A Giant Leap Forward for West Virginia Property Tax Appeals

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H.B. 2581, passed during the 2021 regular session of the West Virginia Legislature, makes changes to property tax appraisal methods[1] and enacts significant changes to the appeal process for property tax matters. This article discusses the current protest and appeal process available to taxpayers and appraising entities, and the major changes effective for property tax year 2023. The current protest and appeal process will be in place through property tax year 2022. Thereafter, the new process must be used.

I. Current Protest and Appeal Process and Imminent Changes

A. Informal Review Process

Taxpayers have the option of filing informal petitions for review with the governmental entity that appraises the taxpayer's property. For residential and commercial property appraised by county assessors, a taxpayer may file a petition for review of the valuation with the county assessor where the property is located.[2] For industrial property and some natural resource property appraised by the tax commissioner, a petition for review of the valuation may be filed with the tax commissioner.[3]

If an agreement is reached regarding the valuation, the ruling generally may not be appealed.[4]

If no agreement is reached, and the taxpayer's request is denied in whole or in part, the taxpayer has the option of filing a protest with the county commission where the particular property is located.[5]

The process is different if the taxpayer's protest is based on the classification of the property for property tax purposes or on whether the property is subject to property taxation. In those instances, the taxpayer is entitled to file an application with the county assessor regarding the classification or taxability issue. The assessor is required to decide the question either by sustaining the protest and making the proper corrections or by providing a written determination of the reasons for refusal of the protest.[6] The taxpayer may also request that the assessor certify the classification or taxability question to the tax commissioner, who is required to issue a ruling by the end of February of the property tax year.[7] Historically, the first level of appeal following the tax commissioner's ruling on a classification or taxability issue is the circuit court where the property is located.[8]

H.B. 2581 leaves the informal review process mostly intact.

B. Board of Equalization and Review; Board of Assessment Appeals

Taxpayers that are dissatisfied by the valuation decision made by a county assessor or the tax commissioner may file an appeal with the county commission sitting as a board of equalization and review.[9]

Per statutory changes made in 2010, taxpayers have the option of appearing before the county commission sitting either as a board of equalization and review in February or as a board of assessment appeals in October of the property tax year.[10] The board of assessment appeals' process has afforded taxpayers additional time to prepare materials and testimony for the appeal. Boards of assessment appeals operate in the same fashion as boards of equalization and review, with the primary difference being that the appeal is heard *after* the real and personal property books are closed and after the tax tickets for the property tax year have been provided to taxpayers.

As a result, taxpayers that choose the board of assessment appeals process are required to verify that first- and second-half property taxes will be paid as they are listed on the tax ticket.[11] If the taxpayer successfully challenges the appraised value, a tax credit voucher is to be used in subsequent tax years to account for the overpayment in the year that was appealed.[12]

Following the passage of H.B. 2581, the board of equalization and review process remains largely the same, although taxpayers now have the option of skipping the county commission step altogether and instead initiating their formal appeal with the West Virginia Office of Tax Appeals, as discussed below. The newer board of assessment appeals process has been repealed in its entirety and will be replaced by the West Virginia Office of Tax Appeals appeal option. The board of equalization and review process now requires that a taxpayer agree to timely pay first-and second-half installments of taxes while the appeal is pending, a requirement that was previously specific to appeals filed with the board of assessment appeals.[13]

C. Circuit Court and Supreme Court Appeals

Currently, appeals of valuation issues coming from a decision by a board of equalization and review or board of assessment appeals are filed with the circuit court where the real or personal property is located.[14] Also, in matters involving the classification or taxability of property for property tax purposes, an appeal of the tax commissioner's final determination is filed with the circuit court where the property is located, and the board of equalization and review or board of assessment appeals process is not used.[15] The taxing authority or the taxpayer is entitled to appeal a question of valuation to the West Virginia Supreme Court of Appeals if the assessed value of the property is $50,000 or more, or if the issue pertains to classification or taxability of the property.[16]

Appeals to circuit court also require a frustrating step whereby a taxpayer appealing a decision of the board of equalization and review or the board of assessment appeals must have the transcript of the hearing certified by the county clerk and transmitted to the circuit court within 30 days of filing the petition for appeal.[17] While the onus is on the taxpayer to request certification of the transcript, county clerks frequently are flummoxed by their duty to carry out the certification. On more than one occasion, taxpayers lost their right to appeal because of a breakdown in the certification process.[18]

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While property tax appeals based on valuation, classification, or taxability may still wind up in circuit court, H.B. 2581 repeals the statute providing for appeals straight from the board of equalization and review or board of assessment appeals to circuit court, along with the frustrating procedural requirements that accompany those appeals.

