Washington Research Council

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Toward a More Effective Tax Appeals Process for Washington

Executive Summary

The Council on State Taxation (COST) notes that the U.S. tax system works because of voluntary compliance; thus, it is imperative that the system be perceived "to be balanced, fair, and effective" (Lindholm et al. 2016). Washington's tax appeals process often does not meet that standard. It is inefficient, lacks precedential value at most levels, and does not require tax and legal expertise for those hearing appeals.

The American Bar Association and COST have identified four principles that are essential for an effective tax appeals process. They are:

- There must be no requirement for taxpayers to pay the disputed tax or post a bond prior to an independent hearing;
- The members of the appeals forum must be experienced in state tax laws;
- The appeals forum must be truly independent; and
- The independent forum must establish the record for further appeals.

In Washington, the Washington State Board of Tax Appeals (WSBTA) hears property and excise tax appeals. Though the WSBTA does not require payment of the tax to access the forum, there is no stay on tax collection; as a practical matter, taxpayers must pay the disputed tax before any WSBTA proceedings occur. The WSBTA is an independent appeals forum and its decisions are published.

In 2016, Washington earned a C- on COST's state tax administration scorecard, making it one of the five states with the lowest marks. Some of the reasons for Washington's poor showing are:

- Taxpayers must file an appeal within 30 days.
- There is a lack of excise tax expertise at the WSBTA.
- It can take too long for an appeal to be decided.
- The Legislature has enacted retroactive tax legislation.
- Taxpayers must, as a practical matter, pay the disputed tax prior to an independent hearing.

To improve the tax appeals process, Washington could look to the example of Oregon, which has a judicial branch tax court. The American Bar Association presents another option in its Model State Administrative Tax Tribunal Act, which shares the essential elements highlighted by COST. In 2015, the state Senate passed 2SSB 5449, which was modeled on Oregon's Tax Court and incorporated many of the provisions of the ABA model act. To accommodate the structure of the judicial branch under Washington's constitution, 2SSB 5449 would have created a tax appeal division in the Court of Appeals. The bill would have improved Washington's grade on COST's scorecard.

Washington's current tax appeals system is inefficient. Making changes similar to those proposed in 2SSB 5449 would result in a tax appeals system that is more balanced, fair, and effective—and thereby improve Washington's tax and business climate.

Council on State Taxation

COST is a non-profit, national trade association of multistate corporations. It works to "preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities" (COST 2017). COST is well respected within the tax community and produces several useful reports on tax issues. These include the annual State and Local Business Tax Burden study, which we wrote about in "Washington State Businesses Pay 58 Percent of State and Local Taxes" (WRC 2017).

The Council on State Taxation (COST) notes that the U.S. tax system works because of voluntary compliance; thus, it is imperative that the system be perceived "to be balanced, fair, and effective" (Lindholm et al. 2016). Washington's tax appeals process often does not meet that standard. It is inefficient, lacks precedential value at most levels, and does not require tax and legal expertise for those hearing appeals.

According to COST, there are four "essential elements of an effective and independent state tax appeals process" (Lindholm et al. 2016). They are:

- There must be no requirement for taxpayers to pay the disputed tax or post a bond prior to an independent hearing;
- The members of the appeals forum must be experienced in state tax laws;
- The appeals forum must be truly independent appeals forum; and
- The independent forum must establish the record for further appeals.

These elements are also the basis for the Model State Administrative Tax Tribunal Act put forth by the American Bar Association (ABA) in 2006 as a model for state legislatures.

COST grades the states' tribunals on these elements (and additional dimensions); in its most recent scorecard, Washington earned a C-. There is room for improvement on our current system. The ABA's model act could serve as a model for Washington, as could the Oregon Tax Court; indeed, the state Senate passed a bill modeled on both the ABA model act and the Oregon Tax Court in 2015.

In the case of Washington, "pay to play" is required, in effect.

Principles for an Effective Tax Appeals Process

As noted above, COST identifies four elements that should be present in a tax appeals process. These elements are also the core principles behind the ABA's model act. A state's appeals process should not require prepayment, members of the appeals forum should be experienced in state tax laws, the appeals forum should be independent, and the forum should establish the record for further appeals.

