PROPOSED FINAL REPORT

TO THE ADVISORY BOARD

MICHIGAN TAX PROCEDURE PROJECT

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INTRODUCTION

In the autumn of 1965, the Tax Section of the State Bar, the Michigan Department of Revenue, and trust funds of the Law School of The University of Michigan contributed to a joint fund to finance an overall review of the procedures, both administrative and judicial, by which state tax questions are resolved. The fund was and is being used primarily to provide compensation for three members of a research staff who work under an unpaid Project Director, Professor L. Hart Wright.

Reports of the research staff were submitted to, and carefully discussed by, an advisory board consisting of the Council of the Tax Section, high-level representatives of the Department of Revenue and of the Attorney General, and members of the State Tax Commission. Lending urgency to the discussions, was the anticipation, subsequently realized, that the Legislature would enact a state income tax. It was recognized that such tax would aggravate the existing burdens of some shortcomings associated with exiting procedures.

The inquiry covered the conflict resolution practices in both the property and non-property tax fields. The State Tax Commission and its functions were scrutinized as well as the Department of Revue, including the latter's settlement and litigation policies. The adequacy of the Department's regulations and ruling programs also was considered. At the judicial level the study embraced diverse procedures associated with the multiplicity of forums through which tax questions can be litigated.

The following report sets out the recommendations made by the Advisory Board.

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PART A

SUMMARY: PRESENT PCOREDURES AND PROPOSED CHANGES

1. The Property Tax

In the property tax area, the 1800-odd assessment districts and local Boards of Review make uniform procedures and practices literally impossible. The situation is aggravated by the absence of clearly-defined qualifications for personnel. The State Tax Commission, though charged by state with supervisory powers, actually and unavoidably spends the bulk of its effort acting as a case-by-case review agency for appealed decisions of local Boards of Review.

Changes clearly are in order if taxpayers are to be assured of reasonably uniform and equitable property tax assessments as well as of objective and high-caliber independent review of decisions reached at the local level.

The changes recommended include county-wide assessment districts and county-wide Boards of Review, higher qualification for assessors and for Board of Review members, greater supervision and coordination of local districts by the State Tax Commission, and the creation of a separate review tribunal to take over the case-by-case review function now allotted to the State Tax Commission by statute.

It is particularly important that a taxpayer believe he will be accorded an impartial review of assessments for the Michigan Constitution accords a high degree of finality to all valuation decisions handed down by the agency reviewing appeals from decisions of the local Boards of Review. This review function, under our recommendations, would be vested in a newly created State Tax Tribunal.

2. Specific Taxes

The Michigan Department of Revenue is responsible for administrative resolution of tax disputes stemming from most of so-called specific taxes, subject to judicial appeal. It also issues regulations and rulings pertaining to these same specific taxes. While the following summary of proposed changes in administrative procedures literally focuses almost exclusively on the Department and on the taxes it administers, it is contemplated that these proposals would be implemented also, to the extent feasible, by other agencies which administer other state imposed taxes (illustratively, the Corporation and Securities Commission in the case of the corporation franchise tax).

2.1 Conflict resolution via the settlement route

At the moment, while the Department of Revenue does engage in compromise as a means of resolving tax disputes, there is no formal commitment to its use within the department. Further, though knowledgeable tax practitioners are quite aware that the Department is prepared to resolve truly debatable tax disputes of a non-resident character on the basis of mutual concessions responsive to the litigation hazards (i.e., to the competing strengths and weaknesses of the two positions), many general practitioners, let alone the public at large, are not.

This situation should be corrected. The Department should make it clear, internally and externally, not only that compromise is available but that, as is true at the federal level, it is the preferred technique in the settlement of truly debatable issues not having precedent value. Further, to preclude misunderstanding, the present ambiguous statute – which seems to – but does not – bar settlement should be replaced. An enactment specifically authorizing the department to rely upon settlement as a device is

unnecessary; for the Attorney General has ruled that a common law right of settlement exists.

If the taxpayers are to accept an administrative determination, there must be a right to appeal within the Department from deficiencies proposed by the auditor. And this appeal must be to a conferee who is expected to act in an objective manner. To avoid the impression that he is the mouthpiece for the particular deputy commissioner who is directly responsible for enforcement of a given tax, the conferee should be directly under the Commissioner himself.

Appeal to the conferee normally will exhaust the taxpayer's administrative remedies. However, in one type of situation, there should be a further internal review (as distinguished from an appeal) of the conferee's determination. Whenever he proposes, by reference to the litigation hazards to compromise the type truly debatable issue which, if litigated, a court – to conform to the statute – would have to decide entirely for one side or the other, the proposed settlement should be referred to the legal staff for its informal written opinion. Should an unfavorable opinion result, the matter should be referred to the Commissioner. The Commissioner would have two paths of action available to him: (1) he could delegate power to the conferee to settle as the conferee had proposed originally, or (2) he could request that the disagreement between the conferee and the legal staff office be referred to him for resolution.

2.2 Field auditor's role in conflict resolution process1

If settlement is to be employed as the preferred method of resolving tax disputes, it is important to allocate precisely the settlement authority to be exercised by the several

echelons and to make clear to all concerned – Department of Revenue personnel and taxpayers alike – what levels exercise what authority in what types of situations.

This precision is particularly important for the group known as the field auditors. The stance taken by these men in the course of examining taxpayer returns, and the limited amount of true settlement authority which should be exercised by them, becomes tremendously important to the whole conflict resolution process.

At present, however, written instructions to field auditors do not indicate the extent of their settlement authority or the stance they are to take in diverse situations. Nor does the training they receive provide adequate orientation as to these matters. Consequently, each man proceeds on the basis of his own judgment, more or less influenced by his own subconscious attitudes. The result is understandable: there is no assurance of uniformity in the treatment accorded to taxpayers. One taxpayer may be able to reach a compromise with an auditor while another, similarly situated, may encounter an auditor who believes he lacks authority to make compromises and refers the question to his superiors. Moreover, one auditor may think it is proper, as to an issue he deems to be close, for him to abandon the issue if he reaches a close on-balance judgment for the taxpayer, while another auditor, in the same circumstance, may think he should set up a deficiency for the entire amount.

In the interests of uniformity and equality of treatment for all taxpayers, and to preserve the integrity of the Department's administrative conflict resolution process, auditors should be instructed specifically covering the stance to be adopted in various general circumstances and the limited circumstances under which they are permitted to exercise true settlement authority. These instructions, the details of which are set forth in

the main body of this report, should be published as part of the procedural regulations to the end that taxpayers will fully understand the whole of the Department's conflict resolution process.

2.3 The regulations program

While the Department of Revenue currently issues regulations purportedly to clarify the statutes, in fact such regulations – excluding those pertaining to sales and use taxes – tend to do little more than rephrase the statutory language. Drafted by non-lawyers within the Department, they do not represent a coordinated approach to statutory amplification and interpretation. Not until these regulations have been drafted are they sent to the Attorney General's office where, for the first time, lawyers examine them. No effort is made to publicize generally whatever hearings on regulations are held; the Department notifies those business organizations it believes will be affected, thus in effect selecting the taxpayers who will appear. Once issued, the regulations are accorded little weight by the courts.

The federal Internal Revenue Service has learned that, rather than have a legally trained mind review the product of non-legally trained draftsmen, greater efficiency and quality is achieved by having the original draft prepared by its legal staff. For like reasons, we propose that the legal staff in that division of the Attorney General's office concerned with taxes should draft the proposed regulation which then would be sent to the Department of Revenue for scrutiny to ascertain if the draft accurately reflects the department's position. Ultimately, the Commissioner himself should have the final administrative say-so. However, once a proposed regulation has received tentative departmental approval, a public hearing should be held with advance notice given to

affected trade associations and to associations composed of practitioners such as the Tax Section of the Michigan State Bar and counterpart organizations composed of accountants. The final version of a regulation would be promulgated after the hearing.

All regulations should be drafted to achieve certain goals: (1) the reduction of complex statutory language to lay terms, and (2) identification of the government's position of recurring types of questions, with existence of doubt as to the truly correct answer being a reason for reflecting the Department's position rather than being a reason for ignoring the problem.

While the above-outlined procedures would tend to improve the quality of <u>future</u> regulations, standing alone they would not affect those previously issued. Because the latter, except for those dealing with sales and use taxes, are not as comprehensive as they should be, they should be re-drafted and re-promulgated as soon as adequate personnel can be obtained.

A final problem concerns those areas where the state's substantive tax law corresponds to or rides piggyback on the federal tax law. Where the statutory pattern is common to both, the Department, in its regulations program, should seize upon one device to avoid substantial and unnecessary duplication of effort and to preserve the integrity of the piggyback idea. Specifically, its own regulations should state its intention to follow the applicable federal regulation. Because copies of the latter regulations are so accessible, no attempt should be made to repeat in the Department's own regulations the substance of the otherwise applicable federal regulations.

The fact that the Department proposes to rely on these federal regulations to the extent they are applicable under state statutes should be stated in the departmental

regulations. Should the federal regulations, as will undoubtedly occur, be altered in any way – whether through addition, deletion, modification or revocation – corresponding changes in the departmental regulations will be unnecessary. An attorney will need to consult only the federal regulations to ascertain the departmental position, again assuming that such federal regulations are applicable under the Michigan statutes.

With this exception (i.e., the piggyback ride of departmental regulations on federal regulations in the same way that the Michigan income tax rides piggyback on the Internal Revenue Code) we contemplate that the method of processing proposed and final departmental regulations will be spelled out in procedural regulations, not in a statute. The exception relating to the piggyback aspect itself is, because of its complexity, the prime reason why the overall procedural requirements should not be dealt with by statute. Apart from that exception, however, it is contemplated that the processing of all regulations initially issued by the Department of Revenue would be similar to that processing now provided by the Administrative Procedure Act in the case of other agencies. Indeed, as to the hearings on proposed regulations, the requirements which should be set forth in procedural regulations would call for more widespread notice than that actually required by the Administrative Procedure Act.[1]

2.4 Letter rulings, published rulings, and oral inquiries

At present, the Lansing office of the Department of Revenue maintains a fairly open-door policy in responding to inquiries pertaining to taxes. Questions are raised and answered by telephone, in the course of an oral conference, or by letter. For other than inquiries submitted by letter, which are answered in writing, answers are oral and immediate.

[1] Cf. Opinions of the Attorney General 1952-1954, 123 (1953), No. 1595.

This accessibility and speed of response would seem, however, to preclude sufficiently thoughtful consideration of matters novel or complex. As to these, absent extensive records and subject-matter indices, oral responses also are unlikely to achieve adequate uniformity.

Two other major defects exist in the program as it presently functions. These involve the public's lack of knowledge regarding the Department's accessibility, and the lack of any systematic official publication of the more important responses made to taxpayer inquiries. Many general practitioners, let alone taxpayers themselves, are unaware of the Department's policy of answering inquiries by letter or in oral conferences. Further, tax specialists as well as general practitioners are ignorant of the important substantive positions taken previously by the Department. Even though some trade-association journals do occasionally publish rulings of interest to their own members, such limited-circulation publications are <u>not</u> a substitute for official departmental publication of the interpretative positions taken in letter rulings likely to be of general interest, that is, those having precedent value.

The following steps should be taken, and substantial publicity should be given to the program as ultimately constituted. Not only should procedural regulations specifically describe all aspects of the rulings program in its final form, but every effort should be made to acquaint general practitioners and the general public with the various forms in which the Department will respond to taxpayers' inquiries.

