Remedies Available to a Disproportionately Assessed Taxpayer in New York State

Albert K. Hill

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Taxation-State and Local Commons

Recommended Citation
Albert K. Hill, Remedies Available to a Disproportionately Assessed Taxpayer in New York State, 5 Buff. L. Rev. 145 (1956).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol5/iss2/3

This Leading Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
REMEDIES AVAILABLE TO A DISPROPORTIONATELY ASSESSED TAXPAYER IN NEW YORK STATE

By Albert K. Hill*

Probably the most ancient of the many problems found in the taxation system of New York State is that of disproportionate assessment for purposes of the general property tax. Clouds gathered on the horizon early in 1779¹ and the skies have loomed ever darker and more forbidding over subsequent state legislatures.² In 1949 the lawmakers again sought a solution and appointed a temporary state board of equalization and assessment to ferret out the difficulties and, if possible, determine their resolution.³ After five years, the results of intensive investigation and study were published in the form of new equalization rates for the taxing units of the state.

The legislature has concerned itself primarily with that inequality which exists within a larger taxing unit when property on the roll of one taxing district is assessed at a larger percentage of full value than property on other rolls. This problem is closely related to that which occurs when the property of one taxpayer on an assessment roll is valued at a higher percentage of true value than that of other persons on the same roll . . . disproportionate assessment.

What happens when a taxpayer finds that his assessment is at a rate unequal to that of his fellow taxpayers? Must he bear an unequal share of the tax burden, or may he take measures to secure equality? This study is directed to these questions.

* Member of the New York Bar.

1. L. 1779, c. 16. This act empowered county boards of supervisors to appoint three of their number to superintend the raising of the property tax. These supervisors were authorized to examine the assessment rolls and to recommit them for further consideration by the local assessors if valuations were too high or too low.

2. 1 Stat. 589 (1798) provided authority for equalization of assessments by the Commissioners of the direct tax. By L. 1799, c. 72, the New York Legislature directed the use of such valuations for the state property tax. Rev. Laws c. 611, §4 (VanNess & Woodworth 1813), gave county boards of supervisors some equalization powers. Strongly worded attacks on existing inequalities were contained in messages by several governors of the state. See Governor's Message, 1843, p. 24; Governor's Message, 1859, p. 41; Governor's Message, 1860, p. 175. In 1859 the first state board of equalization was created. L. 1859, c. 312. Subsequent legislation has involved many aspects of the problem.

I. ASSESSMENT PROCEDURES AND REMEDIES AVAILABLE

WITHIN THE FRAMEWORK OF THOSE PROCEDURES

Any consideration of taxpayers' remedies necessarily involves a preliminary investigation of the method by which the taxes in question are levied or assessed. New York State has not levied a general property tax since 1928, so the taxes under discussion here are those by counties and smaller governmental units upon real estate within their boundaries. Personal property is specifically excluded from the general property tax. 4

A. The Assessing Process 5

By far the greater bulk of property is valued by local assessors, 6 but the Tax Law provides for the assessment of so-called "special franchises" by the State Tax Commission. 7

1. Property in General

The local assessors are directed to ascertain annually the full value of all taxable property within their jurisdiction. Corporate holdings are also included in this assessment. 9 This is so even where the realty assessed comprises part of a single parcel extending beyond the limits of one tax district. Such a situation presents many difficulties, and since there is no provision for valuation and apportionment of values by a central agency, it would appear that assessment must necessarily be made upon a reproduction-cost-less-depreciation or appraised basis, rather than on one of capitalized earnings. It is an obvious fallacy to attempt to

4. N. Y. TAX LAW §3.
5. The dates set forth below may vary depending upon the municipality involved. Under section 11(1) of the City Home Rule Law a city has the power to enact local laws relating to: the preparation, confirmation and correction of local assessments for taxation purposes; the review of such procedures subject to the further review by the courts; and the levy, collection and administration of city taxes. See City of New Rochelle v. Seacord, 30 N. Y. S. 2d 240 (1941). Most if not all of the cities of the State have adopted periods differing from those set forth in the Tax Law.
In following local laws, caution should be observed to make certain that subsequent amendments of the Tax Law have not superceded the local provisions, as was the case in Bapps Corporation v. City of Buffalo, 279 App. Div. 263, 109 N. Y. S. 2d 369 (4th Dep't 1951), aff'd 304 N. Y. 766, 108 N. E. 2d 677 (1952).
7. N. Y. TAX LAW §45. This function has been temporarily transferred to the state board of equalization and assessment. See note 3 supra.
9. N. Y. TAX LAW §11, providing, "The real estate of all Incorporated companies liable to taxation shall be assessed in the tax district in which the same shall lie, in the same manner as the real estate of individuals."
evaluate, on a capitalized earnings basis, portions of parcels of realty held by an integrated enterprise.

The Tax Law stipulates that assessments are to be at full value as of June first each year. A roll is to be prepared listing the assessed value of the land and the total assessment upon a form prescribed by the State Tax Commission. Upon completion of this list on or before June twenty-fourth, a copy is to be made available for public inspection until the second Tuesday in July. On that date the assessors will hear and determine all complaints about assessments brought before them. At the conclusion of these hearings, the assessors revise the roll in accordance with their decisions and place their oath upon it. The completed rolls must again be opened for public inspection. Delivery of the various local rolls to the clerk of the board of supervisors follows. Preparatory to the levy of taxes, the supervisors are to "examine the assessment rolls . . . for the purpose of ascertaining whether the valuations in one tax district bear a just relation to the valuations in all the tax districts in the county." Aggregate valuations of real estate in any tax district may be increased or diminished in accordance with a mathematical formula elaborated in the Tax Law. The board lacks any power to change individual assessments, and even in equalizing assessments within the county may not disturb the aggregate valuation of realty listed on the assessment rolls.

Although the supervisors may correct manifest clerical errors on the rolls they may not add omitted property without due notice to the affected taxpayer.