No Prepayment. Requiring taxpayers to pay a tax before being allowed to dispute it means that their cash must be tied up with the state for a potentially lengthy period even in cases when the appeal will ultimately be decided in their favor. COST argues that free access to the forum to dispute a tax assessment

> *. . . is especially important during difficult state economic climates—once tax money is paid into the system, it is often difficult or impossible to wrest a refund from the state.* (Lindholm et al. 2016)

Except in property tax cases, the federal government allows "taxpayers to litigate tax assessment challenges all the way up to the U.S. Supreme Court without prepayment or bonding" (Allen and Fields 2012). No state currently requires full "pay to play" (which occurs when taxpayers must pay a tax without even a chance to contest it at a non-independent forum). But, as COST notes,

> *. . . some states still require payment of the tax or posting of a bond to obtain access to the circuit court or district court level in the case of an adverse decision by an independent non-judicial body.* (Lindholm et al. 2016)

In the case of Washington, "pay to play" is required, in effect, because there is a stay on collecting excise tax only while a challenge is heard within the Department of Revenue's review process. After that, payment must be made regardless of whether the taxpayer exercises further appeal rights, even at the state Board of Tax Appeals (an independent non-judicial body).

Tax Law Experience. COST argues, "Tax tribunal judges must be specifically trained as tax attorneys and have significant state tax experience, and the tribu-

nal should be dedicated solely to deciding tax issues" (Lindholm et al. 2016). Such focus is important given the "tremendous growth and complexity in the body of tax law" (Lindholm et al. 2016).

Further,

> *Judges not trained in tax law are less able to decide complex corporate tax cases on their merit and a perception exists (rightly or wrongly) that the revenue impact of these complex cases too often helps guide decision-makers through the fog of complicated tax statutes, regulations, and precedent. That perception reflects poorly on a state's business climate and reputation as a fair and competitive place to do business.* (Lindholm et al. 2016)

Similarly, the Taxation Section of the Washington State Bar Association highlights nine attributes of a tax appeals process "as promoting due process and fundamental fairness" (Quintal 2015). They are: no prepayment requirement, published opinions, direct review by appellate courts, sufficient pay for judges, no political party considerations for judges, requirement that judges be attorneys with tax expertise, an informal option, geographic flexibility, and a mediation option.

Independent Appeals Forum and Establishment of a Record. It is important for a taxpayer to have the opportunity to appeal an assessment in a forum that is independent of the agency that made the assessment in the first place. As COST notes,

> *Independent tribunals are less likely to be perceived as driven by concerns over revenue collection, upholding departmental policies, or offending departmental decision-makers.* (Lindholm et al. 2016)

Further, the coauthors of the ABA model act write that if a tribunal hearing is an official hearing of record, a taxpayer would "only have to incur the time and expense of presenting his case on the facts and law once—before the Tax Tribunal" (Allen and Fields 2012).

Ultimately,

> *States without an independent tax tribunal or similar appeals system limit a taxpayer's real ability to challenge a state tax assessment. States that do not offer an independent tribunal, and/or force taxpayers to appeal based on a record established at a non-independent proceeding, are less attractive to businesses and are more likely to see taxpayers engage in structural tax planning to minimize potential exposure in the state*. (Lindholm et al. 2016)

According to the American Institute of Certified Public Accountants (AICPA), as of February 2016, 16 states do not have independent tax tribunals. Twenty-nine states have executive branch tribunals (including Washington) and six have judicial branch tribunals (Arizona, Connecticut, Hawaii, Indiana, New Jersey, and Oregon).

Federal History. These arguments about tax appeal fairness have been made for almost a century. At the federal level, Congress established the Board of Tax Appeals in 1924. Its purpose "was a narrow one, to assure that in most cases a taxpayer could obtain an independent review of the assertions of a tax deficiency before the deficiency would be assessed and collected" (Dubroff and Hellwig 2014).

Despite being "virtually indistinguishable" from a court, the Board of Tax Appeals was an "independent agency in the executive branch" (Dubroff and Hellwig 2014). For the first time, taxpayers "could obtain an adjudication of tax liability in advance of the necessity for payment" (Dubroff and Hellwig 2014). Previously, taxpayers had to pay the tax liability they disputed and then sue for a refund in district court or the Court of Claims.

In 1926, the Board was authorized to impose a filing fee to help prevent "the abuse of Board proceedings" (Dubroff

Acronyms

ABA—American Bar Association

AICPA—American Institute of Public Accountants

COST—Council on State Taxation

DOR—Department of Revenue

WSBTA—Washington State Board of Tax Appeals

and Hellwig 2014). (Indeed, appeals decreased by 25 percent.) The Board was renamed the Tax Court in 1942, and Congress converted it to a court under Article I of the Constitution in 1969 (Johnson 1998).

