

Spring 1986

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### Recommended Citation

Quirk, William J. (1986) "Taxpayer Remedies in South Carolina," *South Carolina Law Review*: Vol. 37 : Iss. 3 , Article 5.

Available at: <https://scholarcommons.sc.edu/sclr/vol37/iss3/5>

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# TAXPAYER REMEDIES IN SOUTH CAROLINA

WILLIAM J. QUIRK\*

The power to tax is the most extensive and unlimited of all the powers which a legislative body can exert.

*Chief Justice Moses, dissenting  
State v. County Treasurer (1873)*<sup>1</sup>

## I. INTRODUCTION

The power to tax, the most extensive and unlimited of legislative powers, is without restraint except by constitutional limitations. Under our system, only the judiciary can resist the unlawful encroachment of an illegal tax. To tie the hands of the judiciary, as the Chief Justice wrote in *State v. County Treasurer* more than one hundred years ago, "would not only render uncertain the tenure by which the citizen holds his property, but would make it tributary to the unrestrained demands of the Legislature."<sup>2</sup>

The history of taxpayers' remedies in South Carolina is the history of efforts, often successful, to preclude judicial review of tax disputes. Following the Revolution, South Carolina's taxpayers, having just fought a war to secure their rights, had ample legal protection, including a writ of prohibition to prevent the collection of an illegal tax.

The taxpayers' common-law rights were destroyed, however, in the period immediately following the Civil War. In the 1870s, the South Carolina legislature's desire for revenue led to the enactment of several statutes in derogation of taxpayers' previous rights. Taxpayers were told they could no longer prevent the collection of an illegal tax; rather, they would be required to pay it

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1. 4 S.C. 520, 539 (1873)(Moses, C.J., dissenting).

2. *Id.*

first, then sue for a refund. Moreover, highly technical conditions restricted the right to bring a refund action, and a wrong step would deprive the taxpayer of any remedy at all. In 1959 the federal courts found that South Carolina laws failed to provide a plain, speedy, and efficient remedy for taxpayers.<sup>3</sup>

The state's present system is basically unchanged from the statutory pattern established by the legislature in the 1870's. Under this system, the taxpayer must cross a procedural minefield to recover his money, even though everyone involved agrees that money was wrongfully taken.

Of course, any tax system must provide for the efficient collection of revenue to meet the state's common obligations. It is equally important, however, that a system operate to protect the state's citizens and the tenure by which taxpayers hold their property. Surely the South Carolina bench and bar can design a system closer to the one in effect after the Revolution—one that is fair and simple, but does not endanger the treasury. The history of taxpayer remedies in the state should help in the design of a better system that could then be presented to the people for their approval.

## II. MAJOR SUBSTANTIVE CONSTITUTIONAL LIMITATIONS

The premise of this article is that taxpayers should not be deprived of basic constitutional rights because of technical procedural rules. While most of this article will address the available remedies, a brief statement is made here of the taxpayer's major constitutional rights.

The cornerstones of the taxpayer's protection are the due process and equal protection clauses, which originated in the South Carolina Constitution of 1868.<sup>4</sup> The 1868 Constitution also established the requirement that "taxes . . . be laid upon

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3. *United States v. Livingston*, 179 F. Supp. 9 (E.D.S.C. 1959), *aff'd per curiam*, 364 U.S. 281 (1960). See *infra* note 42.

4. S.C. CONST. art. I, § 13 states in part: "[N]or shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." The state's taxpayers are also, of course, protected by the fourteenth amendment to the federal constitution, which provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2.

the actual value of the property taxed, as . . . ascertained by an assessment made for the purpose of laying such tax.”<sup>5</sup> This provision was intended to prohibit a tax system based upon classification of property.<sup>6</sup>

In 1977, however, article X of the South Carolina Constitution was redrafted to authorize the classification of property for tax purposes.<sup>7</sup> The new article X creates five classes of real property, each of which is to be taxed at a specific percentage of the property’s market value.<sup>8</sup> A similar system is established for personal property, which is divided into three classes.<sup>9</sup> The legislature cannot, of course, alter these constitutionally created classes, but it may change the ratio for a particular class by a two-thirds vote.<sup>10</sup> Any such change, of course, would apply to the class as a whole. The constitution also authorizes the legislature to provide for property assessments,<sup>11</sup> but permits that body to “vest the power of assessing and collecting taxes in all of the political subdivisions of the State.”<sup>12</sup>

5. S.C. CONST. art. III, § 29 provides: “All taxes upon property, real and personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax.”

