tenuous bonds of mutual confidence between the taxpayer and the tax administrator. Experience teaches that under such a policy returns filed by taxpayers are more accurate. Taxpayers, for example, always are reluctant to return a doubtful item if they fear they will be unable to recover an overpayment. They are less inclined to resolve every doubt against the state when they have the assurance that the state will be fair in refunding that which does not rightfully belong to it.

There is no specific refund statute in respect of personal property taxes, but Section 5395, General Code, provides that the Tax Commissioner may issue a final assessment certificate within certain time limitations and this certificate, if an "excess" finding results, will effect a refund. In the case of "local situs" property taxes, tangible and intangible, the taxpayer will receive a cash refund; in

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<sup>20</sup> OHIO GEN. CODE §§ 5545-21 to 5545-29, inc.

<sup>21</sup> See OHIO GEN. CODE §§ 5394 and 5611.

<sup>22</sup> OHIO GEN. CODE §§ 6064-41, 6064-41a, 6212-48, 6212-49, 6212-49b.

<sup>23</sup> See OHIO GEN. CODE § 5546-9a.

<sup>24</sup> OHIO GEN. CODE §§ 5894-22 to 5894-22e, inc.

the case of "state situs" intangible property taxes he will receive a certificate of abatement.<sup>25</sup> The authority of the Tax Commissioner under Section 5395, General Code, has been held by the Board of Tax Appeals and the Ohio Supreme Court to be discretionary, and from his determination under this section no appeal may be taken unless there is a "deficiency" as distinguished from an "excess" finding.<sup>26</sup> Thus there is no appeal if the Tax Commissioner makes a finding which has the effect of denying a refund.<sup>27</sup>

Prior to 1939, the Ohio law provided no machinery for remitting overpayment of taxes paid to the Treasurer of State, such as "state situs" intangible property taxes, corporation franchise taxes or public utility excise taxes. As to all of these recourse could be had only to the Sundry Claims Board and of course its favorable action had to be implemented by a specific legislative appropriation. When Section 1464-3 was enacted in 1939 a provision was included authorizing the Tax Commissioner to issue certificates of abatement as to taxes overpaid to the Treasurer of State, such as those named, at any time within five years prior to the making of application there-

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<sup>25</sup> OHIO GEN. CODE § 5395 provides in part: "In case of assessments certified to the county auditor, if such final assessment certificate comprises any 'excess' items he shall ascertain whether or not the taxes for the year or years thereby represented have been paid; if so, he shall draw his warrant on the county treasurer in favor of the person paying them, or his personal representative, for the full amount of the taxes computed upon such 'excess' items and further proceedings herein shall be had as provided in sections 2589 and 2590 of the General Code; . . ." In other words, a cash refund is only available as to tangible and intangible personal property taxes overpaid to the county treasurer, generally known as "local situs" property taxes. In the case of final assessments certified to the auditor of the state, usually referred to as "state situs" intangible property taxes, § 5395 provides: "If such final assessment certificate comprises any 'excess' items he shall ascertain whether or not the taxes for the year or years thereby represented have been paid and certify such fact to the tax commissioner and thereupon such proceedings may be had with respect to such 'excess' items as provided in section 1464-3 of the General Code; . . ." Pursuant to this section the taxpayer obtains, not a cash refund, but a certificate of abatement. The time limitation generally applicable to the issuance of final assessments under § 5395 is the approximate two-year period specified in OHIO GEN. CODE § 5377. However, as to "state situs" intangible property taxes, certificates of abatement may be applied for directly under OHIO GEN. CODE § 1464-3 and the same may be issued within a five-year period. See *The Niles Bank Co. v. Evatt*, 145 Ohio St. 179, 60 N.E. 2d 789 (1945). Thus, there is an obvious discrimination between taxpayers of the same class. "State situs" intangible property taxpayers include public utilities, inter-county corporations, financial institutions and dealers in intangibles.

<sup>26</sup> *Willys-Overland Motors, Inc. v. Evatt*, 141 Ohio St. 402, 48 N.E. 2d 468 (1943).

<sup>27</sup> The situation is otherwise as to "state situs" intangible property taxes where the taxpayer makes a direct application for a certificate of abatement under OHIO GEN. CODE § 1464-3. *The Niles Bank Co. v. Evatt*, note 25, *supra*.

for. Certificates of abatement are payable to the taxpayer and are negotiable, and may be tendered by the payee or transferee thereof to the Treasurer of State as payment of any tax of the same kind.