Tax Appeals in Washington

Washington has had an independent tax appeals tribunal for the last 50 years. It is called the Washington State Board of Tax Appeals. In 1965, Governor Daniel J. Evans appointed a Tax Advisory Council

> *. . . to survey and analyze Washington's tax statutes and evaluate their administration, yield and effect and make recommendations relating to changes in existing laws and administrative practices*. (Grim 1966)

The Council recommended the creation of the Department of Revenue. The department would be

> *. . . vested with all the powers, functions, and responsibilities of the present Tax Commission, except for the Commission's quasi-judicial function of hearing taxpayers' protests and appeals*. (Grim 1966)

For that, the Council recommended "establishment of a Board of Tax Appeals as an independent state agency" (Grim 1966). It did so because, at the time, the way the Tax Commission handled appeals was

> *. . . deficient from the standpoints of both taxpayer protection and administrative merit. Equity is not served when an appellant body is also the body that has promulgated the regulations governing the actions that are being appealed. In other words, the Tax Commissioners are now in a position of adjudicating upon appeals from their own actions. A Board of Tax Appeals separate from any revenue administration agency or program would eliminate these functional confusions and serve the public interest.* (Grim 1966)

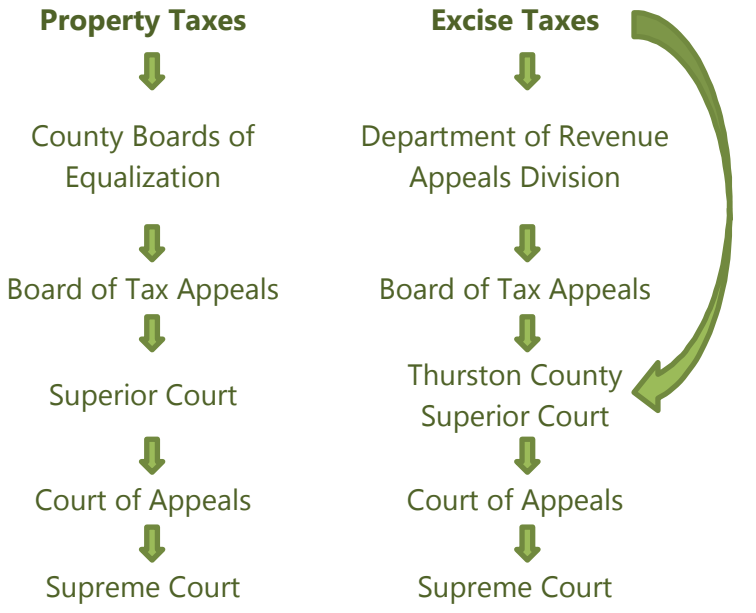
Incidentally, the Council also recommended that "a tax division, designated as a Tax Court, be established within the state Superior Court system" (Grim 1966). The court "should have jurisdiction over all state and local tax appeals with the exception of questions arising in probates" (Grim 1966). Further,

> *The Council believes that such a Tax Court could be created without raising constitutional questions. It would serve the public interest, not only in providing essential impartial review but in enabling one or two Superior Court judges to become specialists in tax law*. (Grim 1966)

This recommendation was not enacted. But a Board of Tax Appeals was established.

Current Tax Appeals Process. Today, taxpayers in Washington generally may appeal tax disputes through the Washington State Board of Tax Appeals (WSBTA). The WSBTA was created in 1967 and has three members who are appointed by the governor for six-year terms. They may not all be members of the same political party. State law requires that Board members be "qualified by experience and training in the field of state and local taxation" (RCW 82.03.020). In

Chart 1: Current Tax Appeals Process



practice, though, members do not always have such experience and need not have law degrees.

The WSBTA hears property and excise (including sales and business and occupation) tax appeals. These include appeals of decisions of the Department of Revenue (DOR) and county boards of equalization. Taxpayers typically have 30 days from the date the notice or decision was mailed to appeal, and there is no filing fee. For each case, the WSBTA must prepare written decisions (RCW 82.03.100); those that "are of general public interest" must be published (RCW 82.03.110). WSBTA decisions lack precedential value.

Taxpayers are not statutorily required to prepay the taxes in dispute at the WSBTA. As noted above, though, payment is effectively required in many excise tax cases. Filing an appeal through the WSBTA does not stay collections; taxpayers must post a bond to do so. Further, the tax due date isn't stayed. This means that, depending on how long the WSBTA process takes, if taxpayers do not prepay and are unsuccessful in their appeals, they have to pay a late payment penalty. (In the case of property taxes, appeals are of valuations that will result in future tax bills, so prepayment isn't relevant.)

