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Maurice S. Culp

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# ADMINISTRATIVE REMEDIES IN THE ASSESSMENT AND ENFORCEMENT OF STATE TAXES

MAURICE S. CULP\*

A knowledge both of the kinds of administrative remedies available to the taxpayer and of the time when they are available is very important.<sup>1</sup> The tax structure of any given state is complicated and composed of a great variety of taxes.<sup>2</sup> In no single study can one hope to do justice to the administrative remedies available to the taxpayer under the entire structure. The scope of this article is limited to a few taxes which are common to many or all of the states. A comparative analysis of the administrative remedies open to the taxpayer under the *general property*, the *income*, the *inheritance* and *estate*, and the *general sales* taxes will be made.

A general discussion of the taxpayer's independent judicial remedies is not within the scope of this study, but it is necessary to consider judicial remedies to a limited extent. An analysis of administrative remedies would be incomplete without some consideration of the statutory provisions for a judicial review of administrative action by taxing officials. It is equally important to determine the extent to which the statutory remedies are to be considered exclusive and to preclude any independent judicial or equitable remedies.

## I. STATUTORY PROCEDURE FOR THE REVIEW OF ASSESSMENTS

Very commonly there are two stages for the utilization of administrative remedies. Almost universally some opportunity is given at the

\* Assistant Professor of Law, Lamar School of Law, Emory University. The writer wishes to acknowledge his appreciation of the courtesies extended by the library staffs of the schools of law of Duke University, the University of North Carolina, and the University of Southern California College of Law without which this study could not have been made.

<sup>1</sup> The subject of taxpayers' remedies has received some detailed treatment by studies in individual states and in discussions of special problems. The following list includes some of the more important studies: Carey and Schuyler, *The Illinois Taxpayer's "Day in Court"* (1937) 31 ILL. L. REV. 993; Culp, *Georgia Taxpayers' Remedies—In the Assessment and Collection of General Property, Income, Estate and Other Special Taxes and Licenses* (1939) 1 GA. B. A. J. no. 3; Field, *The Recovery of Illegal and Unconstitutional Taxes* (1932) 45 HARV. L. REV. 501; McAllister, *Taxpayers' Remedies—Washington Property Taxes* (1938) 13 WASH. L. REV. 9; Sclove, *Refunds and Recovery of State Taxes Erroneously, Illegally or Unconstitutionally Imposed in West Virginia* (1935) 41 W. VA. L. Q. 348; Stason, *Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies* (1930) 28 MICH. L. REV. 637; notes, *Remedies for Unequal Property Valuations* (1932) 46 HARV. L. REV. 1000; *Actions to Recover Taxes* (1926) 12 VA. L. REV. 433; *Relief against Discriminatory Assessments* (1937) 23 VA. REV. 613.

<sup>2</sup> Detailed tables for the individual states and comparative tables are included in TAX SYSTEMS OF THE WORLD (17th ed. 1938).

initial assessment stage for a review of assessments. Less frequently, statutory remedies are available either after the assessment has become final or after the taxpayer has actually paid the tax.

Under most taxing statutes the taxpayer's first line of defense requires positive action; he must take the initiative and invoke the statutory provisions for the review of assessments by an application to some administrative tribunal. He will receive a hearing of some kind. In some cases he will be entitled to appeal to a higher administrative tribunal. Occasionally the findings of the administrative authorities will be final and conclusive, but in most cases the taxpayer will have an opportunity to have a judicial review of the administrative findings concerning the assessment. Indeed, this general statement of the tactical approach of the taxpayer is subject to abundant modification as the following discussion indicates. Because of the great diversity among the taxes selected for study, some detailed attention to each tax may sometimes be necessary.

### *Initial Administrative Review*

There is practically no interstate uniformity in the organization or constitution of the administrative boards designated to hear complaints about *general property* tax assessments. The only common principle is that the type of reviewing board is determined largely by the prevailing type of local government. In New England the reviewing board is a town tribunal such as the selectmen, the board of relief, or the board of civil authority.<sup>3</sup> In widely scattered sections of the country, town,<sup>4</sup> city,<sup>5</sup> and borough<sup>6</sup> boards of equalization hear complaints. However, the most prevalent territorial unit of review is the county. Such county administrative authority is often called a board of equalization.<sup>7</sup> Frequently the board of county commissioners<sup>8</sup> or

<sup>3</sup> CONN. GEN. STAT. (1930) §1194 (board of relief for the town); DEL. REV. CODE (1935) §§1267, 1304 (board of assessments); N. H. PUB. LAWS (1926) c. 64, §13 (selectmen); VT. PUB. LAWS (1933) §§8-635, 8-730.

<sup>4</sup> MICH. COMP. LAWS (Mason, 1929) §6784 (with provision for appeal to the county board from the township board in §6727).

<sup>5</sup> VA. CODE ANN. (Michie, 1936) Tax Code §§344, 345.

<sup>6</sup> MINN. STAT. (Mason, 1927) §§2035, 2040, 2049.

<sup>7</sup> County boards of equalization or the equivalent in the following states: N. J. REV. STAT. (1937) §§54: 3-18, 54: 3-21 (county board of taxation); N. Y. CONSOL. LAWS (McKinney, 1937) bk. 49, §56; N. C. PUB. LAWS 1937, c. 291, §§1105(7) (b) (for cities, §§1202); ORE. CODE ANN. (1930) §§69-301, 69-304, 69-306; TENN. CODE ANN. (Williams, 1934) §1429; TEX. STAT. (Vernon, 1936) art. 7211. In Louisiana it is the parish board: LA. GEN. STAT. ANN. (Dart, Supp. 1936) §8391.

<sup>8</sup> FLA. COMP. GEN. LAWS ANN. (Skillman, Supp. 1934) §1041(90)(12) (for intangibles); IDAHO CODE ANN. (1932) §61-402; ME. REV. STAT. (1930) c. 13, §73; MD. ANN. CODE (Flack, Supp. 1935) art. 81, §§38, 39, 182; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §§2113, 2115; N. M. STAT. ANN. (Courtright, 1929) §§141-306, 141-230; WASH. REV. STAT. ANN. (Remington, 1933) §11220; WYO. REV. STAT. ANN. (Courtright, 1931) §115-220 (The state

supervisors<sup>9</sup> will have the equalization of assessments as one of its functions. In the Middle West, particularly, a special county board of review or taxation hears such complaints.<sup>10</sup> A few states permit a hearing upon the original assessment before the state tax commission or board of tax appeals.<sup>11</sup> The county court, sitting as an administrative tribunal, equalizes assessments in Arkansas and West Virginia.<sup>12</sup> On the other hand, the Alabama statutes make no general provision for an administrative review of assessments.<sup>13</sup> In some states the assessment of the general property tax is not a unitary process. A local officer or board will assess real and tangible personal property locally situated. A state body will assess as a unit property belonging to utilities and others owning property which is widely scattered or which is not susceptible of assessment locally. When the assessment is made by the state authority in these states, the taxpayer's remedy for the review of the assessment is usually invoked by an application for a rehearing or redetermination before this body.<sup>14</sup>

During the last decade the *income* tax as a source of revenue has become increasingly popular, most of the present state income tax

board hears complaints without formal appeal under §115-511, and under §115-202 the board of county commissioners hears complaints regarding property coming into the state after tax day.)

<sup>9</sup>CAL. REV. LAWS ANN. (1936) §§3672, 2675; KY. STAT. ANN. (Carroll, 1936) §§4120, 4123; MISS. CODE ANN. (1930) §3165; MISS. LAWS 1932, c. 187; MO. REV. STAT. (1929) §§9802, 9814 (If the county board is not in session a board of two justices of the peace hears the complaint in a summary manner under §§9803, 9804.)

<sup>10</sup>ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §§3090, 3065; ARK. DIG. STAT. (Castle, Supp. 1927) §§9911, 9778; COLO. STAT. ANN. (Michie, 1935) c. 142, §§110, 114; GA. CODE (1933) §92-6912 (special board of arbitration); ILL. REV. STAT. (State Bar Assoc. ed., 1937) c. 120, §102; IOWA CODE (1935) §§7132, 6982-d3; KAN. GEN. STAT. ANN. (Corrick, 1935) §§79-1412, 79-1413; NEB. COMP. STAT. (1929) §§77-1702, 77-509; OKLA. LAWS 1933, c. 115, §§6, 8; S. C. CODE (1932) §§2779, 2432.

<sup>11</sup>State board: NEV. COMP. LAWS (Hillyer, 1929) §6548; state tax commission: OHIO GEN. CODE ANN. (Baldwin, 1934) §5394 (for personal property); board of tax appeals: MASS. GEN. LAWS (1932) c. 59, §65 (alternative method); N. J. REV. STAT. (1937) §§54-2-39, 54-49-18, 54-1-41. In South Carolina the state tax commission's original assessments are subject to review by a board of tax review: S. C. CODE (1932) §2432. The Virginia commissioner of revenue reviews realty assessments: VA. CODE ANN. (1936) Tax Code §265.

Under the recent tax administration act in Georgia assessments of the state revenue commissioner are ultimately reviewed by a board of tax appeals: GA. LAWS EX. Sess. 1937-1938, p. 89, §§18, 19.

<sup>12</sup>ARK. DIG. STAT. (Castle, Supp. 1927) §9911; W. VA. CODE (Michie, 1937) §§693, 693(1).

<sup>13</sup>ALA. CODE ANN. (Michie, 1928) §§6096, 3080. But in the more populous counties in the state, a board of review is created: Ala. LAWS EX. Sess. 1936, no. 176, p. 206, §6.

<sup>14</sup>ILL. REV. STAT. (State Bar Assoc. ed., 1937) c. 120, §102; IND. STAT. ANN. (Burns, Supp. 1937) §64-1321, Ind. Acts 1936, c. 306, §1; IOWA CODE (1935) §7132; N. D. LAWS 1931, c. 276; WIS. STAT. (1937) §§70-46, 70-47(2).

Many states have a system of personal valuation of personal property. In those states the only disputes over valuation will arise from the raising of an assessment by the public tax officers or in the case of real property assessments.

laws having been adopted during this period. At the present time at least thirty-four states impose a personal net income tax.<sup>15</sup> Unlike the general property tax, the income tax assessment machinery is relatively simple. This tax is centrally administered in most cases, and one official or central board is responsible for its enforcement. The income tax is computed on the basis of a personal tax return which each person must file with the central administration. Clerks and employees of the state revenue department may assist in the actual computation of the tax by the taxpayer, but this fact does not estop either the taxpayer or the state from asking for a reexamination of the amount. In twenty-three states<sup>16</sup> the taxpayer may be assessed for a deficiency in his income tax at any time within the period allowed by the Statute of Limitations which varies from three to five years after the return has been filed. These statutes require the tax officials to notify the taxpayer of the corrected amount. Then the taxpayer must take fairly rapid steps to raise and present any objections he may have to the increase. Most statutes authorize the state tax commission or board or other tax official to grant a hearing or a rehearing when applied for by the taxpayer.<sup>17</sup>

<sup>15</sup> See TAX SYSTEMS OF THE WORLD, *op. cit. supra* note 2, at 137, 138. Indiana does not have a net income tax. It has a gross income tax which combines some of the features of the personal income tax with that of the general sales tax. It will be discussed, however, in connection with the income tax rather than with the sales tax.

<sup>16</sup> ALA. CODE ANN. (Michie, Supp. 1936) §345.33; ARIZ. REV. CODE (Court-right, Supp. 1936) §3183z12; Ark. Laws 1929, Income Tax Law, §26; Cal. Stat. 1937, c. 668, §11; Colo. Laws 1937, c. 175, §25; DEL. REV. CODE (1935) §159; GA. CODE (1933) §§92-3303, 92-3302; IDAHO CODE ANN. (1932) §61-2467; Ind. Laws 1937, c. 117, §12; IOWA CODE (1935) §6943-f23; KAN. GEN. STAT. ANN. (Corrick, 1935) §79-3226; LA. GEN. STAT. ANN. (Dart, 1932) §§8587-75, 8587-83, 8587-86; Md. Laws 1937, c. 11, §241; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §2295.20; N. M. Laws 1933, c. 85, §4; N. C. Pub. Laws 1937, c. 127, §335; Okla. Laws 1935, c. 66, art. 6, §27; PA. STAT. (Purdon's Compact ed., 1936) tit. 72, §3402-504; S. C. CODE (1932) §2460; UTAH REV. STAT. ANN. (1933) §§80-14, 80-19, 80-34; VT. PUB. LAWS (1933) §902; VA. CODE ANN. (Michie, 1935) Tax Code, §46; W. Va. Laws 1935, c. 89, §46.

There is some possibility that the Georgia statutes cited above have been repealed by implication by the recent tax administration act, Ga. Laws Ex. Sess. 1937-1938, p. 99, §44. But repeals by implication are not favored in Georgia. *Sims v. State*, 7 Ga. App. 852, 68 S. E. 493 (1910).

In some states the notice of an additional assessment may be very general. The Wisconsin courts have held that notice that an assessment is likely to be made coupled with knowledge of the date of the board's meeting is sufficient. *Milwaukee County v. Dorsen*, 208 Wis. 637, 242 N. W. 515 (1932); *Curtis Companies v. Wisconsin Tax Comm.*, 214 Wis. 85, 251 N. W. 497 (1933). If the taxpayer is afforded an opportunity to contest the increased assessment at a later date, no notice need be given of the additional assessment at the time it is made.

