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JUDICIAL TAX COURTS FOR THE STATES: A MODERN IMPERATIVE

*William D. Dexter**

I. Introduction

There has been growing discontent among tax gatherers and taxpayers alike over the disposition of state and local tax disputes.¹ Concern centers on the nature of appellate review and its availability irrespective of the tax involved or the amount or subject matter in controversy. In many jurisdictions the system of review in tax cases presents an unwieldy array of alternative administrative and judicial avenues of review which are confusing to the prospective tax appellant and destructive of economy and uniformity in the system. This article will assess the need for a specialized judicial court to review the initial disposition of tax matters.

Any review of tax matters should have as its objectives:

- (1) Equity to individual taxpayers and among taxpayers engaged in similar operations within any tax jurisdiction;
- (2) Adequate safeguards against arbitrary administrative action with assurance of certainty and uniformity in application;
- (3) Simplicity in resolving questions of tax liability;
- (4) Resolution of tax liability issues within a reasonable period of time;
- (5) Economic feasibility; and
- (6) Disposition by a competent impartial tribunal.

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¹ While the rise in federal expenditures, and the concomitant rise in the "bite" taken out of the taxpayer's earnings, have received extensive comment and have long been the subject of national debate, the soaring income and expenditures of local units of government have gone relatively unnoticed. Figures released last summer from a joint Senate-House study of income, taxation, and expenditures in the states indicate that state and local taxes over the ten-year period from 1955 to 1965 more than doubled, increasing from some \$23.5 billion to \$51.2 billion. It is estimated that combined state expenditures in three years will exceed \$103 billion, or as much as the federal government spent in the fiscal year 1964.

It has been a long-standing rule that a state may not exact a tax from its citizens without satisfying the requisites of constitutional due process. Therefore, each state has conformed its existing tax structure at least to the minimal standards of constitutional due process as set by federal and state courts.² This is true even though federal courts have had only a limited opportunity to measure the state tax structure's adherence to those standards. Review of state tax matters by federal courts has been curtailed by the provision of the Johnson Act that federal district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a "plain, speedy and efficient" remedy may be had in the state courts.³ The availability of review under Section 2281 of the Federal Judicial Code is even more limited in the wake of *Swift v. Wickham*⁴ where the Supreme Court admonished that the broad review provided by the three-judge panel is available only where substantial federal questions are presented and that jurisdiction under the provision should be construed strictly to that end.⁵

Given the fact that each state's tax structure therefore presumably will reflect the "plain, speedy and efficient" remedy required by the federal standard and will reflect due process required under its state constitution, obviously the suggestion of an alternative and presumably "better" route for review through a state tax court presupposes the need for *more* than the requisites of minimal due process. "More" may simply mean an easier, faster, or more manageable route. It may involve only a less costly method of review which is of prime importance to the taxpayer with a small amount of tax at issue. This insistence on the right of judicial review of tax questions, even though there is concurrently available review by an administrative agency, can only be explained by that feature of impartiality and objectivity attributed peculiarly to a full-fledged court. This attitude has not developed without factual justification, for the safeguards found in the judicial process are often not required in the administrative process, particularly on a state and local level. Therefore it can be urged that judicial tax review should be used to whatever extent is practicable. Disposition of controversies through administrative review should be held to a minimum, dictated primarily by the amount in controversy. This would clearly maximize the effectiveness of the judicial check on the administrative process.

To the extent that the stated objectives can be realized better by a tax court than by the present system of administrative and judicial review of

² See *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Carbonneau Industries Inc. v. City of Grand Rapids*, 198 F. Supp. 629 (W.D. Mich. 1961).

³ 28 U.S.C. §1341 (1952).

⁴ 382 U.S. 111 (1965).

⁵ For a recent application of that rule to a tax matter, see *Kuhn v. State of Michigan Civil Action No. 30179* (E.D. Mich. Sept. 5, 1967), decided by a three-judge panel.

initial tax dispositions, the creation of a tax court in any state is amply justified. Significant advantages can be achieved by the creation of such a court, for it would:

- (1) Promote a higher level of judicial competence in an increasingly complex and technical field of law;
- (2) Help to prevent a multiplicity of tax litigation;
- (3) Provide for a more uniform administration and enforcement of the revenue and tax laws of the state;
- (4) Result in a speedier determination of tax litigation;
- (5) Provide judicial review which, in comparison to the many existing methods of judicial review now permitted, would be more direct and less expensive to the taxpayer and to the state;
- (6) Simplify judicial review procedures and eliminate the choice of forum or remedy allowed by the availability of alternative methods of review open to the *ex parte* choice of the initiating party.

