WEST VIRGINIA CODE CHAPTER 11 ARTICLE 10A

WV Legislature

§11-10A-1. Legislative finding; purpose.

The Legislature finds that there is a need for an independent quasi-judicial agency separate and apart from the Tax Division to resolve disputes between the Tax Commissioner, county assessors, county commissions, and taxpayers to maintain public confidence in the state tax system. The Legislature does therefore declare that the purpose of this article is to create the West Virginia office of tax appeals to resolve disputes between the Tax Commissioner, county assessors, county commissions, and taxpayers and to prescribe the powers and duties of the office of tax appeals.

WV Legislature

§11-10A-2. Definitions.

(a) "Division" means the Tax Division of the West Virginia Department of Tax and Revenue.

(b) "Tax commissioner" or "commissioner" means the Tax Commissioner of the State of West Virginia or his or her authorized designee.

(c) "Office of tax appeals" means the West Virginia office of tax appeals created by this article.

WV Legislature

§11-10A-3. Office of tax appeals created.

There is hereby created the West Virginia office of tax appeals, a quasi-judicial agency which, for administrative purposes only, is in the Department of Tax and Revenue.

WV Legislature

§11-10A-4. Principal office; place for hearings; county commission to provide facilities.

The principal office shall be at the state capital, but the office of tax appeals may hold hearings at any place within this state. A county commission, upon request by the office of tax appeals, shall provide it with suitable rooms and facilities for hearings it holds in that county at times convenient to the county commission and the office of tax appeals.

WV Legislature

§11-10A-5. Seal; authenticating records; judicial notice.

The office of tax appeals shall have a seal. The seal shall have the following words engraved thereon: "West Virginia Office of Tax Appeals." The office of tax appeals shall authenticate all of its orders, records and proceedings with the seal; and the courts of this state shall take judicial notice of the seal.

WV Legislature

§11-10A-6. Chief Administrative Law Judge; appointment, term and vacancy; qualifications; compensation; conflicts of interest prohibited; removal.

(a) The Governor, with the advice and consent of the Senate, shall appoint the Chief Administrative Law Judge from a list of three qualified nominees submitted to the Governor by the board of Governors of the West Virginia State Bar for a four-year term. An appointment to fill a vacancy in the position shall be for the unexpired term.

(b) Prior to appointment, the Chief Administrative Law Judge shall be a citizen of the United States and a resident of this state who is admitted to the practice of law in this state and who has five years of full-time or equivalent part-time experience as an attorney with federal or state tax law expertise or as a judge of a court of record.

(c) The salary of the Chief Administrative Law Judge shall be set by the Secretary of the Department of Revenue created in section two, article one, chapter five-f of this code. The salary shall be within the salary range for comparable chief administrative law judges as determined by the state Personnel Board created by section six, article six, chapter twenty-nine of this code.

(d) The Chief Administrative Law Judge during his or her term shall:

(1) Devote his or her full time to the duties of the position;

(2) Not otherwise engage in the active practice of law or be associated with any group or entity which is itself engaged in the active practice of law: Provided, That nothing in this paragraph may be construed to prohibit the Chief Administrative Law Judge from being a member of a national, state or local bar association or committee, or of any other similar group or organization, or to prohibit the Chief Administrative Law Judge from engaging in the practice of law by representing herself or his or her immediate family in their personal affairs in matters not subject to this article.

(3) Not engage directly or indirectly in any activity, occupation or business interfering or inconsistent with his or her duties as Chief Administrative Law Judge;

(4) Not hold any other appointed public office or any elected public office or any other position of public trust; and

(5) Not be a candidate for any elected public office, or serve on or under any committee of any political party.

(e) The Governor may remove the Chief Administrative Law Judge only for incompetence, neglect of duty, official misconduct or violation of subsection (d) of this section, and removal shall be in the same manner as that specified for removal of elected state officials in section six, article six, chapter six of this code.

WV Legislature

§11-10A-7. Powers and duties of Chief Administrative Law Judge; all employees, except Chief Administrative Law Judge, members of classified service; qualifications of administrative law judges.