Taxpayers may choose a formal or informal hearing of the WSBTA. The result of an informal hearing cannot be appealed (WSBTA 2016a). Formal decisions of the WSBTA on excise tax matters may be appealed to the Thurston County Superior Court (after the disputed tax is paid). Excise tax matters may also be appealed directly to Thurston County Superior Court, bypassing the WSBTA. This is for tax refund cases only (RCW 82.32.180). WSBTA decisions on property tax matters may be appealed to any superior court. There is no stay on collection for property taxes except in rare circumstances (RCW 84.52.018). Superior courts are courts of general jurisdiction, so their judges are not specialists in tax law.

According to the WSBTA, "Most appeals filed with the State Board are property valuation appeals from decisions of the County Board of Equalization" (WSBTA 2016a). About 90 percent of the WSBTA's caseload are "disputes involving property assessments" (WSBTA 2013). Additionally, "The vast majority of property cases are resolved through the informal process ending, if necessary, with a decision by the State Board" (WSBTA 2016b).

Appeals filed with the WSBTA totaled 4,465 in fiscal year 2011 (the highest point in the past ten years); that number dropped to 1,985 in FY 2015. Meanwhile, the WSBTA's backlog (appeals not scheduled) reached a high of 3,591 in FY 2014, and dropped to 3,194 in FY 2015. (WSBTA 2015) According to the WSBTA's 2017–19 budget request, the backlog is currently more than 3,400 cases (WSBTA 2016c). Further,

> *More than half of the current backlog will not receive a hearing until more than 3 years after being filed with the agency. More than 500 dockets are already more than 3 years old. Cases filed today will wait nearly 19 months*

Chart 2: WSBTA Workload (Fiscal Year)

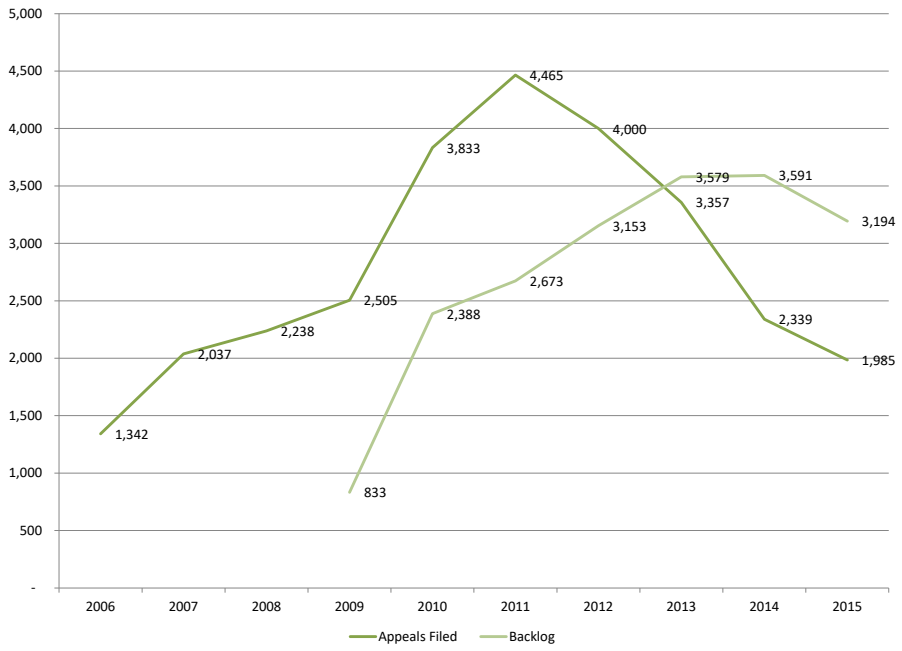


Chart 3: WSBTA Appropriations (Millions of Dollars)

for resolution. (WSBTA 2016c)

The agency assumes "The number of dockets filed with the agency annually will continue at approximately 2,200, slightly less than the average number filed over the last three years" (WSBTA 2016c).

The WSBTA says the backlog is a result of "increased filings" and "inadequate funding and staffing" (WSBTA 2015). Since 2011, the WSBTA has "been short a full-time, senior hearing officer" (WSBTA 2015). In the current biennium, appropriations for the WSBTA are $2.6 million. For the 2017–19 biennium, the WSBTA is requesting an additional $570,000 to add staff to help deal with the backlog. Gov. Inslee's 2017–19 budget proposal would not fund that additional staff, but it would increase spending for the WSBTA to $3.0 million.

Funding is not the issue here, though. Indeed, there are indications that the WSBTA has contributed to its own backlog through inefficient practices. For example, in 2010, when it was already experiencing a large backlog, the WSBTA issued a decision that was 106 pages long with 379 footnotes—despite having a Washington appellate decision on point (Naha Hilltop Associates LP v. Rushton; Cascade Court v. Noble).