11. N.Y. Tax Law §21. The commission is also empowered to issue instructions and promulgate regulations to govern local assessing procedures; N.Y. Tax Law §§21(7), 171.
12. N.Y. Tax Law §25. Due notice of the completion and of the times and place where the roll may be inspected by the public must be given.
13. N.Y. Tax Law §27. N.Y. Tax Law §31 mandates the county board of supervisors to exercise the duties and powers of the assessors in relation to the hearing of complaints which the assessors fail to hear.
15. N.Y. Tax Law §29. City rolls are to be in the hands of the city clerk by August first, and there held for at least fifteen days for public inspection. In a township, the town clerk is to receive a certified copy of the roll by August fifteenth and hold it for examination until October first, when it is delivered to the town supervisor.
17. Ibid. A five step method is prescribed: (1) after inquiry and investigation, the equalization ratio for each tax district is to be determined; (2) the full value of all property in each district is to be ascertained by utilization of this rate; (3) the county ratio is determined by dividing the total full value into the total assessed valuation; (4) the total full value in each tax district is multiplied by the county ratio; (5) assessed values in each district are to be increased or diminished in the amount necessary to make them equal to the figure determined in the fourth step. This formula is used solely for the purpose of apportioning the county tax burden.
19. N.Y. Tax Law §56(3).
Such property, whether omitted in the current or preceding year, may be added to the current roll. If the omission occurred in the preceding year, the property is to be taxed at the rate of taxation imposed in that year. 20

The assessors themselves may add to the current rolls property omitted in the preceding year. 21 The law makes no provision that in such circumstances the property is taxed at the prior rate of taxation, and apparently such property would be taxed at the same rate as all the other property on the roll. 22 Faced with what today appears as certain as taxes themselves, a rising tax rate, the omission of property in one year by the assessors, with its subsequent addition to the tax rolls of the succeeding year, may well produce a tax “windfall” for the municipality.

2. Special Franchises

A special franchise includes the value of the “tangible property . . . situated in, upon, under or above any street, highway, public place or public waters.” 23 However if the franchise is located outside the limits of an incorporated village or city and is less than 250 feet in length it is not considered a special franchise. 24 Properties included within this category are railroad tracks, bridges, gas and water mains, telephone and power transmission lines, subway or street railway tracks, gates and signals at grade crossings, and steam pipes. The right to erect these structures on public domain is granted in a franchise from the state or local governmental unit. The prime holders of such franchises are utility corporations, although a private person or business corporation exercising such a privilege also falls within this classification. Although this grouping would not be considered real estate by a lawyer, it is so treated for purposes of general property taxation. 25

The State Tax Commission annually fixes and determines the assessment of each special franchise within the state subject to taxation. 26 In determining this assessment the latest state equalization rate applies, with one important exception—any portion of the special franchise assessed in the year 1953 shall have applied thereto the 1953 equalization rate. 27

20. Ibid.
23. N. Y. Tax Law §2(6).
24. N. Y. Tax Law §2(7). This subsection does not apply to elevated railroads.
27. Ibid.
REMEDIES FOR DISPROPORTIONATE ASSESSMENT

Complaints must be in writing and specify the objections to the valuation, and must be served upon the Commission at least ten days before the date set for the hearing.\(^{28}\)

Following the hearings, the Commission fixes and determines the final value of each special franchise.\(^{29}\) Certified statements of the valuation of special franchises are to be furnished the clerk of the local governmental unit where such franchises are located not later than 30 days before the final completion, verification and filing of the assessment roll.\(^{30}\) The valuation established by the state agency are assessed valuations for the purpose of all taxes.\(^{31}\)

Prior to the amendment of the Tax Law in 1953\(^ {32}\) the procedure was somewhat different. Full value was first determined, then the equilization rate figured and multiplied by full value to yield final equalized value.\(^ {33}\) By freezing equalization rates on special franchises assessed in 1953\(^ {34}\) the legislature may have created a distinct economic advantage for new business enterprise.\(^ {35}\)

B. Direct Attack Upon Assessments.

Main street on the route to challenging successfully any assessment for tax purposes is an appeal to the officials who are responsible for the alleged erroneous assessment.

1. Property Valued by Local Assessors.

The first opportunity afforded a taxpayer desiring to challenge an assessment upon his property is "grievance day."\(^ {36}\) At this time a verified complaint speci-

\(^{28}\) N. Y. Tax Law §45-a.
\(^{29}\) N. Y. Tax Law §45-b.
\(^{30}\) N. Y. Tax Law §45-c. Within five days after receipt by the clerk, that official is directed to deliver a copy of the statement to the assessors, who must enter such valuation on the assessment roll before final revision and certification.
\(^{31}\) N. Y. Tax Law §45-e.
\(^{32}\) L.\(^ {36}\)
\(^{33}\) N. Y. Tax Law §45 as repealed by L. 1953, c. 874, §2.
\(^{34}\) See note 26, supra.
\(^{35}\) Assume a corporation has a special franchise which has a full valuation of $100,000. If this franchise were assessed in 1953 in a city then having an equalization rate of 95 percent, the assessed value in that year, and all subsequent years (ignoring for purposes of illustration the probable decrease in valuation due to depreciation) would be $95,000. The equalization rate for 1956 in the same city is 65 percent. A franchise acquired subsequent to 1953 and not taxed in that year, though it had a value of $100,000, would be carried on the rolls at $65,000. Thus, two identical franchises, of equal value, might be carried on the tax rolls at greatly differing values. Possibly the apparently discriminatory aspects of the law may lead to early retirement of some special franchises and their replacement by new ones.
\(^{36}\) See note 13, supra.
fying the grounds of objection should be filed with the board of assessors. Technical shortcomings may be cured if objection is raised at the hearings. Apparently if objection is not taken, these defects will be deemed waived.

In the course of hearing and determining complaints, the assessors may receive testimony, administer oaths, hear proofs and require the complainant to appear personally and testify. No formal record of these proceedings is kept but a transcript of the minutes of the testimony of every person must be filed with the town or city clerk. When the assessors make their decision upon the complaint presented to them, an individual taxpayer's remedies are terminated as far as administrative review is concerned. To preserve other remedies available under the statutes of New York, the taxpayer should fully utilize the administrative appeal open to him.