II. New West Virginia Office of Tax Appeals Option

Since its inception in 2002, the jurisdiction of the West Virginia Office of Tax Appeals has been limited primarily to taxes administered in accordance with Chapter 11, Article 10, of the West Virginia Code. This encompasses most taxes imposed in West Virginia, with property tax being the primary tax excluded from jurisdiction of the Office of Tax Appeals.[19]

With the changes enacted by H.B. 2581, taxpayers now have the option of initiating the appeal process for valuation issues with either the board of equalization and review or the Office of Tax Appeals.[20] For classification and taxability questions, once the tax commissioner's office makes its determination, the taxpayer must file a petition for appeal with the West Virginia Office of Tax Appeals within 30 days of receipt of the tax commissioner's ruling.[21]

Importantly, with the repeal of the option of appealing a decision of the board of equalization and review to circuit court, all taxpayers are required to have their appeals routed through the Office of Tax Appeals. If a taxpayer elects to have the appeal first heard before the board of equalization and review, the appeal of the board's decision must be filed with the Office of Tax Appeals.[22] It is not clear whether the Office of Tax Appeals is to initiate a new hearing process or issue a ruling based on the record made before the board of equalization and review, although, presumably, the regular hearing procedures will be followed.[23] Likewise, the procedural requirements for appealing a valuation determination to the Office of Tax Appeals - whether from an assessor, a county assessor, or the tax commissioner - are not clear. Generally, appeals to the Office of Tax Appeals must be filed within 60 days "of the date a person received written notice of an assessment, denial of a refund or credit, order or other decision of the tax commissioner."[24] Out of an abundance of caution, taxpayers who receive an adverse determination on a valuation issue should file a petition for appeal with the Office of Tax Appeals within 30 days of receipt of the denial from the board of equalization and review, assessor, or tax commissioner.

It is anticipated that the board of equalization and review process will be used sparingly in the future, particularly for complex tax appeals. The Office of Tax Appeals process affords taxpayers the opportunity to have their appeals heard by independent judges with extensive tax experience. Multiple law review articles have detailed the inherent due process issues raised by West Virginia's property tax appeal process, wherein inherent conflict issues are raised by having county commissioners who rely on property tax revenue to fund county operations decide whether a taxpayer's valuation should be adjusted.[25]

Under the old appeal procedures, when circuit courts addressed classification and taxability arguments, the matters were heard *de novo* by the court.[26] While H.B. 2581 does not specify how the Office of Tax Appeals should hear such appeals, it is anticipated that all property tax appeals will be heard *de novo*, as the Office of Tax Appeals has exclusive and original jurisdiction for all appeals filed with the tribunal.[27]

In recognition of the vastly increased workload that the Office of Tax Appeals is likely to experience, the State Legislature doubled the number of staff attorneys that the agency may employ from one to two and increased the total number of judges that the agency may employ from three to four, including the chief administrative law judge.[28] For the last several years, the Office of Tax Appeals has employed a chief ALJ and one additional ALJ. It has never employed staff attorneys. It is expected that the increased workload resulting from property tax appeals will result in increased staffing at the Office of Tax Appeals, an issue the chief ALJ raised in the fiscal note that he filed for H.B. 2581.[29]

Appeals from Office of Tax Appeals decisions may be filed in circuit court, and the taxpayer has the option of filing the appeal in Kanawha County (location of Charleston, the state capital), the county where the taxpayer resides, or the county where the real or personal property is assessed.[30]

III. Burden of Proof

Historically, the deck has been stacked against payers of property tax on appeal, as there is a presumption of correctness of the appraisal by the tax commissioner or county assessor, and the taxpayer is required to overcome that presumption by presenting "clear and convincing evidence" that the appraisal is incorrect.[31] Amendments via H.B. 2581 establish a lower burden of proof on taxpayers based on a "preponderance of the evidence standard." [32]

IV. Conclusion

Beginning with property tax year 2023, West Virginia will take a major step forward in affording taxpayers due process in property tax appeals. In lieu of hearings before county commissions that have a vested interest in the property tax revenue at stake in the appeals, taxpayers will make their cases before independent ALJs with the West Virginia Office of Tax Appeals. Further, in lieu of the high burden of proof imposed on taxpayers via the clear and convincing evidence standard, taxpayers will merely be required to prove their cases by a preponderance of the evidence. Finally, and not to be taken lightly, taxpayers with property in multiple counties will be able to have hearings held before the centralized Office of Tax Appeals, obviating the necessity to travel to multiple counties to present the same or similar argument to multiple boards of equalization and review.