<sup>17</sup> ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §3182z13; Ark. Laws 1929, Income Tax Law, §25 (within 30 days from notice have conference, with revision within one year, §31); Cal. Stat. 1937, c. 668, §11; Colo. Laws 1937, c. 175, §23; DEL. REV. CODE (1935) §159(c); GA. CODE (1933) §92-3302; IDAHO CODE ANN. (1932) §61-2449; IOWA CODE (1935) §6943-f24; KAN. GEN. STAT. ANN. (Corrick, 1935) §79-3226; KY. STAT. ANN. (Carroll, 1936) §4281b; LA. GEN. STAT. ANN. (Dart, 1932) §§8587.83; Miss. Laws 1934, c. 120, §29; MONT. REV. CODES

This application must be filed within a relatively short period after notice, ranging from twenty days to two years.<sup>18</sup>

Every state except Nevada<sup>19</sup> imposes a *death* tax of some kind. The *inheritance* tax is the form very generally enacted, but several states have an *estate* tax which is very similar to the federal estate tax.<sup>20</sup> At least fourteen states<sup>21</sup> have a special estate tax in addition to an inheritance tax in order to take advantage of the 80% credit allowed by the federal estate tax. This estate tax is levied only if the inheritance tax imposed by state law does not absorb all of the federal credit. Indiana, Minnesota, Montana, New Hampshire, New York, Pennsylvania, and South Dakota<sup>22</sup> have a death tax on the local estates of non-resident decedents. These taxes ordinarily require no special admin-

ANN. (Anderson & McFarland, 1935) §2295.22; N. Y. CONSOL. LAWS (McKinney, 1937) bk. 59, §374; N. C. Pub. Laws 1937, c. 127, §§335, 340, 341; N. D. Laws 1931, c. 284; Okla. Laws 1935, c. 66, art. 6, §27(b,c); OREGON CODE ANN. (Supp. 1935) §69-1528; PA. STAT. (Purdon's Compact ed., 1936) tit. 72, §3402-505; S. C. CODE (1932) §2467; S. D. Laws 1935, c. 205, §30; UTAH REV. STAT. ANN. (1933) §80-14-19; VT. PUB. LAWS (1933) §908; VA. CODE ANN. (Michie, 1936) Tax Code, §63; W. Va. Laws 1935, c. 89, §53; Wash. Laws 1935, §11200-58; WIS. STAT. (1935) §§71.12, 71.13 (before the tax commission if a corporation, before the county board of review if an individual).

<sup>18</sup> A few states have a limit as low as 20 days. If the taxpayer is a non-resident, it is possible that 20 days would be an insufficient time. In this case the courts would hold that there was a denial of due process of law in the procedure as applied to such a person. *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. ed. 520 (1900).

<sup>19</sup> See FACING THE TAX PROBLEM (1937) c.c. 2-4; TAX SYSTEMS OF THE WORLD, *op. cit. supra* note 2, at p. 150-151.

<sup>20</sup> ARIZ. LAWS 1937, c. 27; GA. CODE (1933) §92-3401; N. Y. CONSOL. LAWS (McKinney, 1937) bk. 59, §249; VT. PUB. LAWS (1933) §119.

<sup>21</sup> These statutes are phrased in different ways, but their object is to impose an additional tax upon an estate which will be the difference between the total state inheritance or transfer tax levied and the 80% credit under the 1926 federal estate tax rates. COLO. STAT. ANN. (Michie, 1935) c. 85, §§23, 24; CONN. GEN. STAT. (Supp. 1935) §502c (with appeal to the superior court); DEL. REV. CODE (1935) §143; KAN. GEN. STAT. ANN. (Corrick, 1935) §79-1401a; ME. REV. STAT. (1930) c. 77, §27; MASS. GEN. LAWS (1932) c. 65a; MICH. COMP. LAWS (Mason, Supp. 1933) §3674; MINN. LAWS 1937, §2321-1; MO. REV. STAT. (1929) §573; NEB. COMP. STAT. (1929) §77-2301; N. H. LAWS 1931, c. 125; N. J. REV. STAT. (1937) §54:38-1; N. C. Pub. Laws 1937, c. 127, §6; OKLA. LAWS, 1935, c. 66, art. 5, §6; S. C. LAWS 1936, no. 960, p. 1768.

In New Jersey the taxpayer may appeal to the ordinary within 30 days after notice, N. J. REV. STAT. (1937) §54:38-10, and under §54:38-1 application may be made to commissioner for a refund or a reduction.

<sup>22</sup> IND. STAT. ANN. (Baldwin, 1934) §§15958, 15959; MINN. LAWS 1937, c. 483, §4 (appeal from determination by attorney general to the district court and then to supreme court); MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §10400.15 (determined by state board of equalization with appeal to the district court); N. H. PUB. LAWS (1926) c. 73, §11 (follows same procedure as for residents under c. 72); N. Y. CONSOL. LAWS (McKinney, 1937) bk. 59, §248-0 (assessed by the tax commission); PA. STAT. (Purdon's Compact ed., 1936) tit. 72, §§1202, 1202a (review by orphans court and appeal to the supreme court); S. D. COMP. LAWS (1929) §6860 (assessed by the tax commission).

In the jurisdictions where there is no express provision for a review of such assessments, it is reasonable to suppose that the ordinary provisions for reviewing the assessments of the tax commission apply as well to the assessment of a non-resident's estate.

istrative action, and if any dispute arises it seems likely, as a rule, that the same general procedure would be applied as is used for the inheritance tax in that state.

The death tax has had a much longer history than the income tax in this country. As a consequence, there is a much greater diversity in the methods of assessment. In about two-thirds of the states assessment is made by a central administrative agency. Most of these states have a single-headed tax department, and in those jurisdictions the assessment is made by the head of the revenue department<sup>23</sup> or the tax commissioner.<sup>24</sup> In the others the state tax commission or similar body will do the assessing.<sup>25</sup> In the other one-third of the states the assessment of the tax is usually under the supervision of the court<sup>26</sup> which has jurisdiction over the administration of decedent estates. A court in supervising or making the assessment is actually acting in an administrative capacity.<sup>27</sup>

When the death tax is assessed by some central administrative authority, the statutes usually require the personal representative of the decedent to file an inventory and a computation of the tax with the central office. If the assessing officer is not satisfied with the return, he will make a deficiency assessment. After notice of this assessment the taxpayer has an opportunity for a hearing which may be either administrative or judicial. The administrative review will be by a

<sup>23</sup> KY. STAT. ANN. (Carroll, 1936) §4281a-33; VA. CODE ANN. (Michie, 1936) Tax Code, §110.

<sup>24</sup> ARIZ. LAWS 1937, c.27, §18; CAL. STAT. 1935, Inheritance Tax Act, §16; CONN. GEN. STAT. (Supp. 1935) §498 c; FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) §1342(31); GA. CODE (1933) §92-3404, as modified by Ga. Laws Ex. Sess. 1937-1938, act. no. 296, p. 77; MASS. GEN. LAWS (1932) c. 65, §25; MISS. CODE ANN. (1930) §§5091, 5092; N. H. PUB. LAWS (1926) c. 72, §8; N. J. REV. STAT. (1937) §54:34-6 (commissioner may appoint appraisers); N. C. PUB. LAWS 1937, c. 127, §22; N. D. LAWS 1927, c. 267, §5(3) (must be approved by the commissioner); TENN. CODE ANN. (Williams, 1934) §1277.

<sup>25</sup> ALA. CODE ANN. (Michie, Supp. 1936) §347.18; DEL. REV. CODE (1935) §138; IND. STAT. ANN. (Burns, 1933) §6-2321; IOWA CODE (1935) §§7330, 7331; KAN. GEN. STAT. ANN. (Corrick, 1935) §79-1517; OKLA. LAWS 1935, c. 66, art. 5, §14; R. I. ACTS 1929, c. 1355, §2; S. C. CODE (1932) §2392; WYO. REV. STAT. ANN. (Courtright, 1931) §115-1213.

<sup>26</sup> ARK. DIG. STAT. (Crawford and Moses, 1919) §10232 (probate); COLO. STAT. ANN. (Michie, 1935) c. 85, §29 (county court); IDAHO CODE ANN. (1932) §14-418; ILL. REV. STAT. (State Bar Assoc. ed., 1937) c. 20, §406 (county judge); ME. REV. STAT. (1930) c. 77, §5; MD. ANN. CODE (Bagby, 1924) art. 81, §17 (circuit court); MICH. COMP. LAWS (1929) §3685 (probate); MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §10400.27; N. M. LAWS 1937, c. 181; N. Y. CONSOL. LAWS (McKinney, 1937) bk. 59, §231; N. D. LAWS 1927, c. 267, §5(3); OHIO GEN. CODE ANN. (Page, 1938) §5346; ORE. CODE ANN. (1930) §10631; TEX. STAT. (Vernon, 1936) art. 7130; UTAH REV. STAT. ANN. (1933) §80-12-20; VT. PUB. LAWS (1933) §1058; WASH. REV. STAT. (Remington, 1933) §11211; WIS. STAT. (1935) §§75.13, 75.15(11).

<sup>27</sup> *In re Castello's Estate*, 189 N. Y. 288, 82 N. E. 139 (1907). (The court stated that the judge was acting as a taxing officer or assessor rather than as a judge.)

hearing either before the officer or commission which determined the assessment or before a special administrative tribunal or board of tax appeals, as in Florida, Massachusetts, and Tennessee.<sup>28</sup> If the judge of the probate or surrogate court has made the assessment, the personal representative may appeal from the judge to the court.<sup>29</sup>

Approximately twenty-four<sup>30</sup> states now have the *general sales* tax in some form. It has been adopted very rapidly as a partial substitute for waning receipts from the general property tax. It is usually centrally administered and is computed from returns which the taxpayer files with the central office. Unless there is some error in the computation of the tax or some irregularity in the return, the taxpayer is not likely to have an occasion to use administrative remedies. In case the tax is increased by the tax collecting authorities there is some statutory provision in at least seventeen states<sup>31</sup> for an administrative hearing of the taxpayer's complaint regarding the increase. Under these statutes the taxpayer must file his petition for a hearing or rehearing before the central administrative officers within a period varying from ten<sup>32</sup> to thirty<sup>33</sup> days after notice of the increase. Several sales tax statutes fail to mention any method for reviewing increased assessments.<sup>34</sup> These statutes are open to serious constitutional objections. In the absence of a legal action to recover the tax, a judicial review of the assessment, or other statutory method of questioning the

<sup>28</sup> FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) §1342(32); MASS. GEN. LAWS (1932) c. 65, §25 (The board reports to the probate court, and its decision is final except as to appeal on matters of law); TENN. CODE ANN. (Williams, 1934) §1277 (to a special board composed of the governor, treasurer, and comptroller).

<sup>29</sup> N. Y. CONSOL. LAWS (McKinney, 1937) bk. 59, §232 (appeal to the surrogate), *In re Castello's Estate*, 189 N. Y. 288, 82 N. E. 139 (1907). From the final decision of the surrogate an appeal could be taken as in other cases. *In re Steinwenders' Estate*, 172 App. Div. 871, 158 N. Y. Supp. 779 (1st Dep't 1916).

<sup>30</sup> See TAX SYSTEMS OF THE WORLD, *op. cit. supra* note 2, at 153-156. The chart in this book lists 26 different states with sales taxes. But there is some difference in the classification used in this article and that used in the chart referred to. See FACING THE TAX PROBLEM, *op. cit. supra* note 19, at 21.

<sup>31</sup> Ala. Laws Spec. Sess. 1936-1937, no. 126, p. 10; ARIZ. REV. CODE ANN. (Courtright, Supp. 1934) §3138s; Cal. Stat. 1937, c. 778, §4; Colo. Laws 1937, c. 230, §26; Iowa Laws 1937, c. 196, §12; Kan. Laws 1937, c. 374, §10; Me. Laws 1937, c. 242, §13; MICH. COMP. LAWS (Mason, Supp. 1933) §3663-22; Miss. Laws 1934, c. 118, §10; Mo. Laws 1937, p. 563, §22; N. J. Laws 1935, c. 268, §507; N. C. CODE ANN. (Michie, 1935) §7880(156)r.; N. D. Laws 1937, c. 249, §12; Ohio Laws 1936, §5346-9a; S. D. Laws 1935, c. 205, §34; Utah Laws 1937, c. 114, §11; Wyo. Laws 1937, c. 74, §12.

Indiana does not have a sales tax, but it has a gross income tax which has some of the elements of the sales tax. This has been considered in connection with the discussion of the income tax.

<sup>32</sup> Ten days from notice in Colo., Utah, and Wyo.

<sup>33</sup> Ala., Cal., Iowa, Kan., Miss., N. J., and N. C.

<sup>34</sup> N. M. Laws 1933, c. 73; W. VA. CODE ANN. (Michie, 1937) §999(24); Wash. Laws 1937, c. 227, §17.



assessment, a failure to provide for an administrative review of the increase amounts to the denial of any opportunity for notice or hearing and fails to provide due process of law.<sup>35</sup>

### *Appellate Administrative Review*

There is a tendency in tax legislation to grant an additional administrative hearing beyond the original review of assessments. It is difficult to generalize in this study on the appellate review accorded to taxpayers against whom special taxes of the type under consideration in this article have been assessed.

Many statutes authorize a further administrative review of the action of the board of equalization or other similar body on general property tax assessments.<sup>36</sup> The appellate tribunal is either an administrative officer or an administrative board,<sup>37</sup> the reviewing board being numerically the more common type. Several statutes make the administrative appeal<sup>38</sup> the exclusive remedy for the correction of errors of fact in assessments.<sup>39</sup> In the case of the income tax, on the other hand,

<sup>35</sup> *Londoner v. Denver*, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. ed. 1103 (1908); see *Stuart v. Palmer*, 74 N. Y. 183, 188 (1878).

<sup>36</sup> Ga. Laws Ex. Sess. 1937-1938, pp. 100, 101, §45 (appeal from the board of tax appeals in matters affecting state assessments); Ind. Acts 1936, c. 306, §1; ME. REV. STAT. (1930) c. 13, §§74, 75 (appeal from assessor to county commissioners); MD. ANN. CODE (Flack, Supp. 1935) art. 81, §183; Mass. Acts 1937, c. 400, §6; MONT. REV. CODES ANN. (Anderson & McFarland, 1934) §2122.9; N. M. STAT. ANN. (Courtright, 1929) §141-408; N. J. REV. STAT. (1937) §54:2-39; N. C. Pub. Laws 1937, c. 291, §§1107, 1202; Okla. Laws 1933, c. 116, §6 (appeal from county board to district court, and by §8, appeal from the state board to the supreme court); ORE. CODE ANN. (Supp. 1935) §69-506; S. C. CODE (1932) §2432 (from state board to board of tax review, and §2780, from county board to state tax commission); TENN. CODE ANN. (Williams, 1934) §1450; UTAH REV. STAT. ANN. (1933) §§80-7-10, 80-7-12; Vt. PUB. LAWS (1933) c. 8-740 (from board of civil authority to commissioner); WASH. REV. STAT. ANN. (Remington, Supp. 1933) §11092.

<sup>37</sup> The Oklahoma statute specifically declares that the appeal shall be to the district court and thence to the supreme court, both courts acting in an administrative capacity. Okla. Laws 1933, c. 116, §§6, 8. However, in the recent decision of *In re Assessment of Kansas City Southern Ry.*, 168 Okla. 495, 33 P. (2d) 772 (1934), it was held that the appeal was in fact judicial, and that the legislature could not declare it to be an administrative appeal.