(a) The Chief Administrative Law Judge is the chief executive officer of the Office of Tax Appeals and he or she may employ one person to serve as executive director, two staff attorneys, and other clerical personnel as necessary for the proper administration of this article. The Chief Administrative Law Judge may delegate administrative duties to other employees, but the Chief Administrative Law Judge is responsible for all official delegated acts.

(1) Upon the request of the Chief Administrative Law Judge, the Governor may appoint up to three administrative law judges as necessary for the proper administration of this article.

(2) All employees of the Office of Tax Appeals, except the Chief Administrative Law Judge, shall be in the classified service and shall be governed by the provisions of the statutes, rules, and policies of the classified service in accordance with the provisions of §29-6-1 *et seq.* of this code.

(3) Prior to employment by the Office of Tax Appeals, all administrative law judges shall be admitted to the practice of law in this state and have at least two years of full-time or equivalent part-time experience as an attorney with federal or state tax law expertise.

(4) The Chief Administrative Law Judge and all administrative law judges shall be members of the Public Employees Retirement System and do not qualify as participants in the judicial retirement system during their tenure with the Office of Tax Appeals.

(b) The Chief Administrative Law Judge shall:

(1) Direct and supervise the work of the legal staff;

(2) Make hearing assignments;

(3) Maintain the records of the Office of Tax Appeals;

(4) Review and approve decisions of administrative law judges as to legal accuracy, clarity and other requirements;

(5) Publish decisions in accordance with the provisions of §11-10A-16 of this code;

(6) Submit to the Legislature, on or before February 15, an annual report summarizing the Office of Tax Appeals' activities since the end of the last report period, including a statement of the number and type of matters handled by the Office of Tax Appeals during the preceding fiscal year and the number of matters pending at the end of the year; and

(7) Perform the other duties necessary and proper to carry out the purposes of this article.

WV Legislature

§11-10A-8. Jurisdiction of Office of Tax Appeals.

The Office of Tax Appeals has exclusive and original jurisdiction to hear and determine all:

(1) Appeals from tax assessments issued by the Tax Commissioner pursuant to article ten of this chapter;

(2) Appeals from decisions or orders of the Tax Commissioner denying refunds or credits for all taxes administered in accordance with the provisions of §11-10-1 *et seq.* of this code;

(3) Appeals from orders of the Tax Commissioner denying, suspending, revoking, refusing to renew any license, or imposing any civil money penalty for violating the provisions of any licensing law administered by the Tax Commissioner;

(4) Questions presented when a hearing is requested pursuant to the provisions of any article of this chapter which is administered by the provisions of §11-10-1 *et seq.* of this code;

(5) Matters which the Tax Division is required by statute or legislatively approved rules to hear, except employee grievances filed pursuant to §6C-2-1 *et seq.* of this code;

(6) Other matters which may be conferred on the office of tax appeals by statute or legislatively approved rules; and

(7) Appeals by any party aggrieved by the valuation of real property and personal property tax assessments and classifications or taxability as set forth in §11-3-1 *et. seq.* of this code.

WV Legislature

§11-10A-9. Appeal to Office of Tax Appeals; petition; answer.

(a) A proceeding before the Office of Tax Appeals appealing a tax assessment, a denial of a tax refund or credit or any other order of the Tax Commissioner, or requesting a hearing pursuant to the provisions of any article of this chapter which is administered pursuant to article ten of this chapter, shall be initiated by a person timely filing a written petition that succinctly states:

(1) The nature of the case;

(2) The facts on which the appeal is based; and

(3) Each question presented for review by the Office of Tax Appeals.

(b) Except where a different time for filing a petition is specified elsewhere in this code, a petition filed pursuant to subsection (a) of this section is timely filed if postmarked or hand delivered to the Office of Tax Appeals within sixty 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.

(c) The Office of Tax Appeals shall, within five days of receipt of a timely petition filed pursuant to subsection (a) of this section, provide the Tax Commissioner with a copy of the petition. The Tax Commissioner shall submit a written answer to the petition within forty days of his or her receipt of the petition. The answer shall succinctly state:

(1) The nature of the case;

(2) The facts relied upon by the Commissioner;

(3) An answer to each question presented for review.