2. Special Franchise Assessments.

A challenge to a special franchise assessment follows the general pattern of grievance day protests under section twenty-seven of the Tax Law. Again, a written complaint specifying the objections is the basis for the challenge. The Commission is to hear and determine not only complaints by the holders of special franchises, but also those by a city, town or village with regard to valuations it has established. After determination of final values, a notice thereof must be sent to each franchise holder and to the governmental unit wherein the property is located. This notice is important since the time of its serving determines when judicial proceedings to review the assessment must be instituted.

3. Disproportion Between Tax Districts.

Consideration of a taxpayer's remedies when he is disproportionately assessed requires mention of state equalization rates and their method of establishment. Such rates are necessarily determined for use in computing state aid to

37. N. Y. TAX LAW §27.
38. People ex rel. New York Cent. R. R. v. State Tax Comm'n, 292 N. Y. 130, 54 N. E. 2d 332 (1944), rehearing denied 292 N. Y. 717, 56 N. E. 2d 122 (1944). On a tax law certiorari to review a special franchise assessment, the petition failed to specify the alleged illegality, and the Court of Appeals held that failure of the Tax Commission to make a timely challenge waived the defect. This principle should apply on grievance day before local assessors as well, inasmuch as the proceedings there are of a much less formal and less technical nature.
39. N. Y. TAX LAW §27. Willful refusal or failure to appear or to answer a material question will bar a taxpayer from any relief.
40. N. Y. TAX LAW §290-c requires application for relief to the proper administrative officials as a prerequisite to institution of judicial proceedings to review an assessment.
41. N. Y. TAX LAW §45-a.
42. Ibid.
43. N. Y. TAX LAW §46.
various local governments, and more importantly, to fix debt and tax limitations created by the State Commission or statute. 44

By an amendment to Article V, Section 1 of the State Constitution, adopted on November 8, 1955, the powers and duties of the State Tax Commission connected with or pertaining to assessment and taxation may be transferred to the State Comptroller by the Legislature. Accordingly, when the Legislature exercises such power, references herein to the Commission may in reality refer to the Comptroller exercising such new powers and duties.

It is the duty of the Commission to examine the assessment rolls of each city, town and village in the state to determine the percentage of full value at which taxable realty on the rolls of such unit is assessed. A final equalization rate shall be established for each such city, town and village. 45

A tentative equalization rate is first adopted, and notice of the same given to the taxing unit involved. Such notice must state the time and place when complaints about the rate will be heard. Any complaints must be in writing and must be served, either personally or by mail, at least five days prior to the hearing date. 46 It would appear that where an equalization rate is changed without notice and opportunity for a hearing, no objection need be filed with the Commission to prepare the way for successful challenge to that action in the courts. 47

Following the required hearings, the Commission determines and adopts a final rate of equalization. 48 Notification of this determination is then given to the clerk of the city, town or village affected. 49 To prevent equalization rates from becoming antiquated and out of step with the times, as has long been the case, the Tax Law provides that the ratio of assessments to market values shall be sampled at least once every five years in all tax units of the state. 50

Where a taxpayer's grievance is not individual but one he suffers in common with the other property owners in his taxing district, he may obtain further administrative relief. If the complaint is based on disproportion between tax districts, a request for equalization might be made to the county board of

45. N. Y. Tax Law §49-a.
46. N. Y. Tax Law §49-b.
48. N. Y. Tax Law §49-c.
49. N. Y. Tax Law §49-d.
50. N. Y. Tax Law §49-f.
supervisors. Should this action prove ineffective, recourse to section 175 of the Tax Law is possible. This section provides a special remedy for a tax unit claiming that it has been aggrieved by an inequitable equalization ratio established by the supervisors. The main hurdle in the utilization of this procedure appears to be that the petition can be brought only by a tax unit, and approval of the action by the legislative body of the district is prerequisite to initiating the appeal. Again, a political obstacle must be overcome before the remedy can be successfully employed. The scarcity of cases involving this procedure may serve to illustrate the inherent difficulties.

Even absent political sanction, an individual taxpayer may press a case of unjust equalization before the Tax Commission by seeking review of the equalization made by the supervisors. No approval of any political body is required. Upon such an appeal or review the Commission may make such deductions from or additions to the aggregate corrected value of the real property of any tax district in the county as it determines proper. No recourse to the courts is provided from such a decision, and apparently the administrative determination is final. Should the Commission's ruling be tested in the courts, its findings of fact should be binding as long as supported by sufficient evidence.

The statute specifically provides that the reasonable expenses of an appeal, including counsel fees of not more than two thousand dollars, shall be certified by the Commission and shall be a charge against the unsuccessful tax unit. No mention is made of costs before the Tax Commission upon a review, and since the proceeding is before an administrative agency costs could not be assessed against the losing party following the review procedure.

A proceeding under Tax Law Section 173-a is also available to an individual taxpayer, as well as to a taxing unit. Under this provision the Tax Commission, acting on information given by a taxpayer or otherwise, may get a show cause...
REMEDIES FOR DISPROPORTIONATE ASSESSMENT

order for a reassessment.\textsuperscript{58} If the Commission's contentions of inequalities or underevaluations is accepted by the court, the local assessors must make a complete reassessment. Possible disruption of tax administration may cause the Commission to proceed warily in these matters, but the proceeding has been utilized in the past.\textsuperscript{69}

II. ATTACK UPON THE ASSESSMENT IN THE NEW YORK COURTS

The exhaustion of administrative remedies is usually a condition precedent to utilization of judicial remedies. This is so in the case of a tax assessment.\textsuperscript{60} But, as with almost every general rule, this one has its engrafted exceptions.\textsuperscript{61}

A. The Statutory Procedure (Proceeding to Review Tax Assessment)

Judicial review of tax assessments has long been an available remedy in New York. Prior to 1880, a taxpayer could utilize the common law writ of certiorari to gain such review. However, this writ was discretionary and could be utilized only in the correction of a tax assessed illegally and without jurisdiction. It could not be applied to an erroneous or unequal assessment.\textsuperscript{62} In 1880 the common law writ of certiorari was abolished and a statutory writ created.\textsuperscript{63} By this action the statutory writ was made available to challenge disproportionate as well as illegal and erroneous assessments.

