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Taxation - Correction of Assessments - Judicial Remedies for Review

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RECENT CASES

TAXATION—CORRECTION OF ASSESSMENTS—JUDICIAL REMEDIES FOR REVIEW—The assessor for the City of Grand Forks appraised appellant's property in an amount appellant believed to be excessive.[1] Appellant's petition for abatement was denied by the city council, whose decision was subsequently affirmed by the Board of County Commissioners for Grand Forks County. On appeal, the district court found the appraisal made by the assessor to be in excess of the *full and true value*[2] of the property, and ordered a refund. The North Dakota Supreme Court, in reversing the decision of the court below, *held* that a district court cannot substitute its judgment as to valuation of property for that of the taxing authorities, unless it be shown that the taxing authorities acted arbitrarily, oppressively, or unreasonably in making their appraisal. *Appeal of Johnson*, 173 N.W.2d 475 (N.D. 1970).

The rule is well established that in the absence of fraudulent or arbitrary conduct on the part of the assessing officer, an excessive or disproportionate valuation for tax purposes will not be set aside by the courts.[3] The court in the instant case, faced with this issue for the first time, chose to adhere to the rule as stated above.[4] This comment will examine the legal effects of the rule adopted in the instant case, the adequacy of institutional and procedural arrangements in North Dakota for application of this type of administrative appeal and judicial review of assessments, and any possible alternatives to the rule.

As a practical matter, the effect of the rule adopted in the instant case is to restrict any judicial inquiry of an appraisal arrived at by the assessor to the reasonableness of the assessor's actions, and not the mathematical validity of the assessment itself.[5] Justification of this approach is founded on the theory that the assessment of property is an administrative function, and the courts should not interfere or impose their views for those of the administrative authori-

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1. The appellant believed the assessment was $9,940.00 in excess of the full and true market value of the property.

2. The full and true value in money is the North Dakota assessment standard. N.D. CENT. CODE § 57-23-01 (1960).

3. 84 C.J.S., *Taxation* § 562, at 1107-11 (1954); 51 AM. JUR., *Taxation* § 723, p. 666 (1944). *See also* People Ex Rel. Munson v. Morningside Heights, Inc., 259 N.E.2d 27 (Ill. 1970).

4. Appeal of Johnson, 173 N.W.2d 475, 481 (N.D. 1970).

5. *See, e.g.*, Norfolk & W. Ry. v. Board of Public Works, 124 W. Va. 562, 21 S.E.2d 143 (1942); People v. M.D.B.K.W., Inc., 36 Ill.2d 209, 221 N.E.2d 650, 652 (1966).

ties.[6] Thus, the burden of proof necessary for the taxpayer to obtain judicial review of an assessment, has been described as follows:

> [T]he taxpayer's burden is not met by showing merely a difference of opinion between his witnesses and the assessing authority, and so, unless it is manifest the valuation is grossly excessive and is a result of the will [of the assessor] and not the judgment [of the assessor], the assessment will be sustained.[7]

The dilemma facing the taxpayer seeking judicial review of an assessment becomes even more apparent when one considers the following rules of construction used by the courts: the assessors valuation of property is presumed to be fair and correct,[8] this presumption applies to all of his acts;[9] further that as long as the assessor acts reasonably, mere errors of judgment will not warrant judicial interference;[10] and finally, that valuation of property is not an exact science, so overvaluation in itself is not enough to overcome the assessor's determination.[11]

Though most courts purport to grant relief for "grossly excessive over-valuation of property,"[12] under a theory of "constructive fraud,"[13] few cases qualify due to the degree the courts will allow over-valuation, before it becomes grossly excessive.[14] For example, in a decision by the Illinois Supreme Court cited in the instant case,[15] a disparity in the appraisal of the assessor of twenty-five percent was held insufficient to warrant judicial intervention.[16] In another Illinois decision, a disparity of seventy-one percent was held not to be "grossly excessive" as to amount to "constructive fraud."[17] *Stalder v. Board of County Commissioners*,[18] decided by the Colorado Supreme Court, further illustrates the inflexibility that can result