(d) A proceeding before the Office of Tax Appeals in other matters conferred by statute or legislatively approved rules shall be initiated by filing a petition with the Office of Tax Appeals in accordance with the provisions of the applicable statute or rule.

WV Legislature

§11-10A-10. Hearing procedures.

(a) The office of tax appeals shall assign a date, time, and place for a hearing on a petition and shall notify the parties to the hearing by written notice at least 20 days in advance of the hearing date. The hearing shall be held within 45 days of the due date of the commissioner's answer unless continued by order of the office of tax appeals for good cause.

(b) A hearing before the office of tax appeals shall be heard de novo and conducted pursuant to the provisions of the contested case procedure set forth in §29A-5-1 *et seq.* of this code to the extent not inconsistent with the provisions of this article. In case of conflict, the provisions of this article shall govern. The provisions of §29A-5-5 of this code are not applicable to a hearing before the office of tax appeals.

(c) The office of tax appeals is not bound by the rules of evidence as applied in civil cases in the circuit courts of this state. The office of tax appeals may admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs.

(d) All testimony shall be given under oath.

(e) Except as otherwise provided by this code or legislative rules, the taxpayer or petitioner has the burden of proof.

(f) The administrative law judge may ask for proposed findings of fact and conclusions of law from the parties prior to the issuance by the office of tax appeals of the decision in the matter.

(g) Hearings shall be exempt from the requirements of §6-9A-1 *et seq.* and §29B-1-1 *et seq.* of this code.

(h) For all appeals regarding property tax assessments, taxability, and classifications pursuant to §11-3-1 et. seq., the standard of proof which a taxpayer must meet at all levels of review and appeal shall be a preponderance of the evidence standard.

WV Legislature

§11-10A-11. Small claims hearing.

(a) If the amount in dispute in any petition filed with the Office of Tax Appeals does not exceed $10,000 for any one taxable year, then, at the option of the taxpayer and with the concurrence of the Tax Commissioner and the Office of Tax Appeals, the hearing shall be conducted under this section. Notwithstanding the provisions of section fourteen of this article, a hearing under this section shall be conducted in an informal manner and in accordance with the rules of practice and procedure as the Office of Tax Appeals may prescribe.

(b) At any time before commencement of the hearing held under this section, the petitioner may unilaterally withdraw the election made under subsection (a) of this section. Upon a change of election, a hearing shall be held in the same manner as other contested matters to which this article applies.

(c) A decision entered in any hearing conducted under this section is not subject to administrative or judicial review under this article, article ten of this chapter or article five, chapter twenty-nine-a of this code and may not be treated as precedent for any other contested matter. The amount, if any, owed by the taxpayer to the state shall be paid within thirty days after notice of the decision is served on the taxpayer. The amount, if any, of overpayment by the taxpayer shall be promptly refunded or credited to the taxpayer.

(d) For purposes of this section, the amount in dispute includes tax, additions to tax and penalties, but excludes interest.

WV Legislature

§11-10A-12. Powers of the office of tax appeals.

In determining the outcome of a case, the office of tax appeals may affirm, reverse, modify or vacate an assessment of tax; may order the payment of or deny a refund, in whole or part; may authorize or deny a credit, in whole or part; or may grant other relief necessary or appropriate to dispose of the matter.

WV Legislature

§11-10A-13. Subpoenas; service; cost; fees; relief; disobedience; oath.

(a) The office of tax appeals has the power to issue subpoenas and subpoenas duces tecum requiring the attendance of witnesses and the production of books, papers, records, documents and testimony at the time and place specified. The office of tax appeals may exercise the power upon the request of any person who is a party to a hearing before the office of tax appeals.

(b) Every subpoena and subpoena duces tecum must be served at least five days before the return date thereof, by either personal service made by any person over eighteen years of age, or by registered or certified mail, but a return receipt signed by the person to whom subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail. Any party requesting a subpoena or subpoena duces tecum is responsible for service thereof and payment of any fee for service. Any person who serves any subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state.