6. See Quirk & Watkins, *A Constitutional History of the Property Tax in South Carolina*, 26 S.C.L. REV. 397, 411-12 (1974).

7. S.C. CONST. art. X, § 2(a) provides: “The General Assembly may define the classes of property and values for property tax purposes of the classes of property set forth in Section 1 of this article and establish administrative procedures for property owners to qualify for a particular classification.”

8. S.C. CONST. art. X, § 1(1)-(5) establishes the following scheme for taxation of real property: (1) manufacturers, utilities, and mining operations are taxed on an assessment equal to 10.5% of fair market value; (2) transportation businesses are taxed on an assessment of 9.5%; (3) legal residences on an assessment of 4%; (4) agricultural realty on an assessment of 4%; and (5) all other real property on an assessment of 6%.

9. S.C. CONST. art. X, § 1(6)-(8) provides the following scheme for taxation of personal property: (1) business inventories on an assessment of 6% of fair market value; (2) farm machinery and equipment, except motor vehicles licensed for highway use, on an assessment of 5%; and (3) all other personal property on an assessment of 10.5%.

10. S.C. CONST. art. X, § 2(d) provides: “The General Assembly may change the ratios as set forth in Section 1, but only with the approval of at least two-thirds of the membership of each house.”

11. S.C. CONST. art. X, § 4 provides: “The General Assembly shall provide for the assessment of all property for taxation, whether for state, county, school, municipal or any other political subdivision. All taxes shall be levied on that assessment.”

12. S.C. CONST. art. X, § 6. Section 5-7-30 of the South Carolina Code, enacted in 1975, is the only delegation to municipalities of authority to impose a fee, tax, or other charge. This section provides in pertinent part:

All municipalities of the State shall . . . have . . . the authority to . . . levy and collect taxes on real and personal property and as otherwise authorized

The levying of taxes must generally be "uniform in respect to persons and property within the jurisdiction of the body imposing such taxes,"<sup>13</sup> but "on properties located in an area receiving special benefits from the taxes collected, special levies may be permitted by general law applicable to the same type of political subdivision throughout the State."<sup>14</sup>

This legislative power is also subject to two further constitutional limitations. First, article III provides that "where a general law can be made applicable, no special laws shall be enacted."<sup>15</sup> Second, article VIII, the home rule amendment adopted in 1973, directs that "[n]o laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government."<sup>16</sup>

The framers of the state constitutional system have, in short, given the state's taxpayers a formidable array of substantive rights. A written constitution, enforced by judges sworn to defend it, is the basis of the people's liberties. Yet technical procedural conditions that prevent a taxpayer from presenting his claim to a court can deny the taxpayer his constitutional rights as surely as if the constitution were torn up. The remainder of this article will deal with the technical procedural conditions.

### III. THE COMMON LAW

The South Carolina Tax Commission (the Commission) has taken the position that a taxpayer's right to the refund of wrongfully collected taxes is a matter of what it calls "legislative grace." The Commission has argued, therefore, that all procedural statutes should be strictly construed against the tax-

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herein, make assessments and establish uniform service charges relative thereto; . . . grant franchises for the use of public streets and make charges therefor; . . . levy a business license tax on gross income . . . .

S.C. CODE ANN. § 5-7-30. See Quirk, *Nature of a Business License Tax*, 32 S.C.L. REV. 471 (1981). See also the interesting opinion by Acting Justice Rodney A. Peebles in *Casey v. Richland City Council*, 282 S.C. 387, 320 S.E.2d 443 (1984).

