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## TITLE 121 PROCEDURAL RULE WEST VIRGINIA OFFICE OF TAX APPEALS

### SERIES 1 RULES OF PRACTICE AND PROCEDURE BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

#### **§121-1-1. General.**

1.1. Scope. -- These procedural rules govern the practice and procedure in all cases and proceedings before the West Virginia office of tax appeals. These rules shall be known and may be referred to as the “office of tax appeals rules” and may be cited as “OTA”.

1.2. Authority. -- These procedural rules are issued under the authority of W. Va. Code §11-10A-20.

1.3. Filing Date. -- March 21, 2003.

1.4. Effective Date. -- April 20, 2003.

1.5. Intent. -- The intent of these procedural regulations is to provide the public with a clear, uniform, prompt, efficient, inexpensive, and just system of resolving controversies with the West Virginia state tax department that are within the jurisdiction of the West Virginia office of tax appeals under the provisions of article 10A of chapter 11 of the W. Va. Code.

1.6. Construction. -- These procedural rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every controversy and shall not be construed to limit or repeal rights afforded or requirements imposed by statute or otherwise.

#### **§121-1-2. Definitions.**

As used in this rule, and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and shall apply in the singular or in the plural.

2.1. “Administrative law judge” means any individual designated and empowered by the chief administrative law judge to conduct any hearing to be held by the office of tax appeals, including any status conference, pre-hearing conference, oral argument, hearing, or similar proceeding before the office.

2.2. “Appellant” unless otherwise noted, means a petitioner or the representative of a petitioner, or other person directly interested who is legally entitled to initiate proceedings before the office of tax appeals.

2.3. “Business day” means any calendar day of the week other than a Saturday, Sunday or a legal holiday in the state of West Virginia. If the last day for filing a document under the provisions of this rule falls on a Saturday, Sunday or legal holiday in this state, the document is considered timely if filed on the following business day.

2.4. “Chief administrative law judge” means the individual appointed by the governor, as provided in

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W. Va. Code §11-10A-6, to be the chief executive officer of the office of tax appeals, until the individual resigns or is removed from office.

2.5. "Clerk" means the executive director of the office of tax appeals.

2.6. "Code" or "this code" means the code of West Virginia of 1931, as amended, as in effect for the relevant period or relevant time.

2.7. "De novo" means the office of tax appeals will decide questions of fact and of law based on the evidence and legal arguments presented in the proceedings before the office. Parties will need to be prepared to present exhibits, testimony and argument to the administrative law judge to which the proceeding is assigned.

2.8. "Division" or "tax division" means the tax division of the West Virginia department of tax and revenue provided for in W. Va. Code §11-1-1.

2.9. "Executive director" means the individual employed by the chief administrative law judge to provide management and administration necessary to run the office of tax appeals.

2.10. "Findings of fact and conclusions of law" means concise statements of the determinations made as to the contested issues of fact, and statements of the applicable law, as determined by the office of tax appeals, which are applicable to the findings of fact.

2.11. "Includes" and "including" when used in a definition contained in this rule shall not be deemed to exclude other things otherwise within the meaning of the term being defined.

2.12. "Intervenor" means any person who meets the qualifications and requirements for intervention under section 44 of this rule and who, upon filing a motion to intervene, is permitted by the office of tax appeals to intervene as a party in the proceeding.

2.13. "Office of tax appeals, " OTA," or "office" means the West Virginia office of tax appeals created by W. Va. Code §11-10A-3, except when the context in which the term "office" is used clearly indicates that a different meaning is intended.

2.14. "Party" means any of the following:

2.14.1. A petitioner or any other person who files a petition or other document seeking to invoke the jurisdiction of the office of tax appeals, the state tax department or other respondent, or both the petitioner and the respondent.

2.14.2. Any intervenor permitted to intervene by the office of tax appeals under section 44 of this rule; and

2.14.3. Any person joined as a contingently necessary party under section 42 of this rule.

2.15. "Person" includes (1) individuals, (2) associations, corporations, estates, limited liability companies, partnerships, trusts, any other group or combination acting as a unit treated as a taxpayer under the laws of this state, (3) any individual or entity acting in a fiduciary or representative capacity for any of the preceding individuals or entities, and (4) any combination of any of the preceding.

2.16. "Petition" includes an application, petition, demand for hearing, or variation of these terms as used in the applicable sections of laws administered by the tax commissioner and for which the office of

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tax appeals has jurisdiction under W. Va. Code §11-10A-8.

2.17. "Petitioner," unless otherwise noted, means a taxpayer or a representative of a taxpayer, or other person or entity directly interested who is legally entitled to initiate proceedings before the office of tax appeals.

2.18. "Pleading" includes any of the following:

2.18.1. petition for appeal;

2.18.2. application for appeal;

2.18.3. motion;

2.18.4. brief;

2.18.5. proposed findings of fact and conclusions of law; and

2.18.6. any other similar document formally filed with the office of tax appeals.

2.19. "Presiding administrative law judge" means the administrative law judge assigned to conduct the status conference, pre-hearing conference, oral arguments, hearing, or similar proceedings before the office of tax appeals.

2.20. "Respondent" means any party or person otherwise responding to a petition or other document originating a proceeding before the office of tax appeals.

2.21. "State tax department" means the tax division of the West Virginia department of tax and revenue, see W. Va. Code §11-1-1, and includes the state tax commissioner or his or her authorized designee.

2.22. "Substantive issue" means an issue where a substantive right, interest or privilege of any party is involved that may be prejudiced as opposed to a minor or mere procedural matters dealt with by the office of tax appeals.

2.23. "Supporting authorities" means cases and authorities cited and relied upon by a party.

2.24. "Tax commissioner" or "commissioner" means the tax commissioner of the state of West Virginia, or his or her authorized designee.

2.25. "This rule" means all of series 1, title 121 of the state code of rules.

2.26. "This state" means the state of West Virginia.

### **§121-1-3. Name of office, location and business hours.**

3.1. Name. The name of the office is the West Virginia office of tax appeals.

3.2. Office location. The principal office of the office of tax appeals shall be in Charleston, West Virginia. However, the office of tax appeals may hold hearings at any place within the state of West Virginia.

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3.3. Business Hours. The office of tax appeals shall be open during business hours on all days, except Saturdays, Sundays, and legal holidays in the state of West Virginia, for the purpose of receiving petitions, pleadings, motions, and other papers. Business hours are from 8:30 a.m. to 5:00 p.m. For legal holidays, see section 7 of this rule.

### 3.4. Mailing Address.

3.4.1. Mail sent to the office of tax appeals by United States mail should be addressed to:

West Virginia Office of Tax Appeals  
1012 Kanawha Boulevard, E., Suite 300  
PO Box 2751  
Charleston, WV 25301

3.4.2. Mail sent to the office of tax appeals by a delivery service other than the United States Postal Service shall be addressed and delivered to:

West Virginia Office of Tax Appeals  
1012 Kanawha Boulevard, E., Suite 300  
Charleston, WV 25301

### **§121-1-4. Jurisdiction of office of tax appeals.**

4.1. The office of tax appeals has exclusive and original jurisdiction to hear and determine all of the following:

4.1.1. Appeals from any assessment of tax (including additions to tax, penalties, interest or other amounts) issued by the state tax department pursuant to the West Virginia tax procedure and administration act, W. Va. Code §11-10-1 et seq.

4.1.2. Appeals from decisions or orders of the state tax department denying, in whole or in part, any refund or credit of any tax (including additions to tax, penalties, interest or other amounts) administered under provisions of the West Virginia tax procedure and administration act, W. Va. Code §11-10-1 et seq.

4.1.3. Requests to review orders of the state tax department denying, suspending, revoking, or refusing to renew any license or business registration certificate, or imposing any civil money penalty for violating the provisions of any licensing or registration law administered by the tax commissioner, W. Va. Code §11-10-1 et seq.

4.1.4. Questions presented when a hearing is requested pursuant to any provision of any article of chapter 11 of the West Virginia Code that is administered by the provisions of the West Virginia tax procedure and administration act.

4.1.5. Requests to reconsider fines levied by the state tax department under provisions of the charitable bingo or raffle laws of this state.

4.1.6. Matters which the tax commissioner is required by statute or legislatively approved rules to hear, except employee grievances filed pursuant to the grievance procedure for state employees set forth in W. Va. Code §29-6A-1 et seq.

4.1.7. Other matters that may be conferred on the office of tax appeals by statute or legislatively

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approved rules.

4.2. Timely petition required. -- In all cases, the jurisdiction of the office of tax appeals depends on the timely filing of a petition. See, e.g., W. Va. Code §§11-10-8 and 11-10-14.

4.3. Bankruptcy. -- With respect to the filing of a petition, or the continuation of proceedings, in the office of tax appeals after the filing of a bankruptcy petition, see Title 11 U.S.C. §362(a).

### **§121-1-5. Timely filing.**

5.1. General. -- Any petition, statement or other document required to be filed within a prescribed period, or on or before a prescribed date, is timely filed if it is delivered in person on or before the due date to the office of tax appeals at its office during normal business hours.

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

5.2.1. Deposited in U.S. mail defined. For purposes of this subsection 5.2, a document or payment is deposited in the mail in the United States when it is deposited with the domestic mail service of the U.S. Postal Service. The domestic mail service of the U.S. Postal Service, as defined by the Domestic Mail Manual, as incorporated by reference in the postal regulations, includes mail transmitted within, among, and between the United States of America, its territories and possessions, and Army post offices (APO), fleet post offices (FPO), and the United Nations, NY. (See Domestic Mail Manual, section G011.2.1, as incorporated by reference in 39 CFR 111.1.) Subsection 5.2 does not apply to any document that is deposited with the mail service of any other country.

5.2.2. U.S. Postal Service postmark. -- If the postmark on the envelope is made by the U.S. Postal Service, the postmark must bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment. If the postmark does not bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment, the document or payment is considered not to be timely filed or paid, regardless of when the document or payment is deposited in the mail. Accordingly, the sender who relies upon the applicability of W. Va. Code §11-10A-21 and this section 121-1-5 assumes the risk that the postmark will bear a date on or before the last date, or the last day of the period, prescribed for filing the document. See, however, subdivision 5.2.6 of this section with respect to the use of registered mail or certified mail to avoid this risk.

a. If the postmark on the envelope is made by the U.S. Postal Service but is not legible, the person who is required to file the document or make the payment has the burden of proving the date that the postmark was made.

b. If the envelope that contains the document has a timely postmark made by the U.S. Postal Service, but it is received after the time when a document or payment postmarked and mailed at that time would ordinarily be received, the sender may be required to prove that it was timely mailed.

5.2.3. Postmark made by other than U.S. Postal Service. If the postmark on the envelope is made other than by the U.S. Postal Service: (1) the postmark so made must bear a legible date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment; and (2) the document must be received by the office of tax appeals not later than the time when

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a document contained in an envelope that is properly addressed, mailed, and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Postal Service on the last date, or the last day of the period, prescribed for filing the document.

5.2.4. Document received late. If a document described in subparagraph 5.2.2.b of this section is received after the time when a document so mailed and so postmarked by the U.S. Postal Service would ordinarily have been received by the office of tax appeals, the document shall be treated as having been received at the time when a document so mailed and so postmarked would ordinarily be received if the person who is required to file the document establishes:

a. That it was actually deposited in the U.S. mail before the last collection of mail from the place of deposit that was postmarked (except for the metered mail) by the U.S. Postal Service on or before the last date, or the last day of the period, prescribed for filing the document or making the payment;

b. That the delay in receiving the document was due to a delay in the transmission of the U.S. mail; and

c. The cause of the delay.

5.2.5. U.S. and non-U.S. postmarks. If the envelope has a postmark made by the U.S. Postal Service in addition to a postmark not so made, the postmark that was not made by the U.S. Postal Service is disregarded, and whether the envelope was timely mailed will be determined solely by the postmark made by the U.S. Postal Service.

5.2.6. Registered or certified mail. If the document is sent by U.S. registered mail, the date of registration of the document shall be treated as the postmark date. If the document or payment is sent by U.S. certified mail, and the sender's receipt is postmarked by the postal employee to whom the document or payment is presented, the date of the U.S. postmark on the receipt shall be treated as the postmark date of the document. Accordingly, the risk that the document will not be postmarked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail.

### **§121-1-6. Computation of time.**

6.1. General. -- In computing any period of time prescribed or allowed by these rules or by direction of the office of tax appeals or by any applicable statute that does not provide otherwise, the day of the act, event, or default from which a designated period of time begins to run shall not be included, and (except as provided in subsection 6.2.) the last day of the period so computed shall be included. If service is made by regular mail, then a period of time computed with respect to the service shall begin on the day after the date of mailing.

6.2. Saturdays, Sundays, and holidays. -- Saturdays, Sundays, and all legal holidays in the State of West Virginia shall be counted, except that:

6.2.1. If the period prescribed or allowed is less than seven (7) days, then intermediate Saturdays, Sundays, and legal holidays in the state of West Virginia shall be excluded in the computation;

6.2.2. If the last day of the period so computed is a Saturday, Sunday, or a legal holiday in the state of West Virginia, then that day shall not be included and the period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday in this state; and

6.2.3. If any act is required to be taken or completed no later than (or at least) a specified number of days before a date certain, then the earliest day of the period so specified shall not be included if it is a

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Saturday, Sunday, or a legal holiday in the state of West Virginia, and the earliest such day shall be the next preceding day which is not a Saturday, Sunday, or a legal holiday in this state. When a legal holiday falls on a Sunday, the next day shall be considered a holiday; and, when a legal holiday falls on a Saturday, the preceding day shall be considered a holiday.

6.3. Cross-references. For computation of the period within which to file a petition with the office of tax appeals, see W. Va. Code §11-10A-9(b).

### **§121-1-7. West Virginia legal holidays.**

7.1. General. -- Legal holidays within the State of West Virginia, in addition to any other day appointed as a holiday by the President of the United States or the governor of this state, are as follows:

New Year's Day -- January 1.

Birthday of Martin Luther King, Jr. -- Third Monday in January

Lincoln's Birthday -- February 12.

Washington's Birthday -- Third Monday in February

Memorial Day -- Last Monday in May

West Virginia Day -- June 20

Independence Day -- July 4

Labor Day -- First Monday in September

Columbus Day -- Second Monday in October

State General election day -- First Tuesday in November (even number years)

Veterans Day -- November 11

Thanksgiving Day -- Fourth Thursday in November

Christmas Day -- December 25

7.2 Special rule. -- When a holiday described in this subsection 7.1 falls on a Sunday, then the following Monday is the legal holiday. When the holiday falls on a Saturday, then the preceding Friday is the legal holiday. This subsection 7.2 does not apply to primary, general or special election days in this state.

7.3. Election days. -- State primary, general and special election days are also legal holidays in West Virginia:

General election day --. The Tuesday after the first Monday in November of each even year.

Primary election day --. The second Tuesday in May of each even year.

### **§121-1-8. Enlargement or reduction of time.**

8.1. General. -- Unless precluded by statute, the administrative law judge, in his or her discretion, may make longer or shorter any period provided by these rules. The period fixed by statute, within which to file a petition invoking the jurisdiction of the office of tax appeals, may not be extended by an administrative law judge.

8.2. Continuances. -- As to continuances, see section 57 of this rule.

8.3. Certain motions. -- Where a motion is made concerning jurisdiction or the sufficiency of a pleading, the time for filing any response to that pleading shall begin to run from the date of service of the order denying the motion, unless the administrative law judge shall direct otherwise.

8.4. Briefs. -- Where the dates for filing briefs are fixed, an extension of time for filing a brief or the

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granting of leave to file a brief after the due date shall correspondingly extend the time for filing any other brief due at the same time and for filing succeeding briefs, unless the administrative law judge shall order otherwise.

### **§121-1-9. Office records.**

9.1. Removal of records. -- No original record, paper, document, or exhibit filed with the office of tax appeals shall be taken from the hearing room or from the offices of the office of tax appeals or from the custody of an administrative law judge or employee of the office, except as authorized by an administrative law judge or except as may be necessary for the executive director to furnish copies or to transmit the same for appeal or other official purposes. With respect to return of exhibits after a decision of the office becomes final, see subdivision 64.4.2 of this rule.

#### 9.2. Copies of Records.

##### 9.2.1. Administrative decisions.

9.2.1.a. Administrative decisions issued by the office of tax appeals subsequent to hearing shall be redacted to preserve confidentiality and, after they become final, shall be filed in the State Register maintained and published by the West Virginia secretary of state. A copy shall also be posted on the website maintained for the office of tax appeals.

9.2.1.b. A plain or certified copy of the redacted decision may be obtained by any person not a party to the proceeding upon application to the executive director of the office of tax appeals and payment of the required fee and postage. In the event the decision is appealed to a court in this state, a plain or certified copy of the decision, as issued and without redaction, may be obtained by any person not a party to the proceeding upon application to the executive director of the office of tax appeals and payment of the required fee and postage, if the copies are to be mailed to the applicant.

9.2.1.c. A plain or certified copy of a decision may be obtained by any person who is a party to the proceeding upon application to the executive director of the office of tax appeals and payment of the required fee and postage, if the copies are to be mailed to the applicant.

9.2.2. Transcripts and other records pertaining to a proceeding. A plain or certified copy of the transcript and other records pertaining to a proceeding may be obtained by any person who is a party to the proceeding upon application to the executive director of the office of tax appeals and payment of the required fee and postage, if the copies are to be mailed to the applicant.

#### 9.3. Fees.

9.3.1. The fees to be charged and collected for any copies shall be twenty-five cents per page.

9.3.2. Transcripts. The executive director shall maintain a record indicating the current cost of obtaining a copy of a transcript of any proceeding.

#### 9.4. Destruction of records.

9.4.1. If an administrative decision is not appealed timely to a circuit court of this state, the record of the proceeding and any other documents and papers pertaining to the proceeding may be destroyed three years after the day the administrative decision was issued by the office of tax appeals.

9.4.2. If an administrative decision is appealed timely to a circuit court of this state, the record of



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the proceeding and any other documents and papers pertaining to the proceeding may be destroyed six years after the day the administrative decision was issued by the office unless a party to the proceeding notifies the office in writing that the administrative decision has not become final and that the decision is still subject to revision by a court. The records may then be destroyed six months after the administrative decision is no longer subject to judicial review.

### **§121-1-10. Confidentiality of records and information.**

10.1. General. -- Pleadings, motions, briefs, proposed findings of fact and conclusions of law and other documents filed in or pertaining to a tax or program administered under the West Virginia tax procedure and administration act, W. Va. Code §11-10-1 et seq., that are in the custody of the office of tax appeals may not be disclosed to the public and are exempt from disclosure under the West Virginia freedom of information act, W. Va. Code §29B-1-1 et seq., except as otherwise provided in this rule.

10.2. The confidentiality rules set forth in W. Va. Code §11-10-5d, to the extent not inconsistent with the provisions of article 10A, chapter 11 of the Code, are applicable to all records and to all employees of the office of tax appeals, as provided in W. Va. Code §11-10A-23.