These suggested advantages must be appraised in the light of existing patterns of administrative and judicial review which not only vary significantly from state to state, but also from tax to tax within the state.

II. Existing Patterns of Review of Tax Matters

A. An Overview

Historically each new tax statute has provided for some form of review process in addition to judicial review. The need for expertise in a particular tax area has led to the creation of specific and limited tax review bodies, generally administrative in nature and composed of individuals who possess some sort of special competence in tax matters. Commonly a second review-body is created which is quasi-judicial in nature but with administrative finality in its decision. A specific appeal route to a court of record in the state court system will typically then be provided, perhaps with further review granted on appeal from that court. In practice the actual scope of the appellate review at any stage of the process is not clearly delineated, nor is this review coordinated with other existing forms

of tax review. As the "patchwork quilt" character of the various review processes has become more evident, legislatures have responded with various "reorganization plans" in an attempt to standardize hearing procedures before reviewing bodies and appeals from them. The Uniform Administrative Procedure Act is an example.⁶ It superimposes a new administrative review and appeal procedure on the existing patterns. With the taxpayer striving to open new appeal routes in the hope of securing a more favorable, more efficient, or more convenient appeal route, it is apparent that such a patchwork will not adequately fulfill the purposes of review. Certainty and uniformity in the application of the tax laws are lost under this patchwork. The ease of challenging a specific imposition disappears, and correspondingly the advantages of forum shopping increase. As the review process becomes less predictable and more complex, the safeguards against arbitrary administrative action and other deprivations of procedural and substantive due process cease to provide meaningful protection. The taxpayer with a small amount of tax in controversy is denied an economically feasible method of contesting questionable tax liability.

B. *The Michigan Example*

The need for a tax court to replace the existing patchwork system of tax review can be illustrated by reference to current procedures in Michigan.

There are marked differences in administrative and judicial review of tax matters depending upon the tax, the administrative agency involved, the choice of forum, the stage in the review process at which judicial review is sought, and whether judicial relief is sought before or after payment. For example, the scope of judicial review of property tax matters is different from judicial review of other taxes. Review varies with the nature of the taxpayer's objection to the tax. Review depends on whether appeal to the courts is before or after appeal to the Michigan State Tax Commission. The availability and nature of judicial relief depends on whether the tax in controversy has been paid. If property taxes are paid under protest and refund is sought because the tax is claimed to be "illegal," suit may be instituted in the Circuit Court for refund prior to appeal to the Commission. Alternatively the taxpayer can elect not to pay the tax and appeal to the Commission. If the tax is claimed to be excessive but not illegal, the taxpayer is generally required to appeal to the Commission prior to resort to the court. Judicial review in the latter instance is in the Court of Appeals and limited to review of claims of fraud or illegality on the part of the Commission.⁷

⁶ MICH. COMP. LAWS §24.101 *et seq.* (1952).

⁷ Under ARTICLE VI, §28, MICHIGAN CONSTITUTION (1963): "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property

The tax laws administered by the Revenue Division of the Treasury Department provide that, with the exception of inheritance and local income tax matters, a taxpayer may appeal from any order or determination of the Revenue Division to the Board of Tax Appeals, created by the Department of Revenue Act of 1941,⁸ or may have any other appropriate remedy provided by law. Many of the tax statutes specifically allow a suit for a refund of money already paid to be brought directly in the Circuit Court (general trial court) in the locality where the taxpayer does business. "Any appropriate remedy provided by law" also includes the right generally to pay taxes and sue in the Court of Claims for refund, the right to proceed for a declaratory judgment in the Circuit Court, and the right to resort to the extraordinary remedies provided by direct appeal to the Court of Appeals or the Supreme Court of Michigan.