13. S.C. CONST. art. X, § 6.

14. *Id.*

15. S.C. CONST. art. III, § 34(IX).

16. S.C. CONST. art. VIII, § 7. The South Carolina Supreme Court discussed the purpose of this provision in *Duncan v. York*, 267 S.C. 327, 228 S.E.2d 92 (1976).

payer.<sup>17</sup> The Commission's view, however, is historically unfounded. At common law, the taxpayer's right to refund was well recognized, and the taxpayer was entitled to initiate court action to restrain the collection of an illegal tax.<sup>18</sup>

South Carolina common law permitted an aggrieved taxpayer to proceed by writ of prohibition to restrain the tax collector from collecting the illegal tax. This right was unique to South Carolina; in other jurisdictions the taxpayer's sole remedy was to bring an action at law for a refund from the collector.

*Burger v. State ex rel. Carter*,<sup>19</sup> an 1841 decision, provides an example of one taxpayer's attempt to use a writ of prohibition. The taxpayer in that case applied for a writ of prohibition, to restrain the tax collector from collecting an excise tax that the taxpayer argued was unconstitutional. The attorney general argued that the writ of prohibition did not lie to prohibit enforcement of a tax execution.

Justice O'Neill, writing for the supreme court, held against the State. He recognized that under English precedent the writ could not be used against a ministerial officer, but was available only to prohibit "the enforcement of the judgment of an inferior jurisdiction, where it has proceeded without jurisdiction or where, having jurisdiction, it has exceeded it."<sup>20</sup> Justice O'Neill observed, however, that use of the writ had not been so restricted in South Carolina: "In this State [the writ of prohibition] has had a wider operation. For want of a better remedy, it has been allowed to restrain the enforcement of tax executions."<sup>21</sup> The court upheld the taxpayer's right to obtain a writ of prohibition against the tax collector without first paying the

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17. See, e.g. Brief of the South Carolina Tax Commission at 3-7, *American Hardware Supply Co. v. Whitmire*, 287 S.C. 607, 300 S.E.2d 289 (1983).

18. See *infra* notes 23-24 and accompanying text.

19. 26 S.C.L. (1 McMul.) 410 (1841).

20. *Id.* at 418.

21. *Id.* The justice noted that the origin of the practice was unclear:

How this practice began, it is difficult, as well as unimportant, to ascertain. It may be that it was allowed on the notion that a tax collector, although a ministerial officer, exercised a sort of judicial power, in deciding that a person who denied his liability to pay a tax, should, notwithstanding, pay it, and in issuing an execution to enforce that decision. This last is so much an incident of the judgment of a Court of general and limited jurisdiction, that when found to follow from the decision of a ministerial officer, it may well justify the application of a writ to him, which would be otherwise wholly inappropriate.

*Id.* See also *State v. Hodges*, 48 S.C.L. (14 Rich.) 256 (1867).

tax:

[T]he practice is well established, has never been before questioned, has operated to the protection of the citizens; and, so far as our experience or information extends, has effected no injury, and produced no inconvenience. We are, therefore of opinion, that it ought not now to be disturbed, for the sake of obtaining precise and technical conformity to the English precedents.<sup>22</sup>

In other jurisdictions, the taxpayer's remedy was limited to the well-established common-law right to obtain a refund of an illegally collected tax. Swift's Digest laid down the rule that "where a person pays taxes that are illegally imposed upon him, whether paid by compulsory process or not, he may recover back the money" from the tax collector.<sup>23</sup> It was the action of *indebitatus assumpsit* for money had and received that was, at an early time, held to be the appropriate remedy for money collected under an illegal assessment.<sup>24</sup>

22. 26 S.C.L. (1 McMul.) at 420.

23. 1 SWIFT'S DIGEST 405 (emphasis in original). In *C. W. Matthews Contracting Co. v. South Carolina Tax Comm'n*, 267 S.C. 548, 230 S.E.2d 223 (1976), the court held that a taxpayer was not constitutionally entitled to a trial by jury in an action pursuant to S.C. CODE ANN. § 12-47-220 (1976), since the right did not exist at the time of the adoption of the 1868 constitution.