### **§121-1-11. Proceedings not open to public.**

11.1 Unless otherwise provided by statute, proceedings before the office of tax appeals are not open to the public. Unless prior permission is granted by the office of tax appeals, no person shall be permitted to make photographs, video recordings, sound recordings, or any other form of recording of proceedings, or any sound, video, or other form of transmission or broadcast of proceedings. Unless prior permission is granted by the office of tax appeals, these activities are not permitted in areas immediately adjacent to the hearing room. With prior approval of the office of tax appeals, photographs, video recordings, sound recordings, other forms of recordings, and sound, video, or other forms of transmissions or broadcasts may be made of ceremonial proceedings in the hearing room.

### **§121-1-12. Seal; authenticating records; judicial notice.**

12.1. The office of tax appeals shall have a seal. The seal shall have the following words engraved thereon: "West Virginia Office of Tax Appeals." The office of tax appeals shall authenticate all of its orders, records and proceedings with the seal.

12.2. The courts of this state take judicial notice of the seal as provided in W. Va. Code 11-10A-5.

### **§121-1-13. Payment of fees or charges.**

13.1. Payments to the office of tax appeals for fees or other charges shall be made in United States currency, or by check, money order or other draft payable in United States currency that is made payable to the order of the "State of West Virginia". Payments shall be mailed or delivered to the executive director of the office of tax appeals in Charleston, West Virginia.

13.2. The executive director shall keep proper records of all payments and shall issue a written receipt to the payor when the payment is made in cash.

### **§121-1-14. Disability of administrative law judge.**

In the event of the death, sickness, or disability of an administrative law judge after he or she has heard any part of the case, his or her successor or alternate may continue the proceeding and decide the matter, if, in the discretion of the chief administrative law judge, continuing the proceeding will not injure

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a party to the proceeding or otherwise result in injustice, or the chief administrative law judge may, in his or her discretion, order the matter reheard.

### **§121-1-15. Form and style of papers.**

15.1. Caption, date, and signature required. - All papers filed with the office of tax appeals shall have a caption, shall be dated, and shall be signed as follows:

15.1.1. Caption. -- A proper caption shall be placed on all papers filed with the office of tax appeals, and the requirements provided in section 29 of this rule shall be satisfied with respect to all such papers. All prefixes and titles, such as "Mr.", "Ms.", or "Dr.", shall be omitted from the caption. The full name and surname of each individual petitioner shall be set forth in the caption. The name of an estate or trust or other person for whom a fiduciary act shall precede the fiduciary's name and title, as for example "Estate of Mary Doe, deceased, Richard Roe, Executor".

15.1.2. Date. -- The date of signature shall be placed on all papers filed with the office of tax appeals.

15.1.3. Signature. -- The original signature, either of the party or the party's representative, shall be subscribed in writing to the original of every paper filed by or for that party with the office of tax appeals, except as otherwise provided by these rules.

15.1.3.a. An individual rather than a firm name shall be used, except that the signature of a petitioner corporation, partnership, limited liability company, other legal entity, or unincorporated association shall be in the name of the corporation, partnership, limited liability company, other legal entity, or association by one of its active and authorized officers, partners or members, as for example "ABC Company, Inc., by Richard Roe, President".

15.1.3.b. The name, mailing address, and telephone number of the party or the party's representative, as well as the representative 's state court bar number, if any, shall be typed or printed immediately beneath the written signature.

15.1.3.c. The mailing address of a signatory shall include a firm name if it is an essential part of the accurate mailing address.

15.2. Number Filed. -- For each paper filed with the office of tax appeals, there shall be filed one conformed copy together with the signed original thereof, except as otherwise provided in these rules.

15.2.1. When the filing is in more than one proceeding or contested case (as a motion to consolidate, or in cases already consolidated), the number filed shall include one additional copy for each docket number in excess of one.

15.2.2. If service of a paper is to be made by the executive director, copies of any attachments to the original of such paper shall be attached to each copy to be served by the executive director. As to stipulations for evidentiary hearing, see subsection 47.2 of this rule.

15.3. Legible papers required. -- Papers filed with the office of tax appeals may be prepared by any process, but may be filed only if all papers, including copies, filed with the office are clear and legible.

15.4. Size and style.

15.4.1. Typewritten, computer generated or printed papers should be typed or printed only on one

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side, on opaque, unglazed paper, 8 1/2 inches wide by 11 inches long.

15.4.2. All the papers should have margins on both sides of each page that are no less than 1 inch wide, and margins on the top and bottom of each page that are no less than 3/4 inch wide.

15.4.3. Text and footnotes should appear in consistent typeface no smaller than 12 characters per inch produced by a typewriting element or 12-point type produced by a nonproportional print font (e. g., Courier), with double spacing between each line of text and single spacing between each line of indented quotations and footnotes.

15.4.4. Quotations in excess of five lines should be set off from the surrounding text and indented.

15.4.5. Double-spaced lines shall be no more than three lines to the vertical inch, and single-spaced lines shall be no more than six lines to the vertical inch.

15.5. Binding and covers. -- All papers should be bound together on the upper left-hand side only and shall have no backs or covers.

15.6. Citations. -- All citations of case names should be underscored when typewritten or handwritten, and should be in italics when computer generated or printed.

15.7. Return of papers for failure to conform to this section. The office of tax appeals may return without filing any paper that does not conform sufficiently overall to the requirements of this section.

### **§121-1-16. Docketing of cases.**

16.1. Upon the filing of the petition, the executive director shall do all of the following:

16.1.1. Time-stamp all pleadings.

16.1.2. Assign an individual docket number to the proceeding.

16.1.3. Secure all original pleadings for safekeeping.

16.1.4. Establish a separate docket record for each case on a form approved by the chief administrative law judge.

16.2. The docket number assigned to each case shall be the permanent number of the proceeding and shall be affixed by the parties to all future filings in the case. The separate docket record established for each case shall contain entries of all pertinent filings and proceedings in the case and, together with the file containing all original pleadings, constitute the original record of the case to be preserved by the office of tax appeals as prescribed by law.

### **§121-1-17. Appearances and representation of parties.**

17.1. In general. -- A petitioner may appear before the office of tax appeals in his or her own behalf, or by a representative when a power of attorney is filed with the office of tax appeals. See form WV-2848 for an example of a power of attorney. A petitioner may be represented, for example, by a lawyer qualified to practice law in this state (or by co-counsel of record so qualified); or by a certified public accountant; or by a registered public accountant; or by a person who is an enrolled agent for Internal Revenue Service purposes; or by virtually any other adult person.

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17.2. Prose appearance. -- Where a party attempts to represent himself or herself and, in the opinion of the office of tax appeals there is a serious question as to such party's competence to do so, the office of tax appeals, if it deems justice so requires, may continue the case until appropriate steps have been taken to obtain an adjudication of the question by a court having jurisdiction so to do, or may take such other action as it deems proper.

17.3. Representative not to engage in unauthorized practice of law.

17.3.1. While a person who is not authorized to practice law in this state may generally represent a petitioner before the office of tax appeals, that person may not engage in the unauthorized practice of law. Therefore, he or she may not: interrogate his or her own witness, that is, conduct a direct examination, at a hearing before the office of tax appeals; may not cross-examine witnesses; may not argue that a statute, regulation, tax policy, or the like is unconstitutional (on its face or as applied to a particular situation); and may not argue that an ambiguous statute, regulation, tax policy, or the like should be interpreted (construed) in a particular manner.

17.3.2 Practice of law defined. -- The West Virginia supreme court of appeals defines the practice of law as follows:

“In general, one is deemed to be practicing law whenever he or it furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge and skill.”

“More specifically but without purporting to formulate a precise and completely comprehensive definition of the practice of law or to prescribe limits to the scope of that activity, one is deemed to be practicing law whenever (1) one undertakes, with or without compensation and whether or not in connection with another activity, to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures. Nothing in this paragraph shall be deemed to prohibit a lay person from appearing as an agent before a justice of the peace or to prohibit a bona fide full-time lay employee from performing legal services for his regular employer (other than in connection with representation of his employer before any judicial, executive or administrative tribunal, agency or officer) in matters relating solely to the internal affairs of such employer, as distinguished from such services rendered to or for others.”

17.4. In-house counsel. -- A lawyer, including in-house counsel, or the like, for any corporation or other entity, who is not authorized to practice law in this state, must engage, as co-counsel of record, a lawyer who is authorized to practice law in this state, and such co-counsel must be a signatory (including noting his or her West Virginia state bar membership number) in all papers and must appear as the “responsible local attorney” at all proceedings before the office of tax appeals.

17.5. Visiting attorney.

17.5.1. Any person who has not been admitted to practice before the supreme court of appeals of West Virginia, but who is a member in good standing of the bar of the supreme court of the United States, the bar of the highest court of any other state in the United States, or the bar of the District of Columbia (which bar shall extend like privileges to members of the West Virginia state bar), shall be permitted to appear pro hac vice as a visiting attorney in a particular case, in association with a person admitted to

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practice before the West Virginia supreme court of appeals, and in good standing as a member of its bar, in accordance with rule 8.0 of the West Virginia rules for admission to the practice of law, which rule reads:

(a) General rule. Whenever it shall appear that a person, who has not been lawfully licensed and admitted to the practice of the law in the State of West Virginia, has been duly licensed to be admitted to practice before a court of record of general jurisdiction in any other state or country or in the District of Columbia, and is in good standing as a member of the bar of such jurisdiction, he or she may appear in a particular action, suit, proceeding or other matter in any court of this State or before any judge, tribunal or body of this State upon full compliance with the requirements of this rule, if like courtesy or privilege is extended to members of the West Virginia State Bar in such other jurisdiction. Except in conformity with this rule, members of the Bar of any jurisdiction other than the State of West Virginia may not in this State do any act, or hold themselves out as entitled to do any act, within the definition of the practice of law, as prescribed by the Supreme Court of Appeals of West Virginia.

(b) Admission process. Before such privilege of appearance is granted, the applicant shall provide to the judge, tribunal or other body before which the applicant desires to appear, as well as to the West Virginia State Bar, a verified statement of application for pro hac vice admission listing (1) the action, suit, proceeding or other matter which is the subject of the application; (2) the name, address and telephone number of the registration or disciplinary agency of all state courts, the District of Columbia or of the country in which such person is admitted; (3) the name and address of the member of the West Virginia State Bar who will be a responsible local attorney in the matter; (4) all matters before West Virginia tribunals or bodies in which such person is or has been involved in the preceding 24 months; (5) all matters before West Virginia tribunals or bodies in which any member of petitioner's firm, partnership, corporation or other operating entity is or has been involved in the preceding 24 months; (6) a representation by the applicant for each State, the District of Columbia or any other country where said applicant has been admitted to practice, stating whether the applicant is in good standing with the bar of every such jurisdiction and that he or she has not been disciplined in any such jurisdiction within the preceding 24 months; (7) an agreement to comply with all laws, rules and regulations of West Virginia state and local governments, where applicable, including taxing authorities and any standards for pro bono civil and criminal indigent defense legal services. A fee of one-hundred fifty dollars (\$150) shall be paid to the West Virginia State Bar for each individual applicant in each individual pro hac vice admission. The fee shall accompany the verified statement of application for pro hac vice admission which is sent to the West Virginia State Bar.

(c) Responsible local attorney. The applicant shall be associated with an active member in good standing of the state bar, having an office for the transaction of business within the State of West Virginia, who shall be a responsible local attorney in the action, suit, proceeding or other matter which is the subject of the application, and service of notices and other papers upon such responsible local attorney shall be binding upon the client and upon such person. The local attorney shall be required to sign all pleadings and affix the attorney's West Virginia State Bar ID number thereto, and to attend all hearings, trials or proceedings actually conducted before the judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission pro hac vice. The local attorney shall further attend the taking of depositions and other actions that occur in the proceedings which are not actually conducted before the judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission pro hac vice, and shall be a responsible attorney in the matter in all other respects. In order to be a "responsible local attorney" the local attorney must maintain an actual physical office equipped to conduct the practice of law in the State of West Virginia, which office is the primary location from which the "responsible local attorney" practices law on a daily basis. The responsible local attorney's agreement to participate in the matter shall be evidenced by the local attorney's endorsement upon the verified statement of application, or by written statement of the local attorney attached to the application.

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It shall be the duty of every circuit clerk to reject any pleading or other document tendered for filing in the office of said clerk which is not signed or otherwise executed as required by this rule. Any document filed in violation of this rule may be expunged as a fugitive document; Provided, However, that any party shall have a period of thirty days after notice to comply with this rule by filing a certification with the circuit clerk signed by the responsible local attorney and identifying the pleadings and documents thereby affected.

(d) Grounds for denial. If a complete and truthful statement of application be not filed, or if inquiry by the court concerning the applicant's admission and ethics in another jurisdiction indicates, or if the applicant's appearances within the State of West Virginia within the past 24 months are numerous or frequent or involve improper conduct, the court or tribunal shall deny such person the continuing privilege of appearance.

(e) Effect of denial. Any pleading filed by a visiting attorney without complying with this section may, after 14 days' written notice mailed to him or her at the address then known to the clerk of the circuit court or other tribunal or body, be stricken from the record.”

17.5.2. Before appearing before the office of tax appeals, the visiting attorney shall file with the chief administrative law judge a true copy of the verified statement filed with the West Virginia state bar in conformity with the requirements of rule 8 of the West Virginia rules for admission to practice law. If the chief administrative law judge is satisfied that the visiting attorney meets all of the qualifications for admission pro hac vice the chief administrative law judge shall enter an order to that effect and send a copy to the West Virginia state bar.

17.5.3. Alternatively, the visiting attorney may apply for pro hac vice admission to the judge of any circuit court of this state in which a petition for appeal of an adverse administrative decision of the office of tax appeals may be filed, and then tender a copy of the order of the circuit court judge granting the pro hac vice admission.

17.5.4. Duty of local attorney. -- The local attorney shall attend the taking of depositions and other actions that occur in the proceedings which are not actually conducted before the office of tax appeals, as well as those conducted by the office of tax appeals, as required by rule 8 of the West Virginia rules for admission to practice law.

17.5.5. Failure to comply. -- Any pleading, motion, or other paper filed by a visiting attorney not in compliance with this section may be stricken from the record after fifteen (15) days written notice mailed to the visiting attorney at his or her address as known to the chief administrative law judge.

17.6. Representation of tax commissioner. -- Unless the tax commissioner represents himself or herself in person, the tax commissioner shall be represented in all cases, except small claim cases to which the provisions of section 110 of this rule apply, by a person who is authorized to practice law in this state.

### **§121-1-18. Encouraged resolution of controversies by the parties.**

The availability and pendency of proceedings before the office of tax appeals may not be viewed as precluding the parties from attempting to resolve the matters in controversy prior to the hearing, thereby avoiding the need for a hearing, or after the hearing is held but before the administrative decision is issued.

### **§121-1-19. Counsel conference.**

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19.1. In all proceedings, except small claims proceedings under section 110 of this rule, the petitioner or the petitioner's representative shall arrange for a conference with all other parties or representatives for the following purposes:

19.1.1. To discuss the possibility of settlement;

19.1.2. To stipulate to the admissibility of evidence to the fullest extent to which complete or qualified agreement can be reached, including all material facts that are not, or fairly should not be, in dispute;

19.1.3. To identify, for purposes of discovery, all discoverable evidence or documents known to be in the possession or control of the other party, which shall be specifically listed in the summary required by this rule; or

19.1.4. To consider all other matters that may aid in the disposition of the proceeding;

19.2. The conference shall be held within sixty (60) days after the filing of the initial petition requiring service upon the respondent, at a time and place mutually agreed to or, if an agreement cannot be reached, fixed by order of the office of tax appeals.

### **§121-1-20. Ex parte communications.**

20.1. All parties and their representatives shall have access to administrative law judges on an equal basis.

20.2. No party, either directly or through a representative, may communicate in writing with an administrative law judge about any aspect of the merits of the case unless a copy of the written communication is promptly delivered to the opposing representative or, if there is none, to the opposing party.

20.3. Similarly, no party may, either directly or through a representative, communicate orally with an administrative law judge about any aspect of the merits of the case without providing prior notice to the opposing representative or, if there is none, to the opposing party.

20.4. On the other hand, any party may, unilaterally, seek clarification of purely procedural matters, either orally or in writing, by directing questions about the same to the executive director of the office of tax appeals.

### **§121-1-21. Commencement of proceedings.**

21.1. Petition required. -- All proceedings before the office of tax appeals shall be commenced by timely filing with the executive director as a written petition that meets the requirements of this section. An ordinary letter or a substitute form is not sufficient, unless it contains all of the required information, including required attachments.

21.2. Petition must be filed timely. -- Under West Virginia law, the period of time within which a person may file a petition with the office of tax appeals is jurisdictional, not merely directory. The office of tax appeals does not have authority to suspend or extend, for any reason at all, that limitation period.

21.2.1. The office of tax appeals will not hold a hearing on the issue of why, factually, a complete and proper petition was not filed within the time period prescribed by the applicable statute and why, as a matter of "equity" or the like, the untimeliness should be "excused." The office of tax appeals

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will hold a hearing to determine if a petitioner has in fact timely filed in accordance with section 5 of this rule.

21.2.2. If a petition is received in the office of tax appeals that is not timely filed, the chief administrative law judge shall enter an order refusing to docket the petition because the office of tax appeals has no jurisdiction to hear a petition that is not filed timely. The chief administrative law judge shall send a copy of the order to the petitioner, or to the petitioner's representative, if any, identified in the petition, by certified mail, and to the tax commissioner's legal representative. The order shall further advise the petitioner that the determination of the state tax department that the petitioner sought to appeal is now final and is not subject to administrative or judicial review. This administrative order is not subject to any further review by the office of tax appeals.

### 21.3. Form of petition.

21.3.1. A form for a petition is available from the office of tax appeals, upon request. The form is also available on the internet at <http://www.state.wv.us/ota>. See also, Form 2 in Appendix I of this rule.

21.3.2. A petition shall be prepared on letter-size paper (8 1/2" x 11") by computer or typewriter, if possible. If a computer or typewriter is not available, the petition may be completed by handwriting that is legible (printing is preferred over cursive).

21.3.3. A petition shall include the following information:

- a. The petitioner's name, including any "doing business as" name;
- b. The petitioner's mailing address (street address and any post office box or drawer), e-mail address (if any), telephone number(s), and fax number (if any);
- c. The petitioner's social security number, federal employer identification number, or any other identifying number assigned to the petitioner by the West Virginia state tax department or by the Internal Revenue Service (the office of tax appeals will use any of these numbers only for purposes of performing its functions as required by law);
- d. The type(s) of tax(es) involved or the specific nature of the non-tax matter involved (such as a charitable bingo license revocation);
- e. The division, section, unit, or other organizational part of the state tax department that issued the notice of assessment, denied the claim for refund or credit, suspended or refused to issue the license or business registration certificate, or took any other action prompting the filing of the petition;
- f. The date on which the petitioner received the written notice that prompted the filing of the petition;
- g. If applicable, the taxable period(s) or year(s) involved and the amount of tax, additions, penalty, interest or other amount in controversy;
- h. Separately numbered paragraphs stating, in clear, concise, and, as much as possible, specific terms, each and every material error, factual or legal, that the petitioner alleges has been made by the state tax department;
- i. The specific relief sought by the petitioner;



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j. If desired by the petitioner, a request that the matter, if eligible and approved by the office of tax appeals, be processed as a small claim case under section 110 of this rule;

k. If desired by the petitioner, a waiver of the right to be heard in person and, instead, submission of the matter by the petitioner on the petition and any notarized affidavits or other relevant and self-explanatory documents submitted with the petition;

l. The name, mailing address, e-mail address (if any), telephone number(s), fax number (if any), and occupation (such as lawyer or certified public accountant) of the petitioners representative, if any;

m. A legible copy of the power of attorney that is necessary for any representative (see Form WV-2848, available from the state tax department or from the internet <http://www.state.wv.us/taxrev/uploads.wv2848.pdf>);

n. The signature of the petitioner, or of the petitioner's representative, and the date signed, beneath a statement that the petition is made with the knowledge that a willfully false representation set forth in the petition is a misdemeanor punishable according to law; and

o. It is not necessary that the petition be notarized.