1. The Department should restrict its willingness to provide oral responses to the following areas:

   (a) Procedural matters,

   (b) Substantive problems as to which the statutory answer is clear, or

(c) Substantive problems where the Department has a well-established interpretative position applicable to the facts involved.

No attempt should be made to respond orally to complex or novel situations. Employees in the Lansing office of the Department should be instructed that, in case of doubt, (a) no oral response should be given, (b) the taxpayer should be advised of the existence of a letter ruling program under which a written response will be made to a written inquiry, and (c) informed also where that program and its requirements are described in the Department's procedural regulations.

2. Taxpayers should be able to request letter rulings on <u>prospective</u> transactions in the expectation that, except under certain circumstances, they will receive promptly such letter rulings. The request itself should be in writing. Further, at the time of submitting the request, a taxpayer also should request an oral conference in the event departmental personnel tentatively conclude that there may be an unfavorable tax response to such taxpayer's proposed transactions. If the latter proves to be the case, the taxpayer should be invited to an oral conference before the final decision is resolved. During such conference, those aspects of the problem which have proved troublesome to the Department should be explored fully.

3. Those letter rulings which the Department believes to have general interest – and hence possess some precedent value for administrative purposes – should be published by the Department.
as "Michigan Revenue Rulings" with names and other identifying characteristics removed. Practitioners, other than those concerned with the earlier letter ruling, should be assured, through the following device, of an opportunity to express their opinions as to the position which the Department tentatively proposes to publish officially. All revenue rulings should be published first as <u>tentative</u> revenue rulings and should have this status for a specified time – say 60 days – from the date of publication. During this specified time, any practitioner or other interested party would be free to submit a brief stating his opinion, and the reasons therefore, on the position tentatively taken by the Department. At the conclusion of this specified period, there would be another period – say 20 days – during which the Department would consider the position tentatively taken in the light of any briefs filed. If, by the end of this second period, the Department does not publish any change in the tentative revenue ruling, it would lose its tentative status and become a full-fledged revenue ruling.

4. The Department should refuse to issue a private advance letter ruling whenever there is a federal Internal Revenue Service <u>letter ruling</u>, equally relevant under state statutes, covering the same proposed transaction. Taxpayers should be able to rely on such federal letter rulings so issued and the Department in turn should accept as its own the interpretative position set forth therein. Comparably, the Department should instruct its personnel as a

> matter of hierarchical control that federal revenue rulings, where equally relevant under state statutes, are deemed to reflect the Department's own interpretative position. In short, department advance private letter rulings and published revenue rulings should ride piggyback on federal letter rulings and revenue rulings in the same way that the Michigan Income Tax Act rides piggyback on the federal Internal Revenue Code.

2.5 Technical advice from Lansing

Most tax practitioners have learned through experience that, if in the course of an audit they request an auditor to seek technical advice from Lansing as to the handling of a particular issue, the auditor usually will initiate such a request (through his supervisor).[1] There is no reason to suppose, however, that general practitioners are aware of this possibility. We propose only that this arrangement be formalized in the sense of being described in the Department's published procedural regulations.

3. Independent Review of Property Tax and Non-Property Tax Disputes: State Tax Tribunal

As explained In Part D infra, there are six reasons peculiar to the Michigan scene[2] why we propose to lodge the jurisdiction over all tax disputes in a State Tax Tribunal, riding circuit throughout the state, with a Small Claims Division to accommodate the taxpayer with a small claim. Staffed by three members, the Tribunal's regular decisions would be published. Although a specialist tribunal itself, all appeals would be to generalist courts. At the election of the taxpayer, trial by jury would be available. Jurisdiction of this Tribunal would include the review (whether on the basis of deficiencies or refunds) of the tax determination of any state agency charged with the administration of any state tax (not just the review of Department of Revenue

[1] They are aware also that an auditor may initiate such a request on his own initiative. Whichever of the two protagonists provokes the seeking of advice by the auditor, the auditor will act on the advice so received in his handling of the particular issue.
[2] See Part D, §§2.2 and 3.1 infra.

determinations) and also the review of property tax determinations made by county Boards of Review.

The concern arising in many quarters by any proposal to lodge all jurisdictions over tax disputes in such a specialized tribunal should be dissipated to a substantial degree by certain aspects of our recommendations. The very fact that the proposed State Tax Tribunal would have three members in itself assures a certain diversity of viewpoint. The right of a taxpayer to elect a trial by jury gives every taxpayer the option to have lay finders of the facts. Third, all review of the Tribunal's decisions would be by generalist courts. Fourth, the statute would not require that any special weight be given to the decisions of the specialist tribunal. The generalist appeal court would be free, if it chose, to treat the tribunal's determinations with no greater respect than it now accords determinations (facts and law) by generalist trial courts and juries.

The recommendation that the State Tax Tribunal ride circuit throughout the state assures continuance of the accessibility presently provided by the use of the circuit courts for tax disputes. Another feature currently deemed an advantage by taxpayers – the informal procedures used by the State Tax Commission – would be preserved for the very taxpayers with most reason to need them: Taxpayers with small claims could be heard by our tribunal's Small Claims Division and there they would have the benefit of comparable informal procedures. Hearings in the Small Claims Division would take place before a single member of the Tribunal as regularly constituted – note before a commissioner of lesser stature – who would have the responsibility of protecting the taxpayer against any technical missteps he or his non-attorney advisor might make. The

taxpayer in the Small Claims Division could choose anyone to represent him subject to disapproval by the presiding member of the Tribunal for cause.

B. THE MICHIGAN PROPERTY TAX: ADMINISTRATION AND REVIEW PROCEDURES

1. Introductory note

Recommendations pertaining to administrative and review procedures bearing on the Michigan Property Tax fall into the four following main divisions, each of which is separately discussed below:

i) Assessment procedures;

ii) Boards of Review;

iii) State Tax Commission; and

iv) Review procedures.

2. Assessment Procedures

2.1 Summary of recommendations

The subtopics which follow deal with the following five recommendations pertaining to assessment procedures:

1. Assessment districts should be county-wide.

2. Assessment personnel should be placed on a professional basis by requiring the following:

   (a) College graduation

   (b) Satisfactory passing of a test administered by the State Tax Commission

   (c) Continued participation in training programs administered by the State Tax Commission

3. Notice of assessment changes should be given individually to each taxpayer. Local newspaper notice should be given of any re-assessment program for any given area.

4. The State Tax Commission should be empowered, without any time limitation, either to order the reappraisals within a given county be made or to conduct its own reappraisals within a given county, the cost of such reappraisal, however effected, to be charged to the county in question.

5. The possibility of requiring reassessment by assessment districts of all properties within such districts at definite intervals should be explored by and, if deemed feasible and desirable, implemented by the State Tax Commission under its supervisory powers.

2.2 Assessment districts should be county-wide

Michigan currently has about 1800 local assessment districts, the great majority of which are too small to serve as efficient units in the state's assessment system.

In too many instances these small districts cannot afford professional staff.[1] Moreover, the fragmentation in itself creates problems in supervision and administration. The State Tax Commission finds it extraordinarily difficult if not impossible to supervise effectively this plethora of small districts with largely unprofessional personnel while the smallness of the districts creates internal problems. There is grave difficulty in insuring a satisfactory degree of equity among diverse classes of property and within specific classes of property within a small district. Further there is a strong tendency toward excessive dependence by local assessors on the county equalization department. While local assessors have tended to believe that any deficiencies in their assessment will be corrected through the equalization process, this belief in practice has tended to preserve under-assessments and/or lack of uniform assessments.

Combining local assessment districts to form county-wide districts automatically would facilitate efficiencies in administration, personnel, and equipment.

Since a larger area would be encompassed, there would be a greater number of different classes of property as well as of more instances of property within a single class. This greater variety combined with wider range would tend to produce more uniform assessments as between different classes of property as well as within a class.

[1] Discussed infra.

Moreover, supervision by the State Tax Commission would be facilitated by the very fact of its having fewer units to supervise.

Further, the county equalization department – never designed to play a part in the assessment process as such – would not be expected to compensate for any deficiencies in the local assessors' practices. Assessors would have to bear the full responsibility for assessments made.

Rather obviously the larger area base for each assessment district would enable the acquisition and efficient use of adequate equipment. Less obviously perhaps, this would facilitate the collection and maintenance of uniform and permanent records within each county. Such records should include the following:

1. Classification, grade, and value of each tract of land located outside cities and towns, as well as of platted subdivisions and additions.
2. Descriptions and values of all improvements on land located outside cities and towns.
3. Descriptions and values of all lots, tracts, and improvements in cities, towns, platted subdivisions and additions.

2.3 Assessment personnel should be placed on a professional basis

In the township, this being the typical assessing district for most of Michigan, the supervisor, an elected official, has complete control over township assessments. Assessment, however, is only one of a variety of duties performed by such supervisor who typically treats all of his supervisory responsibilities as a part-time sideline to his main occupation. Typically, also, a supervisor's skills or experience in assessment are not considered pivotal by the township electorate and the statute itself imposes no professional qualifications as to this function. Hence, the local supervisor – however honest and conscientious – usually is inadequately prepared for his assessment duties,

devotes little time to them, and in addition may find himself (if he hopes for reelection) under pressure from various constituents to take account of local political realities. These considerations and the complex realities of present day assessment problems more than offset any advantage to be derived from his personal intimate knowledge of local conditions. Indeed, it should be observed that when local assessment districts, even when well staffed for day-by-day operational purposes, undertake comprehensive reassessments, they usually employ outside professional appraisal firms.

While some assessment districts do have the will and the resources to maintain a professional staff, these represent a very small fraction of the 1800-odd Michigan assessment districts. By placing assessment districts on a county-wide basis in accordance with our first recommendation, it will be possible to use only professionally trained assessors who would be subject to the supervisory powers of the State Tax Commission. However, some degree of local control is probably desirable. County control over assessment personnel could be retained by having the power to appoint assessors lodged in the county boards of supervisors with the restriction that appointments be made from lists of individuals certified by the State Tax Commission. Further, no assessment district or state statute should impose prior residence or property ownership requirements for appointment to an assessing position.

It is not enough to require that qualified individuals alone be eligible for appointment to positions as assessors. All professional assessing personnel should be required by the State Tax Commission under its supervisory power to participate on a continuing basis in training programs maintained by the Commission.

Clearly costs – not only for professional personnel but also for supporting personnel, equipment, supplies, office space, record maintenance – would increase significantly under a county-wide assessment district program utilizing professional assessors and appraisers. It should be observed, however, that the present low cost of relying on township supervisors for the assessment process may be more apparent than real. The current modest monetary expenditure takes no account of the hidden costs of unsystematic and widely varying assessments with the consequent inequities as well as a failure to derive tax revenue justly due.

2.4 Taxpayer should be given actual notice of assessment change

State statutes doe not require assessors to send actual notice of assessment changes to taxpayers who are presumed to have constructive notice. Hence – except where assessors choose to give such notice or where such notice is required by local charter or ordinance – a taxpayer may have no actual notice of an assessment change until he receives his tax statement based thereon.

At the time the tax statement is received, however, the period during which an administrative appeal may be taken to challenge the assessment has elapsed. This fact, coupled with the finality rule, means that a taxpayer (in an assessment district where notice is not given) can protect himself only by routinely and annually inspecting the assessment roll to guard against any possible change.

