

The Report
Of The
Tax Commissioner
Board of Tax Appeals
Recommendations

November 15, 2011

Joseph W. Testa, Tax Commissioner
Ohio Department of Taxation

Presented to

John R. Kasich, Governor, State of Ohio

William G. Batchelder, Speaker Ohio House of Representatives

Thomas E. Niehaus, President of the Ohio Senate

Ohio Tax Commissioner Committee
Ohio Board of Tax Appeals Reform

Am. Sub. H.B. 153
129th General Assembly

SECTION 757.30. The Tax Commissioner shall conduct a review of the operations of the Board of Tax Appeals, and, not later than November 15, 2011, shall submit a written report to the Governor, Speaker of the House of Representatives, and President of the Senate providing an assessment of the Board's operations and recommendations for improvement. The Tax Commissioner's review shall include consultation with persons who have participated in or have had matters before the Board and are familiar with the Board's operations and procedures. The report shall include recommendations for improving the appeals process, internal operations, and other operational matters the Commissioner deems advisable. The Commissioner may designate an employee of the Department of Taxation to conduct the review.

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Executive Summary

The Board of Tax Appeals (“BTA”) has experienced challenging times in recent years. As budget cuts forced staff reductions to their lowest levels in recent history, the economic downturn has flooded the board with record numbers of appeals from county boards of revision (“BOR”). Since FY 2009 appeals from the Department of Taxation have more than doubled. Despite these challenges, the BTA has made few structural or operational changes to address the situation, which has contributed to an increasing backlog of unresolved cases.

The BTA hears appeals from determinations of the Ohio Tax Commissioner, the 88 county boards of revision, municipal boards of review, budget commissions, and other tax-related matters. Appeals from BOR decisions make up the majority of the BTA’s docket. Annually, all 88 BORs receive tens of thousands of complaints against the valuation of real property set by county auditors for calculation of local property taxes. A survey of all Ohio BORs found that 68,292 complaints were filed for tax year 2010, which affected taxes paid in 2011. Of these complaints, up to 9% were appealed to the BTA on a county-by-county basis.

Given recent economic trends, the number of BOR complaints filed state-wide has increased dramatically since 2009 and will continue to do so in the future. With a current BTA case backlog of over 7,200 real property cases alone, the committee anticipates that the number of BOR appeals pending before the BTA will exceed 10,000 by the end of FY 2012. Although the number of cases decided by the BTA increased to 3,061 in FY 2011 and has grown by another 816 since July 1, 2011, it is apparent that the BTA has not been able to address the backlog of appeals or maintain its pace against incoming filings.

Background

In 2008, the BTA’s operating budget was significantly reduced, which required it to lay off a majority of its staff (6 of 9 attorney examiners and additional support staff). In 2011, the BTA received additional funding (\$450,000) which has enabled it to hire three new attorney examiners and an additional support staff member. While it’s clear the reduced staff was a factor in the creation of the current backlog, it is also clear that simply adding more employees will not correct the problem.

The process of handling cases has not changed at the BTA in many years – not even in response to a mounting number of cases and reduced staffing levels. All cases, large and small, proceed through a discovery phase, motion practice, hearing procedure, drafting phase, and culminate in the issuance of a decision. The BTA has followed its historical process where an attorney examiner manages, hears, and drafts

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a detailed written decision, and the chief attorney examiner reviews the decision and circulates it to the three BTA board members. Currently, the chief attorney examiner conducts a thorough review of each case generated by multiple attorney examiners. The board members' involvement in reviewing cases varies by member. While some may base their decisions on the hearing examiner's written opinion, others opt to review the entire file which often extends from listening to audio recordings of the initial hearing before the local BOR to reviewing the transcript and evidence presented at the hearing before the BTA. Whether the case involves the valuation of a complex multi-million dollar commercial property or a small valuation dispute for a residential property, this review and decision process is the same.

The process of scheduling cases also has not changed at the BTA. Historically, the BTA schedules all cases in the order in which they were received. The cases can be divided into two large groups: complex cases where the parties are represented by counsel (typically involving commercial property), and simpler cases where the property owner represents himself (typically limited to residential property). The BTA's discovery phase generally closes 120 days after the filing of the appeal. Cases are scheduled for hearing 30 to 60 days in advance, and parties are required to disclose exhibits and witnesses 14 days prior to hearing.