Issues with the Current Tax Appeals Process

COST ranks the states every three years on their tax appeals processes. It does so in order to make legislatures aware "that they must be sensitive to the compliance implications and competitiveness concerns created by poor tax administrative laws and ineffective tax appeal systems" (Lindholm et al. 2016).

The COST scorecard evaluates states on whether they have an independent dispute forum, whether the taxpayer must prepay the tax in dispute, whether the state has the same statute of limitations for refunds and assessments, whether the state has equal interest rates for refunds and assessments, whether the state has an ample protest period (preferably 90 days), the state's corporate return filing burden, whether the state requires transparency in guidance and rulings, and other issues.

In 2016, COST added the enactment of retroactive tax legislation to its "other issues" component. According to COST, legislatures are increasingly

> *. . . waiting until after appellate courts have finally decided a tax dispute before reversing the courts' decisions. Such legislation turns the judicial process into results-oriented decision making, undermining taxpayers' perception of fair and impartial tax appeals in the states*. (Lindholm et al. 2016)

In 2016, Washington received a C- grade on the scorecard, making it one of the five states with the lowest marks. Oregon received a B. The top-graded states are Indiana and Kansas, while Nevada and North Dakota received the lowest marks. Washington's grade was a C in 2013; its poorer grade in 2016 is due to retroactive tax legislation.

According to COST, Washington

> *. . . has produced two of the most egregious retroactive tax changes in the nation, reversing the results in two Washington Supreme Court decisions, with the retroactive changes subsequently upheld by the same court.* (Lindholm et al. 2016)

(These cases are In re Estate of Hambleton v. Department of Revenue and Dot Foods, Inc. v. Department of Revenue.)

Also contributing to Washington's low score is the fact that the Legislature "failed to act on legislation that would create a new, independent tax appeals process without 'pay to play'" (Lindholm et al. 2016). This is in reference to SB 5449, about which there is more information below.

Stakeholders have concerns about expertise and application of the law in the appeals process.

Some of Washington's low marks are related to how the WSBTA works. COST notes that taxpayers in Washington have only 30 days to protest an excise tax assessment. Additionally, although COST recognizes that the WSBTA is an independent dispute forum, it says that, as the WSBTA has excise and property tax jurisdiction, members "may lack expertise in excise tax matters" (Lindholm et al. 2016). Finally, COST points to the length of time it takes from filing date to decision. (The 2013 scorecard highlighted the significant backlog of cases at the WSBTA.)

Washington also received low marks from COST for issues that arise outside of the WSBTA. First, DOR is not bound by decisions of the WSBTA for other taxpayers or the same taxpayer for different years, letter rulings regarding other taxpayers, department determinations, industry guidelines posted on the DOR website, or regulations. Second, DOR "is not foreclosed from collecting tax, even though payment of tax is not a jurisdictional requirement in the BTA" (Lindholm et al. 2016).

Stakeholders also have concerns about the WSBTA's expertise and application of the law. According to the WSBTA's FY 2016–FY 2017 strategic plan, many appeals to the WSBTA "present complex legal and valuation issues" (WSBTA 2015). Further, "Year after year, the complexity of these appeals has increased, due in part to the increasing participation of tax professionals representing taxpayers" (WSBTA 2015). The Taxation Section of the Washington State Bar Association points to this complexity as a problem with the current system. According to the Taxation Section, "General superior court judges and BTA board members often lack legal expertise in state excise taxes, yet are asked to examine complex issues of state and local excise tax law" (Quintal 2015).

The Taxation Section also worries about an inconsistent application of the law that occurs in the system:

> *For property taxes, the taxpayer may also appeal to the BTA or to a superior court. BTA decisions can conflict with each other, and superior court decisions are not published, cannot be cited, and have no precedential value. This has led to inconsistent application of both statutory and case law causing confusion for Washington taxpayers*. (Quintal 2015)

(The description of superior court decisions is true for all cases, not just those involving taxes.)

The time it takes to resolve a case can also be an issue, as noted by COST. An excise tax dispute could involve appealing within DOR, appealing to the WSBTA, appealing to Superior Court, appealing to the Court of Appeals, and appealing to the state Supreme Court. And, depending on where the appeals end, there might not be clear guidance for other taxpayers or DOR due to the lack of precedent-setting at some levels. This is inefficient and time consuming.

The WSBTA itself recognizes some of the problems with the current process. It acknowledges,

> *At current funding levels, the agency is unable to fulfill its mission: To maintain*

> *public confidence in the state tax system by providing taxpayers and taxing authorities with an accessible, fair, and efficient appeals process.* (WSBTA 2016c)

Further, the agency's 2017–19 budget request notes that there is currently "a huge backlog of cases, unacceptable delay in the provision of services, and decreases in service reliability and customer satisfaction" (WSBTA 2016c). But the fact that the WSBTA faces budget constraints doesn't explain away all of the problems that have been identified with the appeals process.