The procedure for obtaining a refund of sales taxes is set forth in Section 5546-8, General Code. It provides that the Treasurer of State shall refund to vendors the amount of taxes illegally or erroneously paid where the vendor has not reimbursed himself from the consumer. When the illegal payment was made, not to a vendor, but to the Treasurer of State by the consumer, the refund is made to the consumer. In all cases an application must be filed with the Tax Commissioner within ninety days from the date it is ascertained that the assessment or payment was illegal or erroneous.<sup>28</sup> The Tax Commissioner's findings are certified to the Auditor of State who in turn draws a warrant for such certified amount on the Treasurer of State to the person claiming the refund.<sup>29</sup>

A similar procedure in respect of illegal or erroneous use taxes is set forth in Section 5546-32, General Code.

#### APPEALS TO THE BOARD OF TAX APPEALS<sup>30</sup>

Appeals from final determinations by the Tax Commissioner may be taken to the Board of Tax Appeals under Section 5611, General Code. Such matters include the commissioner's final action in respect of any preliminary, amended or final tax assessments, reassessments, valuations, determinations, findings, computations or orders. Appeals may be taken by the taxpayer or the person to whom notice of the commissioner's determination is required to be given, by the Director of Finance if the revenues affected by the decision accrue primarily to the state treasury, or by the county auditors of the counties to whose general tax funds the revenues affected by such decision primarily accrue.

To perfect an appeal, written notice of appeal must be filed both with the Board of Tax Appeals and with the Tax Commissioner within thirty days after notice of the Tax Commissioner's final determination shall have been given or otherwise evidenced as required by law. The statute specifically requires that the notice of

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<sup>28</sup> The ninety-day period for filing such application does not begin to run until the vendor or tax payer has actual knowledge of illegality or error. *The Phoenix Amusement Co. v. Glander*, 148 Ohio St. 592, 76 N.E. 2d 605 (1947).

<sup>29</sup> See OHIO GEN. CODE § 5546-6 as to credit in respect of returned merchandise.

<sup>30</sup> This portion of the discussion is limited to appeals from determinations of the Tax Commissioner. For appeals from County Boards of Revision and County Budget Commissions, see OHIO GEN. CODE §§ 5610 and 5625-28, respectively.

appeal shall set forth or shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the Tax Commissioner to the taxpayer of the final determination complained of, and shall also specify the error or errors therein complained of. The Ohio Supreme Court has held that these are mandatory jurisdictional requirements and if not complied with the appeal will be dismissed.<sup>31</sup>

Upon the filing of a notice of appeal, the Tax Commissioner is required to certify to the Board of Tax Appeals a transcript of the record of the proceedings before him together with all evidence, documentary or otherwise, considered by him in connection therewith. The appeal is heard by the board or one of its examiners at its office in Columbus or in the county where the appellant resides. The board has promulgated rules of practice and procedure which are available upon request and which should be carefully read and observed by the practitioner.

The board may order the appeal to be heard upon the record and the evidence certified to it, but upon application of any interested party it is required to order the hearing of additional evidence.<sup>32</sup> The statute further provides that the decision of the board may affirm, reverse, vacate or modify the tax assessments, valuations, determinations, findings, computations or orders complained of in the appeal.<sup>33</sup>

Decisions of the Board of Tax Appeals become final and conclusive for the current year unless reversed, vacated, or modified as provided in Section 5611-2, General Code. Such decisions and the date of entry thereof upon the board's journal are required to be certified by registered mail to all parties to the appeal and, under certain circumstances, to other persons specified in the statute.<sup>34</sup>

#### APPEALS TO THE OHIO SUPREME COURT

Proceedings to obtain reversal, vacation or modification of decisions of the Board of Tax Appeals are by appeal directly to the

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<sup>31</sup> *Kinsman Square Drug Co. v. Evatt*, 145 Ohio St. 52, 60 N.E. 2d 668 (1945); *Dayton Rental Co. v. Evatt*, 145 Ohio St. 215, 61 N.E. 2d 210 (1945); *American Restaurant Co. v. Glander*, 147 Ohio St. 147, 70 N.E. 2d 93 (1946).

<sup>32</sup> See *Bloch v. Glander*, 151 Ohio St. 381, 86 N.E. 2d 318 (1949); *Clark v. Glander*, 151 Ohio St. 229, 85 N.E. 2d 291 (1949).

<sup>33</sup> The Board has no power, however, to change the inherent nature of the assessment or to levy a tax different from that under consideration. *Wellnitz v. Evatt*, 19 O.O. 330 (B.T.A.).

<sup>34</sup> Copy of entry to attorney of record was held to constitute notice to appellant in *Lutz v. Evatt*, 144 Ohio St. 635, 60 N.E. 2d 473 (1945).