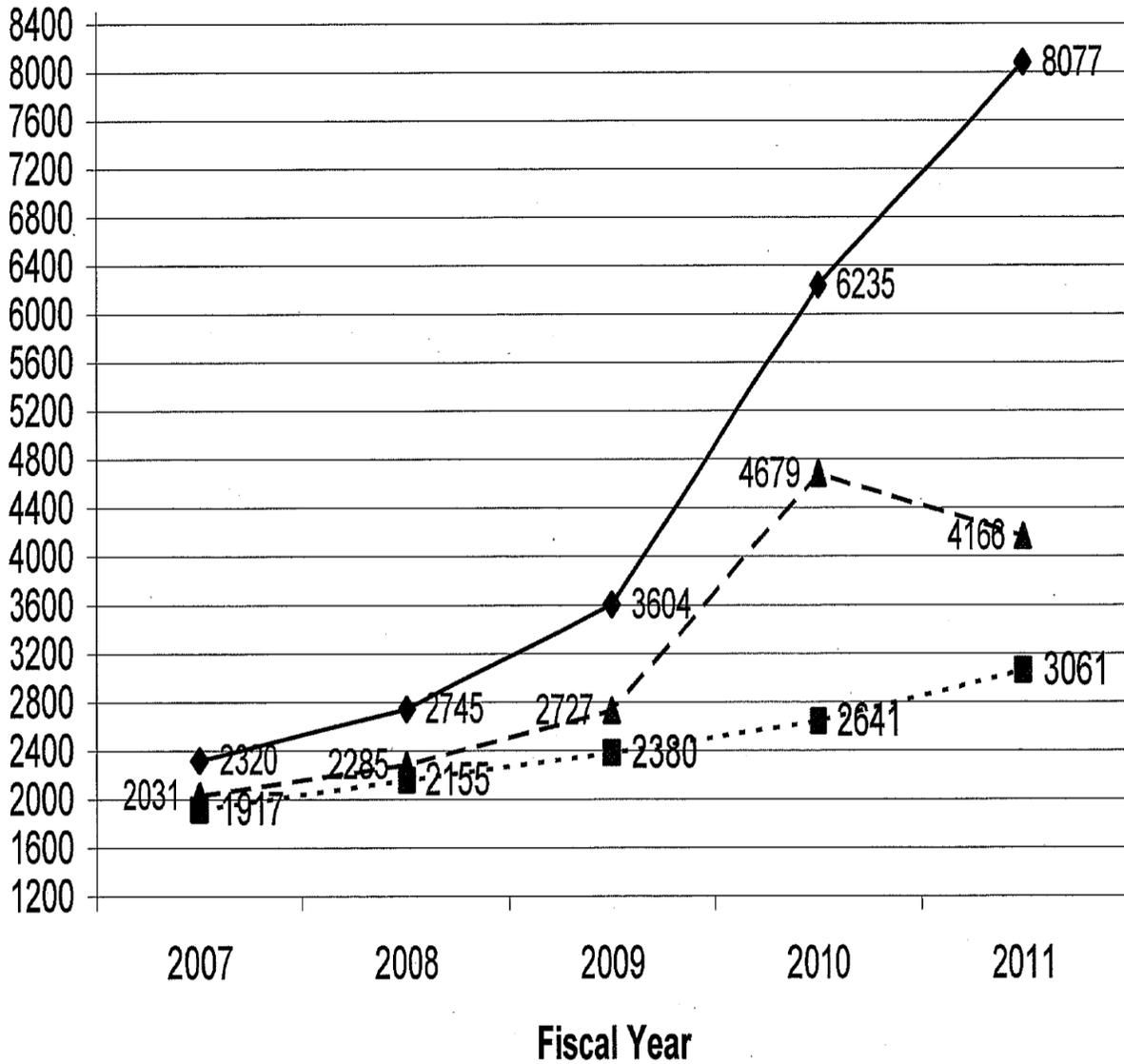
The hearing process is another procedure that has not evolved at the BTA. Generally speaking, the group of regular practitioners who appear before the BTA is relatively small, and they are well-familiar with the current hearing procedures and, naturally, use them to their clients' best advantage. For instance, although the statutes require a complainant before the BOR to bring all evidence in its possession to that hearing, the BTA hearing is a *trial de novo*, which means it can be tried as if the matter had not been heard before and as if no decision had been reached. Therefore, nothing precludes any party from presenting new evidence to the BTA. Practitioners typically do not wish to disclose their evidence, e.g., a new appraisal report, to opposing counsel until the last possible moment. This significant evidence is often exchanged only 14 days before trial. In large cases it is not unusual for practitioners to negotiate to avoid disclosing their appraisal evidence or to avoid the costs of obtaining an appraisal altogether. These practices cause an unnecessary number of continuance requests which result in an individual case being set for hearing multiple times, even though the case has been pending for many months if not years.