In the inheritance tax field, matters are usually determined by the Probate judge on the recommendation of an account examiner of the Revenue Division. If questions arise as to the levy of the inheritance tax on the estate, they may be resolved by a petition in the Probate Court, with review of that decision on appeal to the Circuit Court. Since the rate of the Michigan inheritance tax is low, many of these controversies involve very small amounts. This has resulted in a very limited review of these questions by appellate courts, and consequently, in many areas of inheritance tax enforcement there are no appellate decisions. Since it is inconceivable that all eighty-three counties in Michigan are applying the inheritance tax law in accordance with any common standard, it is fair to conclude that as to the inheritance tax there is nonuniform enforcement of the tax.⁹

Two examples rather vividly portray the complexity of present methods of review. In 1960 the same substantive question concerning the jurisdictional reach and constitutionality of the Michigan business activities tax was pending simultaneously before numerous Circuit Court judges, the Court of Claims, the State Board of Tax Appeals, the Supreme Court of Michigan, and the United States District Court for the Eastern District of Michigan. Each of these tribunals with the exception of the Michigan Supreme Court was ostensibly exercising concurrent jurisdiction over the

tax laws from any decision relating to valuation or allocation." This is in accordance with the GENERAL PROPERTY TAX ACT, MICH. COMP. LAWS §211.152 (1948) and with judicial decisions on point. See *S. S. Kresge Co. v. City of Detroit*, 276 Mich. 565, 268 N.W. 740 (1936); *Kingsford Chemical Co. v. City of Kingsford*, 347 Mich. 91, 78 N.W.2d 587 (1956). For an excellent discussion of the application of this principle to the existing review routes and the conclusion that the review provided by the GENERAL PROPERTY TAX ACT and other law is woefully inadequate, see Krawood, *Michigan's Need for a Tax Court and the Inadequacy of Appeal Procedures Provided by the General Property Tax Law*, 11 WAYNE L. REV. 508 (1965).

⁸ MICH. COMP. LAWS §205.1 *et seq.* (1948).

⁹ This same pattern is generally applicable in the determination and enforcement of liability for the mentally ill or retarded in State institutions.

same substantive question. Most of these cases were pending before judges whose crowded dockets made it extremely difficult for them to handle complicated and protracted tax litigation.

The second and more recent example of the confusion that results from a variety of review processes in tax matters is found in the history of litigation between the State of Michigan and The Detroit Edison Company concerning liability for the corporate franchise tax. Under Michigan corporation law, a corporation, believing itself to be aggrieved by a determination of its liability for the corporate franchise tax imposed by the Corporation Fees, Tax and Charges Act,¹⁰ may apply to the Corporation and Securities Commission for a redetermination of the franchise liability. Under Section 9 of that Act,¹¹ a further appeal may then be taken to the corporation tax appeal board, and within thirty days of the decision of that body either party may appeal "from the decision of the appeal board to the supreme court of the state." Conceding that, under the General Court Rules of 1963 promulgated by the Michigan Supreme Court, jurisdiction for this appeal might be lodged in the Court of Appeals, such jurisdiction was created subsequent to the last amendment of the statute in question, and it could be argued, as the State in fact did argue, that the appeal route there established was the only appeal route provided or available. This would follow from the legislative intent seemingly apparent in Section 9. However, in *The Detroit Edison Co. v. State of Michigan*,¹² the corporate taxpayer established its right to sue in the Court of Claims for recovery of franchise taxes paid under protest without first appealing to the corporation tax appeal board. The majority opinion saw the issue as an abuse of administrative discretion by the Commission in attempting to hold the claim in abeyance until the same question for a prior year was resolved in the appeal pending before the tax appeal board where it affected the corporation's right to get a "certificate of good standing." The concurring opinion of Mr. Justice Carr met the issue from a different point of view. The appeal remedy provided by Section 9 of the Corporation Fees, Taxes and Charges Act could not be and was not the exclusive appeal route:

It is significant that the legislature did not specify that the remedies to a corporation, thereby afforded, would be exclusive. In view of the decision of this Court in *in re Consolidated Freight Co.*, 265 Mich. 340, 348 (4 PUR N§ 397), it may be assumed that the legislature intended that the review in this court should be confined wholly to questions of law, in other

¹⁰ MICH. COMP. LAWS §450.301 (1948).

¹¹ *Id.* at §450.309.