<sup>38</sup> The Georgia procedure for reviewing the determination of the board of county assessors is unique. The taxpayer who is dissatisfied with the final assessment made by the board of assessors may file notice of his objection with the board. At the same time he notifies the assessors that he has selected an arbitrator, giving his name. Then the board selects an arbitrator, and the two select a third member. This board of arbitration hears the dispute and renders a final decision. GA. CODE (1933) §§92-6911, 92-6912. This procedure has been held constitutional. *McGregor v. Hogan*, 263 U. S. 234, 44 Sup. Ct. 50, 68 L. ed. 282 (1923); *Barnes v. Watson*, 148 Ga. 822, 98 S. E. 500 (1919). This final decision is unimpeachable except for fraud. *Vestel v. Edwards*, 143 Ga. 368, 85 S. E. 187 (1919); see Culp, *loc. cit. supra* note 1.

<sup>39</sup> *In re Chicago*, R. I. & P. Ry., 140 Kan. 465, 37 P. (2d) 7 (1934); *Chesapeake & Potomac Telephone Co. v. Board of County Comm'rs*, 116 Md. 220, 81 Atl. 520 (1911) as modified by MD. CODE ANN. (Flack, Supp. 1935) art. 81,

because it is usually centrally administered there is seldom opportunity for more than a rehearing before the central taxing officers. A few statutes do permit a taxpayer to appeal from the assessment<sup>40</sup> to a special administrative tribunal such as the state board of equalization, the state tax commission, or the board of tax appeals.<sup>41</sup> Inheritance and estate tax statutes are generally silent on this subject. Like the income tax most of these taxes are assessed by the central authorities, and it is not likely that there will be any opportunity for such an appeal unless it is in those states which provide for a general administrative appeal. In the remainder of the states death taxes are assessed by the courts, and a judicial appeal is the appropriate procedure. General sales tax statutes make no provision for an administrative appeal, and a few such statutes expressly state that the administrative assessment is final.<sup>42</sup>

There is no statutory definition of the scope of the review to be granted by the appellate administrative tribunal. However, in practice, because of factors of judgment required in the making of an original assessment, the review is likely to be a *de novo* investigation. If the appellate review is so broad, there is no good reason why it should not be final upon the question of valuation, for an administrative hearing can accord due process of law equally as well as a judicial hearing.<sup>43</sup> However, as is later indicated, most states do not make the administrative review final and conclusive.

§186a (permitting a review on questions of law only); *State v. Sadler*, 21 Nev. 13, 23 Pac. 799 (1890); *State ex. rel. Adams-McGill Co. v. Kernan*, 51 Nev. 336, 275 Pac. 369 (1929); *State ex. rel. Boatman v. Superior Court*, 122 Okla. 70, 250 Pac. 1024 (1926); *Phillips v. Bancroft*, 75 Vt. 357, 56 Atl. 9 (1903). In *Columbia River Bridge Co. v. Wellington*, 140 Ore. 413, 13 P. (2d) 1075 (1932), the Oregon court held that the statute passed subsequently which provided for an appeal from the board of equalization to the tax commission impliedly repealed a prior statute granting appeals to the circuit court.

<sup>40</sup> Cal. Stat. 1937, c. 668, §11 (to state board of equalization); Md. Laws 1937, c. 11, §241 (state tax commission); MASS. GEN. LAWS (1932) c. 62, §45 (state board of tax appeals); N. C. Pub. Laws 1937, c. 128, §34 (from commissioner's findings appeal either to state board of assessments or Superior Court of Wake County).

<sup>41</sup> Under the federal income tax law the taxpayer may file a petition for a redetermination before the Board of Tax Appeals within 90 days after notice is sent to him by registered mail. 52 STAT. 538 (1938), 26 U. S. C. A. §272(a) (Supp. 1938). If the taxpayer appeals to the Board of Tax Appeals, he will be precluded from suing in the courts of the United States to recover such taxes. 5 PAUL AND MERTENS, LAWS OF FEDERAL INCOME TAXATION (1934) §5140. If the taxpayer wishes to sue, he should pay the tax, apply for a refund, and then sue in the federal courts under authority of 49 STAT. 1745 (1936), 26 U. S. C. A. §§1672, 1673 (Supp. 1938).

<sup>42</sup> Cal. Stat. 1937, c. 778, §4 (final); Mo. Laws 1937, p. 563, §22; N. J. Laws 1935, c. 268, §507; S. D. Laws 1935, c. 205, §34.

<sup>43</sup> *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. ed. 372 (U. S. 1855); *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. ed. 1040 (1905); *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. ed. 523 (1907).

*Statutory Judicial Review of Administrative Assessments*

A judicial review of the action taken by boards of equalization or other tribunals reviewing assessments is more common than the appellate administrative review.

In general the statutes governing the general property tax authorize an appeal from the final determinations of local and county boards of equalization. The Alabama statutes authorize a direct judicial review of original assessments in most cases.<sup>44</sup> If the taxpayer has taken an administrative appeal to a state board and he is still dissatisfied with the final result he may have a judicial review of the board's decision in several states,<sup>45</sup> as in Georgia, Massachusetts, and New Jersey where the decisions of the board of tax appeals are subject to a judicial review.<sup>46</sup> Most state income tax statutes provide for some mode of judicial review of the final income tax assessment,<sup>47</sup> it being necessary to take the appeal within thirty to sixty days<sup>48</sup> after notice of the final assessment. In most states a personal representative may appeal from a death tax assessment, and in at least ten states the taxpayer has an opportunity for a judicial review of his sales tax assessment.

As a general rule the reviewing court will be a tribunal of original jurisdiction, such as a circuit, district, or superior court whether the

<sup>44</sup> *Ala. Code Ann.* (Michie, 1928) §§6096, 3080. In cities of over 110,000 population the board of review corrects assessments and the probate judge gives notices of delinquencies and issues orders to show cause. *Ala. Laws Ex. Sess.* 1936, no. 176, §5.8. This latter section seems to allow the defendant a defense to tax liability.

<sup>45</sup> *ARIZ. REV. CODE ANN.* (Struckmeyer, 1928) §3065; *COLO. STAT. ANN.* (Michie, 1935) c. 142, §110; *ILL. REV. STAT.* (State Bar Assoc. ed., 1937) c. 120 §115; *IND. STAT. ANN.* (Burns, 1933) §64-1020; *IOWA CODE* (1935) §6982-d4; *MINN. STAT.* (Mason, 1927) §2371 (in case of omitted property assessed by the commission); *MISS. LAWS* 1935, c. 149, §1; *NEB. COMP. STAT.* (1929) §77-409; *N. M. LAWS* 1933, c. 85, §41; *OHIO GEN. CODE ANN.* (Page, 1938) §5611-2 (by court of common pleas in case of real property); *ORE. CODE ANN.* (1930) §§69-442, 69-507; *PA. STAT.* (Purden's Compact ed., 1936) tit. 72, §1104 (the board of finance and review reviewing state taxes); *S. D. COMP. LAWS* (1929) §6682; *VA. CODE ANN.* (Michie, 1936) Tax Code, §265; *WASH. REV. STAT.* (Remington, Supp. 1933) §11097; *WYO. REV. STAT. ANN.* (Courtright, 1931) §115-512.

<sup>46</sup> *Ga. Laws Ex. Sess.* 1937-1938, pp. 100, 101, §45; *MASS. GEN. LAWS* (1932) c. 58, §13; *N. J. REV. STAT.* (1937) §54:51-1; *N. J. LAWS* 1936, c. 171, p. 408.

<sup>47</sup> *ALA. CODE ANN.* (Supp. 1935) §345.33; *ARIZ. REV. CODE ANN.* (Courtright, Supp. 1936) §3182z14; *Colo. Laws* 1937, c. 175, §26a; *DEL. REV. CODE* (1935) §160; *IDAHO CODE ANN.* (1932) §61-2468; *IOWA CODE* (1935) §6943-f25; *KAN. GEN. STAT. ANN.* (Corrick, 1935) §79-3227; *KY. STAT. ANN.* (Carroll, 1936) §4281b; *LA. GEN. STAT. ANN.* (Dart, Supp. 1936) §8487.80, 8487.81; *MD. ANN. CODE* (Flack, Supp. 1935) art. 81, §186(b); *MISS. LAWS* 1934, c. 120, §30; *MO. REV. STAT.* (1929) §10134; *MONT. REV. CODES ANN.* (Anderson & McFarland, 1935) §2295.23; *N. H. PUB. LAWS* (1926) c. 65, §26; *N. M. LAWS* 1933, c. 84, §4; *N. Y. CONSOL. LAWS* (McKinney, 1937) bk. 59, §375; *N. D. COMP. LAWS ANN.* (Supp. 1925) §2346a38; *ORE. CODE ANN.* (Supp. 1935) §69-1529; *UTAH REV. STAT. ANN.* (1933) §80-14-40; *VT. PUB. LAWS* (1933) §909; *VA. CODE ANN.* (Michie, 1936) Tax Code §46; *W. Va. Laws* 1934, c. 89, §54.

<sup>48</sup> Arizona has a 20-day Statute of Limitations. *ARIZ. REV. CODE ANN.* (Courtright, Supp. 1936) §3182z14.

appeal be from an assessment of general property,<sup>49</sup> income,<sup>50</sup> inheritance and estate,<sup>51</sup> or sales taxes.<sup>52</sup> Two income tax statutes permit a direct review by the state supreme court,<sup>53</sup> and the appeal goes directly to the highest state court<sup>54</sup> from the death tax assessment in California, South Carolina, and Washington. Also a number of death tax statutes direct the appeal to the court having jurisdiction over the administra-

<sup>49</sup> From local and county boards of review to a court (superior, circuit, district, county): ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §§3090, 3065; COLO. STAT. ANN. (Michie, 1935) c.142, §116 (if the amount is under \$7,500 to the county commission and then to the district court and if over \$7,500 to county or district court directly, §115); CONN. GEN. STAT. (1930) §1200; IDAHO CODE ANN. (1932) §§61-1910, 30-1108, 30-1111; IND. STAT. ANN. (Burns, 1933) §64-1020; IOWA CODE (1935) §§7133, 4076, 4128, Iowa Laws 1937, c.21 §5 (omitted assessment); ME. REV. STAT. (1930) c.13, §§75, 79, 86, 80; MINN. LAWS 1936, c.483, §6; MISS. CODE ANN. (1930) §3179; MO. REV. STAT. (1929) §9980; NEB. COMP. STAT. (1929) §77-1705 (with appeal to supreme court, also §77-305 on reassessments); N. M. STAT. ANN. (Courtright, 1929) §141-306; N. D. LAWS 1931, c.276 (7); ORE. CODE ANN. (Supp. 1935) §69-309; PA. STAT. (Purdon's Compact ed. 1936) tit. 72, §§3250-1, 5020-518 (appeal to supreme court under tit. 72, §5020-519); R. I. ACTS 1935, c.2260, §4; S. D. COMP. LAWS (1929) §6727; VA. CODE ANN. (Michie, 1936) Tax Code, §346; W. VA. CODE (Michie, 1937) §694.

In Rhode Island a proper method is a petition to the superior court for relief within six months after the time for payment of such tax. The taxpayer must render an account as a condition precedent to this review. *Greenough v. Board of Canvassers*, 34 R. I. 84, 82 Atl. 411 (1912); *Clare v. Curran*, 52 R. I. 196, 159 Atl. 835 (1932).

<sup>50</sup> Ariz., Colo., Iowa, Kan., Ky., La., Md., Mo., Mont., S. D., Va.

<sup>51</sup> ALA. CODE ANN. (Michie, 1928) §6096 (14 days to go to the circuit court); ARK. DIG. STAT. (Castle, Supp. 1927) §10232; COLO. STAT. ANN. (Michie, 1935) c.85, §30 (to district court); CONN. GEN. STAT. (1930) §498c (probate court); FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) §1342(32) (*certiorari*); IDAHO CODE ANN. (1932) §14-418 (district court); IND. STAT. ANN. (Burns, 1933) §6-2321; IOWA CODE (1935) §7335 (in equity); KAN. GEN. STAT. ANN. (Corrick, 1935) §79-2005; KY. STAT. ANN. (Carroll, 1936) §4281a-33 (to circuit court); MISS. CODE ANN. (1930) §4095 (in chancery); NEB. COMP. STAT. (1929) §77-2211 (county court); N. H. PUB. LAWS (1926) c.72, §§8, 40 (probate court); N. J. REV. STAT. (1937) §54:34-14 (ordinary); N. M. LAWS 1937, c.181 (district court); N. Y. CONSOL. STAT. (McKinney, 1937) bk. 59, §232 (appeal to surrogate); N. C. Pub. Laws 1937, c.128, §22; N. D. LAWS 1927, c.267, §5(3); OHIO GEN. CODE ANN. (Page, 1938) §5348; OKLA. LAWS 1935, c.66, art. 5, §14; ORE. CODE ANN. (1930) §10-632; PA. STAT. (Purdon's Compact ed. 1936) tit. 72, §2327; S. C. CODE (1932) §2492; S. D. COMP. LAWS (1929) §6840; UTAH REV. STAT. ANN. (1933) §80-12-21; VT. PUB. LAWS (1933) §1059; VA. CODE ANN. (Michie, 1936) Tax Code, §§110, 111; W. VA. CODE ANN. (Michie, 1937) §862; WIS. STAT. (1935) §75.15(12); WYO. REV. STAT. ANN. (Courtright, 1931) §115-1215. See KIDDER, STATE INHERITANCE TAXES AND TAXABILITY OF TRUSTS (1934) c.18.

<sup>52</sup> Ala. Laws Spec. Sess. 1936-1937, no. 126, §10 (to circuit court); Colo. Laws 1937, c.230, §28(b) (district court); Iowa Laws 1937, c.196, §13 (district court); Kan. Laws 1937, c.374, §10 (district court); Me. Laws 1937, c.242, §17 (superior court); N. D. Laws 1937, c.239, §13; Ohio Laws 1936, §5546-9a (common pleas); Utah Laws 1937, c.114, §12 (supreme court); Wyo. Laws 1937, c.74, §12 (district court).

The Louisiana Luxury Tax Act of 1935 provides that delinquent taxes shall be collected by rule, after hearing in the court issuing the rule, at which time all defenses may be presented by the taxpayer. La. Laws 1936, act. 75, §9.

<sup>53</sup> Ore. and Utah.