Alternatives that Could Improve the Process

There are several examples Washington could follow to help remedy these deficiencies.

As noted above, Indiana received the best grade on COST's scorecard this year. Since 1986, Indiana has had a tax court located in the judicial branch. The Indiana Tax Court "has exclusive jurisdiction over any case that arises under the tax laws of Indiana" (Indiana Code 33-26-3-1). For example, it hears appeals of determinations of the Indiana Department of State Revenue and the Indiana Board of Tax Review (which hears property tax assessment appeals). Before 1986, such cases were heard in the circuit or superior court systems. (ITC 2016a) The Indiana Tax Court has one judge who must have practiced law for five years, and it has a small claims docket. Decisions of the Court must be in writing and may be appealed to the Indiana Supreme Court. (ITC 2016b)

Indiana taxpayers must file a petition to enjoin the collection of the disputed tax during an appeal (IC 33-26-6-2). This is a fault that COST finds with Indiana's system. Additionally, there has apparently been concern about the timeliness of the Tax Court's decisions (Stafford 2015). A task force was appointed in 2015 to look into the issue. It made some recommendations meant to improve timeliness, but it found that

> *The fundamental purposes of the Tax Court remain valid: (1) decisions by a single court with expertise; (2) body of consistent, uniform, binding tax law; (3) and elimination of forum shopping and inconsistency of judgments.* (AHATF 2016)

Like Indiana, Oregon also has a judicial branch tax court. Similarly, the American Bar Association has endorsed a model tax appeals process for states to consider. Washington considered a bill in 2015 that would have created a tax appeal division in the Court of Appeals. These alternatives are described in detail below.

Oregon Tax Court

The Oregon Tax Court was created in 1961. Before the creation of the Tax Court, "there was a negative feeling engendered in some individuals because the tax commission acted as both judge and jury at its hearings" (Roberts 1973). Additionally, tax specialists wanted "a court accustomed to tax problems" (Roberts 1973).

This judicial tax court "is a court of record and of general jurisdiction, having the same powers as a circuit court" (Roberts 1973). The Tax Court judge has written,

> *Although the court is fundamentally an Oregon circuit court as to its powers, it is properly viewed as a specialized court whose rules and practices differ from a general circuit court as needed to support its special focus on Oregon's tax system.* (Breithaupt and Tanner 2011)

Tax Court decisions may only be reviewed by the state Supreme Court, and decisions are made in writing. The Tax Court has one judge who is elected for a six-year term and must have practiced law for at least three years. There is a filing fee, and individuals may be granted attorney's fees and expenses. (Roberts 1973) There is no requirement

to pay the disputed tax before filing an appeal (Breithaupt 2013).

Between 1961 and 1997, tax disputes in Oregon were first handled by the Department of Revenue, which held an administrative hearing with no formal record. Decisions could then be appealed to the Tax Court. But, "Concerns were expressed by taxpayers and others as to the neutrality of the Department in hearings and timeliness of decisions of the Department" (Breithaupt 2013). So, in 1995, the Oregon Legislature created the Magistrate Division of the Tax Court (it became effective in 1997). Magistrates are appointed by the judge of the Tax Court (ORS 305.498). Decisions of a magistrate may be appealed to the judge of the Tax Court.

Since the 1997 change, "no concern about timeliness has been expressed" and the Magistrate Division "disposes of upwards of 90% of the cases by mediation or decision from which no party appeals" (Breithaupt 2013). According to the Tax Court judge,

> *Anecdotal evidence suggests, however, that both the perception and reality of greater neutrality has been achieved through moving the initial hearing process into the judicial branch for decision by a person in no way accountable to the Department.* (Breithaupt 2013)

American Bar Association Model Act

In 2006, the American Bar Association (ABA) adopted the "Model State Administrative Tax Tribunal Act" and recommended that the state legislatures adopt it. They did so because the tax appeals processes of many states do not incorporate the four essential elements described above.

The ABA's model act would create an independent tax tribunal within the executive branch; the agency would have tax expertise and taxpayers would have the right to have their cases heard before paying the amounts disputed. (But, in the case of property taxes, the ABA recognizes that "a single taxpayer's tax liability may constitute a substantial part of a local jurisdiction's annual revenue." Prepayment in such cases "may be appropriate" (ABA 2006).)