(c) Fees for the attendance of witnesses subpoenaed shall be the same as for witnesses before the circuit courts of this state. All fees related to any subpoena or subpoena duces tecum issued at the request of a party to an administrative hearing shall be paid by the party who requested the subpoena or subpoena duces tecum be issued. All requests by parties for issuance of subpoena or subpoena duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay the fees.

(d) Upon motion made promptly, and in any event before the time specified in a subpoena or subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is to be held or the circuit court of the county in which the person upon whom any subpoena or subpoena duces tecum was served resides, has his her or its principal place of business or is employed, or the circuit court of the county in which any subpoena or subpoena duces tecum was served, or the judge of any circuit court in vacation, may grant any relief with respect to the subpoena or subpoena duces tecum which any circuit court, under the West Virginia rules of civil procedure, could grant, and for any of the same reasons, with respect to any subpoena or subpoena duces tecum issued from any circuit court.

(e) In case of disobedience to or neglect of any subpoena or subpoena duces tecum served on any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the circuit court of Kanawha County or of the county in which the person resides, has his her or its principal place of business or is employed, or the judge thereof in vacation, upon application of the chief administrative law judge of the office of tax appeals, may compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from the circuit court for a refusal to testify therein.

WV Legislature

(f) Witnesses subpoenaed under this section shall testify under oath or affirmation.

WV Legislature

§11-10A-14. Recording hearings; notice; record; transcripts; costs.

(a) Except in the small claims division, all hearings before the office of tax appeals shall be recorded by means acceptable for use in courts of this state. All parties shall receive notice that the hearing will be recorded and that each is entitled to receive a copy of the recording at cost.

(b) A copy of the written exhibits made part of the record shall be available to any party upon request and payment of a reasonable fee.

(c) Upon appeal to circuit court, a verbatim transcript and copy of written exhibits shall be prepared for submission to the circuit court with the cost paid by the party taking the appeal: Provided, That if both parties appeal, the cost of the transcript shall be shared equally by the two parties.

WV Legislature

§11-10A-15. Appearances before the office of tax appeals.

(a) A person may appear before the office of tax appeals in his or her own behalf, or may be represented by an attorney or by any other person as he or she may choose.

(b) Nothing in this section may be construed to permit the unauthorized practice of law as defined by the West Virginia Supreme Court of Appeals.

WV Legislature

§11-10A-16. Decisions and orders of the office of tax appeals; publication.

(a) Every final decision or order of the office of tax appeals shall be in writing and shall include a concise statement of the material facts and conclusions of law.

(b) All final decisions or orders of the office of tax appeals shall be issued within a reasonable time, not to exceed six months, from the date the petition is filed or from the date the hearing record is closed, whichever is later.

(c) All final decisions and orders, except small claims decisions, shall be published in the state register after having been redacted to maintain confidentiality. The office of tax appeals may also post its redacted decisions on the Internet.

WV Legislature

§11-10A-17. Service of notice of final decisions and orders.

(a) Notice of final decisions and orders of the office of tax appeals shall be served upon the parties either by personal or substituted service, or by certified mail.

(1) Service of notice by personal or substituted service is valid if made by any method authorized by the rules of the West Virginia rules of civil procedure.

(2) Service of notice by certified mail is valid if accepted by the party, or if addressed to and mailed to the party's usual place of business or usual place of abode or last known address and accepted by any person.

(b) Any notice addressed and mailed in the manner specified in subsection (a), which is refused or not claimed, may then be served by first-class mail, postage prepaid, to the same address and the date of posting in the United States mail is the date of service.

WV Legislature

§11-10A-18. Finality of decision by the office of tax appeals; amount due payable; prompt refunds.

Unless an appeal from the decision of the office of tax appeals is taken pursuant to section nineteen of this article, within sixty days after service of notice of the decision, the office of tax appeals's decision shall become final and conclusive and not subject to either administrative or judicial review. The amount, if any, owed by the taxpayer shall be due and payable to the Tax Commissioner on the day following the date upon which the decision became final. The amount of overpayment by the taxpayer, if any, shall be promptly refunded or credited to the taxpayer.

WV Legislature

§11-10A-19. Judicial review of office of tax appeals decisions.