<sup>54</sup> Cal. Stat. 1935, p. 1972; S. C. CODE (1932) §2493 (when first assessed in the tax office); WASH. REV. STAT. (Remington, 1933) §11211.

tion of estates. Several statutes expressly authorize an appellate judicial review of the decision of the first reviewing court,<sup>55</sup> although in most states the statutes are silent on the subject. There are at least two views which the courts may take in deciding whether a right of appeal exists. One view is that there can be no appeal unless it is specifically mentioned by the taxing statute in question.<sup>56</sup> The other is that the general appeal statutes apply. An argument for the latter position is that the action of the lower court is judicial action, and, unless the taxing statute expressly excludes an appeal, the judgment on the tax appeal would be subject to review by the appellate courts<sup>57</sup> as any other judgment.<sup>58</sup>

The scope and character of the judicial hearing accorded by the reviewing court is frequently uncertain. In the absence of a statutory statement on this matter, it will be a matter of policy whether the courts will allow a broad review or limit the hearing to questions of law. The assessment of a tax is at least a mixed question of law and fact on which the taxpayer should be entitled in fairness to a thorough hearing, preferably by a tribunal other than that which made the assessment originally. The scope of the judicial hearing, therefore,

<sup>55</sup> Provisions governing appeals to higher courts fall into three classes: (1) specific provisions; (2) appeals as in other civil cases; (3) no special provisions for any appeal. The following statutes authorize an appeal: ARIZ. LAWS 1937, c. 28, §18; ARK. DIG. STAT. (Crawford and Moses, 1919) §10232; COLO. STAT. ANN. (Michie, 1935) c. 85, §5; IND. STAT. ANN. (Burns, 1933) §6-2321; IOWA CODE (1935) §7337; KY. STAT. ANN. (Carroll, 1936) §4281a-33; MISS. CODE ANN. (1930) §5095; N. M. LAWS 1937, c. 181; OKLA. LAWS 1935, c. 66, art. 5, §14; ORE. CODE ANN. (1930) §10-632; PA. STAT. (Purdon's Compact ed. 1936) tit. 72, §2327; R. I. ACTS 1929, c. 1355, §23; UTAH REV. STAT. ANN. (1933) §80-12-21; VT. PUB. LAWS (1933) §1061; VA. CODE ANN. (Michie, 1936) Tax Code, §112. Appeal as in other civil cases: ME. REV. STAT. (1930) c. 77, §5; MO. REV. STAT. (1929) §587; WYO. REV. STAT. ANN. (Courtright, 1931) §115-1215. No specific appeal is provided by statutes in La., Md., Mich., Minn., Tenn., and Tex.

Seven sales tax acts authorize an appeal from the decision of the original reviewing court: ARIZ. REV. CODE ANN. (Courtright, Supp. 1936) §3138s (supreme court); COLO. LAWS 1937, c. 230, §27(d) (supreme court); IOWA LAWS 1937, c. 196, §13 (supreme court); MISS. LAWS 1934, c. 118, §10; N. C. CODE ANN. (Michie, 1935) §5880(156)r; N. D. LAWS 1937, c. 239, §13; UTAH LAWS 1937, c. 114, §12 (directly to supreme court from the assessment); WYO. LAWS 1937, c. 74, §13.

<sup>56</sup> *State v. Bowlin's Estate*, 141 Ark. 481, 217 S. W. 464 (1920).

<sup>57</sup> *Crittenberger v. State Savings and Trust Co.*, 63 Ind. App. 15, 114 N. E. 225 (1916). Indiana statute now permits an appeal. IND. STAT. ANN. (Burns, 1933) §6-2321.

<sup>58</sup> The taxpayer has no affirmative remedy under GA. CODE (1933) §92-3404. However, the commissioner can only collect the tax by execution, and the taxpayer can interpose an affidavit of illegality under §92-7301. *Carreker v. Green & Milam, Inc.*, 183 Ga. 864, 189 S. E. 836 (1937). However, it is likely that the new tax administration act in Georgia will be held applicable to the estate tax. See GA. LAWS EX. SESS. 1937-1938, pp. 89, 99, 100, 101, §§19, 44, 45. If it is held applicable, the courts should hold that the affidavit of illegality can be filed only where there is some defect of jurisdiction or illegality in administration, because the tax administration act allows an administrative appeal which is subject to judicial review.

should depend upon whether there has been some previous review of the assessment. If the appeal lies directly from the board which fixed the assessment in the first instance, it is appropriate to permit an examination by the court of the fairness of the assessment. If, on the other hand, the appeal is from some appellate administrative tribunal, the review should be limited to questions of law.

Under the general property tax there are quite a few cases<sup>59</sup> which recognize the right to a judicial review. Some courts limit themselves to a consideration of questions of law, as in Indiana where the supreme court has said:<sup>60</sup> "The right of appeal" means an appeal where there is a judicial question presented", and the taxpayer is not entitled to invoke the assistance of the court, in the absence of fraud or arbitrary action, where the sole question is one of appraisalment. Many courts permit a broader hearing: (1) either a summary hearing according to equity rules, or (2) a trial *de novo*.<sup>61</sup> In a limited number of states the

<sup>59</sup> *Arizona Copper Co. v. State*, 15 Ariz. 9, 137 Pac. 417 (1913); *Colorado Tax Comm. v. Colorado Central Power Co.*, 94 Colo. 287, 29 P. (2d) 1030 (1934); *Pierre Water-Works Co. v. Hughes*, 5 Dak. 145, 37 N. W. 733 (1888); *First Nat. Bank of Moscow v. Board of Comm'rs*, 40 Idaho 391, 232 Pac. 905 (1923); *First Nat. Bank of Newton v. Board of Review*, 200 Iowa 255, 204 N. W. 223 (1925); *Ball v. P. V. & K. Coal Co.*, 235 Ky. 445, 31 S. W. (2d) 707 (1930); *Moller-Vanderbloom Lumber Co. v. Board of Sup'rs*, 134 Miss. 249, 99 So. 823 (1923); *Chapel v. Franklin County*, 58 Neb. 544, 71 N. W. 1062 (1899); *Hahn System v. Stroud*, 109 Neb. 181, 190 N. W. 672 (1922); *Pennsylvania R. R. v. State Board of Taxes and Assessments*, 103 N. J. Law 28, 134 Atl. 722 (1926); *Jackling v. State Tax Comm.*, 40 N. M. 241, 58 P. (2d) 1167 (1936); *Stanton v. Frankel Bros. Realty Co.*, 117 Ohio St. 345, 158 N. E. 868 (1927); *In re Moore*, 77 P. (2d) 676 (Okla. 1938); *Smith Securities Co. v. Multnomah County*, 98 Ore. 418, 194 Pac. 428 (1921); *Dupry v. Johns*, 261 Pa. 40, 104 Atl. 565 (1918); *In re Premises 255-57 So. 15th St.*, 326 Pa. 467, 192 Atl. 923 (1937); *Copp v. State*, 69 W. Va. 439, 71 S. E. 580 (1911).

Many statutes are silent regarding a provision for judicial review of the judgment of the initial court to which an appeal has been taken from the order of an assessment reviewing tribunal. There are at least two views on this subject. One is that the general provisions for appellate review apply to the decisions of the lower court, whether its judgment grows out of a special statutory proceeding or an ordinary action at law. *Colorado Tax Comm. v. Colorado Central Power Co.*, 94 Colo. 287, 29 P. (2d) 1030 (1934). The other view is that if the statute does not expressly provide for it, the taxpayer cannot have a review of the initial court's judgment. *Jackling v. State Tax Comm.*, 40 N. M. 241, 58 P. (2d) 1167 (1936); *Smith Securities Co. v. Multnomah County*, 98 Ore. 418, 194 Pac. 428 (1921).

<sup>60</sup> See *Peden v. Board of Review*, 208 Ind. 215, 227, 195 N. E. 87, 91 (1935).

<sup>61</sup> *Carr's Fork Coal Co. v. Perry County Board of Sup'rs*, 263 Ky. 642, 93 S. W. (2d) 359 (1936); *Stanton v. Frankel Bros. Realty Co.*, 117 Ohio St. 345, 158 N. E. 868 (1927); *Delaware, L. & W. Co.'s Tax Assessment*, 224 Pa. 240, 73 Atl. 429 (1909); *Appeal of Du Bois*, 293 Pa. 186, 142 Atl. 134 (1928); *In re Assessment of Metropolitan Bldg. Co.*, 144 Wash. 469, 258 Pac. 473 (1927). (The trial *de novo* is limited to the question whether the valuation is erroneous to the extent that it was actually or constructively fraudulent.)

Ga. Laws Ex. Sess. 1937-1938, pp. 100, 101, §45, affords an example. An appeal to the superior court is a *de novo* investigation. The whole record of the lower court is brought up for review, and all competent evidence is admissible, whether it was admitted before or not.

character of the review is outlined by statute.<sup>62</sup> For example, the courts in Missouri and New Jersey can only review administrative tax decisions through the writ of *certiorari*,<sup>63</sup> and in Maryland the supreme court can review the action of the state board on questions of law only.<sup>64</sup> Statutes in Kansas, South Carolina, and Utah fail to make any express provision for a judicial review.

Several income tax statutes specify that the hearing by the reviewing court shall be as in equity.<sup>65</sup> At the other extreme, a few jurisdictions permit a review only by the writ of *certiorari*.<sup>66</sup> Doubtlessly in many other states, where the statutes do not specify the character of the hearing, the same rules will be applied as are accorded to real property assessments mentioned earlier.<sup>67</sup>

Inheritance and estate tax statutes have not attempted to direct the scope of the judicial review of administrative decisions in assessment matters, the hearing being left to the discretion of the courts. Some courts will permit a reexamination of the findings of fact and conclusions of law;<sup>68</sup> others will confine the hearing to the question of the validity of the assessment as a matter of law.<sup>69</sup>

Under the general sales tax, as we have seen, there is often no administrative appeal from the original assessment. This fact should

<sup>62</sup> TENN. CODE ANN. (Williams, 1934) §1448 (where the only question is a denial of the right to tax there is a trial before a justice of the peace with an appeal to the circuit court); WIS. STAT. (1935) §70-47(7) (appeal to circuit court from boards in cities of the first class only).

<sup>63</sup> MO. REV. STAT. (1929) §9980; N. J. REV. STAT. (1937) §54:51-11, N. J. Laws 1936, c. 263, p. 501, c. 171, p. 408 (Uniform State Tax Procedure Act).

<sup>64</sup> MD. CODE ANN. (Flack, Supp. 1935) art. 81, §186a.

<sup>65</sup> In Iowa, Kan., Ky., and Miss. the review is in chancery. In Missouri there is a hearing *de novo*.

In *Baker v. Wisconsin Tax Comm.*, 210 Wis. 557, 246 N. W. 695 (1933), the court held that an appeal from the state tax commission to the court is confined to the record before the tax commission. However, *Yawkey v. Wisconsin Tax Comm.*, 212 Wis. 357, 248 N. W. 773 (1933), held that the court exercises an independent judgment upon the record, and can correct the assessment as well as the application of the law. In *State v. Nygaard*, 159 Wis. 396, 150 N. W. 513 (1915), the Wisconsin court held that the tax assessor of income taxes was entitled to appeal from the action of the board of review.

<sup>66</sup> Mont., N. Y., and Utah.

<sup>67</sup> For similar authorities under the general property tax see notes 59-61, *supra*.

<sup>68</sup> *Hodges v. Inman*, 149 Miss. 785, 115 So. 893 (1928); *In re Brown's Estate*, 54 Utah 73, 179 Pac. 652 (1919). But the findings of the trial court will not be disturbed in the absence of great and clear preponderance of the evidence. *In re Smith's Estate*, 261 Pa. 51, 104 Atl. 492 (1918); *In re Daniel's Will*, 225 Wis. 502, 274 N. W. 434 (1937).

<sup>69</sup> *Merchants' Nat. Bank of Richmond v. South Carolina Tax Comm.*, 133 S. C. 406, 131 S. E. 142 (1926).

The Vermont court holds that the findings of the inheritance tax appraisers cannot be reviewed if they acted within their jurisdiction. *St. Albans v. Avery*, 95 Vt. 249, 114 Atl. 31 (1921). There can be no appellate review in inheritance tax cases in West Virginia where the amount of the tax is less than \$100. *Edgar v. Hall*, 101 W. Va. 281, 132 S. E. 651 (1926).

be taken into consideration in determining the scope of judicial review in such cases. Statutes in several states specifically cover the matter. In Alabama, Iowa, Kansas, and North Dakota the hearing is in either the circuit or district courts like a proceeding in equity.<sup>70</sup> The writ of *certiorari*<sup>71</sup> is the method of review in Colorado, Illinois, and Utah.<sup>72</sup>

## II. ADMINISTRATIVE REMEDIES AFTER ASSESSMENTS

Ordinarily the taxpayer's opportunity for administrative redress will have passed when he has gone through the procedure discussed. However, several states have statutory provisions which permit the recovery or refunding of taxes after they have been paid.

### *The Refund*

The refund is an application for the return of a tax which is filed with the officer by whom it has been collected. It is a purely administrative remedy designed to make easy the correction of errors and mistakes made by the administrative staff. If the application for a refund is given a full and careful hearing, the chance is that such a hearing will produce the desired result without the necessity of a resort to judicial action. Every taxing statute should, for the convenience both of the government and the taxpayer, make a liberal provision for the refund. It affords a simple and inexpensive remedy, and for that reason it is probably desirable that the filing of a claim for a refund be a condition precedent to the utilization of other remedies at this stage. Every opportunity will then be afforded the taxing officers to correct errors before a taxpayer is put to the expense of some legal or equitable remedy.<sup>73</sup> However, existing statutes hardly achieve the result desired.

At least fifteen<sup>74</sup> states have some statutory provision for a refund of general property taxes. Usually the taxpayer need not allege that he has paid the tax under protest in order to file his claim. He may

<sup>70</sup> See statutes cited *supra* note 52.

<sup>71</sup> See statutes cited *supra* note 52.

<sup>72</sup> The statutes require the taxpayer to make application for the appeal within a relatively short time after the final decision of the administrative officers. It is 20 days in Colo.; 30 days in Ala., Kan., Mo., Ohio, Okla., Utah; 60 days in Iowa, N. D., and Wyo.