The provisions of the act of 1880 were carried over in the Tax Law in 1909, where they remained substantially unchanged for forty years. In 1949 the

\textsuperscript{58} The order may be obtained from any justice of the Supreme Court in the judicial district within which the tax district is located. See N. Y. Tax Law §173-a.
\textsuperscript{60} Morewood Realty Holding Co. v. Board of Supervisors, 241 App. Div. 841, 271 N. Y. Supp. 392 (2d Dep't 1934), aff'd mem. 265 N. Y. 520, 193 N. E. 301 (1934).
\textsuperscript{61} Dun & Bradstreet, Inc. v. City of New York, 276 N. Y. 198, 206, 11 N. E. 2d 728, 731 (1937). "It is equally well settled that if they (the taxing officials-ed.) act entirely without jurisdiction in making an assessment their act may be enjoined by a court of equity. In such a case, the rule against collateral attack does not apply." See also National Bank of Chemung v. City of Elmira, 53 N. Y. 49 (1873). Reasons for the distinction between illegal and erroneous taxes are suggested in McLean v. Jephson, 123 N. Y. 142, 25 N. E. 409 (1909).
\textsuperscript{63} L. 1880, c. 289, later incorporated in N. Y. Tax Law §290-c and remaining in substance in that law today.
statutory writ was abolished and a proceeding to review a tax assessment replaced it. Thus the Tax Law was brought into conformity with the Civil Practice Act, wherein the writ of certiorari was abolished in 1937.65

The ostensible purpose of this change was to preserve the substantive rights which certiorari served to safeguard, but at the same time to cast off the procedural technicalities which accompanied the old proceeding.66 The Judicial Council leveled the brunt of its attack at the anomaly whereby a person had to petition for a writ which the court could not deny.67

A proceeding to review a tax assessment for alleged disproportion in valuations may be initiated by a taxpayer under Tax Law section 290. The owner of a special franchise may maintain the same sort of proceeding under Tax Law section 46. Within thirty days after the completion and filing of the assessment roll68 an application for relief must be brought at a special term of the supreme court in the judicial district in which the offending assessment was made.69 Notice of an application for review, returnable in not less than twenty nor more than ninety days, must be served upon the assessing officials,70 coupled with

"... a petition duly verified setting forth that the assessment is illegal, specifying the grounds of the alleged illegality, or if erroneous by reason of overvaluation, stating the extent of such overvaluation, or if unequal in that the assessment has been made at a higher proportionate valuation that the assessment of other property on the same roll by the same officers, specifying the instances in which such inequality exists, and the extent thereof, and stating that he is or will be injured thereby. Such petition must show that application has been made in due time to the proper officers to correct such assessment."71

64. L. 1949, c. 551.
65. L. 1937, c. 526.
66. 15 N. Y. JUDICIAL COUNCIL ANNUAL REPORT 77-80, 317-350 (1949).
67. Ibid. p. 78, "This includes the anachronism of requiring an aggrieved taxpayer to petition the court for a writ which the court cannot deny if the petition complies with the statutory requirements. In this respect the issuance of the tax certiorari writ is not within the discretion of the court, and the writ serves no function, since the court does not pass upon the sufficiency of the petition at that time." The Council considered its own previous suggestion that all special proceedings might be converted into actions (Fourteenth Ann. Rep., Legislative Document (1948) No. 18, pp. 49-51, 175-208; Third Ann. Rep., Legislative Document (1937) No. 48, pp. 133-170) and said that because of distinctions between the two procedures, such as a hearing de novo, further study was required before any definite recommendation could be made.
68. This will be after the second Tuesday in July and before August first (in a city) or August fifteenth (in a town). N. Y. Tax Law §§25, 29. These dates will vary from city to city. See note 5, supra.
69. N. Y. Tax Law §290-a. Under sec. 46 a taxpayer seeking to challenge a special franchise assessment must institute the proceeding not less than thirty nor more than sixty days after the written notice of final value required by sec. 45-d is served.
70. N. Y. Tax Law §290-b. But see note 5, supra.
71. N. Y. Tax Law §290-c (italics added).
Clearly the statute seems to compel any taxpayer to exhaust the remedies available to him on grievance day. Despite this, the New York courts have held that application to administrative officials was not a prerequisite to judicial remedies where the assessing officials lacked jurisdiction over the subject matter.\textsuperscript{72} In such a case the assessors have erroneously determined jurisdictional facts essential to any actions under authority of law. Such authority of law is also lacking where the statute is unconstitutional, and accordingly the New York courts do not require exhaustion in such a case.

Exhaustion has been demanded however in cases where part of the assessment was admittedly valid. A case in point is that of the taxpayer who claimed that he had been illegally taxed on buildings which were allegedly exempted by a special ordinance. In its decision against the taxpayer the court, denying relief in equity, noted the distinction between illegal and erroneous taxes.\textsuperscript{73} Since the assessors admittedly have jurisdiction where disproportion is the ground of attack, the aggrieved taxpayer’s initial petition appears relegated to those officials who placed the valuation upon his property.

If grievance day fails to settle the taxpayer’s complaint, he may resort to the statutory review. The proceeding is usually tried by a referee. The parties may stipulate certain parcels of real estate, regardless of assessed value, to be offered in evidence at the hearing.\textsuperscript{74} Should the parties fail to agree on these parcels, the referee may make a selection from lists submitted by the adversaries.\textsuperscript{75} From these lists the referee will choose an equal number for each side, to which the proofs must be confined, except that evidence of actual sales within the tax district during the year in question may also be introduced.

Valuations may be determined on the basis of reproduction cost less depreciation,\textsuperscript{76} capitalized income or earnings,\textsuperscript{77} recent sales of the same or comparable


\textsuperscript{73} Sikora Realty Corp. v. City of New York, 262 N. Y. 312, 186 N. E. 796 (1933). Among the many cases reaching similar results, see Young Women’s Christian Ass’n v. City of New York, 247 N. Y. 591, 161 N. E. 194 (1928), mem. affirming 220 App. Div. 49, 220 N. Y. Supp. 365 (1st Dep’t 1927); Elmhurst Fire Co. v. City of New York, 213 N. Y. 87, 106 N. E. 920 (1914).