Given the instability of the current real estate market, the number of BTA appeals is projected to increase in coming years which will only serve to add to the current backlog of cases. Utilizing the historical processes to schedule, hear, and decide cases, the BTA will be unable to manage this docket in a timely and effective manner. The committee's proposed reforms for the BTA are focused on dealing with the current crisis and preventing future backlogs. The solution is two-fold: 1) establish a temporary, intermediate review process for residential valuation cases within the Tax Commissioner's Office to assist the BTA with its current backlog, and 2) remodel the historical processes at the BTA going forward.

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Numbers

To discuss the number of cases mounting at the BTA is one thing; to see the number displayed as a graph certainly drives home the seriousness of the situation. A graph of the growing numbers of cases from the BTA's own annual report tells the story.



Number of Cases Received ▲

Number of Cases Decided ■

Pending Case Load ◆

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6,972 cases were pending at the beginning of fiscal year (“FY”) 2011. From the BTA annual report, 8,077 cases were pending at the end of the FY 2011. The BTA estimates that over 91% of these cases are real property valuation appeals from BOR complaints. In order to get a sense of upcoming cases, the Tax Commissioner conducted an informal survey in several heavily populated counties to determine how many BOR decisions were appealed for each tax year since the real estate market began to stagnate in 2008. For informational purposes, each county’s current or upcoming reappraisal (“RE”) or triennial update (“TR”) is also listed.

Sample of Counties with Largest Number of BTA Appeals

County	Update		2008	2009	2010	2011 to Date	Total Unresolved
Cuyahoga	2012	RE	925	988	745	1372	2666
Montgomery	2011	TR	103	568	594	106	976
Summit	2011	TR	78	721	210	87	807
Franklin	2011	RE	288	313	213	311	691
Lake	2012	RE	75	196	321	100	488
Hamilton	2011	RE	65	200	189		251
Lucas	2012	RE	196	282		137	247
Butler	2011	TR		127	133	36	154
Ashtabula	2011	TR	64	130			107
Medina	2013	RE		118	60		161
Stark	2012	RE			82	45	136
Clark	2013	RE	64				106
Portage	2012	RE	95				54
Lorain	2012	RE				59	182
Licking	2011	RE				43	117
Delaware	2011	RE			78		118
Totals			1953	3643	2625	2296	7261

(Note: Due to system limitations some county data was unavailable)

The chart demonstrates the seriousness of the BTA’s situation. In four months from July 1, 2011, the BTA has decided just over 200 cases per month. October 2011 set a new all-time record with 700 appeals filed at the BTA. If this pace continues the BTA will need to more than triple its monthly case production just to maintain the current backlog of over 9,000 pending cases. The questions posed are: can the BTA triple its output with its current operation, and whether more than 9,000 cases is an acceptable backlog for any administrative agency?

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Kaizen Experience
Ohio Department of Taxation

Recently the Department of Taxation experienced a backlog of a significant number of cases. With the assistance of the Department of Administrative Services, staff members responsible for the petition process as well as staff from unrelated divisions came together to review and reform the petition procedures by participating in a Kaizen Event.¹ The goal of the Event was to reduce the backlog of un-worked petitions and improve the flow of those documents through the Department. All of the adopted changes realized through this examination are expected to lead to better tracking of petitions, faster results for taxpayers, and lower average handling costs per case.

The goal was to significantly reduce the backlog of 17,500 cases. As of November 10th, 2011, the pending docket stands at 4,600 cases and continues to decline resulting in cost savings and a more responsive government.

The lessons learned through the process review were that cases needed to be considered at the earliest entry point possible in order to be triaged into similar categories. Additionally, the group explored how technology can assist in the process and make the process smoother. In short, the Kaizen experience allowed the Department to employ staff with the appropriate level of skill sets, the right equipment, and at the right time in the petition process, to better serve Ohio citizens protesting tax assessments.

Keeping in mind the lessons learned from the Kaizen experience, the Department has drawn upon staff members of the Ohio Department of Taxation and stakeholders in the BTA process to address the issue of the BTA's backlog. The goal was to establish a procedure that will allow the BTA to efficiently and effectively respond to those who bring their appeals to that board, and the following pages outline the recommendations of that committee.