### 21.4. Required attachment.

21.4.1. In general. -- A legible and complete copy of the determination of the state tax department (e.g., notice of assessment, denial of claim for refund or credit, refusal to issue license, order suspending a license, etc.) prompting the filing of the petition shall be attached to the petition. A petition is not complete and is deficient without this attachment.

21.4.2. Exception. -- The only exception to subdivisions 21.3.1 is a petition for refund or credit that is filed because the state tax department failed to act on a claim for refund or credit. In this latter instance, a true copy of the claim for refund or credit shall be attached, along with evidence of the date the claim was filed with the state tax department, such as a certified mail return receipt card signed by an employee or agent of the state tax department.

21.5. Number of copies to be filed. -- An original of the petition and one exact copy of the same shall be filed simultaneously. A petition is not complete and is deficient without inclusion of the copy, except as otherwise provided in this rule.

### **§121-1-22. Filing of petition**

22.1. Hand delivery. -- The petition, including the required copy and attachments, may be hand delivered to the office of tax appeals, in Charleston, West Virginia, during normal business hours, which are 8:30 a.m. to 5:00 p.m., Monday through Friday, except legal holidays in this state.

W. Va. Office of Tax Appeals  
1012 Kanawha Boulevard, E., Suite 300  
Charleston, WV 25301

22.2. U. S. mail delivery. The petition, including the required copy and attachments, may be mailed, postage prepaid, to the office of tax appeals. Timely mailing is timely filing. The earliest U. S. postmark date shown on the envelope or other wrapper is the date of filing. If the U. S. postmark date is illegible or

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missing, the date of physical receipt of the petition in the office of tax appeals is the date of filing. The mailing address for the office of tax appeals is:

W. Va. Office of Tax Appeals  
1012 Kanawha Boulevard, E., Suite 300  
PO Box 2751  
Charleston, WV 25301

22.3. Private delivery service. -- The petition, including the required copy and attachments, may be delivered, charges prepaid, to the office of tax appeals by any delivery service approved by the Internal Revenue that a taxpayer may use to deliver tax returns or other documents to the Internal Revenue Service. Delivery to the delivery service on the last day for filing the petition is timely filing, only if the taxpayer requires that delivery be made to the office of tax appeals, during normal business hours, on the office of tax appeal's next business day. If the delivery service is not one approved by the Internal Revenue Service, the petition is not filed until it is physically received in the office of tax appeals. The address of the office of tax appeals is:

W. Va. Office of Tax Appeals  
1012 Kanawha Boulevard, E., Suite 300  
Charleston, WV 25301

22.4. Facsimile transmission. -- The petition may be filed by facsimile transmission to the office of tax appeals at (304) 558-1670. With the exception that there are no filing fees, the facsimile transaction shall be subject to and conform to the West Virginia supreme court of appeals rules for filing and service of pleadings and other documents by facsimile transmission, codified as W. Va. trial court rule 12, see Appendix II of this rule. In this instance, only one original of the petition and attachments must be transmitted. A conforming fax transaction received during normal business hours of the office of tax appeals, as shown on the transmittal sheet accompanying the fax, shall be treated as filed on that business day. A conforming facsimile transaction that is received after 5:00 p.m. (in Charleston, WV) on one business day of OTA will be treated as filed on the next business day of the office of tax appeals.

22.5. E-mail delivery. -- Sending petitions by unsecure e-mail is discouraged because the petitioner's confidentiality may be breached. The petition may be sent by e-mail to the executive director of the office of tax appeals at the following e-mail address: ota.state.wv.us. In this instance, only one copy of the petition and attachments must be e-mailed. A petition that is not signed and does not include copies of required attachments is a deficient petition. The e-mail attachments shall be a Microsoft Word file or an Acrobat PDF file. The required attachment to the petition must be an Acrobat PDF document produced by scanning the notice of assessment, or denial of the claim for refund or credit or other document precipitating the filing of the petition. An e-mail attachment that cannot be opened by the office of tax appeals shall be treated as if it were never received by the office of tax appeals. An e-mail attachment that is a corrupt file or infected file shall be treated as if it were never received by the office of tax appeals.

22.6. Web-based filing. -- [RESERVED].

22.7. Wrong address. -- If instead of mailing or otherwise delivering the petition to the office of tax appeals, the petitioner, or the petitioner's representative, causes the petition to be delivered to a place other than the office of tax appeals, such as, for example, the office of secretary of tax and revenue, the office of state tax commissioner or another office in the state tax department, receipt by that office is not receipt by the office of tax appeals unless the other office forwards the petition to the office of tax appeals within the original statutory period for filing the petition.

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### **§121-1-23. Special rule for appeal of jeopardy assessment.**

23.1. Time for filing petition. -- Except as provided in subdivision 23.2 of this section, a jeopardy assessment issued under W. Va. Code §11-10-7(b) is appealed by filing with the office of tax appeals a petition for reassessment within twenty (20) days after the person is served with notice of the jeopardy assessment. The petition shall be accompanied by remittance of the amount assessed, or such security as the tax commissioner deems necessary to ensure compliance with applicable provisions of chapter 11 of the West Virginia Code.

23.2. Extension of time. -- If a motion requesting an extension of time is filed with the office of tax appeals within twenty (20) days after the person is served with notice of the jeopardy assessment and the motion is accompanied by remittance of the amount assessed, or such security as the tax commissioner deems necessary to ensure compliance with applicable provisions of chapter 11 of the West Virginia Code, the person may have an additional thirty (30) days in which to file the petition for reassessment. If an extension of time is granted, the petition for reassessment must be filed within fifty (50) days after the notice of jeopardy assessment is served on the taxpayer. The office of tax appeals has no authority to extend this fifty-day period.

23.3. Security. -- Security posted with the petition for reassessment of a jeopardy assessment, or with the motion to extend the time for filing a petition for reassessment of a jeopardy assessment, shall be in United States currency or in the form of:

23.3.1. A certified check for the amount of the jeopardy assessment drawn on a state or national bank located in this state or on a national bank located in another state made payable to the State of West Virginia;

23.3.2. An irrevocable letter of credit for an amount not less than the amount of the jeopardy assessment issued by a state or national bank located in this state or a national bank located in another state that may be drawn on by the tax commissioner without the consent of any other person;

23.3.3. A corporate surety bond issued by a surety company authorized to engage in surety business in this state and conditioned upon taxpayer's payment of the amount assessed, or the amount for which the taxpayer is found to owe the state of West Virginia in an administrative decision of the office of tax appeals that becomes final or, if the decision is appealed, the amount for which the taxpayer is found liable in a final decision of a court of competent jurisdiction, including the amount of statutory interest that continues to accrue after the jeopardy assessment is issued until the amount due is paid; or

23.3.4. Other security acceptable to the tax commissioner.

23.4. For purposes of subsection 23.3 of this section, the amount of the jeopardy assessment includes the amount of tax, additions to tax, penalties, and other amounts assessed plus accrued statutory interest calculated under W. Va. Code §11-10-17.

23.5. Other security. -- When the amount of security acceptable to the tax commissioner is less than the amount assessed, or the security acceptable to the tax commissioner is in a form other than set forth in subsection 23.3 of this section, exclusive of subdivision 23.3.4, there shall be attached to the motion for extension of time, or the petition for reassessment, whichever is first filed with the office of tax appeals, the certificate of the tax commissioner, or a joint motion signed by the taxpayer (or taxpayer's authorized representative) and legal counsel for the tax commissioner, stating the amount of the security and the form of the security that is acceptable to the tax commissioner.

### **§121-1-24. Service of papers.**

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24.1. When required. -- Except as otherwise required by this rule or directed by the office of tax appeals, all pleadings, motions, orders, decisions, notices, demands, briefs, appearances, or other similar documents or papers relating to a case or other proceeding before the office of tax appeals, also referred to as the papers in a case, shall be served on each of the parties or other persons involved in the matter to which the paper relates other than the party who filed the paper.

### 24.2. Manner of Service.

#### 24.2.1. General.

a. Petitions. -- All petitions invoking the jurisdiction of the office of tax appeals and commencing the case or proceeding shall be served by the executive director of the office of tax appeals.

b. Other documents. -- All other papers required to be served on a party shall be served by the party who filed the paper unless otherwise provided in this rule or directed by the office of tax appeals.

c. Certificate of service. -- Except for petitions invoking the jurisdiction of the office of tax appeals, the original paper filed with the executive director shall include a certificate by a party or a party's representative of record that service of that paper has been made on the party to be served or the party's representative of record. For the form of such certificate of service, see Form 1, Appendix I.

#### d. Method of service.

(1) By mail. -- Service of a document may be made by mail directed to the party, or the party's representative of record, at the person's last known address. Service by mail is complete upon mailing, and the date of such mailing shall be the date of such service.

(2) Alternative delivery. -- As an alternative to service by mail, service may be made by delivery to a party, or a party's representative of record.

e. Service on tax commissioner. -- Service shall be made on the tax commissioner by service on, or directed to, the commissioner's counsel at the office address shown in the commissioner's answer filed in the case or, if no answer has been filed, on the director of the legal division of the state tax department at Charleston, West Virginia 25305.

f. Service on nonparties. -- Service on a person other than a party shall be made in the same manner as service on a party, except as otherwise provided in this rule or directed by the office of tax appeals. In cases consolidated pursuant to section 148 of this rule, a party making direct service of a paper shall serve each of the other parties or representative of record for each of the other parties, and the original and copy thereof required to be filed with the office of tax appeals shall each have a certificate of service attached.

24.3. Representative of record. -- Whenever under this rule service is required or permitted to be made upon a party represented by a person who has entered an appearance, service shall be made upon the representative unless service upon the party is directed by the office of tax appeals. Where more than one representative appears for a party, service will be made only on that representative whose appearance was first entered of record, unless that representative notifies the office of tax appeals, by a designation of representative to receive service filed with the office of tax appeals, that the other representative of record is to receive service, in which event service will be made only on the person so designated.

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24.4. Service of subpoenas. -- For service of a subpoena or subpoena duces tecum, see section 68 of this rule.

24.5. Change of address. -- The office of tax appeals shall be promptly notified, by a notice of change of address filed with the executive director of the office, of the change of mailing address of any party, any party's counsel, or any party's duly authorized representative. A separate notice of change of address shall be filed for each docket number.

### **§121-1-25. Proper parties; capacity.**

25.1. Petitioner.

25.1.1. Reassessment. -- A petition for reassessment shall be filed in the name of the person or persons against whom the notice of assessment was issued, or by and with the full descriptive name of the fiduciary entitled to file the petition on behalf of such person.

25.1.2. A petition timely filed shall not be dismissed on the ground that it is not properly brought on behalf of a party until a reasonable time has been allowed after objection for ratification by such party of the filing of the petition; and such ratification shall have the same effect as if the petition had been properly brought by such party. Where the notice of assessment was issued against more than one person, as stated in the tax commissioner's notice of assessment, only those persons who timely acted to file a petition for reassessment shall be deemed a party or parties.

25.2. Respondent. B The tax commissioner shall be named the respondent.

25.3. Capacity. -- The capacity of an individual, other than one acting in a fiduciary capacity, to file a petition in the office of tax appeals, shall be determined by the law of the individual's domicile. The capacity of a corporation to file a petition shall be determined by the law under which it was organized. The capacity of a fiduciary to file a petition shall be determined in accordance with the law of the jurisdiction from which such person's authority is derived and in accordance with any applicable West Virginia law. In case of any conflict, West Virginia law shall control. The authority of a person to represent a petitioner before the office of tax appeals shall be determined under rules of the West Virginia supreme court of appeals.

25.4. Infants or incompetent persons. -- Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may file a petition or defend in the office on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may act by a next friend or by a guardian ad litem.

### **§121-1-26. Processing of filed petition**

26.1. Assignment of docket number. -- Upon receipt of a timely filed petition, the office of tax appeals shall assign it a docket number and notify the parties in writing of that number and the date, time and place of the administrative hearing on the petition. The parties shall refer to that docket number in all subsequently filed documents or communications with the office of tax appeals concerning that matter.

26.2. Service on tax commissioner. -- Within five (5) days after receiving a petition, the office of tax appeals shall forward a copy of the petition, including any attachments, to the state tax commissioner.

### **§121-1-27. Scheduling of hearing.**

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27.1 In every matter, without waiting for an answer to the petition or a reply to the answer to be served and filed, the office of tax appeals shall schedule a date and time for a hearing that shall be held within ninety (90) days after the petition was filed, unless the hearing is continued (postponed) for cause by the office of tax appeals.

### **§121-1-28. General rules of pleading.**

28.1. Purpose. -- The purpose of the pleadings is to give the parties and the office of tax appeals fair notice of the matters in controversy and the basis for their respective positions.

28.2. Pleading to be concise and direct. -- Each statement of fact in a pleading shall be simple, concise, and direct. No technical forms of pleading are required.

28.3. Consistency. -- A party may set forth two or more statements of a claim or defense alternatively or hypothetically. When two or more statements are made in the alternative and one of them would be sufficient if made independently, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may state as many separate claims or defenses as the party has regardless of consistency or the grounds on which based. All statements shall be made subject to the signature requirements of sections 28 and 30 of this rule.

28.4. Construction of pleadings. -- All pleadings shall be so construed as to do substantial justice.

### **§121-1-29. Form of pleading.**

29.1. General. -- All documents filed with the office of tax appeals shall contain all of the following information:

29.1.1 . The caption "West Virginia Office of Tax Appeals";

29.1.2. The title of the case;

29.1.3. The docket number of the case after it is assigned by the office; and

29.1.4. A designation showing the nature of the document.

29.2. Names of parties. -- The title of the case shall include the names of all parties, but shall not include as a party-petitioner the name of any person other than the person or persons by or on whose behalf the petition is filed. In other pleadings, it is sufficient to state the name of the first party with an appropriate indication of other parties.

29.3. Separate statement. -- All statements of claim or defense, and all statements in support thereof, shall be made in separately designated paragraphs, the contents of each of which shall be limited, as far as practicable, to a statement of a single item or a single set of circumstances. Such paragraph may be referred to by that designation in all succeeding pleadings. Each claim and defense shall be stated separately whenever a separation facilitates the clear presentation of the matters set forth.

29.4. Adoption by reference; exhibits. -- Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

29.5. Other provisions. -- With respect to other provisions relating to the form and style of papers filed with the office of tax appeals, see section 15 of this rule.

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29.6. The original of all pleadings, motions, and briefs shall be filed with the executive director of the office of tax appeals.

### **§121-1-30. Signing of pleadings.**

30.1. Signature. -- Each pleading shall be signed in the manner provided in section 15 of this rule. Where there is more than one attorney or other representative of record, the signature of only one is required. Except when otherwise required by statute or specifically directed by the office of tax appeals, pleadings need not be verified or accompanied by affidavit.

30.2. Effect of signature.

30.2.1. The signature of the attorney or other representative of a party constitutes a certificate by the signer that the signer has read the pleading, that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

30.2.2. The signature of the attorney or other representative or the party also constitutes a representation by the person that he or she is authorized to represent the party or parties on whose behalf the pleading is filed.

30.3. If a pleading is not signed, it shall be stricken, unless it is signed promptly after the omission is called to the attention of the pleader.

### **§121-1-31. Answer.**

31.1. Time for filing answer. -- Within forty (40) days after receiving a copy of the petition from the office of tax appeals, the tax commissioner shall file with the executive director of the office of tax appeals an original and one conforming copy of his or her written answer to the petition accompanied by proof of service of a copy of the answer on the petitioner or the petitioner's representative of record, if any.

31.2. Content of answer. -- The answer shall be drawn so that it will advise the petitioner and the office of tax appeals fully of the nature of the defense.

31.2.1. It shall contain a specific admission or denial of each material allegation in the petition; however, if the tax commissioner is without knowledge or information sufficient to form a belief as to the truth of an allegation, then the commissioner shall so state, and such statement shall have the effect of a denial.

31.2.2. If the tax commissioner intends to qualify or to deny only a part of an allegation, then the commissioner shall specify so much of it as is true and shall qualify or deny only the remainder. In addition, the answer shall contain a clear and concise statement of every ground, together with the facts in support thereof on which the commissioner relies and has the burden of proof.

31.2.3. It shall fully advise the petitioner of any affirmative relief sought for the first time by the tax commissioner in his or her answer.

31.2.4. Paragraphs of the answer shall be designated to correspond to those of the petition to

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which they relate and the answer shall clearly and concisely state:

- a. The nature of the case;
- b. The facts relied upon by the tax commissioner;
- c. A specific admission or denial of each statement of alleged material fact contained in the petition; however, if the tax commissioner is without knowledge or information sufficient to form a belief as to the truth of a statement, then the answer shall so state, and such statements shall have the effect of a denial; otherwise, any material allegations of fact contained in the petition that are not specifically admitted or denied in the answer shall be deemed to be admitted.;
- d. A specific answer to each question, whether of law, accounting, or otherwise, raised in the petition;
- e. A statement of any additional material facts concerning (1) any specific affirmative relief not previously requested by the tax commissioner or (2) any issue for which the tax commissioner has the burden of proof under law; and
- f. The specific relief that the tax commissioner now seeks, including any specific affirmative relief sought for the first time in the answer.

31.2.5. It is not necessary for the answer to be notarized.

31.3. No extension of time to file. -- The forty (40)-day period of time for filing an answer is statutory and the office of tax appeals does not have the authority to suspend or extend this period for any reason.

31.4. Effect of answer. -- Every material allegation set out in the petition and not expressly admitted or denied in the answer shall be deemed to be admitted.

### **§121-1-32. Reply.**

32.1. When required. -- If the tax commissioner in his or her answer seeks affirmative relief not previously requested, the petitioner shall serve a reply on the tax commissioner's legal representative within ten (10) days after service of the answer. Within that same ten (10)-day period, the petitioner shall file with the executive director of the office of tax appeals a copy of the reply with proof of the required service on the tax commissioner's legal representative.

32.2. When optional. -- In any other matter, the petitioner may choose to serve on legal counsel for the tax commissioner and file with the office of tax appeals a reply within the ten (10)-day time period and in the manner stated in subsection 32.3 of this section.

32.3. Form and content of reply.

32.3.1. In response to each material allegation in the answer and the facts in support thereof on which the tax commissioner has the burden of proof, the reply shall contain a specific admission or denial; however, if the petitioner is without knowledge or information sufficient to form a belief as to the truth of an allegation, then the petitioner shall so state, and such statement shall have the effect of a denial.

32.3.2. In addition, the reply shall contain a clear and concise statement of every ground,



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together with the facts in support thereof, on which the petitioner relies affirmatively or in avoidance of any matter in the answer on which the tax commissioner has the burden of proof.

32.3.3. In other respects, the requirements of pleading applicable to the answer provided in subsection 31.2 of this rule shall apply to the reply.