<sup>73</sup> There is a possibility that a petition for a refund will be ineffective if it is filed with the same officer who has been previously petitioned for a redetermination of the assessment. For this reason a statute should provide alternative remedies, either by an administrative appeal or by application for a refund. If the taxpayer chooses either, he should be required to pursue it to the end, and he should be prohibited from attempting to use the alternative remedy when he has already exhausted one. Some support for this view may be drawn from the federal income tax law, 49 STAT. 1745 (1936), 26 U. S. C. A. §§1672, 1673 (Supp. 1938). The taxpayer has his choice of appeal to the Board of Tax Appeals or of applying for a refund and later suing to recover the tax if his claim is denied.

<sup>74</sup> See Statutes, cited *infra* note 78.



make his application to a commission or an administrative officer depending upon the organization for tax administration in his state. A few statutes direct the taxpayer to apply for his refund to a designated court, while others allow a choice of applying either to an administrative officer or to a court. Income tax statutes in at least thirteen states<sup>75</sup> permit the taxpayer to file a claim for a refund. The procedure is simple, and, here too, there is no requirement that taxes must be paid under protest as a condition precedent to the filing of the application. About the same number of states, fourteen, allow the personal representative of an estate to request a refund of the overpayment of a death tax.<sup>76</sup> One of the serious defects in most sales tax statutes is the lack of any provision for a refund, although a very few statutes do specifically authorize this remedy.<sup>77</sup> It is very common for the refund statutes relative to the general property,<sup>78</sup> income, and death taxes

<sup>75</sup> ALA. CODE ANN. (Michie, Supp. 1936) §345.36; Colo. Laws 1937, c. 175, §29 (c); DEL. REV. CODE (1935) §162 (a)-(b) (within two years from the return date or 30 days from payment); GA. CODE (1933) §92-3308 (within three years); IND. ACTS 1937, c. 117 (three years); KAN. GEN. STAT. ANN. (Corrick, 1935) §79-3230 (four years); MINN. STAT. (Mason, Supp. 1936) §2394-47 (two years); MISS. CODE ANN. (1930) §4062; UTAH REV. STAT. ANN. (1933) §80-14-37 (after two years decision becomes final except for *certiorari*); W. VA. LAWS 1935, c. 78, §2 (one year); WIS. STAT. (1935) §71.17 (hearing as upon an original assessment under §71.12 and review as in original assessment).

Under ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §3182z18, the taxpayer may have a rehearing if he applies within 20 days after notice as under §3182z13. Under CAL. STAT. 1937, c. 668, §12, he may apply for a refund within two years, with appeal from commissioner to state board.

<sup>76</sup> COLO. STAT. ANN. (Michie, 1935) c. 84, §§43, 44 (three years and two years respectively); IDAHO CODE ANN. (1932) §14-4131 (two years); IND. STAT. ANN. (Burns, 1933) §6-2317; MICH. COMP. LAWS (1929) §3678; MINN. STAT. (Mason, 1927) §2301; MISS. CODE ANN. (1930) §5099; NEB. COMP. STAT. (1929) §77-2210 (two years); N. J. REV. STAT. (1937) §54:34-10; N. Y. CONSOL. LAWS (McKinney, 1937) bk. 59, §225; N. C. Pub. Laws 1937, c. 127, §26; N. D. LAWS 1927, c. 267, §9; ORE. CODE ANN. (1930) §10-613 (three years); S. D. COMP. LAWS (1929) §6855; VT. PUB. LAWS (1933) c. 46, §1087. See KIDDER, STATE INHERITANCE TAXES AND TAXABILITY OF TRUSTS (1934) c. 20.

<sup>77</sup> Colo. Laws 1937, c. 230, §15(b) (permits application for a refund and for a rehearing); La. Laws 1936, no. 75, §10 (providing for a sworn statement by the vendor to the supervisor upon which he may act); N. C. CODE ANN. (Michie, 1935) §7880(156)r; S. D. LAWS 1935, c. 205, §35 (refunds must be claimed within one year from payment).

It is possible in the states where there is a uniform tax procedure act similar to N. J. LAWS 1936, c. 263, §315 and OKLA. STAT. ANN. (1937) tit. 68, §§15-20, 15-21, that a taxpayer could utilize this machinery to secure a sales tax refund.

<sup>78</sup> CAL. REV. LAWS ANN. (1936) §3819; GA. CODE (1933) §§92-5502, 92-3812 (income tax), Ga. LAWS EX. SESS. 1937-1938, p. 95, §34(b) (exclusive of general property tax); IDAHO CODE ANN. (1932) §14-413; IOWA CODE (1935) §7235; KAN. GEN. STAT. ANN. (Corrick, 1935) §79-1702; LA. GEN. STAT. ANN. (Dart, Supp. 1936) §8444.2; MD. ANN. CODE (Flack, Supp. 1935), art. 81, §§152, 153; MO. REV. STAT. (1929) §9981; N. J. LAWS 1936, c. 263; N. Y. CONSOL. LAWS (McKinney, 1937) bk. 59, §§296, 297; N. C. CODE ANN. (Michie, 1935) §7979; ORE. CODE ANN. (Supp. 1935) §69-449; TENN. LAWS 1935, c. 167; VA. CODE ANN. (Michie, 1936) Tax Code, §§407, 410; W. VA. LAWS 1935, c. 74, §12, c. 103, §§12, 13; consult *Kaw Valley Drainage District of Wyandotte County v. Zimmer*, 141 Kan. 620, 42 P. (2d) 936 (1935).

to fix a period of limitations within which the claim must be filed. This period frequently varies from one to three years.<sup>79</sup>

As previously suggested the refund should be made a broad administrative remedy for the correction of errors of all kinds. In order to accomplish this end any equitable objection to the particular tax should be entertained. Most statutes are silent regarding the scope of the refund, and presumably the courts can permit as wide an application as their public policy seems to warrant. Some statutes by express language or by judicial construction have a limiting effect upon its scope. Some of these have limited it to situations where there has been a double assessment or payment of taxes,<sup>80</sup> while others have been interpreted to apply where there is some clerical error or irregularity in the assessment;<sup>81</sup> and one has been held applicable only where there is such an excessive or disproportionate estimate of value as to suggest error and mistake.<sup>82</sup>

While most refund statutes do not make an application for a refund a condition precedent to later judicial action, several income tax statutes require this application<sup>83</sup> before court action to recover an overpayment may be maintained.<sup>84</sup> Likewise, some courts have held that an applica-

<sup>79</sup> An action may be brought upon notice of a refusal without the allegation of a payment of the income tax under protest. ALA. CODE ANN. (Michie, Supp. 1936) §345.40; Colo. Laws 1937, c. 175, §29 (d); GA. CODE (1933) §92-3310; Ind. Acts 1937, c. 117, §12a (may sue within one year of filing and at least six months after application, §12b affording a regular appeal); KAN. GEN. STAT. ANN. (Corrick, 1935) §79-3230; MINN. STAT. (Mason, 1927) §2394-47 (not less than 6 months nor more than two years after filing); Wis. STAT. (1935) §71.17 (within one year).

<sup>80</sup> ILL. REV. STAT. (State Bar Assoc. ed., 1937) c. 120, §§283, 343(1), 346(8); MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §2222; NEV. COMP. LAWS (Hillyer, 1929) §6637. The original Montana statute, MONT. REV. CODE (1921) §2222, applied to taxes erroneously or illegally collected. But this part of the section was repealed by implication. Protest and payment followed by suit to recover taxes is the exclusive remedy under the statute, but it now applies only where taxes have been paid more than once. *Williams v. Harvey*, 91 Mont. 168, 6 P. (2d) 418 (1931).

<sup>81</sup> *Cedar Rapids Hotel Co. v. Stirm*, 221 Iowa 206, 268 N. W. 562 (1936).

<sup>82</sup> *Bengoechea v. Elmore County*, 23 Idaho 397, 130 Pac. 459 (1913).

<sup>83</sup> The time limit for bringing an action after a refund claim has been filed varies: ALA. CODE ANN. (Michie, Supp. 1936) §345.40 (not before three months after filing nor after five years from payment, but suit may be filed within two years of a disallowance); Cal. Stat. 1937, c. 668, §13 (if alleged to be void, sue within 90 days of demand); Colo. Laws 1937, c. 175, §29(d) (at expiration of six months after filing for refund if no action is taken or claim is denied); GA. CODE (1933) §92-3310 (not before three months from filing and not more than five years from payment, but within two years after disallowance); Ind. Acts 1937, c. 117, §12a (not before six months from filing of petition, unless notified earlier of rejection, nor after a year from petition); KAN. GEN. STAT. ANN. (Corrick, 1935) §79-3230 (within six months of filing if no action taken); MINN. STAT. (Mason, Supp. 1936) §2394-47 (six months to two years from filing for refund).

<sup>84</sup> In addition to the action to recover a tax after the refusal of the application for a refund, the Georgia taxpayer can probably wait until the revenue commissioner levies an execution and then file an affidavit of illegality against

tion for a refund must be filed and acted upon before an action may be brought to recover an estate of inheritance tax.<sup>85</sup> If the scope of the refund will permit a hearing upon every reasonable equitable objection, the filing of the application should be made a condition precedent to the bringing of a legal action<sup>86</sup> because this remedy is simple and speedy and will clear up many disputes without resort to the courts, saving their time for ordinary litigation.

### *Miscellaneous Statutory Remedies*

These remedies of an administrative nature are closely akin to the refund. About the only difference is that such applications are made to a different tribunal: either a court or some special administrative body. For example, the general property taxpayer in Nebraska and North Dakota may pay his taxes under protest and apply for an abatement before an administrative tribunal.<sup>87</sup> The general method for securing relief from excessive general property taxation in Massachusetts and New Hampshire is a statutory proceeding<sup>88</sup> for the abatement of taxes.<sup>89</sup> In Missouri<sup>90</sup> the income taxpayer may petition the county

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the execution. GA. CODE (1933) §92-3306. But see the discussion of the effect of the recent tax administration act upon the income tax law, *supra* note 16.

<sup>85</sup> *In re Woolsey's Estate*, 113 Neb. 218, 202 N. W. 630 (1925); *Bunn v. Maxwell*, 199 N. C. 577, 155 S. E. 250 (1930). The Kansas court has indicated that mandamus is a proper remedy to secure a refund of taxes illegally collected. *Kitteredge v. Boyd*, 136 Kan. 691, 18 P. (2d) 563 (1933) (Actually the court refused jurisdiction because plaintiff was a nonresident.)

<sup>86</sup> The federal statute might serve as a useful model. Under the federal estate tax law, the taxpayer may sue for the recovery of any overpayment. He must, however, present a claim for a refund to the commissioner within three years next after the payment of the tax. 44 STAT. 84 (1926) as amended 47 STAT. 283 (1932), 26 U. S. C. A. §510 (1935). Then he may sue within the period of Statute of Limitations if he has not petitioned the Board of Tax Appeals regarding the overpayment. In the event he has petitioned the Board, he is limited to suit for the amount which the Board has determined to be due. 44 STAT. 84 (1926), 26 U. S. C. A. §511 (1935).

<sup>87</sup> NEB. COMP. STAT. (1929) §77-1923(1) (make application to county board within 30 days from payment, with right of appeal from county board as for claims against county); N. D. LAWS 1931, c.286 (demand abatement and sue county treasurer in case of a rejection).

<sup>88</sup> MASS. GEN. LAWS (1932) c.59, §59 (one year Statute of Limitations); N. H. PUB. LAWS (1926) c.64, §13. The Massachusetts courts have held that the statutory proceeding for abatement is the exclusive remedy for the correction of an overassessment. *Central Nat. Bank v. Lynn*, 259 Mass. 1, 156 N. E. 42 (1927); *Wynn v. Board of Assessors*, 281 Mass. 245, 183 N. E. 528 (1932).

<sup>89</sup> Several states have a judicial or administrative remedy for the correction of assessments at a later stage than the assessment level. In Louisiana a taxpayer may file a suit in court to correct his assessment. LA. GEN. STAT. (Dart, Supp. 1936) §§8324.8, 8346.6, 8360, 8444. Taxpayers in Nebraska and North Dakota may pay their taxes under protest and apply for abatement before an administrative tribunal. See statutes cited *supra* note 85. In five other states courts of equity are vested with jurisdiction to determine the question of taxability. CONN. GEN. STAT. (1930) §1201 (apply to equity within one year in case of exempt property); FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) §1037 (where legality of tax or assessment is involved); GA. CODE (1933) §§92-6103, 92-6704 (where certain issues of taxability may be raised); LA. GEN.

court for the abatement of his tax; in Massachusetts and New Hampshire he petitions an administrative tribunal.<sup>91</sup> A personal representative may pay the inheritance tax and petition the courts for its abatement in Kansas, New Hampshire, and Rhode Island.<sup>92</sup> Other miscellaneous statutory remedies are related to legal or equitable actions and will be discussed in connection with the exclusiveness of the administrative remedy.

### III. EXCLUSIVENESS OF THE ADMINISTRATIVE REMEDY

Except in the few instances<sup>93</sup> where the courts have held that the administrative process is the sole method for the correction of errors of fact in assessments, it is very unlikely that the administrative remedies herein considered are exclusive. Many states have a very general statute authorizing an action at law to recover taxes.<sup>94</sup> In addition, special taxing statutes often expressly authorize a recovery of an overpayment. Other states allow a common law action to recover. Some jurisdictions have special statutory equitable actions to correct tax disputes. Besides all of these a court of equity will sometimes intervene in tax matters if there is some recognized ground of equity jurisdiction.

Though a detailed discussion of the general statutory action to recover taxes cannot be undertaken here, the statutes creating the action may be divided into two classes: (1) those providing a very broad, general action to recover back taxes paid under error or mistake of law

STAT. (Dart, Supp. 1936) §8365.5 (upon deposit of the disputed tax money); R. I. Acts 1935, c. 2260, §4 (where tax is illegal or void). In several other states the taxpayer may offer a defense when the tax collectors bring an action to collect the taxes. S. D. COMP. LAWS (1929) §§6822, 6823; VT. PUB. LAWS (1933) §801 (by implication). Several states afford this opportunity at the time of the application for a judgment authorizing sale for delinquent taxes: ILL. REV. STAT. (State Bar Assoc. ed., 1937) c. 120, §§200, 209, 210; MINN. STAT. (Mason, 1927) §§2016, 2118, 2119, 2122, 2089, 2091; NEV. COMP. LAWS (Hillyer, 1929) §6459 (the answer being limited to five defenses: payment, exemption, property not that of taxpayer, assessment in another district, fraudulent or disproportionate assessment); TEX. STAT. (Vernon, 1936) arts. 7226, 8329 (only defenses permitted are no ownership, payment, excessiveness). In Georgia, GA. CODE (1933) §92-7301, a taxpayer may contest the tax by filing an affidavit of illegality to a tax execution issued by the revenue commissioner. It can only be used where specially authorized by statute. It cannot be used against an ordinary tax execution in the absence of special authority. *Carreker v. Green & Milam, Inc.*, 183 Ga. 864, 189 S. E. 836 (1937). The new tax administration act casts doubt upon the present scope of the affidavit of illegality in tax matters. Ga. Laws Ex. Sess. 1937-1938, act no. 296, p. 77.