24. *Adams v. Litchfield*, 10 Conn. 122 (1834). A frequent defense by the government in the early cases, and one still made, is that the taxpayer's payment is voluntary and, therefore, not recoverable. In *Cobb v. Charter*, the Connecticut Supreme Court stated:

The first and principle ground is that the payment was voluntary. It is undoubtedly a general rule that money paid voluntarily, without fraud and with a full knowledge of all the facts, can not be recovered back by the party who has so paid it. He is bound to resist an unjust demand in the first instance. To pay when he could successfully defend against it, and then sue for the money, is a species of frivolity, involving also a circuitry of action, which the law does not encourage. The rule is founded on the presumption that defending in such a suit would afford adequate redress.

32 Conn. 358, 364-65 (1865). The government's defense generally failed because *assumpsit* was appropriate to recover money obtained from anyone by extortion, imposition, oppression, or taking an undue advantage of the party's situation.

The voluntary payment argument presents a problem today for a taxpayer who must pay under protest in order to secure judicial review pursuant to S.C. CODE ANN. § 12-47-220 (1976), but who believes the tax is barred by a statute of limitations or the 10-year statute of repose in S.C. CODE ANN. § 12-49-70 (1976). The taxpayer in this situation should seek the protection of the court prior to payment, in accordance with the general principles of *Ware Shoals Mfg. Co. v. Jones*, 11 S.C. 310 (1878). See *infra* notes 48-59 and accompanying text. The writ of prohibition was issued in numerous cases. See, e.g., *State v. Hodges*, 14 Rich. 256 (1867) (writ of prohibition issued to restrain tax collector

South Carolina was apparently the only state to protect its citizens from illegal tax collections by this use of the writ of prohibition. After *Burger* the writ of prohibition "operated to the protection of the citizens" for another thirty years before the legislature sought to deny this remedy to taxpayers. That legislative action set off a long and bitter constitutional struggle between the general assembly and the supreme court.

#### IV. LEGISLATIVE DESTRUCTION OF THE COMMON-LAW REMEDIES

In 1870 the general assembly acted to abolish the taxpayer's right to use the writ of prohibition. At the same time, the legislature attempted to restrict the taxpayer's right to recover a refund of illegally collected taxes.

The statutory refund action, which was to replace the writ, was very narrow.<sup>25</sup> Under sections 6 and 7 of the new act, a taxpayer who believed his taxes had been erroneously or illegally charged was required to make a full written statement of the facts to the tax collector. That statement was then forwarded to the county auditor and the state auditor; the tax collector was not required to proceed against the taxpayer unless so directed,

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from execution for tax on cotton); *State v. Graham*, 2 Hill 457 (1834)(writ of prohibition issued because execution defective on face for failure to specify tax for which it was issued); *State v. Allen*, 13 S.C.L. (2 McCord) 55 (1822)(writ of prohibition issued to restrain tax collector from enforcing execution for \$10,000 tax on sale of lottery tickets). *But see State v. City Council of Charleston*, 4 Rich. 286 (1851)(writ of prohibition refused to shipowners who claimed that tax on money invested in shipping was a regulation of commerce).

25. An Act to Alter and Amend an Act Entitled "An Act to Provide for the Assessment and Taxation of Property," No. 257, 1870 S.C. Acts 366, 367. The present anti-injunction statute is found in § 12-47-10 of the South Carolina Code, which states:

The collection of State, county, city, town and school taxes and taxes voted by townships in aid of railroads when the roads have been completed through such townships shall not be stayed or prevented by any injunction, writ or order issued by any court or judge. And no writ, order or process of any kind whatsoever staying or preventing the Tax Commission or any officer of the State charged with a duty in the collection of taxes from taking any steps or proceeding in the collection of any tax, whether such tax is legally due or not, shall in any case be granted by any court or the judge of any court.

S.C. CODE ANN. § 12-47-10 (1976). In *Elmwood Cemetery Ass'n v. Wasson*, 253 S.C. 76, 169 S.E.2d 148 (1969), the supreme court held that this section, together with S.C. CODE ANN. § 12-47-50 (1976)(providing that statutory remedies found in Chapter 47 are exclusive), barred an action for declaratory judgment. *See also Bowaters Carolina Corp. v. Smith*, 257 S.C. 574, 186 S.E.2d 761 (1972); *Perpetual Bldg. & Loan Ass'n v. South Carolina Tax Comm'n*, 255 S.C. 527, 180 S.E.2d 195 (1971).



in writing, by the state auditor.<sup>26</sup>

Sections 6 and 7 of the 1870 law appear to be the source of the modern code provisions that condition a refund suit on payment of the tax "under protest in writing."<sup>27</sup> The courts, over the years, have been strict in requiring taxpayers to make written protest at the time of payment as a condition to a refund suit.<sup>28</sup> Today, the payment under protest requirement is the largest single hindrance to a fair tax system and should be abolished.