32.3.4. The paragraphs of the reply shall be designated to correspond to those of the answer to which they relate.

32.4. Effect of reply or failure to reply.

32.4.1. When a required or optional reply is filed, every affirmative allegation set out in the answer and not expressly admitted or denied in the reply shall be deemed to be admitted.

32.4.2. When a reply is not required to be filed, and an optional reply is not filed, the affirmative allegations in the answer will be deemed denied.

32.5. New material. -- Any new material contained in the reply shall be deemed to be denied.

### **§121-1-33. Pleading special matters .**

33.1. A party shall set forth in the party's pleading any matter constituting an avoidance or affirmative defense, including res judicata, collateral estoppel, estoppel, waiver, duress, fraud, and the statute of limitations.

33.2. A mere denial in a responsive pleading will not be sufficient to raise an avoidance or affirmative defense.

### **§121-1-34. Defenses and objections made by pleading or motion.**

34.1. Every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion:

34.1.1. Lack of jurisdiction, and

34.1.2. Failure to state a claim upon which relief can be granted.

34.2. If a pleading sets forth a claim for relief to which the adverse party is not required to file a responsive pleading, then such party may assert at the hearing any defense in law or fact to that claim for relief.

34.3. If, on a motion asserting failure to state a claim on which relief can be granted, matters outside the pleading are to be presented, then the motion shall be treated as one for summary determination and disposed of as provided in section 52 of this rule, and the parties shall be given an opportunity to present all material made pertinent to a motion under section 52 of this rule.

### **§121-1-35. Amended and supplemental pleadings.**

35.1. Amendments.

35.1.1. A party may amend a pleading once, as a matter of course, at any time before a responsive

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pleading is served.

35.1.2. If the pleading is one to which no responsive pleading is permitted, a party may so amend it at any time within 30 days after it is served.

35.1.3. Otherwise, a party may amend a pleading only by leave of the presiding administrative law judge or by written consent of the adverse party, and leave shall be given freely when justice so requires. No amendment shall be allowed after expiration of the time for filing the petition, however, which would involve conferring jurisdiction on the office over a matter which otherwise would not come within its jurisdiction under the petition as then on file. A motion for leave to amend a pleading shall state the reasons for the amendment and shall be accompanied by the proposed amendment. The amendment to the pleading shall not be incorporated into the motion, but rather shall be separately set forth and consistent with the requirements of section 15 of this rule regarding form and style of papers filed with the office. See sections 31 and 32 of this rule for time for responding to amended pleadings.

35.2. Amendments to conform to the evidence.

35.2.1. Issues tried by consent. -- When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. The presiding administrative law judge, upon motion of any party at any time, may allow such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues, but failure to amend does not affect the result of the evidentiary hearing of these issues.

35.2.2. Other evidence. -- If evidence is objected to at the evidentiary hearing on the ground that it is not within the issues raised by pleadings, then the presiding administrative law judge may receive the evidence and at any time allow the pleadings to be amended to conform to the proof, and shall do so freely when justice so requires and the objecting party fails to satisfy the administrative law judge that the admission of the evidence would prejudice the party in maintaining the party's position on the merits.

35.3. Filing. -- The amendment or amended pleadings permitted under subsection 35.2 of this section shall be filed with the office of tax appeals at the evidentiary hearing or shall be filed with the executive director at Charleston, West Virginia, within such time as the administrative law judge may fix.

35.4. Supplemental pleadings. -- Upon motion of a party, the presiding administrative law judge may, upon such terms as are just, permit a party to file a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statements of a claim for relief or defense. If the presiding administrative law judge deems it advisable that the adverse party plead to the supplemental pleading, then it shall so direct, specifying the time within which the supplemental pleading shall be file.

35.5. Relation back of amendments. -- When an amendment of a pleading is permitted, it shall relate back to the time of filing of that pleading, unless the presiding administrative law judge shall order otherwise either on motion of a party or on its own initiative.

### **§121-1-36. Motions.**

36.1. General. -- All requests to the office of tax appeals shall be made by written motion filed with the executive director and accompanied by the appropriate fee, if any. Motions shall be served concurrently by the moving party on all other parties of record and proof of service shall be filed with the executive director. Written opposition, if any, to motions shall be filed within seven (7) days after service. For purposes of this section 36, a stipulation requiring action by the office of tax appeals is treated as a motion.

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36.2. Pleadings on motions. -- Pleading on motions shall be limited to the motion and a brief in support of the motion and a single response to the motion and a supporting brief.

36.3. Oral argument. -- Oral argument is not allowed on motions, except by order of the presiding administrative law judge.

### **§121-1-37. Motion for more definite statement.**

37.1. General. -- If a pleading to which a responsive pleading is permitted or required is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, then the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. See sections 47 and 49 of this rule for procedures available to narrow the issues or to elicit further information as to the facts involved or the positions of the parties.

37.2. Penalty for failure of response. -- The presiding administrative law judge may strike the pleading to which the motion is directed or may make such other order as he or she deems just, if the required response is not made within such time period as the administrative law judge may direct.

### **§121-1-38. Motion to strike.**

38.1 Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within ten (10) days after the service of the pleading, or upon the presiding administrative law judge's own initiative at any time, the presiding administrative law judge may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, frivolous, or scandalous matter. In like manner and procedure, the presiding administrative law judge may order stricken any such objectionable matter from briefs, documents, or any other papers or responses filed with the office of tax appeals.

### **§121-1-39. Motion to dismiss.**

39.1 A petition or proceeding may be dismissed for cause upon motion of a party or upon the presiding administrative law judge's initiative.

### **§121-1-40. Motions -- timely filing and joinder of motions .**

40.1. Motions must be made timely, unless the office of tax appeals shall permit otherwise.

40.2. Motions shall be separately stated and not joined together, except that a motion for a more definite statement (section 37) and a motion to strike (section 38) may be joined.

### **§121-1-41. Parties.**

41.1. General. -- The party who commences a proceeding shall be designated as petitioner and the adverse party as the respondent.

41.2. Change or transfer of interest. -- Upon a change or transfer of interest, the proceeding may be continued by or against the original party in its original capacity, unless the presiding administrative law judge directs the person to whom the interest is transferred to be substituted in the proceeding for the original party, joined with the original party, or made a party in another capacity.

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41.3. Joinder or consolidation. -- If proceedings involving a substantial and controlling common question of law or fact are pending before the office of tax appeals, then the presiding administrative law judge may, with the consent of the petitioners, do any or all of the following:

41.3.1. Order a joint hearing on any or all matters in issue;

41.3.2. Order a joinder of all parties in accordance with their interests;

41.3.3. Order the proceedings consolidated; or

41.3.4. Make other orders concerning the proceedings as may tend to avoid unnecessary costs or delay.

41.4. Parties may be added or dropped by order of the presiding administrative law judge on the motion of any interested person at any stage of the proceedings and according to terms that are just.

### **§121-1-42. Permissive joinder of parties.**

42.1. Permissive joinder. -- No person to whom a notice of assessment has been issued may join with any other person against whom a notice of assessment has been issued in filing a petition in the office of tax appeals, except as may be permitted by subdivision 44.2 of this rule.

42.2. Severance or other orders. -- The office of tax appeals may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party, or may order separate evidentiary hearings or make other orders to prevent delay or prejudice; or may limit the evidentiary hearing to the claims of one or more parties, either dropping other parties from the proceeding on such terms as are just or holding in abeyance the proceedings with respect to them. Any claim by or against a party may be severed and proceeded with separately. (See also subdivision 60.1.1 of this rule regarding consolidation.)

### **§121-1-43. Misjoinder of parties.**

Misjoinder of parties is not grounds for dismissal of a case. The office of tax appeals may order a severance on such terms as are just. See subsection 42.2 of this rule.

### **§121-1-44. Intervention.**

44.1. No intervention of right. -- Because of the confidentiality rules in W. Va. Code §11-10-5d and W. Va. Code §11-10A-10(g), no person has a right to intervene in a proceeding before the office of tax appeals.

44.2. Permissive intervention. -- Upon timely application, anyone may be permitted to intervene in a proceeding before the office of tax appeals: (1) when a statute of this state confers a right to intervene, or (2) when the applicant' claim or defense and the main proceeding have a question of law or fact in common. In exercising its discretion, the office of tax appeals shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties and the petitioners statutory right to confidentiality.

44.3. Procedure. -- A person desiring to intervene shall serve a motion to intervene upon the parties as provided in section 24 of this rule. The motion shall state the grounds for the motion and be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

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### **§121-1-45. Substitution of parties; change or correction in name.**

45.1. Death. -- If a petitioner dies, the presiding administrative law judge, on motion of a party or the decedent's successor or representative or on its own initiative, may order substitution of the proper parties.

45.2. Incompetency. -- If a party becomes incompetent, the presiding administrative law judge on motion of a party or the incompetent's representative or on its own initiative, may order the representative to proceed with the case.

45.3. Successor fiduciaries or representatives. On motion made where a fiduciary or representative is changed, the presiding administrative law judge may order substitution of the proper successors.

45.4. Other cause. -- The presiding administrative law judge, on motion of a party or on its own initiative, may order the substitution of proper parties for other cause.

45.5. Change or correction in name. -- On motion of a party or on its own initiative, the presiding administrative law judge may order a change of or correction in the name or title of a party.

### **§121-1-46. Depositions and discovery.**

A party may obtain depositions and discovery for purposes of evidentiary hearings before the office of tax appeals by following the rules of civil procedure for those purposes adopted by the West Virginia supreme court of appeals, W.Va.R.C.P. rules 26 through 37, except rule 35, which are reproduced in Appendix III to this rule. For these purposes, whenever the words "trial" or "court" are used in rules 26 through 34 and rules 36 and 37, they shall, for purposes of section 121-1-100, mean, respectively "evidentiary hearing" and "office of tax appeals."

### **§121-1-47. Stipulations for evidentiary hearing.**

#### 47.1. Stipulations Required.

47.1.1. General. -- The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence which fairly should not be in dispute. Where the truth or authenticity of facts or evidence claimed to be relevant by one party is not disputed, an objection on the ground of materiality or relevance may be noted by any other party but is not to be regarded as just cause for refusal to stipulate. The requirement of stipulation applies under this section without regard to where the burden of proof may lie with respect to the matters involved. Documents or papers or other exhibits annexed to or filed with the stipulation shall be considered to be part of the stipulation.

47.1.2. Stipulations to be comprehensive. The fact that any matter may have been obtained through discovery or requests for admission or through any other authorized procedure is not grounds for omitting such matter from the stipulation. Such other procedures should be regarded as aids to stipulation, and matter obtained through them, which is within the scope of subdivision 47.1.1, must be set forth comprehensively in the stipulation, in logical order in the context of all other provisions of the stipulation.

47.2. Form. -- Stipulations required under this section shall be in writing, signed by the parties thereto or by their counsel, and shall observe the requirements of section 15 of this rule as to form and style of papers, except that the stipulation shall be filed with the office of tax appeals in duplicate and only one set of exhibits shall be required. Documents or other papers, which are the subject of stipulation

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in any respect and which the parties intend to place before the office of tax appeals, shall be annexed to or filed with the stipulation. The stipulation shall be clear and concise. Separate items shall be stated in separate paragraphs, and shall be appropriately lettered or numbered. Exhibits attached to a stipulation shall be numbered serially, i. e., 1, 2, 3, etc. The exhibit number shall be followed by "P" if offered by the petitioner, e. g., 1-P; "R" if offered by the respondent, e. g., 2-R; or "J" if joint, e. g., 3-J.

47.3. Filing. -- Executed stipulations prepared pursuant to this section, and related exhibits, shall be filed by the parties at or before commencement of the evidential hearing in the case, unless the presiding administrative law judge in the particular case shall otherwise specify. A stipulation when filed need not be offered formally to be considered in evidence.

47.4. Objections. -- Any objection to all or any part of a stipulation should be noted in the stipulation, but the presiding administrative law judge will consider any objection to a stipulated matter made at the commencement of the trial or for good cause shown made during the evidentiary hearing.

47.5. Binding effect. -- A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the presiding administrative law judge or agreed upon by those parties. The presiding administrative law judge will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so where justice requires. A stipulation and the admissions therein shall be binding and have effect only in the pending case and not for any other purpose, and may not be used against any of the parties thereto in any other case or proceeding.

### **§121-1-48. Cases consolidated for hearing.**

48.1 With respect to a common matter in cases consolidated for trial, the reference to a "party" shall mean any party to any of the consolidated cases involving such common matter.

### **§121-1-49. Prehearing conference.**

49.1. Required. -- Except in small claim cases and except as otherwise ordered by the presiding administrative law judge, a prehearing conference shall be held in all proceedings before the office of tax appeals.

49.2. Filing of prehearing statement. -- Not less than five (5) days before the prehearing conference, each party shall exchange and file with the executive director a prehearing statement in a form determined by the office of tax appeals.

49.3. Purpose of prehearing. -- The purposes of the prehearing conference are as follows:

49.3.1. To specify all sums in controversy and the particular issues to which they relate.

49.3.2. To specify the factual and legal issues to be litigated.

49.3.3. To consider the formal amendment of all petitions and answers or their amendment by prehearing order, and, if desirable or necessary, to order that the amendments be made.

49.3.4. To consider the consolidation of petitions for hearing, the separation of issues, and the order in which issues are to be heard.

49.3.5. To consider admissions of fact to avoid unnecessary proofs, including the level of assessment and authenticity of documents, such as statutes, ordinances, charters, and regulations.

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49.3.6. To identify all witnesses.

49.3.7. To identify all exhibits in support of the main case or defense and admit the authenticity of exhibits if possible.

49.3.8. To estimate the time required for hearing.

49.3.9. To discuss the possibility of settlement, including settlement efforts to date.

49.3.10. To consider all other matters that may aid in the disposition of the proceeding.

49.4. Scheduling of prehearing conference. -- When a case is ready for prehearing conference, as determined by the presiding administrative law judge, the executive director shall schedule the matter for a prehearing conference at a time and place to be designated by the presiding administrative law judge.

49.5. Notice of prehearing conference. -- Not less than fourteen (14) days before a prehearing conference, unless otherwise ordered by the presiding administrative law judge, the executive director shall send notice of the time, date, and place of the prehearing conference to all parties.

49.6 . The presiding administrative law judge who conducts the prehearing conference shall inquire of the parties as to whether or not all claims arising out of the appealed finding, ruling, determination, decision, or order have been joined. The answers to the inquiry and each finding, ruling, determination, decision, or order pertaining to the claims shall be included in the summary of the results of the conference.

49.7. Order summarizing results. -- The presiding administrative law judge who conducts the prehearing conference shall prepare, and cause to be served upon the parties or their representatives, not less than seven (7) days in advance of the hearing, an order summarizing the results of the conference, specifically covering each of the items stated in this section. The summary of results controls the subsequent course of the proceeding unless modified at or before the hearing by the presiding administrative law judge to prevent manifest injustice.

49.8. Limitation on discovery after prehearing conference. -- Discovery shall not be conducted after completion of the prehearing conference, unless otherwise ordered by the presiding administrative law judge.

49.9. Failure to appear. -- Failure to appear at a duly scheduled prehearing conference may result in the dismissal of the appeal or the scheduling of a default hearing as provided in section 54 of this rule.

### **§121-1-50. Motion to dismiss.**

50.1. Motion. -- The following defenses to a claim for relief set forth in a pleading, at the option of the pleader, may be made in a motion to dismiss rather than in a responsive pleading:

50.1.1. The office of tax appeals lacks jurisdiction of the subject matter of the petition;

50.1.2. The office of tax appeals lacks jurisdiction over the petitioner;

50.1.3. The petitioner lacks legal capacity to petition;

50.1.4. There is an action pending between the same parties on the same controversy in a court of

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any state or the United States; the administrative law judge need not dismiss on this ground, but may make such order as justice requires;

50.1.5. The petition may not be maintained because of the expiration of an applicable statute of limitation;

50.1.6. The petition may not be maintained because of release, payment, discharge in bankruptcy, or the like;

50.1.7. The petition fails to state a cause or claim upon which relief may be granted; or

50.1.8. The office of tax appeals should not proceed in the absence of a joinder of a person who should be a party.

50.2. Service and filing. -- A motion to dismiss shall be served on the other party or parties and filed with the executive director of the office of tax appeals along with a certificate of service or other proof of service.

50.3. Initiation by chief administrative law judge. -- The chief administrative law judge on his or her own motion may, upon notice to the parties, issue an order dismissing the petition on the ground that:

50.3.1. The office of tax appeals lacks jurisdiction of the subject matter of the petition; or

50.3.2. The office of tax appeals lacks jurisdiction over the petitioner.

50.3.3. The petitioner has failed to prosecute the petition.

50.3.4. The notice of intent to dismiss shall inform the parties of the facts and the reasons providing the basis for the intended dismissal. The notice of intent to dismiss shall also provide the parties with twenty (20) days in which to file written comments opposing the proposed dismissal. The opposing party shall serve a copy of the written comments on the other party or parties in the proceeding and a certificate of service shall be attached to the written comments filed with the office of tax appeals.

### **§121-1-51. Disposition on the pleadings.**

51.1. General. -- After the pleadings are closed, but within such time as not to delay the evidentiary hearing, any party may move for disposition on the pleadings. The motion shall be filed and served in accordance with the requirements otherwise applicable. See sections 36 and 40 of this rule. The motion shall be disposed of before the evidentiary hearing unless the office of tax appeals determines otherwise.

51.2. Matters outside pleadings. -- If, on a motion for disposition on the pleadings, matters outside the pleadings are presented to and not excluded by the office of tax appeals, the motion shall be treated as one for summary disposition and shall be disposed of as provided in section 52 of this rule, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by section 52.

### **§121-1-52. Summary judgment.**

52.1. General. -- Either party may move, with supporting materials outside the pleadings, for a summary disposition in the moving party's favor upon all or any part of the legal issues in controversy. Such motion may be made at any time commencing twenty (20) days after the pleadings are closed, but within such time as not to delay the evidentiary hearing.



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52.2. Motion and proceedings thereon. The motion shall be filed and served in accordance with the requirements otherwise applicable. An opposing written response, with supporting materials outside the pleadings, shall be filed within such period as the presiding administrative law judge may direct. A decision shall thereafter be rendered if the pleadings and answers to interrogatories, depositions, admissions, or any other acceptable materials, such as affidavits, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law. A partial summary judgment may be made which does not dispose of all the issues in the case.

52.3. Case not fully adjudicated on motion. -- If, on motion under this section, a decision is not rendered upon the whole case or for all the relief asked and an evidentiary hearing is necessary, the presiding administrative law judge may ascertain, by examining the pleadings and the materials supporting the motion and by interrogating the parties or their representatives, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The presiding administrative law judge may thereupon make an order specifying the facts that appear to be without substantial controversy, including the extent to which the relief sought is not in controversy, and directing such further proceedings in the case as are just. At the evidentiary hearing of the case, the facts so specified shall be deemed established, and the hearing shall be conducted accordingly.

52.4. Form of affidavits; further testimony; defense required. -- Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or filed therewith. The presiding administrative law judge may permit affidavits to be supplemented or opposed by answers to interrogatories, depositions, further affidavits, or other acceptable materials, to the extent that other applicable conditions in this rule are satisfied for utilizing such procedures. When a motion for summary disposition is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of such party's pleading, but such party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for the evidentiary hearing. If the adverse party does not so respond, then a decision, if appropriate, may be entered against such party.