<sup>90</sup> MO. REV. STAT. (1929) §10135 (within 45 days).

<sup>91</sup> MASS. GEN. LAWS (1932) c. 62, §43 (within six months); N. H. PUB. LAWS (1926) c. 65, §25 (within 60 days).

<sup>92</sup> KAN. GEN. STAT. ANN. (Corrick, 1935) §79-1517 (payment under protest reviewed by the district court); N. H. PUB. LAWS (1926) c. 72, §41 (petition within one year); R. I. Acts 1929, c. 1355, §23.

<sup>93</sup> See cases cited *supra* note 39.

<sup>94</sup> See note 95, *infra*.

or fact;<sup>95</sup> (2) a numerically more common type which permits an action to recover provided that the taxes were paid under written protest.<sup>96</sup>

Several of the special tax statutes incorporate a specific action to recover taxes as an integral part of the taxing scheme. Thus, many income tax statutes create a statutory action to recover taxes erroneously or illegally paid. These statutes frequently set up as conditions precedent to the maintenance of the action: (1) payment under protest;<sup>97</sup> or (2) the filing<sup>98</sup> of an application for a refund.<sup>99</sup> Under the Arkansas income tax law<sup>100</sup> a taxpayer who is dissatisfied with the commissioner's determination must test the actual assessment by filing an action against the officer. Only the death tax statutes of Arizona and Kentucky authorize an action to be brought against the tax department for the recovery of the tax.<sup>101</sup> Several general sales tax statutes also authorize an action to recover. One of the more detailed remedies is provided by the Arkansas statute which permits any person aggrieved by his sales tax assessment to pay the commissioner the amount claimed, the payment to be accompanied by a notice of an intention to sue. The commissioner must hold the tax money so paid for thirty days, and if suit is filed within that time, he holds the money subject to the judgment of the reviewing court.<sup>102</sup> Procedure under the Oklahoma act is

<sup>95</sup> ALA. CODE ANN. (Michie, 1928) §§3140, 3144, ALA. CODE ANN. (Michie, Supp. 1936) §3146; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §3136; CAL. REV. LAWS (1935) §§3819, 3669a; DEL. REV. CODE (1935) §§1282, 1360; IDAHO CODE ANN. (1932) §61-1913; LA. GEN. STAT. (Dart, 1932) §§8324.8, 8346.6; OKLA. REV. STAT. (1921) §9971; R. I. LAWS 1935, c. 2260, §5; WIS. STAT. (1935) §70-47(6); VA. CODE ANN. (Michie, 1936) Tax Code §§410, 414.

<sup>96</sup> MICH. COMP. LAWS (1929) §3444; MINN. STAT. (Mason, 1927) §2091 (personal property); MINN. LAWS 1937, c. 483, §3; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §§2269, 2270, 2272; NEB. COMP. STAT. (1929) §77-1923(2); NEV. COMP. LAWS (Hillyer, 1929) §6552, 6459; N. M. LAWS 1933, c. 143; N. C. CODE ANN. (Michie, 1935) §7979; N. D. LAWS 1931, c. 286; S. C. CODE (1932) §§2846, 2847; S. D. COMP. LAWS (1929) §6826; TENN. CODE ANN. (Williams, 1934) §§1790, 1992; WASH. REV. STAT. ANN. (Remington, 1933) §§11315-2, 11315-6.

<sup>97</sup> Ark. LAWS 1929, Income Tax Laws, §32 (pay under protest and sue to recover back within 30 days); OKLA. COMP. STAT. (Supp. 1934) art. 6, §339, 39(c) (notice of intention to file suit at the time of payment and suit within 30 days provided by statute as a legal remedy in all cases); S. C. CODE (1932) §2469 (pay under protest if tax deemed unjust or illegal and sue within 30 days, this to be the exclusive remedy). No protest or demand is necessary under Wash. LAWS 1935, §11200-58.

<sup>98</sup> Cal. Stat. 1937, c. 668, §13 (within 90 days if tax is wholly or partially void).

<sup>99</sup> An application for a refund is likewise necessary under the Federal Income Tax Act before an action at law may be instituted. 49 STAT. 1745 (1936), 26 U. S. C. A. §§1672, 1673 (Supp. 1938).

<sup>100</sup> Ark. LAWS 1929, Income Tax Law, §32.

<sup>101</sup> Ariz. LAWS 1937, c. 27, §18; Ky. STAT. ANN. (Carroll, 1936) §4281a-31 (within two years regardless of protest).

<sup>102</sup> Ark. LAWS 1937, act 154, §19(a). Subsection (b) provides that this shall be a legal remedy in both state and federal courts. Subsection (c) states that a taxpayer need not file a suit if there is already pending another suit involving the same legal problems. He will recover if the other suit is successful.

almost identical.<sup>103</sup> Less detailed statutory actions have been authorized in other states.<sup>104</sup> The availability of the action to recover may be implied from a few statutes.<sup>105</sup>

Even if a special taxing statute makes no provision for an action to recover, it seems reasonable to presume that the courts will interpret the general statutes authorizing actions to recover taxes to include actions to recover overpayments under any tax, provided the language of the statute is susceptible of that interpretation. As a matter of policy, it would seem wise to authorize a statutory action under which any overpayment could be recovered without regard to payment under protest. However, as already mentioned, it might be wise to make an application for a refund a condition precedent to such an action.

### *Common Law Actions*

Several jurisdictions in the absence of statutes permit a taxpayer to bring actions to recover taxes.<sup>106</sup> In some states the action is limited to a recovery of payments made under duress or coercion;<sup>107</sup> others confine the action to a recovery of payments made under mistake of fact<sup>108</sup> or made where the tax or assessment is illegal.<sup>109</sup> Independently of statute a few courts require that the tax must have been paid involuntarily,<sup>110</sup> but the more common condition is that the tax must

<sup>103</sup> Okla. Laws 1934, c. 66, art. 7, §14. The aggrieved taxpayer is required to remit the tax and give the commission notice of the intention to file suit to contest the tax. If the suit is filed within 30 days following payment, the money is segregated to await the judgment of the court. The statute declares that it affords an adequate legal remedy in federal and state courts.

<sup>104</sup> ARIZ. REV. CODE ANN. (Courtright, Supp. 1936) §3138s (no protest necessary, but there must be a demand before suit); MICH. COMP. LAWS (Mason, Supp. 1933) §3663-22 (pay and sue); Miss. Laws 1934, c. 118, §10 (pay and sue without necessity of protest); N. C. CODE ANN. (Michie, 1935) §7880(156)r (apply for a hearing and refund and sue if claim is denied); Utah Laws 1937, c. 114, §23 (pay under protest and suit within 6 months).

<sup>105</sup> A Washington statute, Wash. Laws 1934, c. 130, §189, tacitly recognizes the right to sue, by authorizing payment of judgments obtained for overpayment of taxes. Presumptively, upon application the commissions might order a refund in the following states: ILL. REV. STAT. (State Bar Assoc. ed., 1937) c. 120, §433; Kan. Laws 1937, c. 374, §10; N. M. Laws 1933, c. 73; Wash. Laws 1937, c. 227, §17; W. VA. CODE ANN. (Michie, 1937) §999(24). On the West Virginia situation see Sclove, *loc. cit. supra* note 1.

<sup>106</sup> Mayor and City Council of Baltimore v. Home Credit Co., 165 Md. 57, 167 Atl. 552 (1933).

<sup>107</sup> Talbot v. Charlton's Ex'r, 247 Ky. 568, 57 S. W. (2d) 519 (1933).

<sup>108</sup> Pacific Coal & Lumber Co. v. Pierce County, 133 Wash. 278, 233 Pac. 953 (1925) (money paid under mistake of fact or without authority of law).

<sup>109</sup> Seaboard A. L. Ry. v. Allen, 82 Fla. 191, 89 So. 555 (1921); Idaho Irrigation Co. v. Lincoln County, 28 Idaho 98, 152 Pac. 1058 (1915); Kimball v. Merchants' Savings Loan and Trust Co., 89 Ill. 611 (1878). For a discussion of the vagaries of the Illinois action to recover taxes see Carey and Schuyler, *loc. cit. supra* note 1; note (1933) 28 ILL. L. REV. 272; (1920) 23 ILL. L. REV. 821.

<sup>110</sup> In the absence of statute, the general view is that a voluntary payment of a tax cannot be recovered back. First Nat. Bank v. Jackson County, 227 Ala. 448, 150 So. 690 (1933); Aetna Insurance Co. v. New York, 153 N. Y. 331, 47 N. E. 593 (1897); Adrico Realty Corp. v. New York, 250 N. Y. 29,

have been paid under protest.<sup>111</sup> The common law action in Georgia has been so curtailed by statute as to be virtually useless in most cases.<sup>112</sup>

### *Resort to Administrative Remedies*

Unless otherwise provided by statute there is usually an important condition precedent to the maintenance of an action to recover taxes. Almost without exception in the selected taxes studied in this article some kind of administrative machinery for the review of assessments is provided. The courts require the taxpayer to use these administrative remedies before he can qualify as an applicant for judicial relief.<sup>113</sup>

164 N. E. 732 (1928). For an example of an involuntary payment see Ford v. Holden, 39 N. H. 143 (1859). Whether a payment is voluntary or involuntary is a question beyond the scope of this article.

<sup>111</sup> Connelly v. San Francisco, 164 Cal. 101, 127 Pac. 834 (1912); Boyer Bros. v. Board of Comm'rs, 87 Colo. 275, 288 Pac. 408 (1931); Shaw v. Allegheny, 115 Pa. 45, 7 Atl. 770 (1887) (*Quære*: whether the rule of this case has not been changed by statute); A. H. Stange Co. v. Merrill, 134 Wis. 514, 115 N. W. 115 (1908); note (1933) 21 CALIF. L. REV. 285 (on manner of attacking assessments in California).

<sup>112</sup> Under the Georgia interpretation, the tax must be illegal. Callaway v. Mayor of Milledgeville, 48 Ga. 309 (1873); First Nat. Bank of Americus v. Americus, 68 Ga. 119 (1881); Dennison Mfg. Co. v. Wright, 156 Ga. 789, 120 S. E. 120 (1923). The payment must be involuntary. Tatum v. Trenton, 85 Ga. 468, 11 S. E. 705 (1890); Hoke v. Atlanta, 107 Ga. 416, 33 S. E. 412 (1899). But the payment is voluntary if made without objection, although the tax may be illegal. Jackson v. Atlanta, 61 Ga. 228 (1878). If payment results from the threat of an officer technically incapable of enforcing the tax, it is not a compulsory payment. Williams v. Stewart, 115 Ga. 864, 42 S. E. 256 (1902); Eibel v. Royal Indemnity Co., 50 Ga. App. 206, 177 S. E. 350 (1934). The law requires payment to be under compulsion. GA. CODE (1933) §20-1107. A threat by one with "color of office" has been held compulsion. Dennison Mfg. Co. v. Wright, 156 Ga. 789, 120 S. E. 120 (1923); Strachan Shipping Co. v. Savannah, 168 Ga. 309, 147 S. E. 555 (1929). A payment under protest is without significance. GA. CODE (1933) §20-1107. And a payment under mistake of law cannot be recovered. Strachan Shipping Co. v. Savannah, 168 Ga. 309, 147 S. E. 555 (1929); Morris v. Floyd County, 46 Ga. App. 150, 167 S. E. 128 (1932).

<sup>113</sup> Catholic Society of Religious and Literary Education v. Madison County, 74 F. (2d) 848 (C. C. A. 4th, 1935); Springfield v. Hotel Charles Co., 84 F. (2d) 589 (C. C. A. 1st, 1936); Hammond Lumber Co. v. Los Angeles County, 104 Cal. App. 235, 285 Pac. 896 (1930); Miller v. Board of County Comm'rs, 92 Colo. 425, 21 P. (2d) 714 (1933); People v. Illinois Women's Athletic Club, 360 Ill. 577, 196 N. E. 881 (1935); Security Trust & Savings Banks v. Mitts, 220 Iowa 271, 261 N. W. 625 (1935); Lowther v. Moore, 191 Ky. 284, 229 S. W. 705 (1921); Traverse Beach Ass'n v. Elmwood Township, 142 Mich. 297, 105 N. W. 768 (1905); Clarke v. Board of Comm'rs, 66 Minn. 304, 69 N. W. 25 (1896); *In re* Payment of Real Estate Taxes in Pine County, 96 Minn. 392, 105 N. W. 276 (1905); State *ex rel.* Dobbins v. Reed, 159 Mo. 77, 60 S. W. 70 (1900); Belknap Realty Co. v. Simineo, 67 Mont. 359, 215 Pac. 659 (1923); Janike v. Butler County, 103 Neb. 865, 174 N. W. 847 (1919); Bayonne v. Morris & Cummings Dredging Co., 113 N. J. Law 116, 166 Atl. 174 (1933); *In re* Taxes Assessed against Property of Scholie, 42 N. M. 371, 78 P. (2d) 1116 (1938); People v. Commissioners, 99 N. Y. 254, 1 N. E. 733 (1885); Garysburg Mfg. Co. v. Board of Comm'rs, 196 N. C. 744, 147 S. E. 284 (1929); Hammond v. Winder, 112 Ohio St. 158, 147 N. E. 94 (1925); Bonaparte v. Tradesmen's Nat. Bank, 175 Okla. 530, 53 P. (2d) 1106 (1936); Oregon & W. M. Sav. Bank v. Jordan, 16 Ore. 113, 17 Pac. 621 (1888); Western Union Telegraph

The theory behind this rule is that the legislatures have provided a system for the review of assessments and that the taxpayer will secure any justifiable relief to which he is entitled if he pursues the statutory remedies.