The judges of the tribunal would be appointed by the governor for 10-year terms. Filing fees would be established. Decisions would be made in writing, no later than six months after the last brief is filed or the hearing completed. The tax tribunal's decisions would be precedential. There would be a small claims division; its judgments would not be considered as precedent and could not be appealed. Otherwise, taxpayers would be "entitled to judicial review of a final decision of the Tax Tribunal" (ABA 2006).

According to the ABA, the model act houses the tribunal in the executive branch because some state constitutions may not allow for it to be in the judicial branch. But judicial branch placement would be ideal:

> *A specialized judicial branch court would have advantages over the executive branch tribunal contemplated by the Model Act, i.e., a judicial court would have greater institutional independence and the power to invalidate facially unconstitutional tax statutes.* (ABA 2006)

As the coauthors of the model act write, it incorporates state tax tribunal best practices, but it is not the only way to effect the goal

> *. . . that every taxpayer who receives a state tax assessment, before paying the tax in dispute, can obtain a hearing of record, in forum that is completely independent of the tax collector and that has a tax expert for a judge.* (Allen and Fields 2012)

SB 5449

In 2015, the Washington state Senate passed 2SSB 5449, but the House did not act on the bill. It incorporated many elements of the ABA model act.

The bill would have created a tax appeal

SB 5449 would have created a tax appeal division in the state Court of Appeals.

division in the state Court of Appeals. The tax appeal division would have heard appeals related to excise, property, and estate taxes, as well as appeals from county boards of equalization. Additionally, the tax appeal division would have had "exclusive appellate jurisdiction over appeals from the superior court in any case involving the validity of any tax, assessment, or toll." Except in the case of property tax appeals, notices of appeal would have had to have been filed within 90 days of receipt of the determination in dispute. For property tax appeals, the current timeframe of 30 days since the decision was mailed would have still applied.

Importantly, the bill asserts that "the taxpayer has the right to have his or her case heard by the tax appeal division prior to the payment of any of the amounts asserted as due by the tax administration agency and prior to the posting of any bond"—except in property tax cases. Additionally, the tax appeal division would have been able to stay collection of any assessment of the DOR. This ability would have initially been limited: The amount that could be stayed would have been $500,000 or less through June 30, 2019; $750,000 from July 1, 2019 through June 30, 2023; and $1 million or less from July 1, 2023 through June 30, 2027. There would have been no limit thereafter. But, interest could have been imposed on the amount stayed.

The tax appeals division would have had three judges—one from each of the three appellate divisions. The judges would have been elected for six-year terms and would have been required to have "at least five years' experience as an attorney practicing in state tax law."

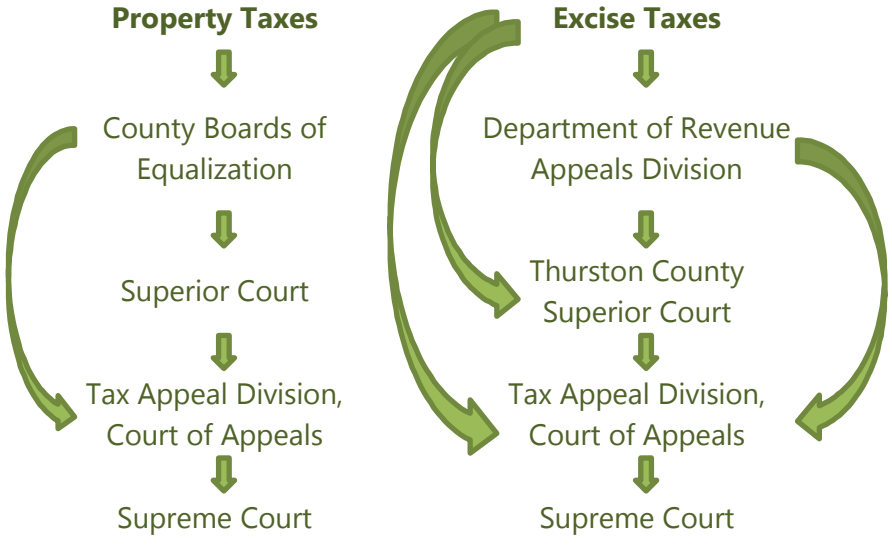
The three judges would have formed the "main department" of the division, and they would have heard "appeals that involve complex issues, issues of substantial public importance, or issues that require expertise beyond a commissioner's proficiency." The main department would have had to make decisions within six months of submission of the last brief filed during the hearing or within six months of completion of the hearing. Final decisions of the main department would have had to be issued in writing and published as opinions of the court.

All other appeals would have been heard by the "commissioner department." Commissioners would have been appointed by the three judges and would have been required to have "at least three years' of experience practicing in state or local tax law." Decisions of the commissioner department would have had to be in writing but not "published as opinions of the tax appeal division."