52.5. When affidavits are unavailable. -- If it appears from the affidavits of a party opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify such party's opposition, then the presiding administrative law judge may deny the motion or may order a continuance to permit affidavits to be obtained or other steps to be taken or may make such other order as is just. If it appears from the affidavits of a party opposing the motion that such party's only legally available method of contravening the facts set forth in the supporting affidavits of the moving party is through cross-examination of such affiants or the testimony of third parties from whom affidavits cannot be secured, then such a showing may be deemed sufficient to establish that the facts set forth in such supporting affidavits are genuinely disputed.

52.6. Affidavits made in bad faith. -- If it appears to the satisfaction of the presiding administrative law judge at any time that any of the affidavits presented pursuant to this section are presented in bad faith or for the purpose of delay, then the presiding administrative law judge may order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable counsel's fees, and any offending party or counsel may be adjudged guilty of contempt or otherwise disciplined by a circuit court in an appropriate proceeding brought for that purpose.

### **§121-1-53. Submission without evidentiary hearing.**

53.1. General. -- Any case not requiring an evidentiary hearing for the submission of evidence (as,

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for example, where sufficient facts have been admitted, stipulated, established by deposition, or included in the record in some other way) may be submitted at any time by motion of the parties filed with the office of tax appeals. The parties need not appear before an administrative law judge, when the case is submitted in this manner.

53.2. Burden of proof. -- The fact of submission of a case, under subsection 53.1 of this rule, does not alter the burden of proof, or the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof.

### **§121-1-54. Default and dismissal.**

54.1. Default. -- If any party has failed to plead or otherwise proceed as provided by this rule or as required by the presiding administrative law judge, then such party may be held in default by the presiding administrative law judge either on motion of another party or on the initiative of the presiding administrative law judge. Thereafter, the presiding administrative law judge may enter a decision against the defaulting party, upon such terms and conditions as the presiding administrative law judge may deem proper, or may impose such sanctions (see, e. g., section 46 of this rule) as the presiding administrative law judge may deem appropriate. The presiding administrative law judge may, in his or her discretion, conduct a hearing to ascertain whether a default has been committed, to determine the decision to be entered or the sanctions to be imposed, or to ascertain the truth of any matter.

54.2. Dismissal. -- For failure of a petitioner properly to prosecute or to comply with this rule or any order of the office of tax appeals or for other cause which the presiding administrative law judge deems sufficient, the presiding administrative law judge may dismiss a case at any time and enter a decision against the petitioner. The presiding administrative law judge may, for similar reasons, decide against any party any issue as to which such party has the burden of proof, and such decision shall be treated as a dismissal for purposes of subsections 54.3 and 54.4 of this rule.

54.3. Setting aside default or dismissal. -- For reasons deemed sufficient by the presiding administrative law judge and upon motion expeditiously made, the presiding administrative law judge may set aside a default or dismissal or the decision rendered thereon.

54.4. Effect of decision on default or dismissal. -- A decision rendered upon a default or in consequence of a dismissal, other than a dismissal for lack of jurisdiction, shall operate as an adjudication on the merits.

### **§121-1-55. Motions and other matters.**

55.1. Hearing on motion. -- If a hearing is to be held on a motion or other matter, apart from an evidentiary hearing on the merits, then such hearing ordinarily will be held at Charleston, West Virginia, unless the presiding administrative law judge, on his or her own motion or on the motion of a party, shall direct otherwise. As to hearings at other places, see subdivision 62.3.2 of this rule. The parties will be given notice of the place and time of hearing.

55.2. In the discretion of the presiding administrative law judge, the hearing on a motion may be held by telephone or by use of videoconferencing equipment, with one or all of the parties.

55.3. Failure to attend. -- The office of tax appeals may hear a matter ex parte where a party fails to appear at such a hearing or fails to participate by telephone or videoconferencing equipment when such is permitted. With respect to attendance at such hearings, see section 59 of this rule.

### **§121-1-56. Notice of hearing.**

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56.1 General. -- After a petition is docketed by the executive director of the office of tax appeals, the parties shall receive written notice of the date, place, and time of the evidentiary hearing.

56.2. Standing prehearing order. -- In order to facilitate the orderly and efficient disposition of all cases, at the direction of the chief administrative law judge, the executive director shall include with the notice of hearing a standing prehearing conference order or other instructions for hearing preparation. Unexcused failure to comply with any such order may subject a party or a party's counsel to sanctions. See, e. g., section 54 of this rule.

56.3. Calendar call. -- Each case set for evidentiary hearing will be called at the time and place scheduled. When more than one case is scheduled for hearing at the same time, counsel or the parties shall indicate their estimate of the time required for evidentiary hearing. The cases for evidentiary hearing will thereupon be heard in due course, but not necessarily in the order listed.

### **§121-1-57. Continuances.**

57.1. General. -- The hearing of a case or matter scheduled for hearing on a calendar may be continued by an administrative law judge with the office of tax appeals upon motion or on his or her own initiative.

57.2. Motion for continuance. -- A motion for continuance shall be in writing and inform the office of tax appeals of the position of the other parties with respect thereto, either by endorsement thereon by the other parties or by a representation of the moving party. A motion for continuance based upon the pendency in the office of tax appeals or a court of a related case or cases shall include the name and docket number of any such related case, the names of counsel for the parties in such case, and the status of such case, and shall identify all issues common to any such related case.

57.3. Continuances disfavored. -- The office of tax appeals looks generally with disfavor upon a request (motion) for a continuance (postponement) of a scheduled hearing. Especially disturbing is a request for a continuance that is made on short notice or that is made repeatedly in the same matter. To prevent these and other abuses, the policy of the office of tax appeals on continuance of hearings is as follows.

57.3.1. General. -- Except for continuances required due to acts of God, serious illness of counsel, or other significant, unforeseen circumstances, a continuance will not be granted unless a request (motion) by any party, including the tax commissioner, is made: (1) both in writing and by telephone call to an administrative law judge; (2) for good cause; and (3) timely, that is, not less than seven (7) calendar days prior to the scheduled hearing date; and (4) with the already-obtained written agreement of the person representing the adverse party.

57.3.2. Good cause for granting an otherwise proper and timely request for a continuance of a hearing does not include a scheduling conflict, including one involving a conflict with a proceeding in another matter in court, unless the request for the continuance is made immediately upon learning of the conflict.

57.3.3. Court reporter fee. -- Should a party, less than twenty-four hours before a scheduled hearing, file a motion requesting a continuance and it is granted for very exceptional circumstances, the office of tax appeals may condition the continuance upon the party's written agreement that the party will pay the fee that the court reporter charges for cancellation of the hearing with less than twenty-four (24) hours notice.

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57.3.4. New hearing date. -- When a motion for a continuance of a hearing is granted, the office of tax appeals ordinarily will thereafter contact the representatives of the parties to attempt to arrive at a mutually agreeable date and time for resetting the hearing during the normal business hours of the office of tax appeals.

57.3.5. Length of continuance. -- A continuance of a hearing that is granted will be for a period of time no longer than ninety (90) days. A general, or open-ended, continuance of a hearing, for any reason, will almost never be granted.

57.3.6. Limit on number of continuances. No more than one continuance will be granted to a party in any matter.

57.3.7. Continuance pending resolution. Any attempt at resolution of the matter without a hearing and decision by the office of tax appeals, while highly encouraged, should be commenced immediately upon filing of the petition, and should not be initiated shortly before the hearing. If a proper and timely request for a continuance of the hearing is made and granted to allow the parties to finalize the attempted resolution, the parties must completely finalize the resolution before the re-set hearing date. In addition, prior to the re-set hearing date, the parties must also file a written motion, executed by the both parties or their representatives, to remove the matter from the hearing docket. Otherwise, the re-set hearing will be held.

57.3.8. The office of tax appeals reserves the authority to make any adjustment to a provision of this hearing continuance policy that is necessary for very exceptional circumstances, such as an act of God, serious illness of a representative, party or witness, or other significant, unforeseen circumstances.

### **§121-1-58. Place of evidentiary hearing.**

58.1. Designation of place of evidentiary hearing. -- The evidentiary hearing shall be held at Charleston, West Virginia, unless the petitioner, at the time of filing the petition, shall file a designation of place of evidentiary hearing showing the place at which the petitioner would prefer the evidentiary hearing to be held. If the petitioner has not filed such designation, the tax commissioner, at the time the answer is filed, may file a designation showing the place of evidentiary hearing preferred by the tax commissioner. The parties shall be notified of the place at which the evidentiary hearing will be held. For a list of places at which the office of tax appeals holds evidentiary hearings, see subsection 62.3.2.

58.2. Accessibility. -- The hearing shall be conducted in a location that is accessible to mobility-impaired individuals. Accessible parking shall also be available.

58.3. Special needs. -- A person who has a disability and who needs to be accommodated for effective participation in a hearing shall contact the executive director of the office of tax appeals in writing or telephonically not less than 7 days before the scheduled hearing date.

58.4. Motion to change place of evidentiary hearing. -- If a party desires a change in the designation of the place of trial, then the party shall file a motion to that effect, stating fully the reasons therefor. A motion made after the notice of hearing has been issued, but less than twenty days before the hearing, will ordinarily be deemed dilatory and will be denied unless the grounds for a change in the designation arose during that period or there was good reason for not making the motion sooner.

### **§121-1-59. Proceedings conducted by videoconferencing.**

59.1. General. -- At the discretion of the chief administrative law judge and with the consent of the parties, the office of tax appeals may utilize videoconferencing to conduct any evidentiary or non-

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evidentiary hearing, prehearing conference or other proceeding before the office of tax appeals, and may permit any witness to testify or be deposed by videoconferencing.

59.2. Documents. -- Any document filed in a proceeding conducted by videoconferencing may be transmitted by electronic facsimile; signatures on a document transmitted by electronic facsimile shall have the same force and effect as original signatures.

59.3. Conduct of proceeding. -- Proceedings conducted by videoconferencing shall be conducted in the same manner as if the parties had appeared in person, and the presiding administrative law judge may exercise all powers consistent with the proceeding. The presiding administrative law judge shall begin all proceedings conducted by videoconferencing by stating on the record identities of all counsel, parties, and witnesses present in the hearing room and at the remote site.

59.4. Videoconferencing system requirements. -- Any system used for conducting proceedings by videoconferencing shall meet the following standards:

59.4.1. The persons communicating must be able to simultaneously see and speak to one another;

59.4.2. The signal transmission must be live;

59.4.3. The signal transmission must be secure from unauthorized acquisition;

59.4.4. Any other standards established by the West Virginia supreme court of appeals for videoconferencing systems used in judicial proceedings in this state

### **§121-1-60. Consolidation; separate evidentiary hearings.**

60.1. Consolidation.

60.1.1. Common facts or law. -- When cases involving a common question of law or fact are pending before the office of tax appeals, the presiding administrative law judge may, with the consent of the petitioners, order a joint hearing of any or all the matters in issue, or order all the cases consolidated, and he or she may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay or duplication.

60.1.2. Absence of common issue or facts. -- Similar action may be taken where cases involve different tax liabilities of the same parties, notwithstanding the absence of a common issue.

60.2. Motion to consolidate. -- Unless otherwise permitted by the office of tax appeals for good cause shown, a motion to consolidate cases may be filed only after all the tax commissioners answers have been filed. The caption of a motion to consolidate shall include all of the names and docket numbers of the cases sought to be consolidated arranged in chronological order (i.e., the oldest case first). Unless otherwise ordered, the caption of all documents subsequently filed in consolidated cases shall include all of the docket numbers arranged in chronological order, but may include only the name of the oldest case with an appropriate indication of other parties.

60.3. Separate hearings. -- The office of tax appeals, in furtherance of convenience or to avoid prejudice, or when separate hearings will be conducive to expedition or economy, may order a separate hearing of any one or more claims or defenses or issues, or of the tax liability of any party or parties. The office of tax appeals may enter appropriate orders or decisions with respect to any such claims, defenses, issues, or parties that are tried separately. As to severance of parties or claims, see subsection 42.2 of this rule.

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### **§121-1-61. Evidentiary hearings in cases, other than small claim cases.**

61.1. In all cases, except small claim cases to which the provisions of section 110 of this rule apply, the chief administrative law judge shall schedule a hearing for a date that is within forty-five (45) days after the due date of the tax commissioner's answer to the petition, unless both of the parties, under section 53 of this rule, have already elected to submit the case on documents only and without a hearing in person or by a representative.

61.2. The chief administrative law judge, by a written order promptly entered, may, however, determine that, for good cause stated in that order, the matter should be set for a date that is later than this normal forty-five (45) day period. The office of tax appeals may not delay the scheduling of such a hearing on the ground that a reply to the answer will or may be filed.

61.3. The chief administrative law judge shall notify the parties of the date, time, and place of the hearing by a written notice served at least twenty (20) days in advance of the hearing.

61.3.1. Notice of the hearing shall be served by personal or substituted service or by certified mail.

61.3.2. Service of notice of the hearing by personal or substituted service is valid if made by any method authorized by the West Virginia rules of civil procedure for trial courts of record.

61.3.3. Service of notice of the hearing by certified mail is valid if accepted by the party, or if addressed to and mailed to the party's usual place of business or usual place of abode or last known address and accepted by any person. If service of notice of the hearing by certified mail, as set forth in the immediately preceding sentence, is returned as "refused," "unclaimed," or "not deliverable," for whatever reason not involving error on the part of the office of tax appeals, the office of tax appeals shall then serve notice of the hearing by first-class mail, postage prepaid, to the same address, and the date of the United States postmark for this first-class mailing is the date of service of notice of the hearing.

### **§121-1-62. Conduct of hearing.**

62.1. The hearing shall be conducted by an administrative law judge employed by the office of tax appeals.

62.2. The administrative law judge is authorized to:

62.2.1. Administer oaths and affirmations;

62.2.2. Sign and issue subpoenas and subpoenas duces tecum prepared by a party;

62.2.3. Rule upon various prehearing motions relating to discovery and the like;

62.2.4. Regulate the course of the hearings, set the date, time, and place for continued hearings, and fix the time for filing of legal briefs and other documents;

62.2.5. Rule upon questions of evidence at the hearing;

62.2.6. Issue decisions and other appropriate orders after hearings; and

62.2.7. Otherwise preside generally over the prehearing, hearing, and posthearing processes.

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### 62.3. Location of hearing.

62.3.1. The office of tax appeals normally conducts hearings at its principal office in Charleston, West Virginia. The notice of the hearing will give the exact address for this office.

62.3.2. The office of tax appeals may hold hearings from time to time at other locations in the State of West Virginia, based primarily upon the number of pending cases from a given geographic region of the State. For example, the office of tax appeals may, at its discretion, but with the convenience of taxpayers or other petitioners primarily in mind, hold hearings in Bluefield, Bridgeport, Martinsburg, or Wheeling, or in other towns selected by the office of tax appeals. These “mobile docket” hearings usually are held in rooms in public facilities provided by the respective county commissions for temporary use by the office of tax appeals.

62.3.3. The office of tax appeals may also hold hearings from time to time using videoconferencing equipment.

### 62.4. Recording of evidence at hearing.

62.4.1. The evidence at a hearing, except a small claim hearings to which the provisions of section 110 of this rule apply, will be recorded by an audio recording device suitable for use in court proceedings in this state or will be stenographically reported and transcribed by a qualified court reporter selected by the office of tax appeals.

62.4.2. To assist in preparing proposed findings of fact or complete legal briefs, a party may purchase a copy of the evidentiary hearing transcript by paying the reasonable cost of transcription.

62.4.3. Due primarily to physical space limitations, but also in the interest of preventing distractions at the hearing, the office of tax appeals ordinarily will not permit the parties to videotape the evidentiary hearing. Any request for such permission must be by a detailed written motion addressed to the chief administrative law judge and must be received by him or her no later than seven (7) days prior to the scheduled hearing. The chief administrative law judge shall rule promptly on this motion, either orally or in writing or both.

62.5. De novo hearing. -- The evidentiary hearing before the office of tax appeals is de novo, that is, it is not actually an appeal from an existing record, but an original proceeding at which the evidentiary record is made. Under statutory and case law all evidence must be introduced at this hearing, and any subsequent appeal by a party to a circuit court will be exclusively on the record made before the office of tax appeals.

62.6. Hearing procedures. -- Hearings before the office of tax appeals are conducted, generally, following the contested case procedures set forth in W. Va. Code §29A-5-1 et seq., to the extent those procedures are not inconsistent with the provisions of article 10A of chapter 11 of the West Virginia Code, the article creating the office of tax appeals.

62.7. Hearings not open to public. -- Hearings before the office of tax appeals are not open to the public and are not subject to the open governmental proceedings act, W. Va. Code §6-9A-1 et seq., unless a statute explicitly states to the contrary.

62.8. Petitioner goes first. -- At the hearing the burden of proof is on the taxpayer or other petitioner, unless an applicable statute provides otherwise. Accordingly, the taxpayer or other petitioner usually will present evidence first.

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62.9. At the hearing, the parties may:

62.9.1. Call and examine witnesses, who must testify under oath or by affirmation;

62.9.2. Introduce exhibits;

62.9.3. Cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in direct examination;

62.9.4. Impeach any witness regardless of which party first called the witness to testify; and

62.9.5. Rebut any evidence against them.

62.10. In presenting its case in response, the tax commissioner's legal representative shall introduce a copy of all relevant documents not previously part of the record or not introduced by the taxpayer or other petitioner, including any audit findings and supporting schedules, and related federal tax documents.

62.11. In the discretion of the administrative law judge, affidavits as to relevant facts may be received, for whatever value they may have, in lieu of the oral testimony of the persons making such affidavits.

62.12. Objections to evidence. -- Objections to evidentiary offers may be made, and they and the rulings thereon shall be noted in the record.

62.13. Inquiry by ALJ. -- The administrative law judge may ask questions of the parties or of witnesses for the purpose of clarifying the record.

62.14. Substitution of copies for originals. -- When books, records, papers, or other documents have been received in evidence, the substitution of a copy thereof may be permitted.

62.15. Return of original exhibits. -- When original exhibits have been received in evidence, the party who offered such exhibits may be permitted to withdraw them after the determination of the administrative law judge becomes final.

62.16. Stipulations.

62.16.1. To expedite the presentation of evidence, a stipulation as to the evidence is strongly encouraged, provided the interests of parties will not be substantially prejudiced thereby. See, section 47 of this rule. Although objections to a particular part of a stipulation should be noted therein, the presiding administrative law judge will rule on any objection to irrelevancy of stipulated facts made at the hearing.

62.16.2. The presiding administrative law judge may, in the interest of justice, allow the parties to make posthearing evidentiary submissions within time restrictions fixed by the administrative law judge.

62.17. Argument. -- After all of the parties have completed the submission of the evidence, they may orally argue the applicability of the law to the facts.

62.18. Legal briefs.

62.18.1. The administrative law judge may order the parties to file legal briefs within the time permitted by the administrative law judge.



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62.18.2. A party filing a legal brief shall serve a copy of a brief on the other party at the time the brief is submitted to the administrative law judge to and proof of service on the other party shall be attached.

62.19. Proposed findings of fact and conclusions of law required.

62.19.1. Unless otherwise directed by the presiding administrative law judge, in every case, whether or not complete legal briefs are submitted, the parties shall submit written proposed findings of fact and conclusions of law within the time restrictions fixed by the administrative law judge.