Simple decency argues in favor of notifying each taxpayer of any change in his assessment, especially when it is realized that the taxpayer has a limited period to dispute the assessment before the local Board of Review – and that this protest is an absolute prerequisite to any further review of the challenged assessment.

Arguments against the giving of such notice, based on the clerical costs involved, are less effectual in the setting of county-wide assessment districts. Larger districts would make feasible the use of modern data processing techniques which would reduce clerical costs as well as the time needed to issue such notices.

2.5 The State Tax Commission should be empowered to conduct, or order to be conducted, reappraisals, expense to be charged to the county concerned.

It is entirely possible that the broad powers conferred by statute upon the State Tax Commission (see M.S.A. §§7.208, 7.210) would be construed as authorizing the State Tax Commission to exercise the above-described powers. However, the language of the statute does not specifically include such authority and the matter should not be left in doubt.

By providing a specific grant of power under the state statutes to the State Tax Commission empowering it to order reappraisals conducted by the county in question or on its own initiative to conduct such reappraisals, the deleterious effects of any effects of any dilatoriness on the part of the assessment district can be forestalled.

Such reappraisals could be either all-encompassing or selective, i.e., cover all the property in an assessment district or be limited to an individual class or classes of property.

Should it be decided by the Commission that it is undesirable to require that all property be reassessed at definite intervals, the express grant of the power to compel ad hoc reappraisals would do much to insure county-initiated periodic reassessments.

State statutes make no requirement that reappraisal take place at regular intervals. Hence it rests entirely upon the local municipality as to the frequency with which reappraisals are conducted.

It is by no means clear that a statute specifically requiring reappraisals at definite intervals would answer the admitted need for periodic reappraisals. Some properties, for example, probably should be reappraised more frequently than others.

It would seem desirable to explore in some depth what other states have done to insure an adequate frequency of property reappraisal and consider the formulation of a policy for Michigan. This study should be undertaken by the State Tax Commission. If a program of reappraisals at definite intervals proves to be feasible and desirable, requirements pertaining to its implementation should be prescribed by the Commission acting under its supervisory power.

3. Boards of Review

3.1 Summary of recommendations

The subtopic which follows deals with the following three recommendations pertaining to Boards of Review:

1. Local Boards of Review should be organized on a county-wide basis with the present structure replaced by a two-tier structure.

2. The first level of this two-tier structure should be lodged in the county assessor's office. Designed to dispose of the more readily adjustable grievances, it should be in session for a sufficiently long period and should ride circuit throughout the county to insure ready access thereto for all taxpayers. First-level appellant-taxpayers could appeal in person or in writing to the assessor. A written statement would not be a prerequisite for raising a question with the assessor. Whatever the assessor's decision, he would be required to give his reasons therefore either in person or in writing.

3. The second level of the two-tier structure would constitute the Board of Review proper, responsible for providing relief to taxpayers unable to achieve it at the first level. Qualifications for board of members would be fixed by the State Tax Commission with the members themselves appointed by the senior circuit judges from a list certified by the State Tax Commission. Board members should receive adequate compensation. There should be no requirement that a taxpayer's appearance before the Board of Review be complemented by a written document.

3.2 Reorganization of the county review system

Local Boards of Review, one for each assessment district, sit during the first two weeks in March. While readily accessible to taxpayers and with highly informal procedures, theirs level of competence leaves much to be desired.

In the main, these Boards of Review are staffed by individuals lacking the professional experience and competence to pass upon technical questions of valuation, whatever may be their general knowledge of local real estate values. All too frequently, the boards act as a rubber-stamp for the local assessor, understandably affecting public confidence. Many attorneys admit they bring disputed assessments before Boards of Review only because this step is a necessary prerequisite for an appeal to the State Tax Commission.

It is recommended that, in lieu of the present arrangement, there be substituted a two-tier county wide review system, the first tier to consist of the county assessor with the second tier being composed of a reorganized independent and professionally oriented Board of Review.

Substitution of this two-tier arrangement, with reviewers at both levels riding circuit and with taxpayers allowed to appear in person or in writing without any prerequisites as to written statements, would retain whatever desirable characteristics of accessibility and informality that exist at present.

Staffed by professionally qualified personnel, the system could provide a high caliber of review, whether for the easily adjustable problem handled in the assessor's office or the more complex problem laid before the independent Board of Review after having been unresolved to the taxpayer's satisfaction at the lower level.

Competence in Board-of-Review members can be insured by the establishment of suitable qualification requirements. These should be fixed by the State Tax Commission. Further, the Commission should prepare a list of those individuals certified as qualified. Actual appointment from that list of individuals to Boards of Review should be made by senior circuit _____ the board's independence.

4. State Tax Commission

4.1 Summary of recommendations

The subtopics which follows deals with the following three recommendations pertaining to the State Tax Commission:

1. The State Tax Commission should be reorganized to increase its supervisory powers over local assessment procedures. Specifically, these supervisory powers should include:

    a) Supervision of local assessment administration with full power to issue binding rules and regulations governing assessment procedures.

    b) Adjustments through the state-wide equalization program for differences in assessment levels among the state's local assessment districts.

    c) Maintenance of valuation research, focused on the development of better assessment standards, methods, and techniques.

2. The State Tax Commission should be relieved of its present case-by-case administrative review function at the state level, with this function being lodged in an independent, qualified appeal tribunal.

3. The State Tax Commission would continue to make the investigations and appraisals it carries on whenever a taxpayer lodges an administrative appeal, for it would have the responsibility for representing the state in taxpayer appeals before the newly proposed State Tax Tribunal.[1]

4.2 Reorganization of the State Tax Commission

[1] This tribunal would also have initial jurisdiction to review tax determinations made by any state agency shared with administration of any state-imposed tax.

The State Tax Commission has broad statutory powers over assessment practices. In actual fact, however, the Commission has exercised relatively few, its limited role in this area having been that of an advisor.

One factor which has hindered it in trying to achieve any semblance of state-wide uniform assessment practices has been the sheer number of assessment districts. Genuine control over the practices of 1800-odd assessors is difficult, if not impossible.

Further, the responsibilities of the State Tax Commission have not been limited to the establishment and supervision of assessment practices. It is the administrative tribunal to which lie case-by-case appeals from the 1800 local boards of review. Thus, instead of devoting its energy and time to the task of establishing maintaining effective control over assessment practices and of fulfilling other supervisory functions, the Commission has had to direct its attention primarily to the correction of individual situations. This obviously prejudices any chance for maintenance of uniform and equitable assessment practices.

The proposed consolidation of assessment districts and Boards of Review on a county-wide basis taken alone, would do much to facilitate more effective implementation of the broad statutory powers conferred upon the State Tax Commission.

Such consolidation, however, would not lessen the Commission's responsibility for hearing all appeals from the local Boards of Review. It is possible, of course, that more stringent qualifications for the members of such boards, with a consequent higher level of expertise, would decrease the number of appeals to the Commission. But even if this decrease did occur, it would not counteract the justified criticism which follows if the Commission simultaneously establishes the assessment practices, its personnel represent

the state in every appeal, and the Commission itself hands down the decisions in such appeals.

This obvious conflict of interest can be avoided by transferring the Commission's quasi-judicial functions to a separate independent tribunal. Moreover, the transfer would fulfill the indispensable purpose of enabling the Commission to concentrate most of its concern and energies on the establishment and maintenance of uniform and equitable assessment practices, while continuing to represent the state in hearings before the independent separate tribunal. This would not put it in the independent separate tribunal. This would not put it in the position of wearing simultaneously the two hats of advocate and judge.

Rather obviously, however, for the State Tax Commission to fulfill its potential as a coordinator and supervisor of assessment procedures, it first must be induced to act more affirmatively in this area than it has done heretofore. Hopefully, it would assume the responsibility for three major functions:

1. Supervision of local assessment administration with full power to issue rules and regulations binding local assessment bodies with respect to assessment practices and procedures. Specifically, the supervision should include:

    a) Giving advice.

    b) Interpreting the General Property Tax Act.

    c) Issuing rules and regulations.

    d) Providing various professional and technical services including the thorough checking of assessment performance by statistical studies and field investigation.

    e) Enforcing assessing standards.

    f) Establishment of qualifications for assessors and appraisers as well as for members of local Boards of Review; certification of candidates as to their fitness for employment on the basis of examinations given by

it or on the basis of examinations satisfactory to it but administered by a state or local personnel agency; removal from office, after a hearing, or any assessor where there is a showing of incompetence or neglect.

2. Adjustment through the state-wide equalization program, for differences in assessment levels among the state's local assessment districts.

3. Maintain valuation research, focused on the development of better assessment standards, methods, and _____.

5. Appeals from County Board-of-Review Decisions

The subtopics which follow describe the present appeal arrangements pertaining to county Board-of-Review decisions and deal with the following four recommended changes:

1. Responsibility for reviewing decisions handed down by the county-wide Boards of Review should be lodged in an independent appeal body, to be known as the State Tax Tribunal,[1] the State Tax Commission being relieved of its case-by-case administrative review function at the state level.

2. A taxpayer, receiving an adverse decision from the county-wide Board of Review, should have at least these two options available as to further review:

   (a) The opportunity to file an appeal with the State Tax Tribunal prior to actual payment, though subject to statutory interest and collection fee in the event of an adverse decision from the Tribunal.

   (b) The opportunity to make payment under protest and file a refund suit before the State Tax Tribunal.

3. In connection with the second of these two options (refund suit), if the tax is payable in installments, the taxpayer should be able to initiate such a suit though he has only paid and protested the first installment of the tax. Of course, if the Tribunal rules adversely to him, any overdue balance of the later installments would be subject to the regular statutory interest charges and collection fee.

4. Taxpayers with small property tax cases should be able to invoke the proposed jurisdiction of the State Tax Tribunal in an informal manner.

[1] This tribunal would also have initial jurisdiction to review tax determinations made by any state agency shared with administration of any state-imposed tax.

5. Finally, as explained more fully in Part D infra, decisions of the State Tax Tribunal itself would be appealable under the same restrictions applicable to the current State Tax Commission. In effect this is provided by Art. VI, §28 of the Constitution.

5.2 Present and proposed appeal arrangements

At the present time, within certain limitations, a taxpayer can achieve judicial review of a contested property tax assessment through at least two different routes.

The first, following payment of the tax under protest and the exhaustion of administrative remedies,[1] involves a refund action before the appropriate circuit court.[2]

The second, at least in certain cases, permits an appeal to be taken directly from the State Tax Commission to the Court of Appeals, apparently without need to pay in advance the tax contested,[3] though late payment of the tax presumably would lead to imposition of statutorily prescribed interest and collection fee.[4]

But whichever route be taken by the taxpayer, the State Tax Commission presently reaches a decision prior to the court, whether that court be the circuit court in a refund suit or the Court of Appeals on review of the Commission's determination.

The requirement that the Commission hear all appeals of property tax decisions handed down by local Boards of Review explains why the Commission spends approximately 75% of its time in this case-by-case review process. Its decisions, insofar as they involve valuation or allocation questions, are accorded a high degree of finality by the Michigan Constitution of 1963. Article VI, §28 provides in part:

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[1] See *Hack v. City of Detroit*, 322 Mich. 558, 567, 34 NW2d 66, 69 (1948) quoting from *Brown v. City of Grand Rapids*, 83 Mich. 101, 109, 47 NW 117 (1890) which cited *Comstock v. City of Grand Rapids*, 54 Mich. 641, 20 NW 623 (1884).
[2] General Property Tax Law, CL '48 §211.53, MSA §7.97.
[3] See *O.M. Scott & Sons Co. v. State Tax Commission*, 1 Mich. App. 184 (1965); *Pantlind Hotel Co. v. State Tax Commission*, 3 Mich. App. 170 (1966); *Lochmoor Club v. City of Grosse Pointe Woods*, 3 Mich. App. 524 (1966); *Liquid Carbonic Corporation v. State Tax Commission*, 4 Mich. App. 488 (1966).
[4] General Property Tax Law, CL '48, §211.89, MSA §7.144.