While the changes offer a substantial improvement to the property tax appeal process for taxpayers, the Legislature should offer support to the Office of Tax Appeals in the form of an increased budget to ensure that the tribunal is properly staffed. The caseload for that agency will increase substantially, and all efforts should be made to ensure that the Office of Tax Appeals can handle the caseload and that taxpayers are able to have their matters heard and decided expeditiously.

For more information, please contact any member of the Frost Brown Todd Tax practice group.

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[1] Amendments to W. Va. Code section 11-1C-10 address application of actual operating expenses in valuing producing oil and natural gas wells and clarify that natural gas liquids are subject to property taxation. Amendments to W. Va. Code section 11-3-15c(c) give the option to taxpayers to provide an appraisal of real property from a licensed real estate appraiser to assessors as part of the informal review process for valuations.

[2] W. Va. Code sections l1-3-15c, 11-3-15d, and 11-3-15e.

[3] W. Va. Code sections 11-3-23a(d) and 11-6k-1 et seq. (oil, natural gas, and managed timberland are excluded from the informal review process).

[4] W. Va. Code sections 11-3-15i(a), 11-3-23a(d)(1), and 11-6k-5-5.

[5] W. Va. Code sections 11-3-15i(c), 11-3-23a(d)(2), and 11-6k-6(c).

[6] W. Va. Code section 11-3-24a(a).

[7] W. Va. Code section 11-3-24a(b)-(c).

[8] W. Va. Code section 11-3-24a(c).

[9] W. Va. Code sections 11-3-24 and 11-3-24a.

[10] W. Va. Code section 11-3-24b.

[11] W. Va. Code section 11-3-23a(c)(2).

[12] W. Va. Code section 11-3-24b(h). The board of assessment appeals process also contemplates the development of a discovery scheduled and the use of a hearing examiner by the county commission. W. Va. Code section 11-3-24b(c)-(d). There is no indication that any county commission ever chose to employ the services of a hearing examiner for an appeal, although some county commissions have developed a discovery schedule.

[13] W. Va. Code section 11-3-23a(c)(2).

[14] W. Va. Code sections 11-3-24a(c) and 11-3-25.

[15] W. Va. Code section 11-3-24a(c).

[16] W. Va. Code section 11-3-25(d).

[17] W. Va. Code section 11-3-25(b).

[18] *Tax Assessment Against Purple Turtle LLC v. Gooden*, 223 W. Va. 755, 679 S.E.2d 587 (2009); *Morgantown Mall Associates Limited Partnership v. City of Westover*, 2017 WL 3821879 (W. Va. S. Ct. 2017); and *Martinsburg IRS OC LLC v. Berkeley County Board of Assessment Appeals*, 2020 WL1487816 (W. Va. S. Ct. 2020).

[19] W. Va. Code section 11-10A-8.

[20] W. Va. Code section 11-3-23a(c)-(d).

[21] W. Va. Code section 11-3-24a(c).

[22] W. Va. Code section 11-3-24(j).

[23] *See* W. Va. Code section 11-10A-8 (the Office of Tax Appeals has exclusive and original jurisdiction for appeals filed with the tribunal) and W. Va. Code section 11-10A-10 (hearing procedures).

[24] W. Va. Code section 11-10A-9.

[25] *See* Michael E. Caryl, "The Illusion of Due Process in West Virginia's Property Tax Appeals System: Making the Constitution's Promise a Reality," 98 *W. Va. L Rev*. 301 (1995); and Steven It Broadwater, "The Illusion of Due Process in West Virginia's Property Tax Appeals System: What Illusion?" 113 *W. Va. L. Rev*. 791 (2011).

[26] W. Va. Code section 11-3-25(c).

[27] W. Va. Code section 1140A-8.

[28] W. Va. Code section 11-10A-7.

[29] *See* Office of Tax Appeals Fiscal Note Summary to House Bill 2581, as introduced.

[30] W. Va. Code section 11-10A-19(b).

[31] *See, e.g., Stone Brooke Ltd. Partnership v. Sisinni*, 224 W. Va. 691, 688 S.E.2d 300 (2009) (Benjamin, J., concurring); and Syl. Pt. 1, *Steager v. Consol Energy Inc.*, 242 W. Va. 209, 832 S.E.2d 135 (2019); *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008).

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[32] W. Va. Code sections 11-3-15h(d), 11-3-23(e).