62.19.2. If legal briefs are submitted, the proposed findings of fact and conclusions of law shall also be set forth in the briefs.

62.19.3. The proposed findings of fact shall refer, whenever possible, to the relevant pages of the transcript of the hearing and exhibits.

62.19.4. A copy of the proposed findings of fact and conclusions of law shall be served on the other party at the time the proposed finding of fact and conclusions of law are filed with the administrative law judge, which shall proof of service shall be attached.

62.20. Records of OTA are exempt from FOIA. -- Records pertaining to petitions filed with the office of tax appeals are not subject to disclosure under the state freedom of information act, W. Va. Code §29B-1-1 et seq., as provided in W. Va. Code §11-10A-10(g).

### **§121-1-63. Burden of proof.**

63.1. General. -- The burden of proof shall be upon the petitioner, except as otherwise provided by statute or legislative rule.

63.2. Fraud. -- In any case involving the issue of fraud with intent to evade tax, the burden of proof in respect of that issue is on the respondent, and that burden of proof is to be carried by clear and convincing evidence.

63.3. Transferee liability. -- The burden of proof is on the respondent to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax.

63.4. Other. The burden of proof in cases that do not arise under the West Virginia tax procedure and administration act, W. Va. Code §11-10-1 et seq., is on the person designated in the applicable statute.

### **§121-1-64. Evidence.**

64.1. General. -- Hearings before the office of tax appeals are relatively informal in the sense that the technical rules of evidence applicable to trials in the courts of record are not binding in hearings before the office of tax appeals. For example, the office of tax appeals may admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs, subject to relevance and materiality. Irrelevant, immaterial, or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law.

64.1.1. Witnesses in a proceeding shall swear or affirm before the presiding administrative law judge to give full and truthful testimony.

64.1.2. If a witness is not testifying as an expert witness, then his or her testimony in the form of opinions or inferences is limited to opinions or inferences that are rationally based on the perception of

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the witness and that are helpful to a clear understanding of his or her testimony or the determination of a fact in issue.

64.2. Ex parte statements. -- Ex parte affidavits, statements in briefs, and unadmitted allegations in pleadings do not constitute evidence. As to allegations in pleadings not denied, see subsections 31.4 and 32.3 and 32.4 of this rule.

64.3. Depositions. -- Testimony taken by deposition shall not be treated as evidence in a case until offered and received in evidence. Error in the transcript of a deposition may be corrected by agreement of the parties, or by the office of tax appeals on proof it deems satisfactory to show an error exists and the correction to be made.

64.4. Documentary evidence.

64.4.1. Copies. - A copy is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the copy in lieu of the original. Where the original is admitted in evidence, a clearly legible copy may be substituted later for the original or such part thereof as may be material or relevant, upon leave granted in the discretion of the presiding administrative law judge.

64.4.2. Return of exhibits. -- Exhibits may be disposed of as the office of tax appeals deems advisable. A party desiring the return at such party's expense of any exhibit belonging to the party, shall, within ninety (90) days after the decision of the case by the office of tax appeals has become final, make written application to the executive director, suggesting a practical manner of delivery. If the application is not timely made, the exhibits in the case will be destroyed.

64.5. Interpreters. -- The parties ordinarily will be expected to make their own arrangements for obtaining and compensating interpreters. However, the office of tax appeals may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation, which compensation shall be paid by one or more of the parties or otherwise as the office of tax appeals may direct.

64.6. Expert witness reports.

64.6.1. Unless otherwise permitted by the presiding administrative law judge upon timely request, any party, including the state tax department, who calls an expert witness, including a tax examiner, shall cause that witness to prepare a written report for submission to the office of tax appeals and to the opposing party. The report shall set forth the qualifications of the expert witness and shall state the witness' opinion and the facts or data on which that opinion is based. The report shall set forth in detail the reasons for the conclusion, and it will be marked as an exhibit, identified by the witness, and received in evidence as the direct testimony of the expert witness, unless the presiding administrative law judge determines that the witness is not qualified as an expert. Additional direct testimony with respect to the report may be allowed to clarify or emphasize matters in the report, to cover matters arising after the preparation of the report, or otherwise at the discretion of the presiding administrative law judge. After the notice of hearing is issued by the executive director, each party who calls any expert witness shall serve on each other party, and shall submit to the office of tax appeals, not later than ten (10) days before the day of evidentiary hearing, a copy of all expert witness reports prepared pursuant to this subdivision.

64.6.1. An expert witness' testimony will be excluded altogether for failure to comply with the provisions of this subdivision 64.6.1, unless the failure is shown to be due to good cause and unless the failure does not unduly prejudice the opposing party, such as by significantly impairing the opposing party's ability to cross-examine the expert witness or by denying the opposing party the reasonable opportunity to obtain evidence in rebuttal to the expert witness' testimony.

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64.6.2. The presiding administrative law judge ordinarily will not grant a request to permit an expert witness to testify without a written report where the expert witness' testimony is based on third-party contacts, comparable sales, statistical data, or other detailed, technical information. The office of tax appeals may grant such a request, for example, where the expert witness testifies only with respect to industry practice or only in rebuttal to another expert witness.

### **§121-1-65. Exceptions unnecessary.**

65.1 Formal exceptions to rulings or orders of the office of tax appeals are unnecessary. It is sufficient that a party at the time the ruling or order of the office of tax appeals is made or sought, makes known to the office of tax appeals the action which such party desires the office of tax appeals to take or such party's objection to the action of the office of tax appeals and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice such party.

### **§121-1-66. Exclusion of proposed witnesses from hearing room until called to testify.**

66.1. Exclusion. -- At the request of a party, the presiding administrative law judge shall order witnesses excluded from the hearing room so that they cannot hear the testimony of other witnesses. The presiding administrative law judge may also make the order on his or her own motion. This subsection 66.1 does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person who is designated as the party's representative by its attorney or other person representing the party, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

66.2. Sanctions. -- The presiding administrative law judge shall include in the record the name of any witness who remains within hearing of the proceedings after his or her exclusion has been directed. Additionally, any person (witness, counsel, or party) who willfully violates instructions issued by the administrative law judge with respect to such exclusion may be subject to the sanctions the administrative law judge, in his or her discretion, deems to be appropriate under the circumstances.

### **§121-1-67. Determination of foreign law.**

67.1 A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice. The presiding administrative law judge, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or otherwise admissible. The presiding administrative law judge's determination shall be treated as a ruling on a question of law.

### **§121-1-68. Subpoenas for persons, papers or other tangible things.**

68.1. In general. -- Upon the written request of any party, the administrative law judge assigned to the matter, or, if an administrative law judge has not been assigned yet, the chief administrative law judge, may issue subpoenas to require the attendance of witnesses at an administrative hearing or subpoenas duces tecum to require the production of books, records, or other tangible things at a deposition or hearing.

68.1.1. A request for a subpoena or for a subpoena duces tecum shall be made in writing at least ten (10) days in advance of the hearing.

68.1.2. All requests by parties for issuance of subpoenas or subpoenas duces tecum shall contain a statement acknowledging that the requesting party agrees to pay any and all fees for service of such

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subpoenas and for the attendance of witnesses.

68.1.3. All subpoenas and subpoenas duces tecum shall be issued in the name of the office of tax appeals.

68.1.4. A party requesting their issuance must see that they are properly served.

68.2. Preparation of subpoenas. -- The party requesting the subpoena or subpoena duces tecum shall prepare the same for consideration by and the signature of the administrative law judge. The party may prepare subpoenas or subpoenas duces tecum forms that are generally used in proceedings before the circuit courts of this state, with any appropriate modifications.

68.3. Signature of ALJ. -- If the administrative law judge determines that the subpoenas or subpoenas duces tecum should be issued as requested, the administrative law judge will sign the prepared subpoenas and deliver the same to the party making such request. Service of the subpoenas and subpoenas duces tecum are the responsibility of the person making the request.

68.4. Service of subpoena. -- The party requesting issuance of a subpoena or subpoena duces tecum shall see that it is properly served. Every subpoena or subpoena duces tecum shall be served at least five (5) days before the return date thereof, either by personal service made by any person over eighteen (18) years of age, or by registered or certified mail.

68.5. Proof of service.

68.5.1. Except as provided in subdivision 68.5.2, proof of service of a subpoena or subpoena duces tecum shall be made to the executive director of the office of tax appeals by written statement of the date and manner and the name of the person served, that is certified by the person who made the service.

68.5.2. A return receipt card or other return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail.

68.6. Fee for service. -- Any person who serves a subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state. Fees for the attendance and travel of witnesses subpoenaed shall be the same as for witnesses before the circuit courts of this state.

68.6.1. All fees related to any subpoena or subpoena duces tecum issued at the instance of the state tax department or other agency, without the request of an interested party, shall be paid by the state tax department or other agency that asked that the subpoena or subpoena duces tecum be issued.

68.6.2. All fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asked that the subpoena or subpoena duces tecum be issued.

68.7. Duties in responding to a subpoena duces tecum.

68.7.1. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories stated in the subpoena duces tecum.

68.7.2. When information subject to a subpoena is withheld on a claim that it is privileged or

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subject to protection as hearing preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

68.7.3. A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place for production or inspection unless commanded to appear for the deposition or evidentiary hearing.

68.8. Protection of persons subject to subpoenas.

68.8.1. A party, or the party's representative responsible for the issuance and service of a subpoena, shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

68.8.2. A person commanded to produce and permit inspection and copying may, within three (3) days after service of the subpoena duces tecum file with the executive director of the office of tax appeals and serve upon the party, or the party's representative specified in the subpoena, written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to a subsequent order issued by the administrative law judge who signed the subpoena duces tecum or a circuit court order. Within five (5) days after an objection is filed with the office of tax appeals, the administrative law judge shall hold a hearing, which may be a conference telephone call to the parties, or their representatives, after which he or she shall forthwith issue an order that (1) directs compliance with the subpoena duces tecum, as originally issued, (2) quashes the subpoena, or (3) modifies the subpoena. The administrative law judge may quash or modify the subpoena duces tecum if it:

- a. Fails to allow a reasonable time for compliance;
- b. Requires a person to travel for deposition to a place other than the county in which the person resides or is employed or transacts business or at a place fixed by order of the court;
- c. Requires disclosure of privileged or other protected matter and no exception or waiver applies; or
- d. Subjects the person to undue burden.

If the subpoena duces tecum (1) requires disclosure of a trade secret or other confidential research, development or commercial information, or (2) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the office of tax appeals may, to protect a person subject to or affected by the subpoena duces tecum, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the office of tax appeals may order the appearance or production upon specified conditions.

68.9. Judicial relief from subpoena. -- Upon motion made promptly and in any event before the time specified in a subpoena or subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is to be held, or the judge thereof in vacation, may grant any relief with respect to the subpoena or subpoena duces tecum, which the court, under the West Virginia rules of civil procedure for trial courts of record, could grant, and for any of the same reasons, with respect to a subpoena or subpoena duces tecum issued from that court.

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68.9.1. Judicial relief may be sought without first exhausting the administrative remedy allowed under subsection 68.8 of this section.

68.9.2. Judicial relief may be sought after the administrative law judge issues his or her order under subsection 68.8 of this section.

68.10. Compelling compliance with subpoena.

68.10.1. In case of disobedience or neglect of any subpoena or subpoena duces tecum served by any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the party serving the subpoena may, upon notice to the person commanded to produce, institute proceedings, in the circuit court of the county of this state in which the deposition is to be taken or the administrative hearing is to be held, for a court order to compel compliance.

68.10.2. The office of tax appeals may compel the attendance of witnesses and the production of books, records or papers in response to a subpoena or subpoena duces tecum. In case of disobedience or neglect of any subpoena or subpoena duces tecum served by any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by the office of tax appeals shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from that circuit court or a refusal to testify therein.

### **§121-1-69. Failure to appear or to adduce evidence.**

69.1. Attendance at hearings. -- The unexcused absence of a party or a party's legal counsel or other representative when a case is called on for hearing will not be ground for delay. The case may be dismissed for failure properly to prosecute, or the evidentiary hearing may proceed and the case be regarded as submitted on the part of the absent party or parties.

69.2. Failure of proof. -- Failure to produce evidence, in support of an issue of fact as to which a party has the burden of proof and which has not been conceded by such party's adversary, may be ground for dismissal or for determination of the affected issue against that party. Facts may be established by stipulation in accordance with section 47 of this rule, but the mere filing of such stipulation does not relieve the party, upon whom rests the burden of proof, of the necessity of properly producing evidence in support of facts not adequately established by such stipulation. As to submission of a case without evidentiary hearing, see section 53 of this rule.

### **§121-1-70. Record of proceedings.**

70.1. General. -- Evidentiary hearings before the office of tax appeals shall be recorded or otherwise reported, and a transcript thereof shall be made if, in the opinion of the administrative law judge presiding at a hearing, a permanent record is deemed appropriate. Transcripts shall be supplied to the parties and other persons at such charges as may be fixed or approved by the office of tax appeals.

70.2. Transcript as evidence. -- Whenever the transcript of the testimony of a witness at a evidentiary hearing before the office of tax appeals is duly certified by the person who reported the testimony for the office of tax appeals, it is admissible in evidence at a later hearing.

### **§121-1-71. Legal briefs.**

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71.1. General. -- Legal briefs shall be filed after the evidentiary hearing or submission of a case, except as otherwise directed by the presiding administrative law judge. In addition to or in lieu of briefs, the presiding administrative law judge may permit or direct the parties to make oral argument or file memoranda or statements of authorities. The office of tax appeals may return without filing any brief that does not conform sufficiently overall to the requirements of this section.

71.2. Time for Filing Briefs. -- Briefs may be filed simultaneously or seriatim, as the presiding administrative law judge directs. The following times for filing briefs shall prevail in the absence of any different direction by the presiding administrative law judge:

71.2.1. Simultaneous briefs. -- Opening briefs within thirty (30) days after the conclusion of the evidentiary hearing, and answering briefs ten (10) days thereafter.

71.2.2. Seriatim briefs. -- Opening brief within thirty (30) days after the conclusion of the evidentiary hearing, answering brief within thirty (30) days thereafter, and reply brief within ten (10) days after the due date of the answering brief.

71.3. Additional rules for briefs.

71.3.1. Extension of time. -- A motion for extension of time for filing any brief shall be made in writing prior to the due date and shall recite that the moving party has advised the party's adversary and whether or not the adversary party objects to the motion. As to the effect of extensions of time, see section 8 of this rule.

71.3.2. Failure to file. -- A party who fails to file an opening brief shall not be permitted to file an answering or reply brief except on leave granted by the presiding administrative law judge.

71.3.3. Delinquent brief. -- Delinquent briefs will not be accepted by the office of tax appeals unless accompanied by a motion setting forth the reason(s) for the delay that the presiding administrative law judge deems sufficient to account for the delay.

71.3.4. Late filed simultaneous brief. -- In the case of simultaneous briefs, the office of tax appeals may return, without filing, a delinquent brief received from a party after the party's adversary's brief was served upon the party.

71.4. Service. -- The party submitting the brief is responsible for promptly serving a copy on each adversarial party.

71.5. Number of copies filed. -- A signed original and one conforming copy of each brief, plus a certificate showing service on each adversarial party, shall be filed with the executive director of the office of tax appeals.

71.6. Form and content. -- All briefs should conform to the requirements of section 13 of this rule and should contain the following in the order indicated:

71.6.1. On the first page, a table of contents with page references, followed by a list of all citations arranged alphabetically as to cited cases and stating the pages in the brief at which cited. Citations should be in italics when printed or computer generated and underscored when typewritten.

71.6.2. A statement of the nature of the controversy, the tax involved, and the issues to be decided.

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71.6.3. Proposed findings of fact (in the opening brief or briefs), based on the evidence, in the form of numbered statements, each of which shall be complete and shall consist of a concise statement of essential fact and not a recital of testimony nor a discussion or argument relating to the evidence or the law. In each such numbered statement, there shall be inserted references to the pages of the transcript or the exhibits or other sources relied upon to support the statement. In an answering or reply brief, the party shall set forth any objections, together with the reasons therefor, to any proposed findings of any other party, showing the numbers of the statements to which the objections are directed; in addition, the party may set forth alternative proposed findings of fact.

71.6.4. A concise statement of each conclusion of law on which the party relies.

71.6.5. The argument, which sets forth and discusses the points of law involved and any disputed questions of fact.

71.6.6 . The signature of counsel or the party submitting the brief. As to signature, see section 15 of this rule.

### **§121-1-72. Decisions of the office of tax appeals in cases, except small claim cases.**

72.1. Written decision required. -- In a case, except a small claim case to which the provisions of section 110 of this rule applies, the administrative law judge shall review the evidence and legal arguments presented by the parties and issue a written decision containing findings of fact and conclusions of law.

72.2. Time to issue. -- The office of tax appeals shall issue its written decision within a reasonable time, not to exceed six (6) months, after the case is fully submitted for decision. A case is fully submitted for decision once (1) all post-hearing evidentiary submissions, if any, required by the administrative law judge are received, (2) all post-hearing submissions of proposed findings of fact and conclusions of law as required by this procedural rule are received, and (3) all required legal briefs are received by the administrative law judge. If a party fails to submit any of these documents by the date ordered by the administrative law judge, including any authorized extension of time, the record shall be closed on the day after the last day the party had to timely submit the document.

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

72.4. Authentication. -- The office of tax appeals shall authenticate all of its decisions, orders, records, and proceedings with its official seal.

72.5. Service of decision. -- Written notice of decisions, and written notice of other orders, of the office of tax appeals in regular (non-small claim) cases, and in small claim cases, shall be served upon the parties either by personal or substituted service or by certified mail. Service of notice of decisions or other orders of the office of tax appeals by personal or substituted service is valid if made by any method authorized by the rules of the West Virginia rules of civil procedure for trial courts of record. Service of notice of decisions or other orders of the office of tax appeals by certified mail is valid if accepted by the party, or if addressed to and mailed to the party's usual place of business or usual place of abode or last known address and accepted by any person. If service of notice of decisions or orders by certified mail as set forth in the immediately preceding sentence is returned as "refused," "unclaimed," or "not deliverable" for whatever reason not involving error on the part of the office of tax appeals, the office of tax appeals shall then serve notice of the decision or order by first-class mail, sufficient postage prepaid,



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to the same address, and the date of the United States postmark for this first-class mailing is the date of service of notice of the decision or order.

### **§121-1-73. Computation by parties for entry of decision.**

#### 73.1. Agreed computations.

73.1.1. Where the office of tax appeals has filed or stated its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the office of tax appeals determination of the issues, showing the correct amount of the liability or overpayment to be entered as the decision.

73.1.2. If the parties are in agreement as to the amount of the liability or overpayment to be entered as the decision pursuant to the findings and conclusions of the office of tax appeals, then they, or either of them, shall file promptly with the office of tax appeals an original and two copies of a computation showing the amount of the liability or overpayment and that there is no disagreement that the figures shown are in accordance with the findings and conclusions of the office of tax appeals. In the case of an overpayment, the computation shall also include the amount and date of each payment made by the petitioner.