> "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation."

Subtopic 4.2 supra discusses the reasons why the Commission should be relieved of its case-by-case review of county Board-of-Review decisions and why these should be lodged in a separate tribunal which is free from the overall responsibility of administering the property tax. It is recommended that this case-by-case review be taken over by the proposed new State Tax Tribunal. In net effect, it would assume the adjudicative function both of the Commission and, in refund cases, of the circuit courts.

Such a shift would insure that tribunal the full-time workload which it would not otherwise have if it had jurisdiction only over appeals pertaining to state-imposed taxes. Because we propose in PART D also to give at the latter function and because a full-time well-compensated arrangement is essential to employment of able men, it should be the body which takes over the State Tax Commission's adjudicative function.

This combined jurisdiction over appeals pertaining to both property taxes and state-imposed taxes would generate a serious constitutional issue, however, if the tribunal were established as a true Tax Court.[1] This is because the previously quoted provision from the state constitution (Art. VI, §28) prohibits, as to property-tax valuation or allocation matters, "appeal … to any court from any final agency provided for the administration of property tax laws."[2] Thus, if the tribunal were made a true Tax Court, the county Board of Review would then be the final "agency" in the administrative

[1] Mich. Consti. Art. VI, §1 provides that the legislature may establish "courts of limited jurisdiction: but requires for such establishment a "two-thirds vote of the members elected to and serving in each house."
[2] Underlining added.

process and there is the real prospect that a county board's valuation and allocation decisions would not be appealable.

To avoid this risk, the proposed State Tax Tribunal should be constituted as a separate and independent administrative tribunal with appointed "judges."[1]

At the present time, a taxpayer appealing from a local Board of Review directly to the State Tax Commission is not required to make prior payment. This opportunity to appeal without payment, though in the future to the State Tax Tribunal should be retained. This is because this aspect of the present arrangement is fair, has worked satisfactorily, and since it elsewhere is proposed – as to state imposed taxes – to continue the present opportunity to sue prior to payment, it seems reasonable to continue it for property tax appeals. However, if the tax falls due before or during an appeal to the State Tax Tribunal, a taxpayer can avoid the statutory interest and collection fee by, and only by, making a timely payment under protest.

The clearly stated opportunity to appeal to the State Tax Tribunal either before or after payment will avoid the confusion which emerged from a timing problem heretofore encountered when taxpayers chose to contest adverse Board-of-Review decisions. Under current procedures, although a taxpayer files a timely appeal to the Commission, there is no assurance a decision will be reached by the Commission prior to the date the tax becomes due. And if the taxpayer pays before the Commission has resolved the matter, he must within 30 days file suit for refund before a circuit court. In short, he may have to file the suit before the administrative remedy has been exhausted – and consequently open the door for the defending municipality to argue non-exhaustion of administrative remedies.

[1] See Part D infra for the reasons why appointment rather than election is desirable.

5.3 Retention of informal procedures in small cases

As discussed in detail in Part D infra, taxpayers with small property tax refund suits, like taxpayers involved with other types of small tax cases, would have the option of utilizing the circuit riding Small Claims Division of the proposed State Tax Tribunal. Informal procedures would be utilized there with the taxpayer free to represent himself or choose any type of representative.

PART C

PROCEDURES PERTAINING TO SPECIFIC TAXES AND RECOMMENDED CHANGES: ADMINISTRATIVE LEVEL

1. Introductory Note

Proposed changes in existing administrative procedures pertaining to specific taxes fall in four main areas:

i) Administrative settlement: the preferred ultimate method of resolving tax disputes;

ii) Field auditor's role in the resolution of disputes;

iii) Regulation program; and

iv) Rulings program.

Each of these subjects is separate considered below. While discussion of these four topics in the context of the state's specific taxes literally focuses only on the Department of Revenue, it is contemplated that other agencies administering state imposed taxes would adapt the proposals, insofar as relevant, to their own situations. Illustrative of this would be the Corporation and Securities Commission which administers the corporation franchise tax.

2. Administrative Settlement: The Preferred Ultimate Method of Resolving Tax Disputes

An agency administering a state imposed tax can choose between two ultimate methods in resolving a tax dispute: administrative "settlement" or litigation.

For the reasons subsequently set forth, the Advisory Board recommends that:

_____ where a case has real precedent value, _____

MISSING INFO

1.

departments administering state imposed taxes should openly follow a

positive policy of "settling" debatable issues on the basis of mutual concessions responsive to the litigation hazards, in much the same manner as that presently pursued by the Appellate Division of the Internal Revenue Service. Mere nuisance values, of course, must be disregarded both by government and taxpayers.

2. In the case of the Department of Revenue, the settlement conferee should be independent of the Deputy Commissioner in charge of enforcing a particular tax and, thus, also independent of field personnel (if any) who proposed the deficiencies. In short, the conferee should receive his delegation of authority from, and be responsible in the chain of command directly to, the Commissioner.

3. Even if the conferee encounters a truly debatable issue of the type which a court, to conform to the statute, would have to decide entirely for either the taxpayer or the Department of Revenue (hereafter referred to as an "all-yes-or-all-no" issue), it is proper, if the case has no real precedent value, for the conferee to agree to an amount deemed by him, on the basis of mutual concessions, to be truly responsive to the litigation hazards. However, in this particular type of case, the conferee must request an informal written opinion on the proposed settlement from the related office of the Attorney General. If an unfavorable opinion results, the head of the tax agency can either (a) specifically authorize the conferee to settle on the terms proposed initially by the conferee or (b) request that the difference of view between the conferee and the related office of the Attorney General (in practice, the assistant Attorney General) be referred to him for resolution.

4. The current somewhat ambiguous legislative prohibition against settlement (§205.6d CL '48, §7.657(6a) MSA) should be repealed. No effort should be made to secure an absolute legislative endorsement of settlement. It would be superfluous for the state Attorney General has ruled that there is a common law right of settlement rendering any legislative endorsement unnecessary.

This latter specific Michigan statute (§205.6a CL '48, §7.657(6a) MSA) dealing with settlements may tend to prevent the Department of Revenue from acquainting the public with the fact that settlement of the types described above do occur even now. While the provision's language might lead to the conclusion that it prohibits settlement, the Department has construed it otherwise with respect to any point in time prior to actual assessment. Consequently, a double standard may well exist. The public at large

(including many general practitioners) is probably unaware of the possibility of tax-dispute "settlements", though such possibility is well known to experienced practitioners who utilize it.

Since the Attorney General has ruled that a common law right of settlement exists, no express statutory grant of such power would be necessary to authorize the Department of Revenue to continue its utilization of the settlement route. However, the section of the statute ostensibly prohibiting settlement should be repealed.

A number of compelling reasons exist for continuance of the Department's existing settlement policy. They may be summarized as follows:

1. Settlement protects the taxpayer's privacy.

2. Settlement leads to efficiencies not present in litigation.

   (a) The additional delay associated with litigation is eliminated, thereby reducing the period of uncertainty and facilitating collection.

   (b) Both sides avoid the additional work and personnel demands required by litigation. This is far more important in the state setting than at the national level if only because, at lease in absolute terms, state rates are low. In consequence, litigation costs are relatively high compared with the amount of tax in issue.

   (c) Overall state costs for court work are reduced.

3. Even as to arguable or close all-yes-or-all-no issues (the "correct" answers to which are open to doubt) the results that can be reached by settlement are <u>equitable</u> in the same sense as are those results which may be reached in the quire different setting of the comparative negligence doctrine. Indeed, where only a relatively small amount of tax is in dispute, it is extremely <u>inequitable</u> for the state to refuse to settle on the basis of mutual concessions responsive to the litigation hazards. In this circumstance, the taxpayers cannot afford to test the matter before an independent tribunal and, thus, is forced to forfeit his otherwise valuable chance to prevail if the matter could only have been litigated.

4. Settlements even of close all-yes-or-all-no issues are in fact <u>responsive to law</u> if based on the litigation hazards, for as of any moment in time prior

to actual litigation, the "correct" answer necessarily is one which accommodates the competing chances under law of both sides.

5. Again with respect to close all-yes-or-all-no issues, through settlements more actual uniformity can be achieved among taxpayers affected by such disputes than would be achieved if administrators tried to resolve such issues only in the manner of a judge. Some such taxpayers would get "completely off the hook," while others, at least at the administrative level, would be stuck for the entire amount. Yet, by hypothesis, i.e., because both questions were deemed to be close, there actually is doubt that the truly "correct" answer was reached in either case.

Despite the proposed reliance on settlement as the primary means of disposing of doubtful or debatable cases, the Department always can and should refuse to settle any "guinea pig" case, i.e., a case it believes, if resolved by the proposed independent State Tax Tribunal[1] with subsequent publication of the decision, would constitute a needed precedent in clarifying the law in that area. The Department also remains free to deny settlement in any dispute where the conferee concludes objectively that the taxpayer's offer is not properly responsive to the existing litigation hazards.

A check on the conferee is indicated in those situations where he proposes, by reference to the litigation hazards, to compromise the type of close issue which, if litigated, a court – to conform to the statute – would have to decide entirely for one side or the other. The proposed settlement upon acceptance by the taxpayer should be referred to the legal staff, i.e., to the related office of the Attorney General, for its informal written opinion. In the event that office of the Attorney General renders an unfavorable opinion as to the proposed settlement, the difference of opinion would go directly to the Commissioner himself. The Commissioner then could decide whether to delegate power to the conferee to complete the settlement as initially proposed or whether

[1] See Part D, infra.

he would instruct the conferee and the related office of the Attorney General to refer the matter to him for his own decision.

The taxpayer himself suffers no disadvantage from the settlement-preference policy. Although the precedent-making type of case will be litigated, in all other disputes the taxpayer has an election, that is, he has the alternative of settling by reference to the litigation hazards or of forcing litigation if he feels that the Department is not truly just. Further, the taxpayer will be dealing with a conferee who is independent of the deputy commissioner who is directly responsible for enforcing a particular tax. This independence is achieved by having the conferee receive his delegation of authority directly from the Commissioner himself. Further, as to all-yes-or-all-no issues, the taxpayer would know that if the conferee accepted the taxpayer's offer, the review would not be by the Deputy Commissioner who has the enforcement responsibility but rather would be by an individual from another agency – the related office of the Attorney General.

3. Field Auditor's Role in the Conflict Resolution Process

If all taxpayers are to be assured a reasonable chance to have their disputes resolved in a uniform manner, great care must be taken in defining the particular role of field personnel in the overall conflict resolution process and in education field personnel regarding the practical meaning of that role. The field manual, presently supplied to field personnel, does not accomplish either.

As a practical matter, persons of the type who can be employed as field auditors will not have the training essential to wise exercise of the type of total settlement authority heretofore proposed for higher echelon personnel characterized as conferees.