¹² 361 Mich. 290, 105 N.W.2d 227 (1960).

words, an appeal in the nature of certiorari. If, therefore, the statutory procedure under the 1954 act, above cited, is exclusive, a corporation considering itself aggrieved by being required to pay the amount of the franchise fee as fixed by the commission has no remedy by which the factual issues can be tried in court. Such result is not consistent with the general property tax law . . . allowing the payment of taxes under protest, with the right to sue to recover such payments.

Had it been the intention of the legislature in the enactment of P.A. 1954, No. 153, to deprive corporations of the right recognized in *Consumers Power Company v. Corporation & Securities Commission*, 326 Mich. 643 (16 ALR2d 1084), to bring action in the court of claims to recover a franchise fee paid under protest, we think such intent would have been clearly expressed. The administrative procedures as provided in said amendatory act are not inconsistent with the right to sue in the court of claims, the review of such procedure being limited to questions of law only. . . .¹³

In 1962, the Court of Claims decided that Edison did have a right to recover the franchise taxes which it had paid under protest.¹⁴ In 1966, the Corporation and Securities Commission, on the theory that the 1962 judgment was not binding for subsequent tax years, assessed a deficiency determination against Edison. Edison, after requesting a redetermination of the deficiency, commenced an action in the Ingham County Circuit Court by filing a "Complaint (in the nature of a petition)" asking that deficiency assessments be vacated and set aside. Jurisdiction in the Ingham County Circuit Court was founded upon the Administrative Procedure Act of Michigan.¹⁵ Under Section 8 of the Act,¹⁶ an aggrieved party in a "contested case" before an administrative agency may sue in a Circuit Court by a complaint in the nature of a petition to have the order of the

¹³ *Id.* at 307, 105 N.W.2d at 236.

¹⁴ *Detroit Edison Co. v. Corporation and Securities Commission*, 367 Mich. 104, 116 N.W.2d 194 (1962).

¹⁵ See note 6 *supra*.

¹⁶ MICH. COMP. LAWS §24.108 (1952).

agency set aside. Rejecting the State's argument that the court had no jurisdiction to hear the petition, the Ingham County Circuit Court denied the state's motion for accelerated judgment.¹⁷

The lesson to be gleaned from the *Edison* cases is clear: the "patchwork quilt" of judicial review can only lead to confusion, inconsistency, and unreliability. Moreover, the expansion of judicial review avenues in this patchwork manner is nearly inevitable under the existing Michigan statutes for judicial review of tax assessments. As long as the avenues are open, good faith litigants will use them. Yet the benefits that accrue to the litigant who can make his own *ex parte* selection of an appeal route will not necessarily be conducive to the evolution of a consistent and just body of tax law nor to an economic method of pursuing it. The confusion and needless expenditure of legal effort, such as that involved in the *Edison* cases or in disputes over liability for the business activities tax, can be avoided by a speedy, orderly, and uniform remedy for the taxpayer.

Quite apart from the problems of multiplicity and uncertainty in tax review, Michigan experience has demonstrated the very practical problem of judicial competence in the adjudication of tax cases which require specialized knowledge gained only by experience in the tax field and by repeated exposure to comparable problems. Tax specialization has been recognized among practicing lawyers for years because of the need for such detailed knowledge. In most instances the general practicing lawyer considers himself incompetent to handle complicated tax matters. The scattering of these specialized questions among the many forums available in the state judicial and administrative structure places an undue burden on the judge lacking special competence in tax matters and therefore on the judicial system.

The complete lack of uniformity in tax administration and enforcement to which the existing patchwork has led means that a taxpayer never knows at what stage of the review process he should obtain judicial review of a tax controversy or in what forum he should adjudicate it in order to secure maximum benefit of the review process. He needs the best legal counsel simply to figure out his path and timing. These uncertainties suggest the need to focus on the questions most relevant to the simplification of the procedural maze.

III. What Should Be the Scope and Availability of Judicial Review?

Michigan case law suggests that current judicial attitudes favor the expansion rather than the contraction of judicial review of tax matters.

¹⁷ Trial court decision reversed on appeal by the Court of Appeals, August 29, 1968, Calendar No. 3847; leave to appeal filed with the Supreme Court September 18, 1968, Calendar No. 52183.