¹ *Kaizen* is Japanese meaning "break for the better" The Kaizen Event is a popular process improvement tool.

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Recommendations

The method the Tax Commissioner's committee used to explore the practice and procedure of the BTA was to examine topics from previous studies and reports, research the practices in surrounding states, and to invite those from the community familiar with BTA's current practices to comment and make recommendations. Several themes developed from the responses. Most of the recommendations are addressed using these broad categories:

- small claims process

- BTA practice and procedures
 - technology updates

 - case management

- uniform rules of practice and procedure affecting county boards of revision.

Small Claims Process

The BTA has one procedure for handling every case that is appealed. As demonstrated by the numbers, this one process cannot handle the number of cases efficiently. Applying the “right-person-with-the-right-equipment-at-the-right-time” principle, the recommendation of the committee is that a small claims process be established by statute for all residential valuation cases.

Currently, pro se appeals (representing oneself) make up 34% of the BTA valuation cases. Given the state of the housing market, the Department anticipates that the percentage of home owners appealing property valuations will increase dramatically. The Franklin County BOR estimates 20,000 complaints will be filed in 2012. The Cuyahoga County BOR estimates 24,000 complaints to be filed in 2013. At the recently completed Franklin County informal property reviews, 75% were residential. By adopting a new statute that changes the way residential appeals are processed, taxpayers can be better served as decisions on less complex cases can be made more efficiently. This treatment is similar to state tax disputes, in that cases disputing \$50,000 or less in controversy will qualify for the small claims process. A BTA case assigned to the small claims process would be administered with

- no discovery
- no additional evidence provided prior to hearing
- a decision with no precedential value
- no right of appeal
- summary decision rendered by hearing examiner.

The points listed above have long been advocated by practitioners that work with valuation cases. Due to the nature of the changes being proposed, any impact brought on by this newer process will take some time to realize. In an effort to aid the BTA in reducing its number of cases in the immediate future, the Tax Commissioner volunteers his employees to assist the BTA as explained in the next section.

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Tax Commissioner Backlog Assistance Program

The Tax Commissioner Backlog Assistance Program is a temporary solution to this very real problem. With its current backlog of more than 9,000 cases, the BTA needs to focus on getting all cases decided as quickly as possible. The committee recommends passing a temporary law that would authorize the Tax Commissioner, who has expertise in valuing property, to process the current residential appeals using the proposed small claims process when the parties to the appeal agree to the alternative venue and: 1) voluntarily opt in to the program with a waiver of the right to appeal and, 2) agree that the evidence of value is limited to what was presented at the local BOR.

The Department's structure can readily adapt to the small claims process. Tax agents routinely address petitions for reassessment in other taxes and utilize financial and other data to reach decisions. Allowing the Department to finalize many of the current appeals will permit the BTA to focus its resources on those cases with more complex factual and legal issues.

The Backlog Assistance Program would apply to all docketed residential appeals pending on the effective date of authorizing legislation. The program would expire not later than two years after the effective date of the authorizing legislation.

BTA Practice and Procedure

Technology Updates

The BTA does not have electronic filing opportunities for appeals, motions, briefs or any other filings with the BTA. There are also no electronic notifications by the BTA to any of the parties involved in cases. In short, the BTA is woefully behind many state agencies in its use of technology.

The committee recommends that changes be made to Chapter 5717 to permit the electronic filing of notices of appeal. Beyond statutory changes the committee recommends the BTA should implement the following including but not limited to:

- electronic filings
- electronic management of cases
- electronic notifications to parties
- electronic exchange of discovery
- remote hearing capability e.g., telephonic and video conferencing.

BTA Practice and Procedure

Case Management

In examining the BTA's current procedures for processing appeals, the Tax Commissioner's committee chose to concentrate on those processes that would increase efficiency and decrease the existing backlog while preventing a new backlog in the future. As a result, the committee's recommendations focus on the following areas of case management:

- case management schedule and continuances
- notice of appeal
- discovery
- mediation/arbitration
- BTA authority to remand
- BTA authority to issue summary judgment entries.