Illustratively, in the case of close all-yes-or-all-no questions, the requisite talent includes the ability to measure, in the manner of a lawyer, the total litigation hazards. Since field auditors cannot be expected to have that talent, true settlement authority in that type of close case ordinarily must be reserved to higher level conferees. But if a field auditor encounters what he believes to be such a case, what role is he to perform? If he actually and objectively believes the correct answer is open to substantial doubt but knows that he at least lacks true settlement authority, should he then try to persuade the taxpayer to agree to a deficiency equal to the entire amount? Clearly the answer is no. It hardly would be ethical for him to do this when he in fact objectively believes the question is of the type which a higher level conferee might be willing to "settle." Alternatively, should he concede outright what he at least believes is a close all-yes-or-all-no issue? Again, ordinarily the answer clearly is no. If the field auditor lacks the talent to "settle" such cases widely, even more clearly he lacks the more demanding talent required to decide such close questions in the refined manner of a true "judge" who must decide on balance which side has the slightly stronger case.

In the end, the overall system of resolving close questions at the administrative level will make sense on if, in the above situations, the field auditor is instructed to be open and above board. In short, he should explain to the taxpayer that (i) he (the auditor) at least believes (while simultaneously acknowledging as to this that he may be wrong,) the issue is open to substantial doubt, (ii) precisely because of this, his role is simply to set up a deficiency primarily to the end of enabling the taxpayer, as a jurisdictional matter, to discuss the matter with a higher level conferee who does have jurisdiction of such issues, and (iii) if the conferee also concludes the question actually is open to

substantial doubt, the conferee does have authority – subject to one internal review – to compromise that particular issue. Further, the auditor should explain the procedure by which the taxpayer gets the issue to the conferee, adding that the latter does, for the sake of taxpayer convenience in non-metropolitan areas, "ride circuit."

The one exception to the foregoing overall arrangement relates to those close all-yes-or-all-no cases which involve only a very small dollar amount of possible tax. While the field auditor actually lacks the talent required properly to predict the "correct" answer to close or substantially doubtful all-yes-or-all-no questions, it also is true that taxpayers concerned with such very small cases hardly can afford to take the time even to carry the case to the higher echelon conferee. In effect then, because of these two competing considerations, there actually is no truly satisfactory way of dealing with such matters. Government, however, has a peculiar responsibility, namely, to bend over backwards to be fair. And this suggests, in our very small arguable all-yes-or-all-no case, that the field auditor should be instructed to concede such issues outright if, viewing the matter objectively, he concludes on balance that the taxpayer has the slightly stronger side of the argument. The Department itself should establish a monetary ceiling on the so-called "very small cases" it will deem to be within this category.

Finally, the auditor's role should differ from the above overall arrangement when he deals with the opposite type of truly arguable issue, namely, one which a court – to conform to the statute – would not have to decide entirely for one side or the other. Illustrative is the typical valuation case which inherently is disputable. In this type of case, the auditor must have as much authority as anyone else. In short, as to these, the

auditor should be instructed to resolve the matter in a completely objective impartial manner.

Experience at the federal level demonstrates that not all auditors, absent careful instructions, will be able to recognize the difference between the two basically different types of disputes, i.e., between issues of the type which a court, to conform to the statue, would have to decide entirely for one side or the other, and other issues which the court itself might split – as in a valuation dispute. The prime problem here tends to be the tendency of the untrained auditor to telescope into one issue what actually are several distinct issues. And though each of the latter actually may be separate all-yes-or-all-no issues, the auditor upon aggregating them – views the aggregate as one issue of the type over which he has as much authority as anyone else. In short, he may think he is authorized to arrive at an overall adjustment by trading, subtly or openly what he might call one close part of the issue for another cost part. But in our illustration, he actually would be compromising each distinctive all-yes-or-all-no issue exactly to the same degree as he would if, instead, he had accepted, say, 50 cents on the dollar with respect to each such issue. Since, for reasons previously state, he should not be authorized to do the latter, he obviously should not be authorized to do the former. And equally important, he must be given some relevant instruction to the end that he will be able to recognize, in a sophisticated manner, the difference between the two categories of cases which should serve to distinguish his two types of authority.

Finally, in the second category of cases, just as in the first, the auditor, on failing to achieve agreement, should explain to the taxpayer the precise procedure to be followed in carrying a dispute to the conference level.

4. Regulations Program

4.1 Introductory Note

At the present time, the Department of Revenue issues regulations which, excluding those dealing with the sales and the use taxes, do little more than paraphrase the language of the statute. Again excluding sales and use tax regulations, those which are issued are not issued on a systematic basis, that is, the Department makes no pretense of having a coordinated set of regulations pertaining to all the substantive provisions it administers.

The availability of regulations which sought to deal in a coordinated manner with more or less all the troublesome substantive provisions and with the procedures to be followed by taxpayers and the Department in the settlement of tax disputes would have certain definite advantages. In terms of hierarchical control, the Department's own auditors and conferees would have a definite guide to follow, this producing at least more administrative uniformity. Taxpayers and practitioners of all types also would benefit from knowledge of all procedural arrangements and from knowledge of interpretative positions the Department plans to take. In short the fact that the Supreme Court of Michigan presently does not seem to accord any substantial special weight to regulations promulgated by the Department is not a sufficient reason for the Department's failure to set certain goals for its regulations program and to systematically strive for their implementation.

Where, however, a particular state statutory provision has such a relationship with a federal tax statute as to render regulations issued under the federal statute equally applicable to the state provision, no justification exists for the state Department of

Revenue to issue its own regulation. Far wiser – and more economical – for the Department to recognize that, where a federal regulation would be equally applicable under a state statute, the federal regulation will be respected.

To achieve a regulations program which will meet the needs of department personnel and taxpayers alike, departmental recognition of certain goals is essential. In summary, these are:

1. Complex statutory language should be reduced to lay terms.

2. The Department of Revenue's position on anticipated issues should be identified.

3. The existence of doubt on a matter constitutes a reason why the Department should identify its position, not a reason for not identifying its position.

To implement these goals, the process whereby the Department issues its regulations should be altered. The proposed changes are summarized as follows:

1. Regulations should be drafted by the related office of the Attorney General in consultation with the Commissioner's office.

2. Once drafted, the proposed regulations should be reviewed and approved by the Commissioner of Revenue.

3. After such approval, public hearings on the proposed regulations should be held with adequate notice given to interested parties.

4.2. Goals of the departmental regulations program

While reliance on federal regulations where equally applicable under state statutes will eliminate the necessity for departmental preparation of regulations pertaining to many state tax provisions, the Department should realize that, with the exception of regulations bearing on the sales and use taxes, a wholesale revision of existing regulations is otherwise highly desirable. Given the existing personnel limitations, however, a wholesale revision may be temporarily impossible. This should not preclude

the Department from setting clearly defined long range goals for the regulations program and from contemplating an ultimate revision of whatever outstanding regulations fall short of these goals.

In carrying out that goal, an attempt should be made to reduce complex statutory language into lay terms. But often times a mere paraphrase of the statute itself is not enough. While some tax provisions leave little room for doubt and, thus, require little, if any, interpretation, a serious effort should be made to anticipate the more frequently recurring troublesome questions and to reflect the Department's interpretative position as to these in its regulations.

In other words,[1] the existence of some doubt on the part of the Department with respect to such matters should itself constitute a reason fro the Department to identify its position in a published regulation. But after a new basic set of regulations are issued, positions taken thereafter on subsequently arising important questions of general interest ordinarily should be published, not as amendments to the regulations, but rather in the form of revenue rulings as is explained more fully in Section 6, infra, of this Part.

4.3 Issuance of regulations

At the present time, regulations are prepared by Department of Revenue draftsmen. The department itself recognizes that, because these men are not legally trained, their effort tends to result in a little more than a rephrasing of the statutory language. After drafting, the proposed regulation goes to the Legislative Service Bureau

[1] At the moment, madumus to have a question laid before the courts is limited to situations involving an actual case or controversy. It could, of course, be argued that the proposed State Tax Tribunal is not a "court" and hence could be granted properly the power to hear a mandamus action and thus force the tribunal to determine the proper position for the Department recommending such a grant of power. At the very least, it would raise too many issues and produce too much controversy over a relatively minor matter.

which examines it and returns it to the Department with any corrections it considers desirable.

After the Bureau has returned the proposed regulation to the Department, it receives its first scrutiny by a legally trained mind when it is sent to the office of the Assistant Attorney General responsible for taxes.

The isolation of the regulation drafting process from legal expertise – however inadvertent such isolation may be – includes the non-notification of the Assistant Attorney General responsible for taxes when the public hearings (required by statute for all other regulations)[1] are held. Indeed, neither the State Bar itself nor tax practitioners individually receive notification of such hearings. The only notifications sent out by the Department of Revenue go to those business organizations which the Department believes will be directly affected by the proposed regulation.

Our proposals for changes in the whole process envisage that the Assistant Attorney General who works with the Department will be brought into the drafting process from the beginning, but with the Commissioner of Revenue retaining the ultimate final authority.

The Department should identify those areas of the statute where it believes regulations are needed and should inform the Assistant Attorney General of those areas. The Assistant Attorney General thereupon should draft the needed regulations after making an earnest effort to identify what likely will be the more frequently recurring troublesome questions. While experience at the federal level demonstrates that legally trained minds, skilled in the interpretative process, can do the most effective job of

[1] While the Department of Revenue is excluded specifically from the operation of the Administrative Procedure Act, in fact it compiled with the notice requirements set out in such act.

identifying probable troublesome spots, timely consultation with administrative personnel also can be of great value here. When the Assistant Attorney General's draftsmen have completed their work, the regulations as drafted should be submitted to the Commissioner of Revenue with the Commissioner possessing full power to change any interpretative position taken by the Assistant Attorney General. After all, it is the Commissioner who has the responsibility to issue regulations, not the Assistant Attorney General.

Assuming that the Commissioner's approval is given, whether immediately upon receipt of the proposed regulations or after conferences to resolve any differences between the Assistant Attorney General and the Commissioner, the proposed regulations should be the subject of public hearings.

Assuming that the Commissioner's approval is given, whether immediately upon receipt of the proposed regulations or after conferences to resolve any differences between the Assistant Attorney General and the Commissioner, the proposed regulations should be the subject of public hearings.

The prime value of these is to help educate the draftsmen and, through them, the person ultimately responsible. Public hearings can, and federal experience shows they often do, present aspects of an interpretative problem which administrators in perfect good faith have overlooked. Complexities heretofore ignored not infrequently will emerge. Modification may be indicated.

While so-called public hearings have been held heretofore, the fact that those participants who theoretically represent the public have been limited to those invited by the department itself nullifies any genuine public character.

Hence it is believe that at the very least the Commissioner of Revenue should give notice of public hearings not only to the trade associations (as he does at present) but in addition to associations composed of practitioners, such as the Tax Section of the State Bar of Michigan, and counter-part organizations composed of accountants. Such organizations would be responsible for informing interested members.

5. Proposed Letter Rulings Program

5.1 Rationale

Where uncertainty over tax consequences causes legitimate prospective transactions to be delayed or abandoned, all concerned suffer: individual taxpayers directly and the state as a whole indirectly. The reputation of the taxing agency itself is damaged. That agency will be held responsible, not only for the consequent delay or abandonment of transactions but for subsequent complaints from a taxpayer who, if he consummates the transaction, thereafter finds he must litigate the tax question to defend the statutory interpretation upon which he proceeded and which the taxing agency afterwards claims was incorrect. Where uncertainty as to tax consequences surrounds a prospective transaction supported by legitimate business purposes, this uncertainty is not created by the individual taxpayer but by the tax system as a whole – the statutes imposing the tax. Consequently, where feasible, the taxing system itself should assume the cost of neutralizing that uncertainty through some sort of advance ruling, issued by the central office, rather than by local auditors, in the interest of greater uniformity and consistency. In general, taxpayers would rely on these.