\textsuperscript{74} N. Y. Tax Law §293.

\textsuperscript{75} Ibid.

\textsuperscript{76} See People ex rel. Manhattan, Inc. v. Sexton, 284 N. Y. 145, 29 N. E. 2d 654 (1940), motion to amend remittitur granted, 284 N. Y. 737, 31 N. E. 2d 204 (1940), to the effect that this is the maximum valuation which may be placed upon property.

property,\textsuperscript{78} and appraisals by experts.\textsuperscript{79} The referee must find the true value of the property involved, and the applicable equalization rate. A procedure for determining the equalization figure was outlined in \textit{People ex rel. Hagy v. Lewis}\textsuperscript{80} and has been followed in subsequent cases.\textsuperscript{81} Under this method the referee must determine the full value of the parcels submitted in proof and of the property which is the subject of the proceeding. The total assessed valuation of the "samples" is divided by the total true valuation found by the referee. The resultant equalization figure is applied to the value found for the taxpayer's property and the value at which it should be assessed is thereby determined. The petitioner's chances of success are reasonably good since it should be an easy matter for his counsel to include on his list for submission to the referee parcels which are undervalued.\textsuperscript{82} Should the taxing officials be fortunate enough to list only properties assessed at full value, there will still be some existent disparity, benefiting the taxpayer. It should be noted that the taxing officials are not likely to produce, nor would they wish to produce, evidence of any property which has been overvalued. Even if such instances exist, the officials are not going to reveal them in view of the probability of arousing not only the taxpayers involved but the general public to methods of valuation which do not meet the requirements of


\textsuperscript{80} 280 N. Y. 184, 20 N. E. 2d 336 (1939).


\textsuperscript{82} An interesting example of the success which may be gained by industrious counsel appears in an unreported decision in \textit{Graf Realty Corp. v. Town and City of Dunkirk} (Chatauqua County, Feb. 14, 1956). Evidence of sales during the taxable year was utilized to prove an equalization ratio of 29 percent.
the Tax Law. Even though this method may not do complete justice to either side, it appears a practical necessity in the expedition of the judicial process.\(^{83}\)

In availing himself of the remedies of the Tax Law, the disproportionately assessed taxpayer has yet another string to his bow. Where his claim is that the equalization rate for property generally is less than ninety-five per cent, he may serve a demand upon the assessors that they admit a certain equalization ratio. If this demand is denied, the taxpayer is then entitled, in the court's discretion, to costs for the added burden he incurred in proving the equalization ratio. To bring himself within this provision, the claimant must prove a ratio not in excess of the figure specified in his demand.\(^{84}\)

The proceeding to review is a complete trial de novo of questions of fact. The referee must make a report on the basis of the evidence presented before him. The judge at special term may either approve this report or reject it and make his own findings. An appeal as of right lies from this order to the Appellate Division.\(^{85}\) Such action must be taken within thirty days after entry of the final order.\(^{86}\) The Appellate Division may review both as to facts and law, and may make its own findings of fact.\(^{87}\)

Most appeals are finally determined by the Appellate Division. However, when that court's decision is dissented from, or the decision below is modified or

\(^{83}\) Final Rep. of the Joint Legislative Comm. on Assessing and Reviewing, Legislative Document (1943) No. 69 gives figures on the great numbers of proceedings to review assessments brought every year, many remaining on court calendars for as long as four years. In New York City there are some 12,000 such proceedings initiated annually, and unless they are speedily determined such a backlog might seriously impede justice.

\(^{84}\) N. Y. Tax Law section 292-b provides that where a proceeding is not brought to trial within four years, it is to be deemed abandoned in the absence of a stipulation of the parties or an order of the court upon good cause shown. This provision does not apply to proceedings in the City of New York. Cahen v. Boyland, 1 N. Y. 2d 8, ............... N. E. 2d ............... (1956). Whether or not this amendment will serve to expedite the trial of such proceedings remains to be seen.

\(^{85}\) N. Y. Tax Law §292-a. Employment of this provision requires some ingenuity and a thorough knowledge of the case by taxpayer's counsel. If the specified percentage is very much in excess of the fact of the situation, in all probability the assessors will accept the demand. But where the stipulated figure closely approaches the true state of facts, taxpayer's counsel must be fairly certain that his proofs of valuation of submitted parcels will be accepted. The provisions of this section do not apply to a proceeding to review a special franchise assessment.


\(^{87}\) N. Y. Civ. Prac. Act §632. Cf. People ex rel. MacCracken v. Miller, 291 N. Y. 55, 61, 50 N. E. 2d 542, 544 (1943), to the effect that the Appellate Division may not set aside a finding made at Special Term, "... unless it appears that the court at Special Term has failed to give to conflicting evidence the relative weight which it should have and thus has arrived at a value which is excessive or inadequate." (court's italics).
reversed, review as of right may be had in the Court of Appeals. An appeal by permission may be taken where the Appellate Division certifies a question of law is involved which should be reviewed. Should this certification be denied the Court of Appeals may grant the request. Sixty days is allowed within which to perfect an appeal to the Court of Appeals.

Normally, the Court of Appeals is limited to reviewing only questions of law, but if the Appellate Division has expressly or impliedly found new facts in reversing or modifying, the Court of Appeals reviews facts as well as law. In such a situation the relative weight of conflicting testimony must be appraised and judgment rendered in accordance with the weight of the evidence.

At one time there was some doubt as to whether a judicially determined valuation in one year might not be res judicata in subsequent years. When the question was directly presented to the Court of Appeals in People ex rel. Hilton v. Fahrenkopf it decided that assessments fixed values annually and therefore a prior judicial determination of value was not binding in future assessments, though the assessors were the same persons. Such an adjudication is evidence of value, however, for the succeeding year.