73.1.3. After receipt of the subdivision 73.1.2 filing, the office of tax appeals will then enter its decision.

#### 73.2. Procedure in absence of agreement.

73.2 .1. If the parties are not in agreement as to the amount of the liability or overpayment to be entered as the decision in accordance with the findings and conclusions of the office of tax appeals, then either of them may file with the office of tax appeals a computation of the deficiency, liability, or overpayment believed by the party to be in accordance with the office of tax appeals findings and conclusions. In the case of an overpayment, the computation shall also include the amount and date of each payment made by the petitioner.

73.2.2. The executive director will serve upon the opposite party, by regular mail or facsimile transaction, a notice of the filing accompanied by a copy of the computation. If, on or before a date specified in the executive director's notice, the opposite party fails to file an objection, accompanied or preceded by an alternative computation, then the office of tax appeals may enter a decision in accordance with the computation already submitted.

73.2.3. If, in accordance with subdivision 73.2.1 of this section, computations are submitted by the parties which differ as to the amount to be entered as the decision of the office of tax appeals, then the parties may, at the office of tax appeals discretion, be afforded an opportunity to be heard in argument thereon and the office of tax appeals will determine the correct liability or overpayment and will enter its decision accordingly.

73.3. Limit on argument. -- Any argument under subdivision 73.2.3 of this section shall be confined strictly to consideration of the correct computation of the deficiency, liability, or overpayment resulting from the findings and conclusions made by the office of tax appeals. No argument will be heard upon or consideration given to the issues or matters disposed of by the office of tax appeals findings and conclusions or to any new issues. This section may not be regarded as affording an opportunity for retrial or reconsideration.

### **§121-1-74. Effect of decision or other final order of office of tax appeals.**

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74.1. The administrative decision, or other final order of the office of tax appeals, becomes final and conclusive and is not subject to either administrative or judicial review, unless an appeal from the decision, or other final order of the office of tax appeals, is taken by a party to a circuit court of competent jurisdiction in this state within sixty (60) days after service thereof. See W. Va. Code §11-10A-19.

74.2. Amount owed tax commissioner. Department on the day following the date upon which the decision or other final order became final.

74.3. Amount owed petitioner. -- The amount of overpayment by the taxpayer, if any, shall be promptly refunded or credited to the taxpayer, in accordance with the taxpayers election.

### **§121-1-75. Publication of administrative decisions, except small claim decisions .**

75.1. All administrative decisions, after they become final, except decisions in small claim cases, and all appealable orders of the office of tax appeals, shall be published in the state register after having been redacted to maintain confidentiality.

75.2. The office of tax appeals may also publish these redacted decisions on the internet.

75.3. Decisions in small claim cases will not be published because they have no precedential value.

### **§121-1-76. Harmless error.**

76.1. No error in either the admission or exclusion of evidence, and no error or defect in any ruling or order, or in anything done or omitted by the office of tax appeals, or by any of the parties, is grounds for granting a new evidentiary hearing or for vacating, modifying, or otherwise disturbing a decision or order, unless refusal to take such action appears to the office of tax appeals to be inconsistent with substantial justice. The office of tax appeals, at every stage of a case, will disregard any error or defect that does not affect the substantial rights of the parties.

### **§121-1-77. Motion to correct clerical or computational mistakes.**

77.1. General. -- A motion to correct clerical or computational mistakes may be filed within twenty (20) days after a written decision was served on the party, unless the chief administrative law judge, in his or discretion, shall otherwise permit. The moving party shall serve a copy of the motion on the other party or parties. A certificate or other proof of service shall be attached to the motion when it is filed.

77.2. Hearing on motion. -- Within seven (7) work days after a party files a motion under this section, the office of tax appeals shall hold a hearing on the motion and within five (5) working days thereafter issue its written order ruling on the motion.

77.3. Motion does not extend appeal time. -- The filing of a motion under this section does not toll or extend the time for applying for judicial review of the written decision.

### **§121-1-78. Motion to reopen record.**

78.1. General. -- A motion to reopen the record may be filed within twenty (20) days after a written decision was served on the party, unless the chief administrative law judge, in his or discretion, shall otherwise permit. The moving party shall serve a copy of the motion on the other party or parties. A certificate or other proof of service shall be attached to the motion when it is filed.

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78.2. Hearing on motion. -- Within seven (7) work days after a party files a motion under this section, the office of tax appeals shall hold a hearing on the motion and within five (5) working days thereafter issue its written order ruling on the motion. The only grounds on which this motion will be granted are:

78.2.1. Newly discovered evidence which, if introduced into the record, would probably have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding; or

78.2.2. Fraud, misrepresentation, or other misconduct of an opposing party.

78.3. Motion does not extend appeal time. -- The filing of a motion under this section does not toll or extend the time for applying for judicial review of the written decision.

### **§121-1-79. Motion for reconsideration of findings or opinion.**

79.1. General. -- Any motion for reconsideration of findings of fact or conclusions of law, with or without a new or further evidentiary hearing, may be filed within twenty (20) days after a written decision was served on the party, unless the chief administrative law judge, in his or her discretion, shall otherwise permit. The moving party shall serve a copy of the motion on the other party or parties. A certificate or other proof of service shall be attached to the motion when it is filed.

79.2. Hearing on motion. -- Within seven (7) work days after a party files a motion under this section, the office of tax appeals shall hold a hearing on the motion and within five (5) working days thereafter issue its written order ruling on the motion.

79.3. Motion does not extend appeal time. The filing of a motion under this section does not toll or extend the time for applying for judicial review of the written decision.

### **§121-1-80. Motion to vacate decision and hold a new hearing.**

80.1. Time for filing. -- A motion to vacate a written decision and hold a new evidentiary hearing, may be filed within twenty (20) days after the written decision was served on the party, unless the chief administrative law judge, in his or her discretion, shall otherwise permit. The moving party shall serve a copy of the motion on the other party or parties. A certificate or other proof of service shall be attached to the motion when it is filed.

80.2. Content of motion. -- The motion shall demonstrate good cause as to why a new hearing shall be held. For purposes of this section, "good cause" means any of the following:

80.2.1. Error of law that, if corrected, would produce a different result;

80.2.2. Mistake of fact that, if corrected, would produce a different result;

80.2.3. Fraud; or

80.2.4. Any other reason the office of tax appeals deems sufficient and material.

80.3. No extension of appeal period. -- The filing of a motion under this section does not toll or extend the time for applying for judicial review of the written decision.

80.4. Reply to motion. -- The opposing party may file a response to the motion for a new hearing within seven (7) days after being served with a copy of the motion of the moving party.

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80.5. Hearing on motion. -- Within twenty (20) days after a party files a motion under this section, the office of tax appeals shall hold a hearing on the motion and within five (5) working days thereafter issue its written order ruling on the motion.

80.6. New hearing. -- If the motion for a new hearing is granted, the order granting the new hearing shall withdraw or vacate the administrative decision that precipitated the filing of the motion. Notice of the day, time and place of the new hearing shall be given as in any other case. The new hearing shall not be limited to the evidence presented during the prior hearing.

### **§121-1-81. No joinder of motions under sections 77, 78 and 79.**

81.1 Motions under sections 77, 78 and 79 of this rule shall be made separately from each other and may not be joined to or made part of any other motion.

### **§121-1-82. Judicial review of office of tax appeals decisions and orders.**

82.1. Either the taxpayer or the commissioner, or both, may appeal the final decision or order of the office of tax appeals by taking an appeal to the circuit courts of this state within sixty days after being served with notice of the final decision or order.

82.2. The office of tax appeals may not be made a party in any judicial review of a decision or order it issued. See W. Va. Code §11-10A-19(b).

82.3. Venue.

82.3.1. If the taxpayer appeals, the appeal may be taken in the circuit court of Kanawha County or in any county of this state:

- a. Wherein the activity sought to be taxed was engaged in;
- b. Wherein the taxpayer resides; or
- c. Wherein the will of the decedent was probated or letters of administration granted.

82.3.2. If the tax commissioner appeals, the appeal may be taken in Kanawha County: Provided, That the taxpayer shall have the right to remove the appeal to the county of this state:

- a. Wherein the activity sought to be taxed was engaged in;
- b. Wherein the taxpayer resides; or
- c. Wherein the will of the decedent was probated or letters of administration granted.

82.3.3 . In the event both parties appeal to different circuit courts, the appeals shall be consolidated. In the absence of agreement by the parties, the appeal shall be consolidated in the circuit court of the county in which the taxpayer filed the petition for appeal.

### **§121-1-83. Appeal taken by filing petition for appeal.**

83.1. Petition for appeal. -- The appeal proceeding is instituted by filing a petition for appeal with the circuit court, or the judge thereof in vacation, within the sixty days after the party is served with a copy of

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the decision or order being appealed, as provided in W. Va. Code §11-10A-19(a).

83.2. Service. -- A copy of the petition for appeal is to be served on all parties appearing of record, other than the party appealing, by registered or certified mail.

83.3. Content. -- The petition for appeal must state whether the appeal is taken on questions of law or questions of fact, or both, and set forth with particularity the items of the decision objected to, together with the reasons for the objections.

### **§121-1-84. Appeal bond.**

84.1. Time for filing. -- If the appeal is of an assessment, except a jeopardy assessment for which security in the amount thereof was previously filed with the tax commissioner, then within ninety (90) days after the petition for appeal is filed, or sooner if ordered by the circuit court, the petitioner must file with the executive director of the circuit court a cash bond or a corporate surety bond approved by the executive director. The surety must be qualified to do business in this state.

84.2. Condition of bond. -- The appeal bond must be conditioned upon the petitioner performing the orders of the court.

84.3. Penalty of bond.

84.3.1 The penalty of the appeal bond may not be less than the total amount of tax or revenue plus additions to tax, penalties and interest for which the taxpayer was found liable in the administrative decision of the office of tax appeals, except as provided in subdivision 214.3.2. of this subsection.

84.3.2. Notwithstanding subdivision 84.3.1, and in lieu of the bond, the tax commissioner, upon application of the petitioner, may upon a sufficient showing by the taxpayer, certify to the executive director of the circuit court that the assets of the taxpayer are adequate to secure performance of the orders of the court. If the tax commissioner refuses to certify that the assets of the taxpayer or other indemnification are adequate to secure performance of the orders of the court, then the taxpayer may apply to the circuit court for the certification.

84.4. No bond may be required of the tax commissioner.

### **§121-1-85. Proceeding in circuit court.**

85.1. General. -- The circuit court will hear the appeal as provided in section §29A-5-4 of the state administrative procedures act, W. Va. Code §29A-1-1, et seq.

85.2. Review. -- The circuit court's review is conducted without a jury and upon the record made before the office of tax appeals, except that in cases of alleged irregularities in procedure before the office of tax appeals, not shown in the record, testimony thereon may be taken by the court. The court may hear oral arguments and require briefs.

85.3. Decision.

85.3.1. The circuit court may affirm the order or decision of the office of tax appeals or remand the case for further proceedings before the office of tax appeals. The circuit court must reverse, vacate, or modify the order or decision of the office of tax appeals if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

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- a. In violation of constitutional or statutory provisions;
- b. In excess of the statutory authority or jurisdiction of the agency;
- c. Made upon unlawful procedures;
- d. Affected by other error of law;
- e. Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- f. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

85.3.2. When the appeal is to review a decision or order on a petition for refund or credit, the court may determine the legal rights of the parties, but in no event shall it enter a judgment for money.

85.4. Appeal to West Virginia supreme court of appeals. -- Either party may appeal to the supreme court of appeals as provided in article 6 of the state administrative procedures act, W. Va. Code §29A-6-1 et seq.

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

### **§121-1-86. Preparation of the record on appeal.**

86.1. General. -- Upon receiving written notice of any appeal by a party from a decision or other final order of the office of tax appeals, to a circuit court in this state, the office of tax appeals shall be responsible for seeing that the record of the case is prepared for submission to the circuit court within the time required by the court.

86.2. Contents. -- The record for appeal shall consist of a copy of the office of tax appeals original file, including, but not limited to, the following items:

86.2.1. A certified list of docket entries showing the dates of filing and the nature of all documents filed and the date and disposition of all proceedings conducted.

86.2.2. All papers, including, but not limited to, all of the following items:

- a. Petitions,
- b. Pleadings,
- c. Notices,
- d. Stipulation,
- e. Motions,
- f. Briefs,

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- g. Intermediate rulings,
- h. The decision or order being appealed,
- i. The original transcript(s) of the hearing(s), and
- j. Original exhibits.

86.3. Payment of costs. -- The reasonable cost of preparing the record shall be paid by the party appealing to circuit court. If both parties appeal to circuit court, the reasonable cost of preparing the record shall be shared equally by both parties.

86.4. Index of record. -- At the time the executive director forwards the record on appeal to the clerk of the circuit court, the executive director shall forward to each of the parties a copy of the index to the record on appeal.

### **§121-1-87. Appeals from interlocutory orders .**

87.1. General. -- For the purpose of seeking the review of any order of the office of tax appeals, which is not otherwise immediately appealable, a party may request the office of tax appeals to include, or the office of tax appeals may on its own motion include, a statement in such order that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation.

87.1.1. Any such request by a party shall be made by motion, which shall set forth with particularity the grounds therefor and note whether there is any objection thereto.

87.1.2. Any order by the office of tax appeals that includes the above statement shall be entered upon the records of the office of tax appeals and served forthwith by the executive director.

87.2. Venue. -- The circuit court, to which an appeal from an interlocutory order may be taken, is the same as that for appeals of decisions and final orders of the office of tax appeals. See subsection 82.3 of this rule.

87.3. Stay of proceeding. -- Unless so ordered by the circuit court, proceedings in the office of tax appeals shall not be stayed by virtue of any interlocutory order that is or may be the subject of an appeal.

### **§121-1-88. Procedures for mediation.**

88.1 Section 89 through 101 of this rule shall govern mediation of proceedings before the office of tax appeals.

### **§121-1-89. Mediation defined**

89.1 Mediation is an informal, non-adversarial process whereby a neutral third person, the mediator, assists parties to a dispute to resolve by agreement some or all of the differences between them. In mediation, decision-making authority remains with the parties; the mediator has no authority to render a judgment on any issue of the dispute. The role of the mediator is to encourage and assist the parties to reach their own mutually acceptable settlement by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint

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problem-solving, exploring settlement alternatives, and other similar means. The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute.

### **§121-1-90. Selection of cases for mediation.**

90.1 Upon motion of any party, or by stipulation of the parties, the office of tax appeals may refer a case to mediation. Upon entry of an order referring a case to mediation, the parties shall have ten (10) days within which to file a written objection, specifying the grounds. The office of tax appeals shall promptly consider any such objection, and may modify its original order for good cause shown. A case ordered for mediation shall remain on the office of tax appeals hearing docket.

### **§121-1-91. Listing of mediators .**

91.1 The West Virginia State Bar maintains and makes available to circuit courts, interested parties, and the public a listing of persons willing and qualified to serve as mediators in the circuit courts. The mediator selected by the parties may come from this list.

### **§121-1-92. Selection of mediator.**

92.1 Within fifteen (15) days after entry of an order or stipulation referring a case to mediation, the parties, upon approval of the office of tax appeals, may choose their own mediator, who may or may not be a person listed on the State Bar listing. In the absence of such agreement, the office of tax appeals shall designate the mediator from the State Bar listing, either by rotation or by some other neutral administrative procedure established by administrative order of the chief administrative law judge.

### **§121-1-93. Compensation of mediator.**

93.1 If the parties by their own agreement choose a mediator who requires compensation, then the parties shall by written agreement determine how the mediator will be compensated. If the office of tax appeals designates the mediator, then it shall, whenever possible, select a mediator who is willing to serve without compensation. If it has established a budget approved by the Legislature for this purpose, the office of tax appeals may reimburse a volunteer mediator for reasonable and necessary expenses, according to the Governor's travel regulations. If a volunteer mediator is not available, then the office of tax appeals shall inquire of the parties whether they are willing to pay the fees of a mediator. If so, then either the parties by stipulation or the office of tax appeals shall select the mediator, and the parties by written agreement shall determine how the mediator will be compensated.

### **§121-1-94. Mediator disqualification.**

94.1. A mediator shall disqualify himself or herself in a proceeding in which the mediator 's impartiality might reasonably be questioned, including, but not limited to, instances where:

94.1.1. The mediator has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

94.1.2. The mediator served as a lawyer in the matter in controversy, or a lawyer with whom the mediator previously practiced law served during such association as a lawyer concerning the matter, or the mediator has been a material witness concerning it;

94.1.3. The mediator knows that he or she, individually or as a fiduciary, or the mediator's spouse, parent or child, wherever residing, or any other member of the mediators family residing in the mediators household, has an economic interest in the subject matter in controversy or in a party to the



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proceeding or has more than a de minimis interest that could be substantially affected by the proceeding;

94.1.4. The mediator or the mediator's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

- a. is a party to the proceeding, or an officer, director or trustee, of a party;
- b. is acting as a lawyer in the proceeding;
- c. is known by the mediator to have a more than de minimis interest that could be substantially affected by the proceeding;
- d. is, to the mediators knowledge, likely to be a material witness in the proceeding.

94.2. A mediator shall keep informed about the mediators personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the mediators spouse and minor children.

94.3. Certain terms defined. -- As used in this section, the following terms mean:

94.3.1. "De minimis" denotes an insignificant interest that could not raise reasonable questions as to the mediators impartiality.

94.3.2. "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party, except that:

a. ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the mediator participates in the management of the fund or a proceeding pending or impending before the mediator could substantially affect the value of the interest;

b. service by a mediator as an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, or civic organization, or service by a judge's spouse, parent, or child as an officer, director, advisor, or other active participant in any organization does not create an economic interest in securities held by that organization;

c. a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

d. ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the mediator could substantially affect the value of the securities.

e. "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

f. "Knowingly," "knowledge," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

g. "Member of the mediators family" denotes a spouse, child, grandchild, parent,

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grandparent, or other relative or person with whom the judge maintains a close familial relationship.

h. "Member of the mediator's family residing in the mediators household" denotes any relative of a mediator by blood or marriage, or a person treated by a mediator as a member of the mediator's family, who resides in the mediators household.

i. "Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece.

94.4 . Any party may move the office of tax appeals to disqualify a mediator for good cause. In the event a mediator is disqualified, the parties or the office of tax appeals shall select a replacement in accordance with sections 92 and 93 of this rule.

### **§121-1-95. Provision of preliminary information to the mediator.**

95.1 The office of tax appeals may require the parties to provide pertinent information to the mediator prior to the first mediation session. Such information may include, but is not limited to: (1) copies of pleadings, transcripts, or other litigation-related documents, or (2) a confidential statement summarizing a party's position on the issues, status of settlement discussions, and what relief would constitute an acceptable settlement.

### **§121-1-96. Time frames for conduct of mediation.**

96.1 Unless otherwise agreed by the parties and the mediator or ordered by the office of tax appeals, the first mediation session shall be conducted within thirty (30) days after appointment of the mediator. Mediation shall be completed within forty-five (45) days after the first mediation session, unless extended by agreement of the parties and the mediator or by order of the office of tax appeals. The mediator is empowered to set the date and time of all mediation sessions, upon reasonable notice to the parties.

### **§121-1-97. Appearances; sanctions.**

97.1 The following persons, if furnished reasonable notice, are required to appear at any mediation session scheduled by the mediator, unless excused by the mediator or the office of tax appeals: (1) each party or the party's representative having full authority to settle without further consultation; and (2) each party's counsel of record. If a party or its representative counsel fails to appear at a duly noticed mediation session without good cause, the office of tax appeals, upon motion, may impose sanctions, including an award of reasonable mediator and attorney fees and other costs against the responsible party.