This is part of the increasing concern over what constitutes "due process." More formal and exacting review procedures on the administrative level have been required, and at the same time judicial review of tax matters has expanded in spite of the administrative finality rule. If every taxpayer is entitled to judicial review of all tax questions in any tax controversy, a serious question is raised concerning the purpose of an administrative appeal agency discharging the quasi-judicial function. Although the expanded function of both the courts and administrative agencies in the process of reviewing tax controversies has grown out of the same concern for impartial competent review, one or the other is really unnecessary assuming that disposition of contested matters by an administrative agency is to be subject to the same rules as disposition by a court. For example, where a tax matter is handled as a "contested case" under the Uniform Administrative Procedure Act,¹⁸ which requires the preparation of a formal record, findings of fact and conclusions of law by the administrative agency and which limits judicial review to the correction of legal errors, judicial review will involve a judicial function different from the trial *de novo* of a complex tax controversy. Under the Act, the review is based on the presupposition that the responsibilities related to fact-finding and subject matter expertise are discharged by the administrative body. As a matter of practice, however, it is not so easy to distinguish between a question of fact and a question of law nor to determine how mixed questions of fact and law are to be handled. How is the administrative agency to treat what it identifies as legal questions that are inextricably bound up in the administrative disposition of a contested case? May we conclude that the quasi-judicial administrative function as a matter of practice is readily distinguishable from the judicial function? Does not limited judicial review, such as that prescribed by the Uniform Administrative Procedure Act, effectively require the same knowledge and competence in tax matters as that possessed by the *de novo* trier of fact? In the last analysis, therefore, does the rule of administrative finality and limited judicial review actually serve to promote a "plain, speedy and efficient" remedy, constructively separating a judicial function from a distinct administrative function in tax matters? To the extent that a distinction of expertise is accorded administrative review by the judiciary, how much of this recognition is motivated by lack of interest and time to devote to complex tax questions? This writer's experience indicates that the respective roles of the courts and administrative review agencies depend in large measure on judicial attitudes toward the impartiality and competency of the administrative review agency and the court's interest in the subject of taxation.

This is not to say that certain questions are not better resolved finally on the administrative level. But the rule of administrative finality is not

¹⁸ MICH. COMP. LAWS §24.104 *et seq.* (1952).

restricted to these questions. It is effectively a rule of expediency and, if we accept this, we must recognize two corollaries both of which are destructive of the just and efficient administration of tax law. First, as the question submitted to the administrative agency becomes relatively more important to the citizen involved and to the political framework within which it is posed, expediency will become less acceptable and different results will follow. Second, it is clear that a rule of expediency cannot peacefully coexist with a deeply felt sense that the courts should have the last word in the administration of justice.¹⁹ To the extent that they do coexist, the two principles are bound to live in tension with each other. The proposal for a judicial tax court is aimed precisely at this tension. With the growing importance of substantive tax law on the state and local level the ordinary rules applicable to the administrative process are being rejected in favor of a more thoroughly judicial review process.

Significantly the motivation to create a form of judicial tax review as opposed to the administrative review process has come as much from government as from private sources. It is perhaps overlooked by the taxpayer that the tax administrator has as much or more interest in the conflict resolution process than the taxpayer himself. Undoubtedly a part of his interest stems from his concern, like that of any other taxpayer, that efficient methods of applying equal justice are evolved. The tax administrator, however, also has less altruistic motives for desiring to perfect the conflict resolution process. Certainly the job of the tax administrator is facilitated when he can anticipate the procedural route in which an appeal will be taken, and does not have to cover all the possible "bets" on the judicial "board." To the extent that the procedural battles are minimized, moreover, he may focus his attention on the sound development of a state or local tax policy.

Ironically it is popular opposition to the concept of a tax court which largely prevents its realization. Such resistance derives from two seemingly opposite tendencies. On the one hand, resistance to such a state tax court

¹⁹ Judge Peter M. Gunnar, first judge of the Oregon Tax Court and for years a pioneer in the enactment of tax court legislation, has summed up the problem thus:

Regardless of the breadth of administrative discretion as propounded by our courts, most Americans, tax men and taxpayers alike, inherently believe that a citizen has his right to a day in court before his property and the product of his labor may be taken from him. We have recognized that to protect the individual from the unconstitutional exercise of the legislative power, and more frequently from the illegal or improper exercise of executive power, is the function of the courts in the last resort.