Case Management Schedule and Continuances: Historically continuances have been granted freely by the BTA resulting in delays. Unlike the BTA, most courts establish an upfront outline of how a case will proceed. The advantage of a case management schedule is that all parties are put on notice regarding the anticipated timeline of a case. The parties to a case can anticipate the need for personnel involvement at specified periods of time, and the attorneys are able to adjust their schedules for client meetings and hearings. Because no schedule can anticipate all events, the schedule should be adaptable; however continuances should be limited to one per party. Another benefit of using a case management schedule is that all interested parties are immediately aware if there is a need to adjust the schedule. Placing the case management schedule online would further benefit all parties. The Case Management system would be made possible by statutory amendments to R.C. 5717.01 and R.C. 5717.02.

Notice of Appeal: (Tax Commissioner cases only) Expanding the ability to amend the notice of appeal may seem counterintuitive to efficiency, but considering overall tax administration, this will improve efficiency. The goal is to concentrate on the substantive tax issues by allowing the notice of appeal to be amended after the transcript is filed by the Tax Department. Allowing appellants to amend notices of appeal will allow for the resolution of the tax dispute without procedural interference.

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Discovery: Use of the case management schedule will have an impact on discovery as issues will be defined earlier and the scope of discovery can be established sooner. Defining the scope of the issues earlier in the process should reduce the requests for continuances that delay the appeal process.

Mediation/Arbitration: The BTA stopped using mediation when its budget was reduced. The majority of the respondents to our questionnaire encourage the BTA to resume the mediation program. Mediation is a beneficial tool for all case types, and resolution of a case without litigation will have a positive effect on reducing the number of pending cases. BTA mediation procedures currently exist in Ohio Administrative Code Section 5717-1-21 and should be utilized.

Authority to Remand: RC 5717.03(G) allows the BTA to remand any issue that has not been previously raised back to the lower hearing body. In order to instruct the lower tribunals, the BTA should have the additional ability to remand cases based on the state of the law. The committee suggests that RC 5717.03(G) be amended to grant the BTA broader authority to remand cases where the lower tribunal has not correctly applied the law.

BTA Authority to Issue Summary Judgment Entries: The Supreme Court has repeatedly held that the BTA does not have the statutory authority to summarily dismiss cases. There are times, however, when the appellant fails to prosecute its appeal or fails to present evidence to support its position. The ability to issue summary judgment entries would allow the BTA to move quickly on appeals that are not well taken and reserve its resources for more substantive cases. The Ohio Revised Code should be amended to provide the BTA with summary judgment authority.

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Rules and Uniformity Affecting the County Boards of Revision

The local boards of revision play a significant role in appeals to the BTA. Consistent rules applied uniformly by all BORs would reduce the number of appeals to the BTA. The committee recommends a statutory change that requires the Tax Commissioner to prescribe uniform BOR rules including, but not limited to, the following areas:

- standardization of hearing procedures
- development of uniform documentation
- encourage resolution of cases through settlement or mediation.

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Summary

In summary, the Tax Commissioner's committee recommends the following to reduce the current case backlog and maintain future efficiencies at the Ohio Board of Tax Appeals including:

- creation of a small claims process
- acceptance of the Tax Commissioner's Backlog Assistance Program
- improvement of the BTA's current technology and the incorporation of new technology, e.g., electronic filing
- development of a formal Case Management Program
- adoption of uniform rules and procedures for county boards of revision.

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Tax Commissioner Committee and Participants

I selected a committee within the Department to aid in the development of these recommendations to improvements of BTA policies and procedures. Input was also requested from twenty-seven (27) groups and associations throughout the state. Those invited to respond included those who practice before the BTA and parties affected by the outcome of its decisions.

Eleven of the invited participants responded and represent the various interest groups. Most commented on the recommendations presented in this report. The committee reviewed all the responses carefully while developing the recommendations found in this report.

- Ohio Board of Tax Appeals
- Ohio Attorney General
- County Auditors' Association of Ohio (CAAO)
- Rich & Gillis Law Group, LLC
- Jim Williamson CPA
- Ohio Township Association
- Ohio Association of School Business Professionals (OASBO)
- Seigel Seigel Johnson & Jennings Co., LPA
- Ohio State Bar Association Taxation Committee
- Ohio Chamber of Commerce
- Brindza McIntyre & Seed LLP

I wish to thank all those who submitted recommendations as well as the tax department staff who reviewed the information and contributed to this report.

Linda Allbright
Margaret Brewer
Matt Chafin, Chief Legal

Stan Dixon, Chair
Gloria Gardner
Michael Heller

Respectfully submitted:

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Ohio Department of Taxation
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