In addition to benefits derived by the individual taxpayer who seeks an advance ruling to resolve uncertainty, the taxing agency itself secures the benefit of being alerted

immediately to new interpretative problems as they arise. It obtains thereby the added opportunity to develop its position for subsequent publication to the benefit, in turn, of its own field personnel as well as of other taxpayers, thereby facilitating uniformity. Ideally, of course, field personnel should initiate many of the issues raised by taxpayer inquiries. As a practical matter, however, taxpayer self-interest will generate far more inquires.[1]

In contract, oral responses by the Department to substantive inquiries have four major shortcomings:

1. The swiftness attendant on oral responses to oral inquiries makes it impossible to give thoughtful consideration to complex or novel issues.

2. The likelihood that no careful records will be maintained setting out oral responses given to complex or novel questions means there can be no departmental assurance that a different member of the Department would give the same answer to a second similar inquiry by another taxpayer.

3. There is no programmatic assurance that the taxpayer can rely on the advice given in such an oral response.

4. The absence of any records means that the oral responses cannot act as a "feeder" to a program of publishing positions on interpretative issues taken by the Department.

The cumulative effect of these reasons leads us to propose that the oral responses program exclude all complex or novel questions and be limited to the following three categories:

1. Procedural matters.[2]

2. Substantive problems where the statutory answer is clear.

3. Substantive problems where the Department has a well-established interpretative position applicable to the facts involved.

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[1] Paraphrased from Wright, Comparative Conflict Resolution Procedures in Taxation 43 (1968).

[2] Department of Revenue personnel state that the great majority of all oral inquiries fall in this category. Taxpayers want to know the date a particular return is due, what form is to be used, where a return is to be _____.

Where a taxpayer makes an oral inquiry falling outside the proper scope of an oral response, departmental personnel, while declining to answer the inquiry, should make every effort to clarify for him the procedures to be followed in securing an advance letter ruling.

5.2 Limitations on issuance of letter rulings

The proposed availability of advance letter rulings on contemplated legitimate business transactions does not mean that the Lansing Office of the Department should stand ready to answer automatically inquiries relative to the tax consequences arising from every proposed transaction. Certain areas merit exclusion.

First, the area within which advance letter rulings will be issued should be confined to questions of law. Questions of fact should be excluded. As to these, the credibility of witnesses often determines the weight accorded much of the evidence. The Lansing office would have to make its determination on the basis of a cold record, with field personnel conducting an examination and certifying that the record contained all the evidence together with its own finding regarding credibility. Then, after the taxpayer filed his return covering the affected transaction, field personnel would have to make a second examination to insure that neither evidence nor facts had changed prior to the completion of the transaction in question.

By confining advance rulings to questions of law, this wasteful duplication can be avoided. Comparably to federal practice, it is proposed in 5.3 infra, that any taxpayer requesting advance letter rulings be responsible for submission of a written statement setting out all relevant facts, including copies of all documents to be executed when the transaction itself takes place. Only after the ruling has been issued, the transaction

consummated, and the return filed, need field personnel ascertain whether the actual facts correspond to those previously submitted to the taxpayer. If they correspond, no legal analysis of the problem need be made by field personnel. That was done before the ruling was issued. By dividing labor between two echelons, all duplication of effort has been prevented.[1]

Second, no advance letter rulings should be issued on proposed transactions deemed lacking in business purpose.

> The proscription regarding transactions lacking in business purpose will not be easy to administer, however. Only at the extremes is it easy to distinguish between proposed transactions which are motivated solely by tax considerations – and hence should fall in the no-ruling area – and others which would have a legitimate purpose in the absence of the tax law but are shaped to take advantage of the less costly of the two or more different tax routes. Though the line between these two categories becomes less discernible as transactions move toward the center, an attempt to distinguish between them must be made, for ordinarily those falling in the second category should be granted advance rulings. Not to rule on transactions falling within the latter category would leave those responsible only for administration of a tax law open to a proper charge that, having established a rulings program, they not have transcended their administrative function. That is, by discriminating through refusal to rule, they presently hope, in terms of practical effect, either to regulate the shape of, or to deny a benefit accorded by the tax law to, transactions which would have been purposeful had the tax law not existed. Of course, the responsibility of a mere administrator to rule in this circumstance can be modified with perfect propriety by the legislature itself. For example, it may be implicit in a given statutory provision that the legislature specifically intended to use a loosely woven statutory standard (oftentimes subjective in character as an en terrorem weapon to police the integrity, and hopefully in practice to fence in the range, of a given tax idea. An advance ruling in this circumstance obviously would frustrate the legislative intention.[2]

Third, no advance ruling should be issued upon any matter upon which a court decision adverse to the state has been handed down and the Department of Revenue has not as yet determined whether it will follow the decision or will litigate further.

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[1] Paraphrased from Wright, Comparative Conflict Resolution Procedures in Taxation 54-55 (1968).
[2] Id..

Fourth, no advance letter ruling should be issued on any matter involving the prospective application of the inheritance tax to the property or the estate of a living person. The very real possibility of statutory change or decisional shift before the taxpayer actually dies, with the complimentary possibility that the department's efforts would have been wasted, makes it unwise for the Commissioner of Revenue to allocate any of his always limited personnel resources for this, possibly fruitless, purpose.

Fifth, for the reasons stated in Section 7 infra, no advance letter ruling should be issued where the federal Internal Revenue Service has issued one, equally relevant under state statutes, to the same taxpayer covering the same proposed transaction.

5.3 Procedure to obtain letter ruling

A taxpayer who seeks an advance private letter ruling upon a proposed transaction should send his written request for such ruling to the Lansing office of the Department of Revenue. The request must

1. Contain a complete statement of all relevant facts relating to the transaction. Such facts include

   (a) Names, addresses and taxpayer identifying numbers of all interested parties;

   (b) A full and precise statement of the business reasons for the transaction;

   (c) A carefully detailed description of the transaction.

2. Be accompanied by true copies of all documents involved in the transaction. Relevant facts reflected in such documents must be

   (a) Included in taxpayer's statement and not merely incorporated by reference; and

   (b) Accompanied by an analysis of their bearing on the issue or issues, specifying the pertinent provisions.

3. Contain a statement whether, to the best of the taxpayer's knowledge, the identical issue is being considered by any field auditor in connection with a tax return already filed.

4. State whether the taxpayer has requested, intends to request, or has secured a federal private letter ruling covering the same proposed transaction.

If the taxpayer is contending for a particular determination, he must furnish an explanation of the grounds for his contentions, together with a statement of relevant authorities, if any, in support of his views.

A specific request for an oral conference must be made at the time the letter ruling is requested. It should, however, be understood that, in the event the Department of Revenue intend to act favorably upon the taxpayer's request for a letter ruling, no oral conference will be held. Should the Department tentatively conclude that the request for a letter ruling will be denied in whole or in part, the taxpayer will be accorded such an oral conference. By enabling the taxpayer who requests an advance letter ruling on a proposed transaction to secure an oral conference only at the point departmental personnel tentatively conclude that the ruling as a requested might be unfavorable, the taxpayer has the opportunity to discuss and respond to the actual precise concerns of the Department.

Once the Department has reached its conclusions upon the taxpayer's request for a letter ruling and the letter ruling itself has been drafted, that letter ruling should be scrutinized to determine if it is of sufficient general interest, that is, is likely to possess sufficient precedent value, to warrant its eventual publication as a revenue ruling. If the letter ruling is considered to have the necessary degree of general interest, it should be sent to the legal staff for its comments prior to issuance, as is explained in more detail in Section 8 infra.

6. Published Revenue Rulings

6.1 Rationale

Publication as revenue rulings of letter rulings that possess general interest (that is, have some precedent value) is necessary if the Department of Revenue is to achieve three important ends:

1. Speedy access by all taxpayers and field personnel to interpretative positions taken by the Department, thus facilitating uniformity.

2. Prevention of reliance by field personnel on secret intra-departmental memoranda establishing departmental interpretative positions, such intra-departmental memoranda being unavailable to taxpayers.

3. Exertion of subtle pressure upon those departmental draftsmen responsible for preparing letter rulings; knowledge that ultimate publication is possible tends to nudge such individuals to take greater care in issue letter rulings.

Some might urge an alternative route. Since the Department has a program for publishing regulations, why not expend the scope of regulations and amend them as need be to take account of any new departmental positions on interpretative issues? Why should the Department have two devices for publicizing its views? Would not a single device more effectively serve both taxpayers and departmental personnel?

Two prime reasons exist justifying the use of both regulations and published revenue rulings and why amendments to existing regulations should not be relied upon by the Department to communicate its position on newly developing issues.

First, the Department ought not to give its newly adopted positions the somewhat more important status courts might accord regulations. In effect, revenue rulings would simply represent early announcement of the Department's litigating position.

Second, marked and significant differences between regulations and revenue rulings are such that the Department needs to have a published rulings program as well as

an effective regulations program. In terms of coverage, a published ruling is directly responsive only to the significant facts stated in the ruling. While it may have the effect of a junior regulation upon departmental personnel, its structure, the mental processes by which it was developed and by which it will be applied, and its scope make it, except as to effect, much more closely akin to a very abbreviated judicial opinion. On the federal level, senior officials associated with the published rulings program have recognized that no two cases are precisely similar and that in consequence field agents and taxpayers both will tend in practice to follow the judicial method of analogizing from a published ruling to circumstances which in some degree vary from it, hopefully within proper limits. Be that as it may, the peculiar genius of a published rulings program corresponds to that of the common law itself. By publishing all the really relevant facts of a case, the Department will be able to identify more precisely the particular terrain it is prepared to cover at that particular time, with more sweeping lines covering yet unworked factual terrain to be ". . . pricked out by the gradual approach . . ."[1] in later published rulings. If the common law system itself proves anything, it is that ultimate meaning often is best ". . . satisfied not by a futile attempt at abstract definition but by pricking a line through concrete application."[2] On the other hand, again using very general terms, regulations – especially those drafted at the time a statute is enacted – have a different though equally vital function. In part this is because their development, style, and method of application correspond far more closely to that of the codes or statutes to which they relate than that characteristic of judicial opinion. In contrast to the above, typically a regulation states general principles, to be applied thereafter both by field forces and taxpayers through

[1] Holmes, J. in Noble State Bank v. Haskell, 219 U.S. 104, 100 (1911)
[2] Frankfurter, J. in Bazley v. Commissioner, 331 U.S. 737, 741 (1947)

deductive reasoning rather than through the analogical approach associated with the judicial method.[1]

It should be departmental policy, after deleting identifying characteristics, to convert into meaningful published rulings all letter rulings which are of general interest, that is, are likely to possess some precedent value. Any such letter ruling falling in that category should be submitted, prior to issuance, to the legal staff for its comments, for reasons explained in Section 8 infra.

Once that letter ruling is issued, and the published version is then drafted, there should be an opportunity for the public to examine and comment upon the revenue ruling as proposed by the Department before such revenue ruling becomes the official state-wide position of the Department.