The 1870 law purported to abolish the writ of prohibition, the centerpiece of the taxpayer's common-law protection in South Carolina. Section 5 provided: "The collection of taxes shall not be stayed or prevented by any injunction, writ or order issued by any court or officer . . . ."<sup>29</sup> This language appeared to be in direct conflict with the 1868 Constitution, which provided that the court of common pleas would "have power to issue writs of mandamus, prohibition, scire facias, and all other writs which may be necessary for carrying their powers fully into effect."<sup>30</sup> The legislature's assertion of constitutional power to restrain the court's writ was bitterly contested for the next forty years.

In 1873 the anti-injunction law came before the South Carolina Supreme Court in *State v. County Treasurer*.<sup>31</sup> The court considered whether the legislature could alter or limit the power granted to the court of common pleas under the constitution, a question that raised the most basic separation of powers issue. In a two-to-one decision, the court supported the legislative repeal of the writ of prohibition.

The court noted that the use of the writ of prohibition in

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26. 1870 S.C. Acts at 367.

27. See S.C. CODE ANN. §§ 12-47-210, -220 (1976).

28. For example, in *Labruce v. City of North Charleston*, 286 S.C. 465, 234 S.E.2d 866 (1977), the taxpayer's suit was dismissed for failure to join the city treasurer as required under S.C. CODE ANN. § 12-47-230 (1976). The court rejected the argument that the city had no treasurer and the taxpayer had been unable to identify the comparable officer.

29. 1870 S.C. Acts at 366.

30. The present constitution provides: "The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus and other original and remedial writs." S.C. CONST. art. IV, § 5. It would seem that because the original jurisdiction of the supreme court to entertain petitions for writs is granted by the fundamental law, it can only be limited by the fundamental law.

31. 4 S.C. 520 (1873).

South Carolina to restrain collection of illegal taxes was “exceptional” and appeared to grant to the judiciary powers that had not been recognized as judicial under the common law.<sup>32</sup> The majority expressly deferred to the legislative power: “If the Legislature cannot be trusted with control over remedies, then it is for the people, who have the right to subject that body to limitations, to interpose, by the expression of a clear intent, to effect such limitation.”<sup>33</sup> Chief Justice Moses, dissenting, thought the people had already acted clearly to effect such limitation by adopting the constitutional provision.

Chief Justice Moses based his dissent on two arguments. First, he pointed out that long before the adoption of the 1868 constitution, the writ of prohibition was well recognized as the appropriate remedy to restrain the collection of an illegal tax in South Carolina.<sup>34</sup> Second, the chief justice argued that when the constitution vested the circuit courts with the power to issue writs of prohibition, “it must be understood as extending it to the writ as then accepted and recognized in South Carolina.”<sup>35</sup> If the constitution conferred the power to issue the writ on the circuit court, “can the Court be deprived of its jurisdiction by the action of the Legislature?”<sup>36</sup> An affirmative answer to that question, the chief justice maintained, would threaten the separation of powers doctrine. Further, “the protection intended for the citizen in ‘his life, property and character,’ through a resort to the

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32. The court stated:

The remedy by prohibition in the case of an illegal tax was allowed in this State formerly, but it was recognized as exceptional. Its allowance cannot be satisfactorily accounted for, unless it proceeded upon the ground that the imposition of taxes was an exercise of judicial or at least *quasi* judicial power.

Whatever may have been the reasoning that induced its allowance under the then existing state of the law, it is clear that to employ that writ at the present time for the purpose claimed is to require the judiciary to do that which, according to the principles of the common law, they could not do, namely, lay hold of political powers in the hands of an administrative officer and mould their exercise according to the judicial idea of their proper use. The practice of England and of the other States is against the allowance of interference of that character.

*Id.* at 534.

33. *Id.* at 533.