### **§121-1-98. Participation.**

98.1 No party may be compelled by this rule, the office of tax appeals, or the mediator to settle a case involuntarily or against the party's own judgment or interest. All parties involved in mediation, however, and their respective representatives and counsel, shall be prepared to negotiate openly and knowledgeably about the case in a mutual effort to reach a fair and reasonable settlement. §121-1-99. Confidentiality of mediation process.

98.2 Mediation shall be regarded as confidential settlement negotiations. A mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. A mediator shall keep confidential from opposing parties information obtained in an individual session unless the party to that session or the party's counsel authorizes disclosure. A mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding

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relating to or arising out of the dispute mediated.

### **§121-1-100. Immunity.**

100.1 A person acting as mediator under this rule shall have immunity in the same manner and to the same extent as an administrative law judge.

### **§121-1-101. Enforceability of settlement agreement.**

101.1 If the parties reach a settlement and execute a written agreement, the agreement is enforceable in the same manner as any other written contract.

### **§121-1-102. Report of mediator.**

102.1 Within ten (10) days after mediation is completed or terminated, the mediator shall report to the office of tax appeals the outcome of the mediation. With the consent of the parties, the mediator may identify any pending motions, discovery, or issues which, if resolved, would facilitate the possibility of settlement.

### **§121-1-103 through §121-1-109. [Reserved.]**

### **§121-1-110. Small claim cases.**

110.1. General. -- The office of tax appeals may handle certain cases as small claim cases as provided in W. Va. Code §11-10A-11. Small claim cases are handled more informally than other cases. The administrative law judge's decision in a small claim case is not subject to further administrative or judicial review.

110.2. Eligible cases. -- Generally, the following cases are eligible for handling as small claim cases and shall be handled as small claim cases upon the written request of the petitioner provided the office of tax appeals concurs in the election:

110.2.1. Those cases in which the amount in controversy does not exceed \$10,000 for any one taxable year. For this purpose, the "amount in controversy" means the total amount of tax and any additions or penalties, but excluding interest, for any one taxable year that is in controversy.

110.2.2. Unless the amount in controversy for any one tax year exceeds \$10,000, the following matters, even without request, shall be handled as small claim cases, unless the chief administrative law judge, in the interest of justice, determines otherwise:

- a. Cases in which the total amount in controversy, excluding interest, is less than \$1,000;
- b. Cases involving estimated tax assessments;
- c. Cases involving assessment or refund of business registration tax;
- d. Cases involving assessment or refund of corporate license tax;
- e. Cases in which the amount of the tax owed, if any, is not in controversy and the only issue is a request for waiver or abatement of additions, penalties, or interest;
- f. Cases involving West Virginia state tax changes based upon federal tax audit changes.

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110.3. Commencement of small claim process. -- A small claim proceeding before the office of tax appeals contesting a notice of assessment or denial, in whole or in part, of a claim for refund or credit of any tax collected by the tax commissioner under the West Virginia tax procedure and administration act, W. Va. Code §11-10-1 et seq., or any appealable order issued by the tax commissioner, shall be initiated by timely filing a written small claim petition that succinctly states:

110.3.1. The nature of the case;

110.3.2. The facts on which the appeal is based; and

110.3.3. Each question presented for review by the office of tax appeals.

110.4. Answer. -- Within five days of receipt of a timely filed petition pursuant to subsection 110.3 of this section, the executive director of the office of tax appeals shall provide the tax commissioner with a copy of the small claim petition. The tax commissioner shall file a written answer to the petition within forty (40) days of his or her receipt of the petition. The answer shall succinctly state:

110.4.1. The nature of the case;

110.4.2. The facts relied upon by the commissioner; and

110.4.3. An answer to each question presented for review.

110.4 The tax commissioner shall serve the petitioner or the petitioner's representative, if a representative is identified in the petition with a copy of the answer. A certificate of service or other proof of service shall be attached to the answer filed with the clerk of the office of tax appeals.

110.5. Appearance and representation.

110.5.1. Petitioner. -- The petitioner may appear before the office of tax appeals in his or her own behalf, or may be represented by an attorney or by any other person as he or she may choose.

110.5.2. Tax commissioner. -- In a small claim case, the state tax department will ordinarily not be represented by legal counsel. The state tax department may be represented in a small claim case by an employee of the department who is not a lawyer but who is familiar with the facts of the case.

110.6. Disposition of small claim cases. A small claim case will generally be decided based upon the content of the small claim petition and any other relevant documentary evidence submitted by the parties in accordance with time restrictions fixed by an administrative law judge.

110.7. Scheduling of hearing. -- The office of tax appeals will not schedule a hearing in a small claim case, until sixty (60) days after the petition was filed, or the petitioner or the state tax department earlier advises that administrative law judge that issues in controversy cannot be resolved without a hearing.

110.8. Notice of small claim hearing. If a small claim petition is set for hearing, the chief administrative law judge shall provide written notice of the date, time and place of the hearing to the petitioner, to the petitioner's representative of record, if any, and to the relevant part of the state tax department, at least twenty (20) days in advance of the small claim hearing, which must be heard within ninety (90) days after the small claim petition is filed, unless set later than that ninety (90)-day period for good cause.

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110.9. Discovery not available. Prehearing discovery and other prehearing processes available in other cases are not available in small claim cases. The parties are strongly encouraged to contact each other after the petition is filed and to diligently work to resolve the matters in controversy without a small claim hearing.

110.10. Continuances. -- The office of tax appeals ordinarily will not grant a continuance (postponement) of a small claim hearing, and will grant no more than one continuance for good cause shown in writing at least seven (7) calendar days prior to the scheduled small claim hearing.

110.11. Small claim hearing. -- The administrative law judge shall conduct any small claim hearing as informally as possible, consistent with orderly procedure.

110.11.1. The petitioner has the burden of proof, and must bring to a small claim hearing two (2) copies of any and all relevant documents that the petitioner wants considered.

110.11.2. Any non-lawyer representative of the State Tax Department attending a small claim hearing must also bring two (2) copies of any and all relevant documents that he or she wants considered.

110.11.3. A small claim hearing will not be recorded.

110.11.4. All testimony at a small claim hearing will be under oath or by affirmation.

110.11.5. The administrative law judge and any non-lawyer representative of the state tax department attending the small claim hearing may ask questions of the petitioner or of his or her representative or witness(es), and the petitioner or his or her representative may ask relevant questions of the state tax department's non-lawyer representative.

110.11.6. After a small claim hearing the parties will not be required to submit proposed findings of fact and conclusions of law, except to the extent the administrative law judge, in his or her discretion, otherwise orders.

110.12. Written decision. -- In a small claim case the administrative law judge shall issue and serve upon the parties a brief written decision, explaining succinctly the basis for the determination.

110.13. Time for issuance of decision. -- The administrative law judge shall issue the small claim decision within ninety (90) days after the case was fully submitted for decision, that is, within ninety (90) days after the case was fully submitted on documents only, or within ninety (90) days after any small claim hearing was held and any and all posthearing evidentiary submissions (and any posthearing submissions of written argument) were received by the office of tax appeals.

110.14. Decision not appealable. -- A decision in a small claim case is final and conclusive upon issuance, and is not subject to any further administrative or judicial review.

110.14.1. The amount, if any, found to be owed by the petitioner to the state tax department shall be paid within thirty (30) days after notice of the small claim decision is received by petitioner or the petitioners representative, if any.

110.14.2. The amount, if any, of overpayment by the petitioner determined by a small claim decision shall be promptly refunded or credited to the petitioner.

110.15. No precedential value. A decision in a small claim case is not precedent for any other

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contested matter.

110.16. Decision not published. A decision in a small claim case will not be filed in the State Register or published elsewhere.

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APPENDIX I.

FORM 1

CERTIFICATE OF SERVICE BY REGULAR MAIL

CERTIFICATE OF SERVICE

I, \_\_\_\_\_, do hereby certify that a true and exact copy of the  
foregoing \_\_\_\_\_ [describe here the document, e.g., brief, motion to  
dismiss, etc.] was served by United States mail, postage prepaid, addressed as follows:

\_\_\_\_\_ [list name and mailing address of  
\_\_\_\_\_ each person so served]

\_\_\_\_\_ [Signature of person making  
certification]

[Type or print underneath signature the name of person]

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FORM 2

PETITION FOR REASSESSMENT

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS
1012 Kanawha Boulevard, E., Suite 300, PO Box 2751, Charleston, WV 25301
Telephone: (304) 558-1666; Fax: (304) 558-1670

Docket No. (to be completed by OTA): \_\_\_\_\_

Date OTA Sent Copy of Petition to State Tax Department (to be completed by OTA): \_\_\_\_\_

Page 1 of 5

[Petition must be computer-generated, typed, or legibly printed. It need not be notarized.]

[An original of the petition and 1 other exact copy must be submitted at the same time, if filing is by hand delivery or by regular mail; if filed electronically or faxed, an original of the petition is sufficient.]

[A legible copy of the notice of assessment MUST be attached to the original and to the copy of petition.]

Date that Petitioner -Taxpayer (not any representative) RECEIVED the notice of assessment (MUST be completed by Petitioner in all cases): \_\_\_\_\_

Name of Petitioner (Taxpayer):

Doing Business as (if applicable):

Mailing address of Petitioner: \_\_\_\_\_

(street address & any p.o. box or drawer & zip code)

Telephone no. of Petitioner (including area code)

Fax no. (if any) of Petitioner (including area code):

E-mail address (if any) of Petitioner:

State (or Federal) Taxpayer I.D. No. or Social Security No.:

Type of Tax:

Part of State Tax Department Involved (Auditing, Internal Auditing, etc.):

Tax Year(s) or Period:

Amounts in controversy: Tax: \$ \_\_\_\_\_ Interest: \$
(being disputed) Additions:\$ \_\_\_\_\_ Penalties: \$



PETITION FOR REASSESSMENT  
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Alleged Error(s) of Fact (if any): (1) \_\_\_\_\_  
(as specific as possible) \_\_\_\_\_  
(attach extra sheets if necessary)

(2) \_\_\_\_\_  
\_\_\_\_\_

Other Alleged Errors (Errors of Law, Accounting, etc.): (1) \_\_\_\_\_  
(as specific as possible) \_\_\_\_\_  
(attach extra sheets, if necessary) \_\_\_\_\_

(2) \_\_\_\_\_  
\_\_\_\_\_

(3) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Specific Relief Sought by Petitioner:(1) \_\_\_\_\_  
(attach extra sheets, if necessary) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_  
\_\_\_\_\_

The Petitioner may represent himself or herself before the West Virginia Office of Tax Appeals or may authorize another person to represent him or her. A representative may not engage in the unauthorized practice of law (for example, by conducting a direct examination of his or her witness; or by arguing the interpretation of an ambiguous statute, regulation, etc.; or by arguing that a statute, regulation, etc., is unconstitutional). An attorney, including in-house counsel for any corporation, who is not authorized to practice law in the State of West Virginia must comply with Rule 8.0 of the Rules for Admission to the Practice of Law, promulgated by the West Virginia Supreme Court of Appeals (see State Court Rules volume of the W. Va. Code), including engaging a “responsible local attorney.” This responsible local attorney’s name, West Virginia State Bar membership number, and signature must be included in this petition.

For any authorized representative, the Petitioner must enclose with the petition a legible copy of the power of attorney form, Form WV-2848, available on the internet at <http://www.state.wv.us/taxrev/uploads.wv2848.pdf>.

I have enclosed the required power of attorney form: \_\_\_ Yes (check)

PETITION FOR REASSESSMENT

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Name of Petitioner's Authorized Representative:  
 Occupation of Representative (lawyer, c.p.a., etc.):  
 Mailing address of Representative  
 (street address & any p.o. box or drawer & zip code)  
 Telephone no. of Representative (including area code):  
 Fax no. (if any) of Representative (including area code):  
 E-mail address (if any) of Representative:  
 Name, mailing address, telephone no., fax no. (if any),  
 e-mail address (if any), & WV State Bar  
 membership no. of any "responsible local  
 attorney":

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In a non-small claim case, a Petitioner may request, in the petition, to have his or her case submitted for a written, appealable decision on documents only and without being heard in person.

This Petitioner desires to waive his or her right to be heard in person and to submit the case for a written decision on documents only:       Yes       No      (check one)

[To be completed by OTA:  Request granted     Request denied]

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The West Virginia Office of Tax Appeals usually holds hearings in Charleston, West Virginia. Occasionally, the Office of Tax Appeals may decide to hold hearings at certain regional locations in this State, depending primarily upon the volume of cases requested to be heard in a region and the travel budget. Please mark your requested preference for the hearing location:

Charleston     Bridgeport     Bluefield     Wheeling     Martinsburg

[To be completed by OTA:  Request granted     Request denied]

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PETITION FOR REASSESSMENT

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Certain cases may be eligible for more informal handling as small claim cases. Decisions in small claim cases are final and conclusive and are NOT subject to any further administrative or judicial review. A non-lawyer usually represents the State Tax Department in small claim cases.

Unless the West Virginia Office of Tax Appeals determines otherwise, small claim cases are submitted on documents only and without a hearing in person.

A taxpayer may request handling of his or her case as a small claim if the amount in controversy (excluding interest), for any one taxable year, does not exceed \$10,000.

I request that my case, eligible for small claim treatment, be handled using small claim procedures; I realize that the law does not allow me to appeal a small claim decision:

\_\_\_\_\_ (check if you request small claim treatment)

[To be completed by OTA: \_\_\_\_\_ Request granted \_\_\_\_\_ Request denied]

Certain types of cases will be handled as small claim cases, without a request, unless the Office of Tax Appeals determines otherwise. These types of cases include: (1) all cases in which the total amount of the tax assessment or the total amount of the tax refund or credit claim is less than \$1,000; (2) all cases involving estimated tax assessments; (3) all business registration tax and corporate license tax assessment or refund matters; (4) all cases involving not the tax itself but only requests for waiver or abatement of additions, penalties, or interest; and (5) cases involving federal tax audit changes.

Within 5 days after a complete and proper petition is timely filed, the West Virginia Office of Tax Appeals will provide a copy of the petition to the State Tax Department. Within 40 days after receiving a copy of such a petition, the State Tax Department will file and serve an answer to the petition.

In a non-small claim case the Petitioner or his or her representative should contact the State Tax Department's legal representative at telephone number (304) 558-5330, to discuss the case. Please wait, however, at least two weeks or so after filing the petition to contact the Division's legal representative, to allow time for a specific legal representative to be assigned and for him or her to become acquainted enough with the case to discuss it intelligently in a preliminary manner.

In a small claim case the Petitioner or his or her representative should contact the part of the State Tax Department that issued the notice of assessment, at the telephone number of that part of the State Tax Department set forth in the notice of assessment. This call to discuss the small claim case with the non-lawyer employee of the State Tax Department should be made immediately after filing the petition.

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PETITION FOR REASSESSMENT

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The Petitioner and the Petitioner's authorized representative, if any, and any responsible local attorney, must sign and date this petition immediately below the following statement, which they have read and understand:

The Petitioner and any authorized representative of the Petitioner, including any responsible local attorney, affirm that all of the material factual information set forth by them in this petition is true, correct, and complete, based upon the information available to them at this time; the Petitioner and any authorized representative of the Petitioner are aware that any willfully false representation set forth in this petition is a misdemeanor punishable according to law.

Petitioner

Date

Petitioner's Authorized Representative (if any)

Date

Petitioner's Responsible Local Attorney (if any)

Date

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FORM 3

PETITION FOR REFUND

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

1012 Kanawha Boulevard E., Suite 300, PO Box 2751, Charleston, WV 25301

Telephone: (304) 558-1666; Fax: (304) 558-1670

Docket No. (to be completed by OTA):

Date OTA Sent Copy of Petition to State Tax Department (to be completed by OTA):

Page 1 of 5

[Petition must be computer-generated, typed, or legibly printed. It need not be notarized.]

[An original of the petition and 1 other, exact copy must be submitted at the same time, if filing is by hand delivery or by regular mail; if filed electronically or by fax, an original of the petition is sufficient.]

[A legible copy of the State Tax Department's letter denying the claim for refund in whole or in part, or of the notice of assessment being paid with the petition under protest in whole or in part, MUST be attached to the original and to the copy of the petition. If the State Tax Department has not ruled on a claim for refund, attach a copy of the claim for refund and note the date it was filed with the State Tax Department.]

Date that Petitioner -Taxpayer (not any representative) RECEIVED the refund claim denial letter or notice of assessment being paid now under protest (MUST be completed by Petitioner in all cases):

\_\_\_\_\_  
Name of Petitioner (Taxpayer):

Doing Business as (if applicable):

Mailing address of Petitioner:

(street address & any p.o. box or drawer & zip code)

Telephone no. of Petitioner (including area code):

Fax no. (if any) of Petitioner (including area code):

E-mail address (if any) of Petitioner:

State (or Federal) Taxpayer I.D. No. or Social Security No.:

Type of Tax:

Part of State Tax Department Involved (Auditing, Internal Auditing, etc.):

Tax Year(s) or Period:

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PETITION FOR REFUND  
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Refund sought (after claim denied or not ruled on): Amount of tax: \$\_\_\_\_\_ plus any statutory interest

Assessment now paid under protest: Tax: \$\_\_\_\_\_ Interest: \$  
Additions: \$\_\_\_\_\_ Penalties: \$  
(Show only amounts being contested; attach remittance for uncontested portion of assessment)

Alleged Error(s) of Fact (if any): (1) \_\_\_\_\_  
(as specific as possible) \_\_\_\_\_  
(attach extra sheets if necessary)

(2) \_\_\_\_\_  
\_\_\_\_\_

Other Alleged Errors (Errors of Law, (1)  
Accounting, etc.):  
(as specific as possible)  
(attach extra sheets, if necessary)

(2)

(3) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Specific Relief Sought by Petitioner (1) \_\_\_\_\_  
(attach extra sheets, if necessary) \_\_\_\_\_

(2)

(3) \_\_\_\_\_  
\_\_\_\_\_

PETITION FOR REFUND

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The Petitioner may represent himself or herself before the West Virginia Office of Tax Appeals or may authorize another person to represent him or her. A representative who is not authorized to practice law in this state may not engage in the unauthorized practice of law (for example, by conducting a direct examination of his or her witness; or by arguing the interpretation of an ambiguous statute, regulation, etc.; or by arguing that a statute, regulation, etc., is unconstitutional). A lawyer, including in-house counsel for any corporation, who is not authorized to practice law in the State of West Virginia must comply with Rule 8.0 of the Rules for Admission to the Practice of Law, promulgated by the West Virginia Supreme Court of Appeals (see State Court Rules volume of the W. Va. Code), including engaging a “responsible local attorney.” This responsible local attorney’s name, West Virginia State Bar membership number, and signature must be included in this petition.

For any authorized representative, the Petitioner must enclose with the petition a legible copy of the power of attorney form, Form WV-2848, available on the internet at <http://www.state.wv.us/taxrev/uploads.wv2848.pdf>.

I have enclosed the required power of attorney form:                     Yes            (check)

Name of Petitioner’s Authorized Representative:

Occupation of Representative (lawyer, c.p.a., etc.):