In *First National Bank of Greeley v. Weld County*,<sup>114</sup> a taxpayer sought to recover taxes paid under protest on the ground that it had paid taxes upon a gross overvaluation of its property. The facts do not indicate that the plaintiff made application to any of the tax authorities to reduce the assessment or correct the discrimination. A demurrer to the complaint was sustained because the plaintiff did not exhaust its remedies before the administrative boards and consequently could not be heard to assert the invalidity of the assessment. The Supreme Court of the United States, in affirming the decision of the trial court, said: "We cannot assume that if application had been made to the commission proper relief would not have been accorded by that body, in view of its statutory authority to receive complaints and examine into all cases where it is alleged that property has been fraudulently, improperly, or unfairly assessed. Nor will plaintiff be heard to say that there was no adequate time for a hearing, in the absence of any effort on its part to obtain one. . . ."

Very few of the selected taxes considered in this article have any express provision for the administrative review of assessments as a condition precedent for the recovery of taxes, although a good many statutes do require, as before mentioned, an application for a refund. Indeed, the Idaho and Wisconsin income tax statutes are the only ones to require expressly that the taxpayer exhaust all administrative remedies<sup>115</sup> before questioning the assessment in court. However, this general doctrine should be applied as a rule of judicial self-limitation to an action to recover any tax where there is ample provision for an administrative review of assessments. But where the statute fails to grant this review, as do some of the sales tax acts, or where the course of the administrative process is uncertain, the rule should certainly not be applied. Where the question before the courts is solely one of

Co. v. Hurlburt, 83 Ore. 633, 163 Pac. 1170 (1917); Beadle County v. Eveland, 43 S. D. 447, 180 N. W. 65 (1920); Parde and Curtin Lumber Co. v. Rose, 83 W. Va. 484, 105 S. E. 792 (1921); Western Machinery Exchange v. Grays Harbor County, 190 Wash. 447, 68 P. (2d) 613 (1937).

<sup>114</sup>264 U. S. 450, 44 Sup. Ct. 385, 68 L. ed. 784 (1924). Accord: Belknap Realty Co. v. Simineo, 67 Mont. 359, 215 Pac. 659 (1923); Janike v. Butler County, 103 Neb. 865, 174 N. W. 847 (1919); Garysburg Mfg. Co. v. Board of Comm'rs, 196 N. C. 744, 147 S. E. 284 (1929).

<sup>115</sup>IDAHO CODE ANN. (1932) §61-2469 (prohibits judicial contest of the tax unless the taxpayer asks for a review by the commission); WIS. STAT. (1935) §71.16(2) (taxpayer must ask for a hearing and appeal to the tax commission before he can get a judicial review), Whitbeck v. Wisconsin Tax Comm. 207 Wis. 58, 240 N. W. 804 (1932); State *ex rel.* Lehman v. Wisconsin Tax Comm., 207 Wis. 517, 242 N. W. 151 (1932).



overvaluation, this rule of judicial self-limitation applies to prevent collateral attack upon assessments in any manner. If the state officers sue to recover unpaid taxes, the taxpayer cannot plead a defense of overvaluation.<sup>116</sup> Several courts have held that an excessive assessment cannot be judicially challenged under a statutory procedure for the abatement of a tax.<sup>117</sup> However, if the assessment is actually void, the rule should not be applied.<sup>118</sup> As the Maine rule should not be applied,<sup>118</sup> As the Maine court<sup>119</sup> has put it: the tax being void, it is the same as if there had never been any attempt to assess the tax.

Most of the decisions concerning these selected taxes in which this issue has been raised have held that there can be no action until the taxpayer has appeared and contested his assessment before the administrative authorities.<sup>120</sup> A few of these decisions are based solely upon public policy, but most of them are the result of a definite statutory requirement.

The supreme court of Kansas<sup>121</sup> has held that the judicial process is concurrent with the administrative and that the taxpayer can file his action at law without first applying for administrative relief. Other courts, while recognizing the general rule, have developed an exception, that the taxpayer need not resort to the administrative process where

<sup>116</sup> *People v. Big Muddy Iron Co.*, 89 Ill. 116. (1878); *In re Payment of Real Estate Taxes in Pine County*, 96 Minn. 392, 105 N. W. 276 (1905); *Western Machinery Exchange v. Grays Harbor County*, 190 Wash. 447, 68 P. (2d) 613 (1937).

<sup>117</sup> *Herman H. Hettler Lumber Co. v. Cook County*, 336 Ill. 645, 168 N. E. 627 (1929); *Wynn v. Board of Assessors*, 28 Mass. 245, 183 N. E. 528 (1932); *Board of Assessors v. Suffolk Law School*, 4 N. E. (2d) 342 (Mass. 1936); *Keene v. Cheshire County*, 79 N. H. 198, 106 Atl. 486 (1919); *Bean & Symonds Co. v. Jaffrey*, 80 N. H. 343, 117 Atl. 12 (1922). It is interesting to note that the New Hampshire court in *Briggs' Petition*, 29 N. H. 547 (1854), held that poverty and inability to pay taxes was a good cause for tax abatement.

<sup>118</sup> The validity of this conclusion depends upon the power of the administrative tribunal to accord adequate relief against a void assessment. If the administrative board is authorized to reduce or cancel an entire assessment because of illegality or for any other reason, then there is much to be said for requiring a resort to the administrative tribunal before applying to a court for relief.

For a citation of cases which hold that resort to administrative remedies is not essential when the assessment is void see note 138, *infra*; for statutes, note 127, *infra*.

<sup>119</sup> *Talbot v. Inhabitants of Wesley*, 116 Me. 208, 110 Atl. 937 (1917).

<sup>120</sup> *Hammerstrom v. Loy Nat. Bank of Sioux City*, 81 F. (2d) 628 (C. C. A. 8th, 1936); *Bistor v. McDonough*, 349 Ill. 624, 181 N. E. 417 (1932); *Stevens v. Carroll*, 130 Iowa 463, 104 N. W. 433 (1905); *Clarke v. Board of Comm'rs*, 66 Minn. 304, 69 N. W. 25 (1896); *Story v. Dixon*, 64 Mont. 206, 208 Pac. 592 (1922); *Belknap Realty Co. v. Simineo*, 67 Mont. 359, 215 Pac. 659 (1923) (where tax is excessive, erroneous, or improper; but where it is illegal, filing of claim is unnecessary); *In re Wadham's Estate*, 249 App. Div. 271, 292 N. Y. Supp. 102 (4th Dep't 1937); *First Nat. Bank v. Achenbach*, 110 Okla. 256, 237 Pac. 574 (1925).

<sup>121</sup> *Kansas Salthouse v. Board of Comm'rs*, 115 Kan. 675, 224 Pac. 73 (1924); *Atchison, T., & S. F. Ry. v. Board of Comm'rs*, 121 Kan. 428, 247 Pac. 442 (1926).

the tax paid is based upon an illegal assessment or is illegal or excessive.<sup>122</sup>

### *Statutory Equitable Remedies*

Most of the equitable remedies which a taxpayer may use are based upon general doctrines of equity. However, some statutes allow an injunction where an assessment is void because it is based upon a tax which is illegal or unconstitutional.<sup>123</sup> Several income tax statutes<sup>124</sup> expressly prohibit the use of the injunction in income tax litigation, and except for the general statutes above mentioned which authorize the use of the injunction to restrain the enforcement of illegal or void taxes,<sup>125</sup> there does not seem to be any statutory basis for intervention by equity in these cases. Florida is the only state having a death tax which gives its courts full power by a bill in equity to determine all matters arising from the administration of its inheritance tax law.<sup>126</sup> Unless the general statutes of a state may be relied upon, there is no statutory basis for equitable intervention under the sales tax. Such statutes are either silent on the matter or expressly prohibit the injunction.<sup>127</sup>

### *Non-statutory Equitable Remedies*

In about one fourth of the states the taxpayer is limited either to administrative remedies or actions at law or both to recover taxes. Statutes in a few states expressly prohibit the use of the injunction to stay or enjoin the collection of taxes.<sup>128</sup> The courts in a greater num-

<sup>122</sup> Arizona Eastern R. R. v. Graham County, 20 Ariz. 257, 179 Pac. 959 (1919); Hardesty Bros. v. Fleming, 57 Tex. 395 (1872); National Metal Edge Box Co. v. Readsboro, 94 Vt. 405, 111 Atl. 386 (1920).

<sup>123</sup> See note 125, *infra*.

<sup>124</sup> Ark. Laws 1929, Income Tax Law, §32; GA. CODE (1933) §92-3307; S. C. CODE (1932) §2468; Wash. Laws 1935, §11200-57 (except on constitutional grounds and then only when all taxes have been paid in full).

<sup>125</sup> CONN. GEN. STAT. (1930) §1201; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §2268; NEB. COMP. STAT. (1929) §77-1923; N. C. CODE ANN. (Michie, 1935) §7979; OHIO GEN. CODE ANN. (Page, 1938) §12075; R. I. Acts 1935, c. 2260; WASH. REV. STAT. ANN. (Remington, 1933) §11315-1; WYO. REV. STAT. ANN. (Courtright, 1931) §89-4201. See also ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §3136; MICH. COMP. LAWS (1929) §3507; S. C. CODE (1932) §2845; TENN. CODE ANN. (Williams, 1934) §§1794, 1795; VA. CODE ANN. (Michie, 1936) Tax Code, §416.

<sup>126</sup> FLA. COM. GEN. LAWS ANN. (Skillman, Supp. 1934) §1342(45). KY. STAT. ANN. (Carroll, 1936) §4281a-31 forbids the injunction.

<sup>127</sup> Ala. Laws Ex. Sess. 1936-1937, no. 126, §10; ARIZ. REV. CODE ANN. (Courtright, Supp. 1934) §3138s; Ark. Laws 1937, act 154, §19(b) (this to be an adequate legal remedy in federal and state courts); MICH. COMP. LAWS (Mason, Supp. 1933) §3663-22; Miss. Laws 1934, c. 113, §10; N. C. CODE ANN. (Michie, 1935) §7880 (156); Utah Laws 1937, c. 114, §23.

<sup>128</sup> ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §3136; MICH. COMP. LAWS (1929) §3507; S. C. CODE (1932) §2845; TENN. CODE ANN. (Williams, 1934) §§1794, 1795; VA. CODE ANN. (Michie, 1936) Tax Code, §416 (except where there is no adequate remedy at law).

ber of states have adopted a definite judicial policy against equitable intervention.<sup>129</sup> In the other states a court of equity may interfere with tax enforcement under certain circumstances.

Ordinarily the existence of a statutory or common law action to recover taxes will induce an equity court to decline jurisdiction.<sup>130</sup> Likewise, the court may refuse jurisdiction on the ground that the taxpayer has an opportunity to make a defense in an action brought by the taxing officials to collect the tax.<sup>131</sup> But the presence of a fact situation which occasions a conventional basis for the exercise of equity jurisdiction may move the court of equity to proceed despite the alleged adequacy of the remedy at law<sup>132</sup> unless expressly prohibited by statute.

Under the former practice it was frequently possible to obtain relief from state taxation in a federal equity court where state courts of equity were powerless to give relief because of a statutory or judicial declaration against the use of the injunction. Under the 1937 amendment<sup>133</sup> to the judicial code the limits of federal interference have been sharply curtailed.<sup>134</sup> Whereas, formerly a federal district court might act in equity if there were no adequate remedy on the law side of the federal court, now it may intervene only to restrain the enforcement of

<sup>129</sup> Notes (1910) 10 COL. L. REV. 564, (1924) 22 MICH. L. REV. 595, (1928) 35 YALE L. J. 122.

<sup>130</sup> *Crow v. Outlaw*, 225 Ala. 656, 145 So. 133 (1932); *Board of Comm'rs v. Atchison, T., & S. F. Ry.*, 52 Colo. 609, 125 Pac. 528 (1912); *People ex rel. Wilbourn v. District Court*, 87 Colo. 316, 287 Pac. 849 (1930); *State ex rel. Hamilton v. Brown*, 172 Mo. 374, 72 S. W. 640 (1903); *Bismark Water Supply Co. v. Barnes*, 30 N. D. 555, 153 N. W. 454 (1915).

<sup>131</sup> *Wells Fargo & Co. v. Nevada*, 248 U. S. 165, 39 Sup. Ct. 62, 63 L. ed. 190 (1918); *Wall v. Borgen*, 152 Minn. 106, 188 N. W. 159 (1922); *Davis v. Santa Rosa Infirmary*, 220 S. W. 125 (Tex. Civ. App. 1920). For citations to statutes prohibiting or limiting the use of the injunction in tax litigation see notes 124, 125, *supra*.

<sup>132</sup> In equitable remedies, as under legal remedies already discussed, a resort to the administrative process for the correction of errors in assessments should be a condition precedent to judicial relief. See notes 113, 114, *supra*.

<sup>133</sup> 50 STAT. 738 (1937), 28 U. S. C. A. (Supp. 1938) §41(1) which provides: "... notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of a tax imposed by or pursuant to the laws of any State where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State."

<sup>134</sup> Until the section under consideration was amended, a very different rule prevailed. A type of remedy might exist in the state courts which could not be obtained in the federal courts. This would not prevent an injunction in a federal court, as the adequate remedy at law had to be on the law side of the federal court. In *City Bank Farmers Trust Co. v. Schnader*, 291 U. S. 24, 54 Sup. Ct. 259, 78 L. ed. 228 (1934), an action was brought in a federal court in Pennsylvania where there is no action at law to recover taxes. There was, however, a state judicial review of administrative action. It was held that the existence of this state remedy did not oust the district court of jurisdiction, because there was no remedy at law in the federal courts. The recent amendment deprives the federal courts of equity jurisdiction where there is a sufficient remedy at law in the state court.

a state tax law where the state does not afford a "plain, speedy and efficient" legal or equitable remedy.

Equity courts have granted injunctions, despite the presence of legal remedies, when the allegations and proof brought the cases within the following recognized heads of equity jurisdiction: (1) the prevention of a multiplicity of suits at law,<sup>135</sup> (2) the removal of clouds on title to real property,<sup>136</sup> (3) doubt and confusion regarding the availability of a legal remedy.<sup>137</sup>

A court of equity will differentiate an attack upon an assessment which is alleged to be void and one which is claimed to be excessive. The courts have held that a void assessment is open to collateral attack, and its enforcement will be enjoined.<sup>138</sup> Most of these cases may be grouped into two classes: (1) cases where the assessing officials have attempted to increase an individual assessment without giving the statutory notice;<sup>139</sup> and (2) cases where the assessing tribunals have

<sup>135</sup> *Gramling v. Maxwell*, 52 F. (2d) 256 (D. C. N. C. 1931); *Shanks v. Winkler*, 210 Ala. 101, 97 So. 142 (1923); *Wanover v. Davis*, 27 Ga. 354 (1859); *Hershbach v. Kaskaskia Island Sanitary and Levee District*, 265 Ill. 388, 106 N. E. 942 (1914); *Carlton v. Newman*, 77 Me. 408, 1 Atl. 194 (1885); *McTiggan v. Hunter*, 18 R. I. 776, 30 Atl. 962 (1895). In *Equitable Guarantee Trust Co. v. Donohoe*, 8 Del. Ch. 422, 45 Atl. 585 (1900), the court said that the vexatiousness of a multiplicity of suits must be real and not merely imaginary, and pointed out that where the state is the party suing it is not to be presumed that the state will resort to a multiplicity of suits.