(a) Either the taxpayer or the commissioner, or both, or in the case of property taxes the county assessor, or county commission, may appeal the final decision or order of the Office of Tax Appeals by taking an appeal to the Intermediate Court of Appeals of this state within 30 days after entry of the final decision or order.

(b) The Office of Tax Appeals may not be made a party in any judicial review of a decision or order it issued.

(c) The appeal proceeding shall be instituted by filing a notice of appeal with the Intermediate Court of Appeals, within the 30 day period prescribed in subsection (a) of this section.

(d) If the appeal is of an assessment, except a jeopardy assessment for which security in the amount thereof was previously filed with the Tax Commissioner, then within 90 days after the notice of appeal is filed, or sooner if ordered by the Intermediate Court of Appeals, the petitioner shall file with the clerk of the Intermediate Court of Appeals a cash bond or a corporate surety bond approved by the clerk. The surety must be qualified to do business in this state. These bonds shall be conditioned upon the petitioner performing the orders of the court. The penalty of this bond shall be not less than the total amount of tax or revenue plus additions to tax, penalties, and interest for which the taxpayer was found liable in the administrative decision of the office of tax appeals. Notwithstanding the foregoing and in lieu of the bond, the Tax Commissioner, upon application of the petitioner, may upon a sufficient showing by the taxpayer, certify to the clerk of the Intermediate Court of Appeals that the assets of the taxpayer are adequate to secure performance of the orders of the court: *Provided*, That if the Tax Commissioner refuses to certify that the assets of the taxpayer or other indemnification are adequate to secure performance of the orders of the court, then the taxpayer may apply to the Intermediate Court of Appeals for the certification. No bond may be required of the Tax Commissioner.

(e) The Intermediate Court of Appeals shall hear the appeal as provided in §29A-5-4 of this code: *Provided*, That when the appeal is to review a decision or order on a petition for refund or credit, the court may determine the legal rights of the parties, but in no event shall it enter a judgment for money.

(f) Unless the Tax Commissioner appeals an adverse court decision, the commissioner, upon receipt of the certified order of the court, shall promptly correct his or her assessment or issue his or her requisition on the treasury or establish a credit for the amount of an overpayment.

(g) Either party may appeal an Intermediate Court of Appeals' decision to the Supreme Court of Appeals as provided in §29A-6-1 *et seq*. of this code.

(h) For all appeals regarding property tax assessments, taxability, and classifications

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pursuant to §11-3-1 *et seq.*, the standard of proof which a taxpayer must meet at all levels of review and appeal shall be a preponderance of the evidence standard.

WV Legislature

§11-10A-20. Rules required.

The office of tax appeals shall adopt rules of practice and procedure in accordance with the provisions of article three, chapter twenty-nine-a of this code no later than March 31, 2003.

WV Legislature

§11-10A-21. Timely filing.

(a) Any petition, statement or other document required to be filed within a prescribed period or on or before a prescribed date under authority of this article is timely filed if it is delivered in person on or before the date to the office of tax appeals at its office during normal business hours.

(b) Any petition, statement or other document required to be filed within a prescribed period or on or before a prescribed date under authority of this article that is delivered by the United States mail to the office of tax appeals is timely filed if the date of the United States postmark stamped on the envelope is within the prescribed period or on or before the prescribed date for filing, and the envelope was deposited in the United States mail, postage prepaid and properly addressed to the office of tax appeals.

(c) The last date for timely filing includes any extension of time authorized by law or rule and any extension of time granted in writing by the office of tax appeals.

WV Legislature

§11-10A-22. Time for performance of acts where last day falls on Saturday, Sunday or legal holiday.

When the last day prescribed under authority of this article for performing any act falls on Saturday, Sunday or a legal holiday, the performance of the act is considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday or a legal holiday. For purposes of this section, the last day for the performance of any act shall be determined by including any authorized extension of time. The term "legal holiday" means a legal holiday in this state.

WV Legislature

§11-10A-23. Confidentiality.

The provisions of section five-d, article ten of this chapter, to the extent not inconsistent with the provisions of this article, are applicable to all employees of the office of tax appeals.

WV Legislature