The commissioner department would have had a small claims division. Taxpayers would have had 90 days to file a petition to appeal a determination to the small claims division, and small claims judgments could not have been appealed. Additionally, the commissioner department would have offered an "informal voluntary and confidential mediation process . . . to help the parties reach an agreement that settles the dispute."

Decisions of the main department could have been appealed to the state Supreme Court. Decisions of the commis-

Chart 4: Tax Appeals Process Under SB 5449



sioner department could not have been "relied upon as precedent" and they could have only been reviewed by the main department.

Appellants would have had to pay a $250 fee when filing notice of appeal to the main department and a $50 fee when filing notice of appeal to the commissioner department. The WSBTA (including appropriations made to it) would have been transferred to the new tax appeal division.

According to the fiscal note, the bill would have reduced general fund–state (GFS) revenues by $16.3 million in 2017–19 and by $4.7 million in 2019–21. It would have increased GFS spending by $4.1 million in 2017–19 and by $3.5 million in 2019–21. The estimate assumes that stays of collections would have delayed revenues by one to three years and that about 10 percent of the taxes involved would have become uncollectable.

Reactions to SB 5449. COST reviewed SB 5449 and wrote that if the bill were enacted, Washington's grade on its scorecard would move from a C (2013's grade) to an A-. The bill

> *. . . addresses COST's Scorecard requirements with respect to tax expertise within an independent tax dispute forum and no "pay-to-play" (prepayment or bond) for appeals, as well as concerns regarding the case backlog at the Board of Tax Appeals and the precedential effect of its decisions*. (Hogroian 2015)

The Taxation Section of the Washington State Bar Association voted to support the bill, writing that the bill's independent tax tribunal "exhibits nine key attributes identified by the Tax Section as promoting due process and fundamental fairness in tax administration" (Quintal 2015). The nine attributes are, as mentioned above: no prepayment requirement, published opinions, direct review by appellate courts, sufficient pay for judges, no political party considerations for judges, requirement that judges be attorneys with tax expertise, an informal option, geographic flexibility, and a mediation option.

The WSBTA commented on a 2013 draft tax tribunal act. It noted,

> *Presently, there is no provision in the law that would allow a stay of tax collection efforts during the pendency of an appeal. . . . staying collection action would dramatically increase the number of property and excise tax appeals*. (WSBTA 2013)

(On the other hand, the bill's proposed filing fee would work in the opposite direction.)

SB 5449 was opposed by the judges of the Court of Appeals because it "appears to have fatal constitutional defects" (Appelwick 2015). The memo notes that because there can only be one Court of Appeals under the Washington constitution, a new and separate Court of Tax Appeals would require a constitutional amendment. Instead, SB 5449 would have created a division within the Court of Appeals. According to the memo, this would create other potential problems, including:

- It would put the "appellate court in the position of reviewing agency decisions, which are non-judicial;"
- It would put the court in "a fact finding position" that is typically reserved for trial court; and
- It would "encroach on the superior court's constitutionally vested original jurisdiction" (Appelwick 2015).

The judges argue that the bill would be challenged in court, "not so much because of the change in tax case procedure, but because of what it represents in legislative authority over the courts' appellate jurisdiction" (Appelwick 2015).

On the other hand, attorney Hugh Spitzer argues that "the Legislature could create another division of the Court of Appeals with jurisdiction over appeals in

tax matters from specified lower courts and government agencies or boards" (Spitzer 2015). Additionally, he writes, "the idea of a specialized appellate division with de novo review jurisdiction would not be altogether inconsistent with past practice in this state or current practice in other places" (Spitzer 2015).

Comment

Washington's system is time consuming and expensive to access and navigate, decisions do not always have precedential value, and those hearing cases do not always have tax expertise.

The WSBTA itself acknowledges that it is currently not meeting its mission "to maintain public confidence in the state tax system" (WSBTA 2016c). It argues that this is the result of inadequate funding. If that were the case, simply moving its workload to the judicial branch might not make a difference. But the case backlog is not the main issue here. Washington's system is time consuming and expensive to access and navigate, decisions do not always have precedential value, and those hearing cases do not always have tax expertise. Altogether, the system is deficient.

Because of these deficiencies, Washington's current tax appeals process gets low marks on COST's scorecard. Other states have tax appeals processes that are fairer, making those states more competitive and attractive to businesses while, at the same time, protecting the rights of their citizenry and providing increased certainty for taxpayers and the government. Changes like those proposed in SB 5449 would align Washington's tax appeals process more fully with the principles espoused by COST and the ABA. This would improve Washington's tax and business climate by making the tax appeals process more balanced, fair, and effective.

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