<sup>136</sup> *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. ed. 445 (1920); *Wallace v. Hines*, 253 U. S. 66, 40 Sup. Ct. 435, 64 L. ed. 782 (1920); *Lightner v. Belk*, 178 Ga. 766, 174 S. E. 349 (1934); *Jayton Independent School District v. Rule-Jayton Cotton Oil Co.*, 259 S. W. 631 (Tex. Civ. App. 1934); *Stange Co. v. Merrill*, 134 Wis. 514, 115 N. W. 115 (1908).

<sup>137</sup> *Fox v. Standard Oil Company*, 294 U. S. 87, 55 Sup. Ct. 333, 79 L. ed. 780 (1935); *State Board of Tax Comm'rs v. Belt Railroad and Stock Yards Co.*, 191 Ind. 282, 130 N. E. 641 (1921); *Ware Shoals Mfg. Co. v. Jones*, 78 S. C. 211, 58 S. E. 811 (1907).

<sup>138</sup> *Gale v. Statler*, 47 Colo. 72, 105 Pac. 858 (1909); *Richards v. Zentner*, 176 Ga. 222, 167 S. E. 516 (1933); *State Board v. McDaniel*, 199 Ind. 708, 160 N. E. 347 (1928); *Layman v. Iowa Telephone Co.*, 123 Iowa 591, 99 N. W. 205 (1904); *Fred M. Crane Co. v. Douglas County*, 112 Neb. 365, 199 N. W. 791 (1924); *Smoky Mountain Land, Lumber and Improvement Co. v. Lattimore*, 119 Tenn. 620, 105 S. W. 1028 (1907); *Sussex County v. Jarratt*, 192 Va. 672, 106 S. E. 384 (1921).

<sup>139</sup> *Richards v. Zentner*, 176 Ga. 22, 167 S. E. 516 (1933); *Chicago Title and Trust Co. v. McDonough*, 355 Ill. 648, 189 N. E. 896 (1934); *P. Lorillard Co. v. Ross*, 183 Ky. 217, 209 S. W. 39 (1919); *Louisiana Long Leaf Lumber Co. v. Vines*, 160 La. 311, 90 So. 660 (1922); *Morris v. State by State Tax Comm.*, 41 N. M. 385, 69 P. (2d) 924 (1937); *Blinn v. Cole*, 90 Ohio St. 458, 108 N. E. 1114 (1914); *St. Louis Basket and Box Co. v. Lauderdale County*, 146 Tenn. 413, 241 S. W. 99 (1922).

The requirements of notice do not often require judicial establishment because they are usually outlined by statute. In *People v. Lycan*, 314 Ill. 590, 145 N. E. 595 (1924), the court said that a notice was sufficient which stated that the board contemplated a raise and requested the owner to appear to present his objections on a day certain. When a date is set by statute the notice of the time of meeting given by the statute itself has been held sufficient. *Yuma County v. Arizona & S. R. R.*, 30 Ariz. 27, 243 Pac. 907 (1926).

Notice must be given when the board contemplates the raising of an individual taxpayer's assessment. *State Board v. McDaniel*, 199 Ind. 708, 160 N. E.

attempted to include property which is not subject to taxation because of a lack of jurisdiction to tax or because of an exemption.<sup>140</sup>

If the assessing authorities have jurisdiction and the charge is that the assessment is either excessive or erroneous,<sup>141</sup> the courts will not ordinarily afford either equitable or legal relief in the absence of statute.<sup>142</sup> As the Illinois court in *People ex rel. Bracher v. Millard* said:<sup>143</sup> "The Constitution provides that the ascertainment of the value of property for the purpose of taxation shall be vested in such persons as are determined by the legislature and prohibits the fixing of such values by any other persons. Courts have no power to fix the value of property for taxation. Such valuation is not open to supervision of the judicial department of the state, unless it is so excessive as to amount to fraud. . . ." There are a good many judicial declarations indicating that the courts will take jurisdiction where the facts indicate

347 (1928); *Fred. M. Crane Co. v. Douglas County*, 112 Neb. 365, 199 N. W. 791 (1924); *Ward County v. Wentz*, 69 S. W. (2d) 571 (Tex. Civ. App. 1934); *Smith v. Stannard*, 81 Vt. 319, 70 Atl. 568 (1908). But where the assessment of an entire district is raised, it is not necessary to give formal notice to the individual taxpayers. *State ex rel. Jennings Bros. Inv. Co. v. Armstrong*, 19 Utah 117, 56 Pac. 1076 (1899); *State ex rel. Showalter v. Cook*, 175 Wash. 364, 27 P. (2d) 1075 (1933); *Baker v. Paxton*, 29 Wyo. 500, 215 Pac. 257 (1923).

The Minnesota court held that the requirement of the statute that notice be given of the meetings of the board of equalization was merely directory. *State v. Cudahy Packing Co.*, 103 Minn. 419, 115 N. W. 645 (1908). However, this holding seems sound only in the event that the statute fixed the date of the meetings so that there was statutory notice.

<sup>140</sup> *Penick v. High Shoals Mfg. Co.*, 113 Ga. 592, 38 S. E. 973 (1901); *Croop v. Walton*, 199 Ind. 262, 157 N. E. 275 (1927); *Baltimore Steam Packet Co. v. Mayor and Council of Baltimore*, 161 Md. 9, 155 Atl. 158 (1931); *Conn v. Jones*, 115 Ohio St. 186, 153 N. E. 897 (1926); *Sullivan v. Bitter*, 51 Tex. Civ. App. 604, 113 S. W. 193 (1908); *Horton v. Driskell*, 13 Wyo. 66, 77 Pac. 354 (1904).

<sup>141</sup> *State v. Little*, 94 Ark. 217, 126 S. W. 713 (1910); *Bank of Cal. v. San Francisco*, 142 Cal. 276, 75 Pac. 832 (1904); *Bordner v. Board of Comm'rs*, 92 Colo. 81, 18 P. (2d) 323 (1932); *Burton Stock-Car Co. v. Traeger*, 187 Ill. 9, 58 N. E. 418 (1900); *People v. Millard*, 307 Ill. 556, 139 N. E. 113 (1923); *Sanford v. Roberts*, 193 Ky. 377, 236 S. W. 571 (1922); *State v. Haynes*, 82 Minn. 34, 84 N. W. 636 (1900); *Johnson v. Johnson*, 92 Mont. 512, 15 P. (2d) 842 (1932); *United States Trust Co. v. Mayor of New York*, 144 N. Y. 488, 39 N. E. 383 (1895); *Sioux Falls Savings Bank v. Minnehaha County*, 29 S. D. 146, 135 N. W. 689 (1912); *Rachford v. Port Neches*, 46 S. W. (2d) 1057 (Tex. Civ. App. 1932); *State v. Mallet Land and Cattle Co.*, 126 Tex. 392, 88 S. W. (2d) 471 (1935); *In re 1926 Timber Assessment in Jefferson County*, 153 Wash. 133, 279 Pac. 392 (1929); *State ex rel. Althen v. Klein*, 157 Wis. 308, 147 N. E. 373 (1914); *State v. Axtell*, 216 Wis. 153, 256 N. W. 622 (1934); *Credwson v. Nefsy*, 14 Wyo. 61, 82 Pac. 1 (1905); *Bunten v. Rock Springs Grazing Ass'n*, 29 Wyo. 461, 215 Pac. 244 (1923).

<sup>142</sup> See *Island Creek Fuel Co. v. Harsbarger*, 73 W. Va. 397, 80 S. E. 504 (1913).

<sup>143</sup> 307 Ill. 556, 139 N. E. 113 (1923).

If a board of equalization or other administrative tribunal will not act upon an appeal or complaint, the remedy is not in a court of equity. Several courts have held that the writ of *mandamus* may be used to compel the board to make a decision. *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 51 N. E. 629 (1898); *Lowenthal v. People*, 192 Ill. 222, 61 N. E. 462 (1901); *Board of Equalization v. Broadway Development Co.*, 178 Okla. 266, 62 P. (2d) 1010 (1936).

that the assessing authorities have adopted a gross overvaluation of property,<sup>144</sup> particularly when based upon a manifestly erroneous method. Such action, though unintentional, amounts to a constructive "fraud" or the equivalent of a "fraud" on the rights of the taxpayer.<sup>145</sup> However, the Supreme Court of Florida in *Tampa v. Palmer*,<sup>146</sup> applied a more stringent rule, namely, that the court will interfere only when the assessment is so obviously and flagrantly excessive as to amount in law to a fraud and to impute to the assessor an intention to discriminate arbitrarily against the taxpayer. As between these two views it would seem that the former is preferable. If the assessor, however honest, has adopted a wrong method of assessment which results in a gross overvaluation, the taxpayer is entitled to relief. The good faith of the assessor should not be an important factor.

What relief can a court give when it overthrows such an assessment? Can the court make an assessment whenever it determines that the administrative assessment cannot stand? The courts, obviously, are not assessing agencies.<sup>147</sup> On the other hand, a taxpayer is entitled to have equality of treatment. The courts can and will give him relief by scaling down the assessed valuation of his property to the level or percentage of actual value fixed for other similar property.<sup>148</sup>

<sup>144</sup> A taxpayer who seeks to question the validity of an assessment in the courts is faced with two handicaps. First, there is a presumption that the record of the assessing authorities is correct, at least *prima facie* so. *Ferry Beach Park Ass'n of Universalists v. Saco*, 127 Me. 136, 142 Atl. 65 (1928); *Hatcher & Co. v. Gosper County*, 95 Neb. 543, 145 N. W. 993 (1914); *Hagerty v. Huddleston*, 60 Ohio St. 149, 53 N. E. 960 (1899). Second, the taxpayer has the burden of affirmatively and clearly showing the excessive, fraudulent, or oppressive assessment. *Phillips v. Board of Comm'rs*, 83 Colo. 82, 262 Pac. 523 (1927); *Clements v. Powell*, 155 Ga. 278, 116 S. E. 624 (1923); *Hayden v. Breathitt County Board of Sup'rs*, 244 Ky. 505, 51 S. W. (2d) 441 (1932); *State v. Backus-Brooks Co.*, 102 Minn. 50, 112 N. W. 863 (1907); *Lancaster County v. Whedon*, 76 Neb. 753, 108 N. W. 127 (1906); *Douglas Land Co. v. Clatsop County*, 87 Ore. 462, 169 Pac. 790 (1918); *Union Tanning Co. v. Commonwealth*, 123 Va. 610, 96 S. E. 780 (1918).

<sup>145</sup> *Blinn Lumber Co. v. Los Angeles County*, 216 Cal. 474, 14 P. (2d) 512 (1932); *Jeffersonville v. Louisville and J. Bridge Co.*, 169 Ind. 645, 83 N. E. 337 (1908); *Wade v. Comm'rs*, 74 N. C. 81 (1876); *Nederland Independent School Dist. v. Carter*, 72 S. W. (2d) 935 (Tex. Civ. App. 1934). In *Rancho Santa Margarita v. San Diego County*, 126 Cal. App. 186, 14 P. (2d) 588 (1932), the court stated that the action of the board of equalization would be deemed the equivalent of fraud, though they acted honestly and in good faith if they used a method of increasing assessments which created serious discriminations. <sup>146</sup> 89 Fla. 514, 195 So. 115 (1925); *cf.* *Vestal v. Edwards*, 143 Ga. 368, 85 S. E. 187 (1915).

<sup>147</sup> *Chesapeake & Potomac Tel. Co. v. State Tax Comm.*, 158 Me. 512, 148 Atl. 832 (1930); *People ex rel. New York v. Keeler*, 237 N. Y. 332, 143 N. E. 211 (1924).

<sup>148</sup> *People ex rel. McDonough v. Schmuhi*, 349 Ill. 446, 194 N. E. 732 (1934); *Eminence Distillery Co. v. Henry County Board of Sup'rs*, 178 Ky. 811, 200 S. W. 347 (1918); *Cumberland County Power and Light Co. v. Inhabitants of Hiram*, 125 Me. 138, 31 Atl. 594 (1926); *Tax Commission v. Ancaster Co.*, 50 Ohio App. 292, 198 N. E. 49 (1934); *Chicago, R. I. & Pac. Ry. v. Young*, 60 S. D. 291, 244 N. W. 370 (1932). But *cf.* *Philadelphia & Reading Coal & Iron*

## IV. CONCLUSION

One of the striking facts developed from this study is that of the complexity and duplication of state tax legislation and machinery. The general property tax presents problems in valuation which the other taxes do not raise, and its assessment machinery must be somewhat more complicated. But there is no reason why a unitary and uniform tax administration should not control all other state-wide tax laws. This could be accomplished very well by a state tax machinery act which would provide adequate administrative machinery for the review of all assessments. Probably for the purposes of the efficient disposition of assessment disputes the administrative remedy should be exclusive. Court action in such cases should be limited to appeals from the administrative authorities on matters of law.

It does not seem fair to the taxpayer to penalize him for a failure to exhaust his administrative remedies before he pays the tax. A very broad power to grant refunds should be vested in the administrative authorities. However, the administrative remedies prior to payment and those after payment should be mutually exclusive. A taxpayer should not be permitted to have more than one full hearing of his objections.

The state tax machinery act should create a liberal statutory action to recover taxes. This action should authorize a recovery for any reason which would render it inequitable for the state to retain the tax money. But it does not seem proper to allow the taxpayer to "re-litigate" the question of excess valuation which under the plan herein advocated should have already become *res adjudicata* by an administrative hearing.

These combined administrative and judicial remedies would afford an adequate remedy at law, and there would be no need for the disruptive interference of a court of equity in tax matters. The proposed tax machinery act should contain a section expressly prohibiting the use of the injunction.

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Co. v. Comm'rs, 223 Pa. 185, 186 Atl. 106 (1936); Appeal of Lehigh Nav. Coal Co., 327 Pa. 327, 193 Atl. 50 (1937); note (1933) 46 HARV. L. REV. 1000.