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6. Garvey Grain, Inc. v. MacDonald, 203 Kan. 1, 453 P.2d 59, 68 (1969).
7. Chicago & N.W. Ry. v. Iowa State Tax Comm'n, 257 Iowa 1359, 137 N.W.2d 246, 252 (1965).
8. *See, e.g.*, Citizens' Committee for Fair Property Tax v. Warner, 127 Colo. 131, 254 P.2d 1005, 1010 (1953); State Ex. Rel. Markarian v. City of Cudahy, ——Wis.——, 173 N.W.2d 627, 629 (1970).
9. Citizens Committee for Fair Property Tax v. Warner, 127 Colo. 131, 254 P.2d 1005, 1010 (1953) ("official regularity").
10. *See, e.g.*, Garvey Grain, Inc. v. MacDonald, 203 Kan. 1, 453 P.2d 59, 68 (1969); Charleston Fed. Sav. & Loan Ass'n v. Alderson, 324 U.S. 182, 190 (1945).
11. Chicago & N.W. Ry. v. Iowa State Tax Comm'n, 257 Iowa 1359, 137 N.W.2d 246, 252 (1965); Citizens' Committee for Fair Property Tax v. Warner, 127 Colo. 131, 254 P.2d 1005, 1010 (1953); Naph-Sol Refining Co. v. Muskegon, 346 Mich. 16, 77 N.W.2d 255, 257 (1956).
12. *See* Mason County Overtaxed, Inc. v. County of Mason, 834 P.2d 352, (Wash. 1963); People Ex Rel. Munson v. Morningside Heights, Inc., 259 N.E.2d 27 (Ill. 1970); Los Angeles Dodgers, Inc. v. County of Los Angeles, 67 Cal. Rptr. 341, 344 (1968).
13. *Id.*
14. *See, e.g.*, Mason County Overtaxed, Inc. v. County of Mason, 84 P.2d 352 (Wash. 1963) (and cases cited therein). *See also* People v. M.D.B.K.W., Inc., 36 Ill.2d 209, 221 N.E.2d 650, 652 (1966).
15. Appeal of Johnson, 173 N.W.2d 475, 482 (N.D. 1970).
16. People v. S.B.A. Co., 34 Ill.2d 376, 215 N.E.2d 233, 235 (1966).
17. People Ex Rel. Munson v. Morningside Heights, Inc., 259 N.E.2d 27, 29 (Ill. 1970).
18. Stadler v. Bd. of County Comm'rs, 364 P.2d 389 (Colo. 1961).

from this rule. In *Stalder*, the property owner claimed excessive valuation due to the assessor's failure to consider new and more economical construction methods, the court admitted the assessments were high but denied relief on the theory that the oversight by the assessor was not in bad faith, and was a reasonable error of judgment.[19]

The court in the instant case did not attempt to distinguish at what point an assessment could be adjudged arbitrary, or unreasonable. Yet if the cases cited by the court are indicative of the standard that it approved, a disparity of twelve percent in the appraisal is not arbitrary,[20] a disparity in the appraisal of twenty-five percent is not arbitrary,[21] and the assessment made by the assessor is not arbitrary without evidence of an "intentional violation of duty . . . or such reckless disregard of a taxpayer's manifest rights as would reasonably lead to an inference of intentional inequality . . ."[22] Other courts have defined arbitrary and capricious action as "willful and unreasonable action, without consideration and in disregard of the facts or circumstances of the case,"[23] or merely as action "without a rational basis."[24]

In substance, the North Dakota Supreme Court is telling the taxpayer who is unable to prove anything beyond mere error of judgment by the assessor, that he must seek redress from the appropriate administrative authorities and not the courts. Given this result, there still remains a major question to be answered that the court did not direct itself to. Can the administrative authorities meet the mandate of the court while at the same time assuring justice to the taxpayer? One commentator has described the problem like this:

> The nature and scope of judicial review, it is submitted, must depend on the character of the review provided in the administrative process.[25]

In North Dakota, the taxpayer unable to meet the strict burden for judicial review imposed by the instant case, must protest the valuation of his property, made by city and or county officers, to his board of county commissioners.[26] This has the following effect.