To this end, whenever the Department issues a revenue ruling, it would have a "tentative" status for a given number of days, say 80. Within the first say 60 days of this period, any taxpayer would be free to submit a brief on the revenue ruling as proposed. If by the end of the 80-day period, the Department had not modified the revenue ruling as originally issued, it would lose its "tentative" character and become an official revenue ruling.

Two purposes would be served by permitting taxpayers to submit their views on proposed revenue rulings. First, the public's diversity equips it uniquely to focus the Department's attention on unanticipated situations affected, though unintentionally so, by the particular choice of words used by departmental personnel in the ruling. Second, since the revenue ruling upon publication at least binds departmental personnel, it is only

[1] Paraphrased from Wright, Toward More Enlightened Administrative Procedures in the Federal Tax Area 4-125 – 4-127 (MS).

fair that, before its final adoption, the affected public be given an opportunity to submit its written views. Remember, in this connection that, as to a letter ruling, the effected taxpayer would have an opportunity to present his views before being adversely affected. Further, in the regulations program, provision also was made for a public hearing. Also, in the event of a dispute between a taxpayer and an auditor, conference becomes available. Thus, to be consistent, and also in the interest of both the Department and taxpayers, the public should be given an opportunity to express, if only in writing, its opinions regarding published rulings before they are finalized.[1]

7. Role of Federal Rulings on State Tax Questions

7.1 Federal private letter rulings

Where the federal and state statutory patterns coincide, senseless and costly duplication of effort would result if the state Department of Revenue took the time to resolve de novo, issues affecting a given proposed transaction as to which the feral Internal Revenue Service has issued a letter ruling to the same taxpayer. Far wiser, in the interests of uniformity and economy, for the Department to declare in its procedural regulations that, in this circumstance, it will follow the federal letter ruling. Such a policy also fulfills the legislature's basic purpose when it uses statutory language conforming to the federal pattern.

In keeping with the foregoing and as indicated in 5.3 supra, any taxpayer who requests an advance letter ruling from the Department of Revenue should be required to state whether he has requested, intends to request, or has secured a federal letter ruling covering the same contemplated transaction. If the taxpayer responds in the affirmative, and if the statutory patterns coincide, he should be informed that the Department will not

[1] Paraphrased from Wright, Comparative Conflict Resolution Procedures in Taxation 65-66 (1968).

issue its won letter ruling, that instead it will follow the federal letter ruling, and that he need only attach to his return a copy of the federal letter ruling.

7.2 Federal published revenue rulings

The preceding subsection sets out our proposal regarding the relationships between the federal and state advance letter rulings program. Set out in 4.1 supra, is our complimentary proposal regarding the relationship between federal and state regulations programs. We further propose that when the federal Internal Revenue Service publishes a federal revenue ruling which would be equally relevant under state statutes, such ruling be declared in procedural regulations to have the same status for Michigan taxpayers and for Department of Revenue personnel as it does for federal taxpayers and for Internal Revenue Service personnel. To provide otherwise would lead to wasteful and costly duplication of effort. Further, no republication of federal revenue rulings as departmental revenue rulings would be necessary. The widespread availability of the former renders such double publication unnecessary and unwarranted.

8. Role of the Legal Staff in the Rulings Program

Essentially, every published ruling constitutes a declaration of the litigating position of the issuing taxing agency with respect to a specified set of facts. Hence the legal staff, i.e., those responsible for that agency's litigation, need to examine from the vantage point of their peculiar training and skills all such statements of litigation position prior to publication.

To this end, we propose that the Commissioner of Revenue direct the draftsmen responsible for the preparation of letter rulings that, on encountering a letter-ruling situation of possible general interest (i.e., possessing some precedent value), he is to

assume that this letter ruling is at least a candidate for subsequent publication and is to consult with the legal staff before the letter ruling is issued to the requesting taxpayer.

At that early date the legal staff can indicate whether it believes the proposed letter ruling sets out a defensible litigating position, taking into account the totality of the Department's litigation policy.

Such pre-issuance consultation would do much to reduce the possibility of having "second thoughts," as to the position then taken, at that later point when the legal staff is asked to consider the tentative draft of the ensuing published version.

In both cases, however, after considering the views of the legal staff, the Commissioner himself (or his delegate) must make the final choice of positions provided only the legal staff concurs in saying it is a defensible litigation position.

9. Technical Advice Program

9.1 Rationale

There is general agreement that the present willingness of the Department of Revenue to respond, through channels, to requests by field auditors for technical advice on interpretative legal issues, whether on the initiative of the auditor or on the request of the taxpayer, serves a useful purpose. It is doubtful, however, that general practitioners are aware of this arrangement.

Therefore, we propose only that the technical advice arrangement be placed upon a formal footing in the sense of having the procedure described in the Department's published procedural regulations.

It is conceivable that general practitioners, made newly aware that technical advice may be requested from Lansing in the course of an audit, may increase its use

beyond the Department's capabilities. This is only a remote possibility, however, for even now experienced practitioners rarely request auditors to seek technical advice, recognizing that post-audit settlement may be much more difficult to effect where a case file contains a piece of unfavorable technical advice. Be that as it may, if the Department finds it is unable to handle all taxpayer-initiated requests for technical advice, it is understood that the Tax Section would support the Department in eliminating the taxpayer's power to initiate the auditor's seeking of technical advice. In that event, the auditor alone would have the power to determine whether such advice should be sought. The taxpayer, of course, would be free to make every effort to convince the auditor of the need to seek technical advice in the handling of particular issues.

9.2 Procedures

Published procedural regulations should provide that if a taxpayer and an auditor, in the course of an audit, are unable to agree on the answer to a particular interpretative legal issue, advice may be sought from Lansing on the initiative of either the taxpayer or the auditor.

The same procedure is to be followed whichever party provokes the request for advice. Once it is determined that advice will be sought, the auditor should send to the taxpayer a written statement of all relevant facts and of the specific questions in issue. The taxpayer then would have a specified period of time within which to indicate in writing the extent to which he is not in complete accord with the auditor's statements. Every effort should be made to reach an agreement as to the facts and issue, but if agreement proves impossible the taxpayer should submit a separate statement, setting out

his understanding of the specific relevant facts and issue, which will be forwarded to Lansing, by the auditor, along with the latter's own statement.

If the taxpayer is not satisfied with the advice ultimately received, the procedural regulations should indicate that the taxpayer does retain the right after the conclusion of the audit to file an administrative appeal to the Department's conferee.[1] In short, the choice of the technical-advice route by the taxpayer does not preclude subsequent utilization of the conference route. This opportunity for a second chance to reach agreement is dictated by the recognition that, under many circumstances, even with unfavorable technical advice outstanding, taxpayer and conferee may be able to achieve a settlement.

10. Changing the Role of the Department Re the Inheritance Tax

As a practical matter, even now auditors of the Department make a preliminary unofficial determination regarding the amount of inheritance tax owing. The first official determination, however, is made by the 72 widely scattered probate courts.

Primarily for reasons that go well beyond any problem pertaining just to the inheritance tax, it is proposed elsewhere in this report that a newly created independent State Tax Tribunal be vested with exclusive authority to undertake on proper petitioner, initial review of all disputes growing out of (i) administrative determination made with respect to all state imposed taxes, and (ii) determination made by county Boards of Review with respect to the property tax.

If that proposal, the merits of which are fully explained in Part D infra, is adopted, necessarily the Department's unofficial role in connection with the inheritance tax would be changed into an official role. In short, the Department itself would make an official

[1] See Section 2, supra.

administrative determination which, on proper petition, would then be reviewable by the circuit-riding State Tax Tribunal. The matter of further appeal from the tribunal also is discussed in Part D infra.

PART D

INDEPENDENT REVIEW OF TAX DETERMINATIONS: STATE TAX TRIBUNAL AND APPEALS THEREFROM

1. Introductory Note

Recommendations relating to independent review of administrative tax determinations, summarized below, are discussed in detail in subsequent subsections.[1]

(a) Exclusive jurisdiction, on proper petition, to review all tax questions pertaining to state imposed taxes and to the property tax would be vested exclusively in a specialized, circuit-riding, State Tax Tribunal composed of three full-time, appointed, lawyer members;
(b) Trial by jury would be available in the State Tax Tribunal;
(c) Appeals from decisions of the State Tax Tribunal would lie to the generalist Court of Appeals or, in certain cases, by certiorari only, to the generalist Supreme Court of Michigan. Where the three trial members reach a unanimous decision, review would lie only via certiorari to the Michigan Supreme Court. However, under two sets of circumstances, appeal would lie as of right to the Court of Appeals: (1) where one member dissents or (2) where two of the three members certify a particular question;
(d) The statute itself would not require, on appeal, that any special weight, other than that accorded determinations in a circuit court, be given to a decision of the State Tax Tribunal.
(e) All regular decisions of the three-member Tribunal would be published, except where the Tribunal itself, because of the factual nature of a particular controversy, orders otherwise;
(f) The State Tax Tribunal would have a Small Claims Division:
    i. Tax disputes coming before the Small Claims Division would be limited to quite small sums, that is, to $250-$300 in taxes or, as to property tax valuations, where the disputed portion of the assessed valuation does not exceed $3,000;
    ii. A Small Claims Division would consist of a single regular circuit-riding member of the Tribunal;
    iii. Typically, decisions handed down by the Small Claims Division would not be published and, thus, would have no precedent value even in the eyes of the Tribunal itself.

[1] For the most recent article on the need for a specialist tax tribunal in Michigan, see Dexter "Judicial Tax Courts for the States: A Modern Imperative," 2 Prospectus: A Journal of Law Reform 129 (1968). For earlier articles dealing with the same subject see Krawood, "Michigan Needs a Tax Court," 44 Michigan State Bar Journal 26 (1965) and Krawood, "Michigan's Need for a Tax Court and the Inadequacy of Appeal Procedures Provided by the General Property Tax Law," 11 Wayne State Law Review 508 (1965).

However, should the relevant administrative tax agency perceive that a case raised a specific issue of fairly widespread importance, it would be permitted to request that the matter be heard by all three members of the Tribunal in which event the decision would be published. Where possible, however, the administrative agency should try to see that such important issues are litigated in cases involving sums beyond the jurisdiction of the Small Claims Division;

iv. A taxpayer with a dispute falling within the jurisdiction of the Small Claims Division would be permitted to elect between two different procedures. He could utilize the Small Claims Division where he is free to be represented by anyone, where the decision will not be published, and where the decision will have no precedent value. Or he could try his case in the regular manner, but here, if represented by another, that representative must be an attorney, for the court needs the help of attorneys in arriving at decisions which are published and because, at least in its eyes, precedents.

2. Rationale Supporting a Single Specialized Trial Tribunal

2.1 In general

There has been protracted debate at both state and federal levels with respect to the relative merits of vesting, as to any area of administrative law, exclusive jurisdiction in a single specialized tribunal rather than in courts of general jurisdiction. The specific recommendations made here rest, however, not on the abstractions typically associated with that nation-wide debate, but rather on practical considerations peculiar to the Michigan tax scene. Moreover, as explained in the next subtopic, the end product proposed here actually combines the best characteristics of both worlds, the specialist and the generalist, with the latter being given the ultimate "say so." Finally, the specialized tribunal would be about as accessible as the local trial courts, for the specialized tribunal would be required to ride circuit through the state.

The need, within this overall context, for a single specialized tribunal at the trial level is responsive to the cumulative impact of four compelling considerations, no one of which is more important than the others.