This is the remedy which the New York statutes have expressly provided for a disproportionately assessed taxpayer. Whether any other remedies are available will be discussed below.

B. Collateral Attack—Proceeding Against a Body or Officer.

A disproportionately assessed taxpayer might be anxious to avail himself of the provisions of Article 78 of the Civil Practice Act dealing with review of

89. N. Y. Civ. Prac. Act §589 (2), (3).
90. N. Y. Civ. Prac. Act §592 (1). This applies to appeals as of right. Application for permission to appeal must be made during the term of the Appellate Division in which the decision was made, or the next succeeding term. N. Y. Civ. Prac. Act §592(2). If that application is denied, application may be made to the Court of Appeals for the requisite permission within thirty days. N. Y. Civ. Prac. Act §592(3).
93. See People ex rel. Eckerson v. Zundel, 157 N. Y. 513, 52 N. E. 570 (1899), where Special Term had held the prior determinations binding. The Court of Appeals termed the assessment for each year a distinct proceeding, but went on to note that the assessors were not the same parties in the separate proceedings and said that a judgment against one set of assessors ought not to be held binding on the action of other assessors who are subsequently elected.
94. 279 N. Y. 49, 17 N. E. 2d 765 (1938).
95. Ibid.
determinations by a body or officer. Such a remedy might be sought because the time limitations are more favorable to the taxpayer.\(^9\)

Relief under this article was once termed a certiorari order,\(^9\) but has gone through the same evolution which occurred in the case of tax certiorari described above. Procedure under both statutes is similar, and where the Tax Law is silent as to any details of practice, the Civil Practice Act provisions have been held to govern.\(^9\) Included in the coverage of this statute are the former special remedies of mandamus and prohibition.\(^9\)

A self-contained limitation may serve to effectively bar a disproportionately assessed taxpayer from this relief.

"Except as otherwise expressly prescribed by statute, the procedure under this article shall not be available to review a determination in any of the following cases: . . .

... .

4. Where it can be adequately reviewed by an appeal to a court or to some other body or officer."\(^2\)

Under this provision the courts have held a taxpayer not entitled to this relief when the assessment complained of was merely erroneous, as distinguished from illegal. Furthermore, this extraordinary remedy is discretionary with the court,\(^2\) and even if it were decided that it need not be denied as a matter of law, where the Tax Law remedy is available the proceeding would probably be dismissed.

Following the rule set forth by the Supreme Court of the United States in *Sioux City Bridge Co. v. Dakota County,*\(^3\) it would be possible to argue that disproportionate assessment violated the Federal Constitution.\(^4\) This might appear to bring such a case within the recognized exceptions to the rules of exhaustion and exclusiveness, but even where unconstitutionality is asserted there is a tendency on the part of the courts to require exhaustion whenever the facts are

---

\(^9\) N. Y. Civ. Prac. Act §1286 allows four months after the determination becomes final and binding within which the proceeding may be initiated.

\(^9\) See notes 62, 64, supra.


\(^1\) N. Y. Civ. Prac. Act §1285.


\(^3\) 260 U. S. 441 (1923).

\(^4\) U. S. Const. amend. XIV, §1.
important to the decision. Here the basic question is one of fact, and the courts are likely to insist upon exhaustion of any administrative remedies before assuming jurisdiction.

Unequal assessment does not violate the New York Constitution, the only provision for equality being a mandate to the Legislature to provide for the equalization of assessments.\(^5\) The remedies of the Tax Law adequately meet this mandate. In light of this fact a New York court would be inclined to hold that the taxpayer be required to utilize the prescribed procedure for the protection of his federal right. Failing that he would be precluded from relief.\(^6\)

C. Collateral Attack—Other Judicial Remedies.

Among the other actions a taxpayer might seek when he has been disproportionately assessed is on to remove a cloud on title, or for declaratory relief. Several cases have held that an action to annul a tax as a cloud on title could not be maintained where, concededly, there was jurisdiction to impose some tax. These decisions give further weight to the principle that collateral attack is banned where the tax was erroneous and not illegal. Possibly the traditional notions that equity will not act where there is an adequate legal remedy, or where one has slept on his rights, are the rationale for such holdings.

Although the supreme court has been given power to declare rights and other legal relations in any action or proceeding,\(^8\) a disproportionately assessed taxpayer's hopes to obtain such relief are slim. Initially a major stumbling block is that the granting of such a declaratory judgment is discretionary with the court.\(^9\) The availability of another statutory remedy, however, neither controls the action nor makes it impractical.\(^10\)

"An action for a declaratory judgment may be maintained, despite the provisions of a taxing statute which provide that the method of judicial review prescribed therein shall be exclusive, where the jurisdic-

\(^{5}\) N. Y. Const. art. XVI, §2.

\(^{6}\) Possibilities of relief in the federal courts are considered infra.


\(^{8}\) N. Y. Civ. Prac. Act §473.

\(^{9}\) N. Y. Rules Civ. Prac. 212, "If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised."

\(^{10}\) Richfield Oil Corp. of N. Y. v. City of Syracuse, 287 N. Y. 234, 39 N. E. 2d 219 (1942).
REMEDIES FOR DISPROPORTIONATE ASSESSMENT

tion of the taxing authorities is challenged on the ground that the statute is unconstitutional or that the statute by its own terms does not apply in a given case."11

The court pointed out that where the challenge was to the assessors' jurisdiction, not only was exclusiveness inapplicable,

"But where it is sought to set aside the assessment on other grounds, then the assessment may be reviewed only in the manner provided in the statute."12

The Court of Appeals has reversed denial of declaratory relief where discretion was exercised on the ground that there was an adequate remedy available by virtue of a statute.13

Adhering to this decision, the Appellate Division has ruled that where the taxpayer is admittedly subject to some tax under a statute or ordinance, it must comply with the requirements of local law as to judicial review of the taxing authorities' action.14 The disproportionately assessed taxpayer does not challenge his assessment in toto, but only that added valuation which makes him bear a greater proportion of the tax burden than do other property owners in the particular tax district.