Gunnar, *Oregon's Unique Tax Court* in REVENUE ADMINISTRATION at 17, (1962).

comes from those taxpayers who wish to maximize the "sporting theory of justice" by retaining a system that encourages piecemeal solution and depends more upon the time and place of filing the complaint than upon the merits of the controversy. On the other hand, there is a suspicion that some popular resistance to the idea of a judicial tax court stems from an unarticulated fear that it would become, not a real court of law, but somehow more a summary process for determining tax liability after the fashion of the infamous Star Chamber of medieval England.

If we believe that forum shopping and alternative avenues of appeal contribute significantly to the impossibility of uniform and equitable applications of rules of law, it is clear that the "sporting theory of justice" is inconsistent with the goals sought in the administration of the tax laws. If there is a choice of forum or other remedy, a taxpayer's counsel is certainly under an obligation to choose the one best suited to his client's needs. However, when the complexity of procedural rules and the array of open avenues permit the taxpayer to avoid just taxation or the state to tax the taxpayer unjustly, then the rules have become so subject to abuse that a basic change in the rules is required.

It is common knowledge that many Circuit Court judges have openly expressed the desire to be rid of tax matters that are extremely complicated in nature and may be brought to them very infrequently. It seems evident, therefore, that the creation of a specialized tax court placing a premium on the expertise of its personnel will provide a more competent forum for the review of these questions while simultaneously ensuring that a full-fledged court will have the final word on just administration of the tax laws.

A glance at the nationwide picture of state tax patterns will suggest that the need for a forum of specialized judicial review in state tax matters is even overdue. As of August 1968, forty-four states had a sales tax; forty-four had a use tax; forty-nine had a cigarette tax; all fifty had a gasoline tax; thirty-eight had an individual income tax; and forty-one levied on corporate income. The states generally have agreements with sister states for reciprocal enforcement of tax provisions, Michigan having such an agreement with thirty-six states. Thirty-one states and the District of Columbia have both a sales and an income tax structure.²⁰ With the existing tax structure as complex as even this quick summary indicates, with the inevitable expansion of state taxation of interstate business as a result of recent decisions clarifying the states' rights in this area,²¹ and with the continued expansion of the demand for state services, the forecast for the economic growth of the states highlights the need for better tax assessment and review procedures. The growing economic importance of state and local tax questions makes for a modern imperative that some simpler, systematized, rational approach to the settlement of these questions

²⁰ Research Section, Revenue Division, Department of Treasury, State of Michigan.

²¹ *Scripto Inc. v. Carson*, 362 U.S. 207 (1960); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

replace the existing patchwork of conflict resolution now prevalent in a great number of states.

IV. The Judicial Tax Court With Exclusive Jurisdiction

The objectives of tax review can best be met by creating a judicial tax court with exclusive jurisdiction. This conclusion is controversial both in concept and in practicality. It is premised on the writer's experience that courts of general jurisdiction that do not specialize in disposition of tax cases generally desire to be rid of tax controversies, particularly the complicated and time-consuming ones. It is also based on the experience that most trial courts of general jurisdiction lack the competence to deal with the kind of tax problems that are usually presented at the judicial level, either as a result of lack of interest, time or background. It is also based on the recognition, however, that unquestionably part of the process of determining tax liability will involve some administrative review. The proposed *judicial* tax court would be as much a part of the court system of the state as the general trial courts or appellate courts, but it would possess specialized expertise in tax matters and would be limited in its jurisdiction to the review of tax liability cases. It would be possible to rely on an independent administrative body rather than a full-fledged *judicial* court of general jurisdiction, if such a body exercised a judicial function under proper safeguards for its impartiality. Ostensibly independent review agencies concerned exclusively with the review of state and local tax disputes have been established in at least fifteen states.²² A brief discussion of the relative merits of such an independent review agency and the judicial tax court is therefore in order.