First, though some may think that the rates associated with state taxes are relatively high, in absolute terms they are so low that few taxpayers can afford to appeal a trial tribunal's determination even if it be assumed they can afford to litigate at all. In consequence, historically, relatively few tax decisions have been appealed to the state's appellate tribunals. Given this, one hardly would expect to find either uniformity or guidance in the unpublished decisions of the many different trial courts of general jurisdiction which become involved. These two shortcomings could be largely remedied by vesting trial jurisdiction in a single tribunal which did publish its more important decisions. Both taxpayers and government could predict that this single court, at the trial level at least, would follow its own published decisions.

Second, in the years ahead, it is almost inevitable that the state's income tax will become the mainstay of its general fund. While much of that law rides piggyback on the federal statute, many of its deviations can be adequately interpreted only by persons who have or develop some understanding of the basic principles which overlay any given deviation. It is unlikely that the trial judge on a court of general jurisdiction will have or can acquire that type of understanding, given the infrequency with which he will encounter such problems. It should be otherwise, however, with respect to a single specialized tribunal.

Third, to induce able lawyers to accept a post on this tribunal and to assure any existing biases are not accentuated by continued part-time tax practice, full time

assignment to this tribunal is desirable. Litigation involving the state's own taxes will not provide a sufficiently full workload to justify this, however.[1] But a full workload would be achieved by wise resolution of yet another quite different problem which must be solved in any event.

This latter problem becomes our fourth consideration and emerges from our earlier recommendation which, for quite different reasons, would relieve the State Tax Commission of its present adjudicatory function with respect to property tax appeals from county Boards of Review. In effect the State Tax Commission would confine itself to an enlarged supervisory function over the property tax system, though its staff would represent the State on appeals to the tribunal which takes over the adjudicative function. We propose that this adjudicative function be assigned to the newly proposed State Tax Tribunal, thereby solving two distinct but important problems.

2.2 Guards against any adverse effect of over-specialization

Some interested observers take a dim view of specialized tribunals, their fear being that members of such tribunals tend to divorce tax law from other areas of law and soon lose the healthy perspective of the generalist. The recommendations made here accommodate these concerns in four different ways.

First, the three different members of the tribunal are almost certain to have somewhat different backgrounds including some experience as generalists, and this becomes relevant to the issue at hand if only because the tribunal would be required to sit in banc in resolving all questions of law except in those situations where the taxpayer himself had elected to try the matter before the tribunal's Small Claims Division.

[1] Typically, litigated cases number less than 100 per year.

Second, even at the point of trial before the specialized tribunal, a taxpayer could call for a jury to find the facts except, once again, where the taxpayer himself had elected to have the matter tried before the tribunal's Small Claims Division.

Third, as previously noted, while the specialized tribunal would exercise exclusive jurisdiction at the trial level, generalists—at this point of appeal—actually would have the final "say so." Even in the face of a unanimous decision by the three-member tribunal, either side could petition the State Supreme Court for a writ of certiorari. Further, if the tax tribunal had reached such a unanimous decision but two of its members were willing to certify that the issue was of sufficient importance and concern to warrant further review, provision would be made for an absolute right of appeal to the Court of Appeals. Provision would be made for that same right of appeal in the event one of the three members of the tribunal filed a dissent to the majority's conclusion regarding any issue. Absent one of the three foregoing circumstances, further review of the tribunal's findings would not be permitted. But this modest limitation seems warranted in face of the fact that this tax tribunal, in contrast to a local circuit court, has three lawyer-members, not just one.

Fourth and finally, if a given decision does go up for further review, the enabling legislation itself would not require the generalists on the appellate court to accord any special weight to the legal conclusions reached earlier by the specialized tribunal other than that weight now accorded determinations of law and fact in a circuit court case.

2.3 Reasons for proposing a "State Tax Tribunal" rather than a "Tax Court"

Creation of the State Tax Tribunal as an administrative agency, rather than as a "Tax Court" properly so-called, is essential to avoid the very real constitutional

prohibition which otherwise would arrive under Art. VI, §8 of the Michigan Constitution. According to this provision, [1] a "court" cannot be authorized to hear appeals from county Boards of Review regarding property tax valuation and allocation problems unless certain specified circumstances exist. Absent those special circumstances, the Constitution contemplated that an administrative agency, such as the State Tax Commission, would hear such appeals and that its findings would be final. Since our overall recommendations contemplate that the State Tax Tribunal will take over this adjudicative function of the State Tax Commission, it obviously must be established as an administrative agency rather than as a "court" properly so-called.

A second less important consideration evolves out of Art. VI, §1 of the Michigan Constitution. While that provision authorizes the legislature to establish "courts of limited jurisdiction," this can be done only "by a two-thirds vote of the members elected to and serving in each house." Observe that this latter requirement refers to two-thirds of the entire membership, not just two-thirds of those present and voting. This demanding requirement need not be hurdled, however, if the tribunal in question is established as an administrative agency, rather than as a "court."

The third and final consideration involves a questionable but possible constitutional challenge. As a practical matter, appointment is the only means of securing the type of individual fitted for a position on the specialized State Tax Tribunal. The Michigan Constitution, while not specifically barring judicial appointment, does refer on several occasions to elected judges. Thus, if the State Tax Tribunal were established as a true "court" and its members appointed, someone might seek judicial review of the enabling legislation on constitutional grounds.

[1] Summarized in Part A, topic 3 supra, and described in somewhat more detail in Part B supra.

3. Other Important Jurisdictional And Procedural Matters Re the State Tax Tribunal

3.1 The Tribunal's jurisdiction

As previously indicated, in addition to property tax appeals from county Boards of Review, the State Tax Tribunal would have exclusive initial jurisdiction to review tax determinations of any state agency charged with administration of any state tax. Thus, as to the latter taxes, the tribunal's jurisdiction would extend well beyond the review, on petition, of income and sales tax determinations made by the Department of Revenue.

Illustratively, the tribunal also would displace probate courts in reviewing, on petition, the Department's determinations with respect to the inheritance tax. This displacement is justified by the cumulative impact of all considerations previously advanced (see 2.2 supra) to support establishment of a single specialized tax tribunal for this state. In this connection, it also is particularly important to remember two previously advanced recommendations bearing on the inheritance tax. Those recommendations (see Part C, supra) would (i) officially lodge responsibility for the initial administrative determination in the Department itself, rather than in the probate courts where it presently resides, and (ii) would apply the Department's own internal administrative appeal and settlement procedures, in the new form proposed in PART C, to the inheritance tax. Those proposals were bottomed on the belief that these purely administrative functions should be put where they belong, that is, in a knowledgeable agency having state-wide responsibility, rather than in 72 different probate courts.

Another illustration of the sweeping jurisdiction proposed for the State Tax Tribunal involves the Corporation Franchise Tax. The Tribunal would displace the hybrid Corporation Tax Appeal Board in reviewing determinations made by the

Corporation and Securities Commission with respect to this tax. This displacement is justified not only by the general considerations advanced in 2.2 supra, but also because of the unfortunate composition of the Corporation Tax Appeal Board. The Board is composed of ex-officio members (Attorney General [Chairman], State Treasurer, and the Auditor General) whose other duties are so demanding that in fact, on any given occasion, it is extremely difficult and sometimes impossible for a majority of them to be present. Further, at least in terms of image, the independent nature of the review, and its overall quality, will be enhanced if the review is conducted, not on a part-time basis by three very busy state officials actually elected supposedly because of competence in other areas, but instead by the three full-time members of an independent and specialized State Tax Tribunal who were appointed because of their supposed competence to act like judges.

3.2 Procedural matters

As to all state imposed taxes, a taxpayer, within a statutorily prescribed period following the appropriate agency's determination, could petition the State Tax Tribunal to review the determination on deficiency basis, that is, without first paying the amount of tax in dispute.[1] Failure to petition within that prescribed period would mean that such review could be obtained only on a refund basis.

Slightly different, but nevertheless quite similar arrangements regarding the tribunal's review of property tax determinations made by county Boards of Review are described in PART B, §5, supra.

[1] Should the taxpayer ultimately lose, however, he would suffer the added interest cost now provided by statute and such collection fees, if any, as may be required in any given case by existing law.

In general, the State Tax Tribunal would be expected to follow procedures similar to those now followed by the United States Tax Court. These, indeed, are almost the same as those which that Court followed at an earlier time when it was called the United States Board of Tax Appeals.

One exceptional procedure peculiar to the State Tax Tribunal involves a proposed Small Claims Division within that Court, as is explained below.

3.3 Small Claims Division within the State Tax Tribunal

The taxpayer whose tax dispute involves a relatively small dollar amount would find that the Small Claims Division of the State Tax Tribunal offers two particular attractions: (1) the use of informal procedures, thus making it feasible for him to represent himself or to be represented by a more knowledgeable relative, friend, or any other person subject only to the Division's disapproval for cause, and (2) the fact that no appeal is possible from a decision of the Division automatically places a ceiling on potential expenditures.

The foregoing type of arrangement is essential if the overall structure is to be responsive to the economic self-interest of the taxpayer who is involved in a dispute involving a small amount. Absent such an arrangement, he simply could not afford to have his dispute reviewed by an independent tribunal.

The informal procedures, with all the advantages they offer to the small taxpayer, do place a heavy responsibility upon the single member of the State Tax Tribunal presiding over the Small Claims Division. He must offset any taxpayer lack of expertise, illustratively protecting the taxpayer against the layman's tendency to stress unimportant facts at the expense of the relevant ones. It is this burden on the presiding member which

argues most cogently against the use of a less well-trained commissioner to preside over the Small Claims Division. An added argument in favor of using a member of the State Tax Tribunal for this purpose is the fact that no commissioner can possibly have an awareness of and responsiveness to the frame of reference within which the State Tax Tribunal operates equal to that possessed by one of the Tribunal's own members.

The argument may be raised that the non-publication and the non-precedent character of Small Claims Division decisions will have two undesirable consequences: the same issues could be litigated year after year and events might cause a sudden flood of cases raising substantially the same legal issue or involving similar fact situations. Should a sudden flood of cases raising similar issues or involving similar fact situations arise, the agency which administers the tax should assume the responsibility to facilitate litigation of suitable guinea pigs in the setting of a return where other issues are of sufficient importance to require litigation outside the Small Claims Division. And, but only as a last resort, any one member of the tribunal should have authority, if he deems a Small Claims Division question to be both of widespread importance and sufficiently "close," to refer that case to the whole tribunal for the purpose of resolving the legal questions at issue. And if the tribunal decides to take jurisdiction and publish an opinion, it also would have authority, should the tax agency then seek further review before an appellate tribunal, to require that agency to pay any attorney chosen by the taxpayer a reasonable fee to handle the appeal. The justification for this rests on the cumulative impact of two considerations. The taxpayer himself was content, by reference to his own economic self interest, to rely solely on the Small Claims Division. Further, he obviously cannot afford to subsidize the tax system by providing it, in its interest – not his, with a

"guinea pig" case. Finally, the fact that the tribunal itself thought the substantive question to be both of widespread importance and "close," and that the tax agency wants to appeal, is sufficient evidence that a small "guinea pig" case is needed in the interest of the whole tax system and, thus, it should bear the cost.

Despite the attractiveness which the majority of taxpayers with small claims probably will find in the Small Claims Division, some taxpayers with equally small claims may prefer to use the full State Tax Tribunal. They should be free to do so. For this reason, no dollar minimum for litigation there is recommended.