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19. *Id.*
20. Appeal of Johnson, 173 N.W.2d 475 (N.D. 1970).
21. People v. S.B.A. Co., 34 Ill.2d 376, 215 NE.2d 233 (1966).
22. S. S. Kresge Co. v. Detroit, 276 Mich 565, 268 N.W. 740, 743 (1936).
23. Markwardt v. County Bd. of Review, 174 N.W.2d 396, 400 (Iowa 1970) (and cases cited therein).
24. State Board of Tax Comm'rs v. Chicago, M. St.P. & Pac. R.R., 121 Ind. App. 302, 96 N.E.2d 279, 282 (1951).
25. Hellerstein, *Judicial Review of Property Tax Assessments*, 14 TAX L. REV. 327, 349 (1959).
26. N.D. CENT. CODE § 57-23-03 (1960).

The elected board of county commissioners,[27] with no requirement of expertise in law or taxation,[28] engaged in managing the affairs of the county,[29] is authorized to exercise quasi-judicial powers.[30] Further, as a result of the instant case, this board of county commissioners actually sits as a court of last resort for the taxpayer unable to gain judicial review of an assessment. Given this degree of responsibility, it has been stated that a minimal standard for review by administrative authorities should include:

> [a] fair hearing to review the action of the assessor before a competent, impartial, and independent review board, where he is given adequate opportunity to present his evidence and make his arguments.[31]

Boards of county commissioners may or may not meet these minimal standards set forth above, but their ability has been repeatedly questioned by commentators.[32] Thus, in regard to "impartiality" it has been said that by the "virtue of the elective nature of their office," the likelihood that inequities arising from political pressures is greatly enhanced,[33] and further, that independence and impartiality can hardly result when the "action of the local assessors is subject to review by county boards . . . made up of officials responsible for local budgets."[34] As noted above, board members have no required expertise in taxation and as a recent California study pointed out,[35] the board is apt to support the assessor who they consider to be an authority.

Impartiality and competence aside, basic fairness, especially as it relates to the hearing stage, requires that each agency adopt essential procedural rules.[36] The procedural due process required of the North Dakota county boards is minimal at best. All that is required is notice of hearing, hearing, and notice of the decision reached.[37] Evidentiary rules such as right of examination and cross-examination, subpoena of witnesses, independent fact finding, and testimony under oath, which are characteristic of a judicial proceed-

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27. N.D. CENT. CODE § 11-11-02 (1960).
28. *Id.* (commissioner need only be a resident of county).
29. N.D. CENT. CODE § 11-11-11 (1960).
30. N.D. CENT. CODE § 57-23-03 (1960).
31. Hellerstein, *supra* n. 25 at 349.
32. *See generally,* Hellerstein, *supra* note 25; Carr, *Property Assessment: Protest, Appeal, and Judicial Review,* 17 ADMIN. L. REV. 187 (1965); Holbrook, *Judicial Review of Determinations by County Boards of Equalization,* 14 So. CAL. L. REV. 276 (1941); Hunt, *Administrative Procedure—An Additional Plea,* 57 ILL. B. J. 464 (1969).
33. Carr, *Property Assessment: Protest, Appeal, and Judicial Review,* 17 ADMIN. L. REV. 187, 193 (1965).
34. Hellerstein, *supra* n. 25 at 349.
35. Final Report of the Joint Interim Committee on Assessment Practices to the California Lgislature, p. 38 (1959), cited in Carr, *supra* n. 33 at 794.
36. Comment, *Administrative Procedure Legislation Among the States,* 49 CORNELL L. REV. 634, 638 (1964). *See also* Gigger v. Bd. of Fire and Police Comm'rs, 23 Ill.App.2d 433, 163 N.E.2d 541 (1959).
37. *See* N.D. CENT. CODE §§ 57-23-02, -06 (1960).

ing, may or may not be used, but North Dakota law certainly does not require their use. One might query why the procedures stated above are deemed minimal for state administrative proceedings,[38] but unnecessary for the county boards exercising quasi-judicial powers? It can be further questioned, if the county boards are not required to record testimony or publish opinions,[39] how will a record be obtained on which to base an appeal or how will the outcome of these decisions have any predictability? In short, the system of decision making by the county boards, can not be uniform in its decisions or procedures. The potential consequences of the courts approach have been put like this:

> A fair hearing before an impartial reviewer is indispensable if the citizenry are to feel, whether they agree or disagree with the decision, that they have had a fair hearing and the property tax system, too, effectively operates as government by law and not merely by the caprice or favoritism of the local assessor.[40]

The North Dakota statute giving the boards of county commissioners the power to abate "invalid, inequitable or unjust assessments" provides that "[a]ny person aggrieved by any decision of said board of county commissioners may appeal to the district court. . . ."[41] The statute provides no burden of proof or other criteria for effecting the appeal. Thus in the instant case, the court had the choice to apply either a strict standard of judicial review, as they did, or a broad standard of judicial review, which they did not discuss. It is submitted that a broad standard of judicial review, for which authority exists,[42] would have been more desirable considering the lack of administrative machinery in North Dakota.

In Minnesota, findings of fact in tax cases by the trial court, if reasonably supported by the evidence as a whole, must be sustained upon review.[43] Thus where an assessor's appraisal was $19,350.00, and the trial court after hearing the evidence presented by both sides, fixed the amount at $14,500.00, the valuation of the trial court was sustained on review.[44] This approach is readily adaptable to North Dakota, in that administrative review could first be exhausted, with the court acting as a final safeguard for the taxpayer.

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38. North Dakota enacted a comprehensive state Administrative Procedure Act in 1941. This act is limited in scope to those agencies having "state-wide jurisdiction". N.D. CENT. CODE § 28-32-01 (1960).

39. Carr, *supra* n. 33 at 198-199.

40. Hellerstein, *supra* n. 25 at 352.

41. N.D. CENT. CODE § 57-23-03 (Supp. 1969).

42. *See* discussion *infra*.

43. *See* Alstores Realty, Inc. v. State, ——Minn.——, 176 N.W.2d 112, 118 (1970).

44. Nelson v. County of Meeker, 285 Minn. 527, 172 N.W.2d 753 (1969).

Alabama, by statute[45] and case law,[46] has also developed a broad standard for judicial review of tax assessments. The court is authorized to decide "both as to the legality of the assessment and the amount thereof."[47] The Supreme Court of Alabama in a recent decision, stated that the appellant only must sufficiently show that the assessment was incorrect, to sustain his burden on judicial review.[48]

There remains yet another choice that could be used to change the result of the decision in the instant case. That choice is for the Legislature to take. The Legislature has at least three courses of action that could be taken. First, it could by statute, apply the Alabama approach[49] mentioned above. This choice would alleviate the necessity of reorganizing the administrative procedure of the county boards. Second, the State Administrative Procedure Act[50] could be made applicable to the county boards. This choice would at least give hearings and their procedure courtroom formality. Third, a totally new system could be initiated. This alternative could be in the form of independent tax review boards,[51] now found in many of the states.

In conclusion, it is imperative that action be taken to alleviate the situation created by the instant case. One can only query how an informed Supreme Court could reach a result that has such potential for injustice. However, it matters very little if this defect is remedied by the court or legislature, as long as action is taken. The taxpayers of North Dakota deserve a more equitable system of review of property tax assessments than their Supreme Court has chosen to give them.

STEVEN L. WOOD

LICENSING—SALES TAX—RIGHT OF A STATE TO LEVY A SALES TAX ON ITS OWN SUBCONTRACTOR—The plaintiffs in this case are the executive vice president of the Minnesota Asphalt Pavement Association and a highway construction company. Defendants are the commissioner of highways, commissioner of taxation, and the state audi-

45. ALA. CODE tit. 51, § 140 (1958).
46. Monroe Bond and Mortgage Co. v. State, 254 Ala. 278, 48 So.2d 431 (1950).
47. ALA. CODE tit. 51, § 140 (1958).
48. State v. City Wholesale Grocery Co., 283 Ala. 426, 218 So.2d 140 (1969).
49. *See* discussion *supra*.
50. N.D. CENT. CODE § 28-32-01 (1960).
51. Independent Tax Review Boards typically consist of 3 to 5 members, with diverse political affiliations, who have a required degree of expertise in Taxation Law, and are given quasi-judicial powers to hear tax appeals. *See, e.g.*, Kansas K.S.A. 74-2433 (1969), and New Jersey N.J.S.A. 54:2-3 (1960).