Typically the independent review agency will be provided by statute as the specific appeal route, following the initial determination of tax liability and perhaps a redetermination at the request of the taxpayer. The review agency will generally be authorized to promulgate its own rules of practice.²³ The review board will typically be placed within the administrative framework of some department of the state, but will be regarded under the statutes as independent, according to statutory statements of varying force and effect. For example, Massachusetts law provides that "There shall be in the department of corporations and taxation, but in no manner subject to the control of the said department, an appellate tax board. . . ." ²⁴ Of course the jurisdiction of the tax board will be spelled out in the statutes and the rules; generally an appeal to a court

²² *Fifteen States Have Independent Review Agencies*, 28 TAX ADMINISTRATORS NEWS 61 (1964).

²³ Cf. RULES OF PROCEDURE AND PRACTICE OF THE BOARD OF TAX APPEALS, State of Louisiana pursuant to LA. REV. STAT. §47:1413 (1950); RULES OF PRACTICE AND PROCEDURE, APPELLATE TAX BOARD, The Commonwealth of Massachusetts pursuant to MASS. GEN. LAWS ch. 58A, §1 (1965).

²⁴ MASS. GEN. LAWS ch. 58A, §1 (1965).

will be provided from the decision of the board. The rules of practice and procedure promulgated by the board will deal typically with the entire process of filing an appeal, drafting such written materials as may be required, identifying the parties to the action, defining who may practice before the board, and other procedures.

There seems little doubt that one of the great virtues of the administrative tax appeal board in practice is its ability to promulgate procedural rules best adapted to the management of the matter presented. Thus, under most rules of practice, the taxpayer may represent himself before the board or have an attorney act for him. Certified public accountants and attorneys from other states may be permitted to practice under certain circumstances and in certain matters on behalf of the taxpayer.²⁵ The rules generally provide for an informal hearing of argument and the issuance of written findings of fact and law. Such rules are generally calculated to make the taxpayer feel at ease in an informal hearing aimed at a full development of the facts with a minimum of procedural roadblocks.

The real character of any particular appeal board, however, is dependent upon a variety of imponderables. The Massachusetts board, for example, is expressly declared by the statute to be an agency of the Department of Corporations, "but in no manner subject to the control of the said department. . . ."²⁶ It exercises concurrent jurisdiction over tax matters with the Massachusetts Superior Court,²⁷ but its findings are final and subject to review by the Supreme Judicial Court only in cases of errors of law.²⁸ Although the remedy provided by the board is said to be exclusive,²⁹ courts of equity may grant declaratory relief as a discretionary matter under certain limited circumstances.³⁰ Although its independence is less clearly secure in practice, the Massachusetts appellate tax board is about as close to a genuine tax court as it is possible to conceive and it was in fact so declared by the Supreme Judicial Court of Massachusetts.³¹

The Michigan corporation tax appeal board, created to review corporate franchise tax matters, may provide a comparison to the Massachusetts board. The corporation tax appeal board is composed of the Attorney General of the State as chairman, the Auditor General and the State Treasurer.³² Findings of fact by the board have been held to be

²⁵ Cf. Rule No. 1, RULES OF PROCEDURE AND PRACTICE OF THE BOARD OF TAX APPEALS, State of Louisiana pursuant to LA. REV. STAT. §47:1413 (1950); Rule No. 21, RULES OF PROCEDURE AND PRACTICE OF THE BOARD OF TAX APPEALS, State of Ohio pursuant to OHIO REV. CODE ANN. §5715.29 (Page 1959).

²⁶ MASS. GEN. LAWS ch. 58A, §1 (1965).

²⁷ *Id.* at ch. 213, §1A (1962).

²⁸ *Id.* at ch. 58A, §13 (1965); ch. 30A, §14(8) (1957).

²⁹ *Id.* at ch. 62, §48 (1921).

³⁰ *Madden v. State Tax Commission*, 333 Mass. 734, 133 N.E.2d 252 (1956).

³¹ *Cohen v. Assessors of Boston*, 344 Mass. 268, 182 N.E.2d 138 (1962).

³² MICH. COMP. LAWS §450.309 (1948).

binding upon the Supreme Court if supported by competent evidence.³³ The statute creating it provides that "The Commission and/or the corporation may . . . appeal from the decision of the appeal board to the supreme court of the state."³⁴ We have discussed the fact, however, that the corporation tax appeal board is not regarded as the exclusive remedy for the taxpayer, and the circumvention of its jurisdiction by the taxpayers of the State undercuts the force or effect of its rulings in creating firm tax policy. In addition there is serious doubt that this review function can be appropriately discharged by State officials sitting *ex officio*.