Where an attack is based on disproportion alone, questions of fact and not of law are presented to the court. The Court of Appeals has said that in a situation where it appears that other than legal questions are involved, the parties should be left to other remedies.15 In light of this decision, the rule of civil practice providing for submission of questions of fact to a jury would be employed apparently only where it was necessary to properly frame an issue of law, and not where there was real dispute over an issue of fact.16

Declaratory relief as of right does not exist, and it is submitted that such a remedy should be unavailable to attack inequality of assessment.

11. Id. at 239, 39 N. E. 2d at 221.
12. Ibid.
16. N. Y. RULES CIV. PRACT. 213. Such submission may be had upon direction of the court.
III. Relief in the Federal Courts

Although disproportionate assessment of itself may not violate any federal right, where such undervaluation is intentional and the product of systematic and arbitrary discrimination, the aggrieved taxpayer is denied the equal protection of the laws.\textsuperscript{17} Assuming a New York taxpayer is able to prove the arbitrary aspects of his overvaluation, may he by-pass the New York procedures for attacking the assessment and resort directly to the federal courts?

In \textit{Hillsborough Township v. Cromwell}\textsuperscript{18} the Supreme Court of the United States allowed a New Jersey taxpayer's suit for declaratory relief\textsuperscript{19} in the federal courts. Here the assessment was attacked on due process\textsuperscript{20} and equal protection grounds. The ultimate decision was on local law, and assumes its importance here since the court held the act was not barred by the Johnson Act. That Act, amended in 1948, provides:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and \textit{efficient} remedy may be had in the courts of such State."\textsuperscript{21}

New Jersey's remedies were considered inadequate by the Supreme Court and the \textit{Hillsborough} case requires a comparison with New York procedures to ascertain whether a like result might be reached in the latter state.

\begin{itemize}
  \item \textsuperscript{17} Sioux City Bridge Co. v. Dakota County, 260 U. S. 441 (1923).
  \item \textsuperscript{18} 326 U. S. 620 (1946). Forewarning of this result was given in \textit{Hackensack Water Co. v. Borough of Oradell}, 17 F. Supp. 39 (D. C. N. J. 1938). A taxpayer sought relief in equity, alleging its property was valued at true worth while all other property in the tax district was assessed at fifty percent of true value. The court denied a motion to strike the complaint, pointing out that neither the assessor nor the county board could reduce the valuation below true value. Moreover, nothing in the New Jersey statutes led to a belief that an individual taxpayer could, as of right, institute any proceedings to gain a reduction.
  \item \textsuperscript{19} 62 STAT. 964 (1948), as amended, 68 STAT. 890, 28 U. S. C. A. §2201 (Supp. 1955); "In case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." The revisor's note states, "While this section does not exclude declaratory judgments with respect to State taxes, such suits will not ordinarily be entertained in the courts of the United States where State law makes provision for payment under protest and recovery back or otherwise affords adequate remedy in the State courts."\textsuperscript{20}
  \item \textsuperscript{20} The county board had failed to comply with the statutory requirements of notice and hearing for the assessment of "omitted property". See note 30, \textit{infra}.
  \item \textsuperscript{21} 62 STAT. 932 (1948), 28 U. S. C. §1341 (1950); (italics added).
\end{itemize}
New Jersey provides for the assessment of property by local assessors, with whom a taxpayer may confer informally in regard to his valuation. Lists prepared by these assessors are filed with the county board of taxation. Formal complaint about an assessment must be made to the board, which

"... may, after investigation, revise, correct and equalize the assessed value of all property in the respective taxing districts, increase or decrease the assessed value of any property not truly valued, add to the lists and duplicates any property which has been omitted or overlooked, at its true value, and in the general do everything necessary for the taxation of all property in the county equally and at its true value."

On appeal to it the board's powers are limited to raising the valuation on property which has been underassessed, and do not extend to reducing the assessment of a taxpayer who claims that he, and he alone, has been assessed at full value. Royal Manufacturing Co. v. Board of Equalization of Taxes and a number of other New Jersey decisions laid down the rule that a disproportionately assessed taxpayer had no right to have his assessment reduced. His remedy was to petition for an increase of the other assessments. Although the New Jersey statutes specifically limit the assessors to revisions not exceeding full valuation, the New York law contains no such restriction, but apparently relies upon the Constitutional mandate that property be assessed at full value.

An appeal from the decision of the county board in New Jersey may be taken to the division of tax appeals of the state department of taxation. If the result of this appeal is unsatisfactory, the taxpayer may seek a certiorari writ for review of his assessment. However, certiorari is discretionary and not available as of right. Mr. Justice Douglas stressed the discretionary aspects of the New Jersey writ in the Hillsborough opinion.

23. N. J. S. A. §54:4-47 (italics added) (repealed by L. 1948, c. 40, §13). Probably this repealer would change the result of the Hillsborough case, but the ensuing discussion is based on New Jersey law as it existed at the time of that decision. Appeal to the board must be on or before August fifteenth. N. J. S. A. §54:3-21. The board must keep a record of its judgments and hear and determine all complaints by November fifteenth. N. J. S. A. §54:3-26.
25. This rule was reiterated in Lehigh Valley R. R. v. State Board, 12 N. J. Misc. 673, 174 Atl. 359 (Sup. Ct. 1934), where certiorari was denied to a disproportionately assessed taxpayer.
29. Staubach v. Cities Service Oil Co., 130 N. J. L. 157, 31 A. 2d 804 (Ct. Err. & App. 1943), to the effect that the writ was discretionary and a refusal to allow the writ was not subject to judicial review.
New York does not provide an intermediate administrative appeal, but allows the taxpayer to bring a proceeding to review the assessment in the courts if the initial appeal is unsatisfactorily determined. Disproportionate assessment is one of three specified bases for instituting such action.\(^3\) The New York remedy is given as of right.\(^3\) It is broader than the federal right, for in the state a taxpayer need only sustain his challenge with the fact of inequality, whereas the federal right seems predicated on proof of systematic and intentional discrimination in undervaluation.