Supreme Court of Ohio. Such an appeal is a matter of right, and the procedure is set forth in Section 5611-2, General Code.

The statute, in so far as it relates to appeals from decisions of the Board of Tax Appeals determining appeals from final determinations by the Tax Commissioner, mentions only determinations of preliminary, amended or final tax assessments, re-assessments, valuations, determinations, findings, computations or orders made by him. No mention is made of appeals in respect of rules promulgated by the Tax Commissioner or by the Board of Tax Appeals and, indeed, there is no appeal in these instances. The Ohio Supreme Court has held that Section 5611-2, General Code, authorizes appeals to the Ohio Supreme Court from the Board of Tax Appeals in quasi-judicial proceedings only, and that the making of rules by the Department of Taxation is not a quasi-judicial proceeding.<sup>35</sup> However, the Administrative Procedure Act does authorize an appeal on the validity of rules, as distinguished from adjudications, to the Court of Common Pleas of Franklin County, Ohio.<sup>36</sup>

Persons who may appeal decisions of the Board of Tax Appeals determining appeals from the Tax Commissioner are specified in the statute and, for the most part, are the persons who are authorized to institute an appeal to the board in the first instance.

Appeals to the Ohio Supreme Court must be taken within thirty days after the date of the entry of the decision of the Board of Tax Appeals on the journal of its proceedings. To effect an appeal, the appellant must file a notice of appeal both with the Ohio Supreme Court and with the Board of Tax Appeals. Such notice must set forth the decision of the Board of Tax Appeals appealed from and the errors therein complained of. Proof of the filing of such notice with the Board of Tax Appeals must also be filed with the Ohio Supreme Court. These also have been held to be mandatory jurisdictional requirements and failure to comply therewith is fatal.<sup>37</sup>

The statute provides that the Tax Commissioner or all persons to whom the decisions of the Board of Tax Appeals is required by Section 5611-1, General Code, to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal

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<sup>35</sup> Zangerle v. Evatt, 139 Ohio St. 563, 41 N.E. 2d (1942). The fifth par. of the syllabus states: "Courts will not aid in making or revising rules of administrative officers, boards or commissions, being confined to deciding whether such rules are reasonable and lawful as applied to the facts of a particular justiciable case."

<sup>36</sup> OHIO GEN. CODE §§ 154-64 (g) and 154-72.

<sup>37</sup> Oliver v. Evatt, 144 Ohio St. 231, 58 N.E. 2d 381 (1944); Lutz v. Evatt, 144 Ohio St. 341, 58 N.E. 2d 955 (1945); Kenney v. Evatt, 144 Ohio St. 369, 59 N.E. 2d 47 (1945); Lutz v. Evatt, 144 Ohio St. 635, 60 N.E. 2d 473 (1945); Sunset Memorial Park Assn. v. Evatt, 145 Ohio St. 194, 61 N.E. 2d 207 (1945).

must be served upon all appellees by registered mail.

Within thirty days after the filing of written demand by an appellant, the Board of Tax Appeals must file with the Ohio Supreme Court a certified transcript of the record of the proceedings of the Board of Tax Appeals pertaining to the decision complained of, and the evidence considered by the Board in making such decision. The Ohio Supreme Court has held that it will not consider any matter not presented to the board, but will confine its revisory jurisdiction to the transcript of the record of the proceedings of such board and the evidence considered by it.<sup>38</sup>

Finally, the statute provides that if, upon hearing and consideration of such record and evidence, the Ohio Supreme Court is of the opinion that the decision of the Board of Tax Appeals appealed from is reasonable and lawful it shall affirm the same, but if the court is of the opinion that such decision is unreasonable or unlawful, it shall reverse and vacate the same or it may modify same and enter final judgment in accordance with such modification. The court has closely adhered to this provision of the statute.<sup>39</sup>

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<sup>38</sup> *The Neil House Hotel Co. v. Board of Revision*, 147 Ohio St. 231, 70 N.E. 2d 646 (1946); *The Swetland Co. v. Evatt*, 139 Ohio St. 6, 37 N.E. 2d 601 (1941).

<sup>39</sup> *Board of Education v. Evatt*, 136 Ohio St. 283, 25 N.E. 2d 453 (1940); *The Fair Store Co. v. Board of Revision*, 145 Ohio St. 231, 61 N.E. 2d 209 (1945); *The Neil House Hotel Co. v. Board of Revision*, note 38, *supra*; *Fiddler v. Board of Tax Appeals*, 140 Ohio St. 34, 42 N.E. 2d 151 (1942); *Wheeling Steel Corp. v. Evatt*, 143 Ohio St. 71, 54 N.E. 2d 132 (1944).