Unless the review agency is clearly surrounded by the safeguards of judicial due process, the basic notion that judicial review should also be available constitutes a principal drawback to such an agency: reviewing bodies are unnecessarily multiplied in order to ensure judicial safeguards. Taken together with the right to a jury trial of pure fact questions, these circumstances dictate the creation of a tax court of general jurisdiction rather than a quasi-judicial administrative agency. The cost, delay, and uncertainty of the remedy involved in permitting administrative action to be reviewed alternatively or cumulatively by a quasi-judicial administrative agency or a trial court is not justified. A tax court of general jurisdiction is the only body capable of combining timely and uniform disposition of tax controversies by a specialized body and the constitutional right to due process. If the function of review is to be exercised by a court which will develop detailed knowledge through experience gained in a specialized forum, there is no reason to believe the review would be less competent than that of an administrative review agency. The identification of the tax review agency with the independence of the judiciary and the single orderly process of appeal within the judicial system provides for the tax court a great measure of that intangible respect and authoritativeness not reflected in the image of an administrative review agency.

The happy compromise in blending the various assets we have discussed would call for review by a court exclusively concerned with tax litigation and empowered to promulgate its own rules of practice and procedure. Essentially this is the nature of the Oregon State Tax Court³⁵ as well as the recommendation of the Commissioners on Uniform State Laws in the Model State Tax Court Act (1957).

V. Conclusion

A state tax court of exclusive jurisdiction can provide the flexibility and expertise of a quasi-judicial administrative agency with judicial com-

³³ *Cleveland-Cliffs Iron Co. v. Corporation and Securities Commission*, 351 Mich. 652, 676, 88 N.W.2d 564, 570 (1958).

³⁴ MICH. COMP. LAWS §450.309 (1948).

³⁵ Created by the OREGON STATE COURT ACT OF 1961, ORE. REV. STAT. §305.405 *et seq.* (1961).

petence and due process. The existence of this specialized court would alleviate the necessity for providing alternative avenues for review of administrative tax determinations. The end result would much better accomplish the objectives of review set out earlier in this article, particularly the goals of more consistent and reliable interpretations of tax law and greater economy for the appellant.

The rapidly changing complexion of state and local taxation requires that the states give serious thought to existing provisions for judicial review of decisions in tax disputes. As the volume of state and local taxation increases, as it almost certainly must do, it is imperative that methods of review keep pace if fair and equitable application of the revenue laws of the states is to result.

The feasibility of a judicial review process as opposed to an administrative review process will in any case depend largely upon the values placed on independent review, the feasibility of creating another court, the case-load under the existing forms of review, the degree to which the existing forms have fulfilled their functions and a host of other factors that depend peculiarly upon the individual state's taxation patterns. Before statutory changes are made these factors must be evaluated to determine the specific requirements of each state.

In Michigan, for example, a study has been undertaken by the Taxation Section of the State Bar Association. The results of this study are now being considered by an advisory board including representatives from the Department of Revenue, the Attorney General's Office, and the Law Revision Commission. This writer is now serving with the group in an effort to reach agreement on appropriate legislation to revise and improve the Michigan situation where necessary. Assuming that such agreement can be reached, provisions will probably be presented in the spring 1969 session of the Michigan Legislature.

Before any specific changes can be made, however, taxpayers and tax administrators alike must become concerned about the shape of revenue administration in the state. The review process must be evaluated by comparing what we have sought to do with what in fact we have provided. A careful study of the Model State Tax Court Act and of the Oregon Tax Court's experience³⁶ would be a most profitable supplement to this evaluation. It is only then that the policies of equal application, uniformity, economy, and expertise that we have posited as the basic values of the review process can be intelligently pursued.

While careful study and evaluation are required, it should be stressed that there is no little urgency about the matter. The processes of review of tax disputes must be updated as rapidly as the process of taxation itself is now developing.

³⁶ See generally Phillips, *The Oregon Tax Court: Some Thoughts on its First Decisions*, 42 ORE. L. REV. 292 (1962).