The New York remedy was considered adequate by a lower federal court. Here the taxpayer had the right of judicial review by certiorari, was entitled to a refund of the taxes with interest, might in some cases obtain a stay of collection of the tax, and was also entitled to secure a declaratory judgment in the state courts.\(^3\)

New Jersey's remedies may be considered inadequate, but the rough similarity of the procedures available in New York should not result in a decision that the relief there is not adequate. The New York statutes provide relief for the disproportionately assessed taxpayer, and the right has become well established through a long series of judicial decisions. The taxpayer need only prove that he is assessed at a higher percentage of full valuation than other taxpayers in his district, and he will be granted a reduction to the proven average level of the tax unit. This reduction may be obtained either in administrative review, or upon judicial review. Under such circumstances, it can hardly be maintained that equal protection of the laws has been denied.

As in the Hillsborough case, due process objections\(^3\) might be made where the assessors fail to comply with the notice and hearing requirements of the Tax

\(^30\) N. Y. Tax Law §§ 46, 290-c.
\(^31\) See note 67, supra.
\(^33\) N. J. S. A. §§54:3-20, 54:4-63.12, 54:4-63.13 54:4-63.14 provide for the addition to the tax lists of “omitted property” and “property omitted by the assessor”. As a condition precedent to assessing the former, the county board of taxation must give a taxpayer five days notice in writing of the time and place when hearings on objections to the proposed assessment will be held. Failure to comply with the notice and hearing requirements was the “local law” ground on which the federal district court invalidated the assessment in the Hillsborough case. In Wyckoff v. Nunn, 39 N. J. L. 422 (Sup. Ct. 1877), the court allowed certiorari as a proper remedy where the taxpayer had no notice of the assessment and no opportunity to appeal to the commissioners of appeal for relief. Where a taxpayer received an indefinite notice of a hearing to assess its property, the court held jurisdiction lacking and allowed certiorari to review denial of a motion to dismiss for lack of jurisdiction. Duke Power Co. v. Essex County Board of Taxation, 122 N. J. L. 589, 7 A. 2d 409 (Sup. Ct. 1939), aff’d mem. 124 N. J. L. 41, 11 A. 2d 21 (Ct. Err. & App. 1939). An assessment was set aside on certiorari for failure to comply with the statutory requirements for assessing “omitted property” in Duke Power Co. v. State Board of Tax Appeals, 129 N. J. L. 449, 30 A. 2d 416 (Sup. Ct. 1939), aff’d per curiam, 131 N. J. L. 275, 35 A. 2d 201 (Ct. Err. & App. 1944).
REMEDIES FOR DISPROPORTIONATE ASSESSMENT

Law. Such defects would probably be held jurisdictional, and in that event the taxpayer would not be held limited to a proceeding to review an assessment under the Tax Law, but could utilize several other methods of collateral attack.

Whether proceeding on equal protection or due process grounds, the New York taxpayer will find a plain, speedy and efficient remedy in the state courts. Thus the Johnson Act should serve to bar him from recourse to the federal courts on these grounds.

IV. Conclusion—One Adequate Remedy

The New York taxpayer who seeks to challenge a property assessment solely on the basis of disproportion or inequality appears limited to a single remedy. Considering the administrative and judicial processes as separate and distinct entities, relief is actually two-fold.

Initially, application for relief is made to the local assessors on grievance day. Exhaustion of this form of relief allows the taxpayer to invoke the aid of the courts by a proceeding to review the assessment.

A declaratory judgment, an action to remove a cloud on title, and other methods equitable in nature appear to be beyond his grasp. Relief in the federal courts is speculative at best, and in all probability unavailable. Furthermore, the New York procedure offers greater protection to the taxpayer than does the federally guaranteed right of equal protection of the laws.

Despite this sole remedy, the taxpayer has no ground for complaint. His right to institute the proceeding is well established. Upon judicial appeal, the assessment is tried de novo. Liberalized practice governing evidence in this trial allows the introduction of proof of sales of comparable property. The statutory provisions for "sampling" reduce the amount of evidence which may be admitted, with a corresponding reduction in costs of the suit to the taxpayer. In addition, by proving an inequality of valuation among these samples, disproportion is also proved. Inequality need not be shown for all the property situated and assessed in the tax district. The remedy is as speedy as any action in these days of crowded

34. N. Y. Tax Law §§25-27, 29, 45-a, 45-b, 45-d.
35. See Second National Bank v. City of New York, 213 N. Y. 457, 107 N. E. 1039 (1915), where failure to give notice of completion and an opportunity to be heard as required by law made the assessment void. The taxes were subsequently validated by the legislature, and a provision for hearing and a review by certiorari was made. The taxpayer did not employ these provisions, but sued to recover the amounts it had paid. Recovery was allowed as to all taxes except those for one year on which the statute of limitations had run when the action was initiated.
court calendars, and judicial relief is not terminated at its initial stage but may be prosecuted through the appellate level.

Though the taxpayer is limited to one remedy for his grievance, that remedy seems completely adequate. It is one which will protect his rights and assure him of bearing no more than his just proportion of the tax burden. True, the time limitations for taking advantage of this review are short, but the taxpayer's desire for more time must be balanced against governmental needs for revenue. Necessarily something more than a mere rule of thumb must be provided by which to gauge the amount of revenue which will be yielded in a given year.

In exchange for the protection afforded him New York insists upon a timely assertion of those rights which are accorded the disproportionately assessed taxpayer.

Although legally the proceeding to review is an adequate remedy, the author is cognizant of the fact that for the small taxpayer who owns a residence of average value the remedy may be financially unsatisfactory. Where disproportion is involved, the taxpayer would require the services not only of an attorney but also of a real estate expert to satisfactorily prosecute a proceeding to review. Such services are not inexpensive, and in the average case would exceed the amount of tax involved. The situation is not unlike that faced by many other persons who have small claims, which must be prosecuted, if at all, in the courts. However, the problem of the disproportionately assessed taxpayer might be more readily solved than the problems of other such claimants. The solution lies in assessing practices, and in the manner of selection of the local assessors. Action by the legislature, though, is the only solution for such a taxpayer if he is to be provided a remedy both legally and financially adequate.