34. *Id.* at 535.

35. *Id.* at 536.

36. *Id.* at 538.

Courts, would be a mere mockery and delusion.”<sup>37</sup> The chief justice continued:

The power to tax is the most extensive and unlimited of all the powers which a legislative body can exert. It is without restraint, except by constitutional limitations. To tie up the hand that can alone resist its unlawful encroachments would not only render uncertain the tenure by which the citizen holds his property, but would make it tributary to the unrestrained demands of the Legislature.<sup>38</sup>

In conclusion, the chief justice wrote that the most basic principles of right and justice were offended by a system that forced a taxpayer to pay an illegal tax and sue for refund:

If the tax demanded should prove to be, not only beyond the competency of the Legislature in its imposition, but increased in amount by the extortion or cupidity of the tax officer, must the citizen be required to pay it, and deprived for an indefinite period of the enjoyment of the amount exacted, and left to a compulsory resort to an action for its recovery? Such a course appears to be at variance with the principles on which our government is founded.<sup>39</sup>

The deep and disturbing questions raised by the 1870 anti-injunction law continued to divide the supreme court<sup>40</sup> until some resolution was brought to this heated dispute in 1907 by the decision in *Ware Shoals Manufacturing Co. v. Jones*.<sup>41</sup>

While the constitutional struggle over the taxpayer's injunctive remedy continued, the legislature moved to restrict further the taxpayer's ability to obtain a refund. In 1878 the legislature enacted “An Act to Facilitate the Collection of Taxes.”<sup>42</sup> This

37. *Id.* at 538-39.

38. *Id.* at 539.

39. *Id.* at 540.

40. See *Chamblée v. Tribble*, 23 S.C. 70 (1884)(McGowan, J., dissenting); *State v. Gaillard*, 11 S.C. 310 (1870)(McIvers, J., concurring, but only because he felt that State v. County Treasurer compelled such a result).

41. 78 S.C. 211 (1907). See *infra* notes 48-59 and accompanying text.

42. An Act to Facilitate the Collection of Taxes, No. 660, 1878 S.C. Acts 785 (current version at S.C. CODE ANN. §§ 12-47-210, -220 (1976)). In 1959 the federal courts ruled that, since there was grave doubt whether this provision gave the right to interest for taxes illegally collected, § 12-47-220 did not provide a plain, speedy, and efficient remedy. *United States v. Livingston*, 179 F. Supp. 9 (E.D.S.C. 1959), *aff'd. per curiam*, 364 U.S. 281 (1960). In response to the *Livingston* decision, the legislature enacted a

law, for the first time, denied the taxpayer any remedy at law unless he first paid the disputed tax under protest, and then brought suit in the court of common pleas within thirty days after payment. This procedure was to constitute the taxpayer's exclusive remedy: "[T]here shall be no other remedy in any case of the illegal or wrongful collection of taxes or attempt to collect taxes . . . ."<sup>43</sup>

The legislature had now established all the essential elements of the current system<sup>44</sup> and had totally dismantled the common-law system. The taxpayer's only statutory remedy was by way of refund, which could be pursued only by strict compliance with the statutory conditions.

Despite the holding in *State v. County Treasurer*,<sup>45</sup> the supreme court never accepted the legislature's encroachment on its power, but continued to issue writs of mandamus in what it considered appropriate cases.<sup>46</sup> In these cases, however, the court drew a "distinction between the granting of a writ to stay or prevent the collection of taxes on the one hand and the correction of tax assessments on the other."<sup>47</sup>

statute that permits taxpayers to recover 6% interest. An Act to Provide for the Payment of Interest on Taxes, Penalties or Interest Recovered Through Litigation, No. 822, 1962 S.C. Acts 1970 (codified at S.C. CODE ANN. § 12-47-60 (1976)). S.C. CODE ANN. § 12-47-230, which provides for payment of municipal taxes under protest, was enacted in 1937. An Act to Amend Section 2846, Volume II, Code of Laws of South Carolina, 1932, No. 107., 1937 S.C. Acts 138.

43. 1878 S.C. Acts at 786. Section 12-47-50 now provides:

There shall be no other remedy than those provided in this chapter in any case of the illegal or wrongful (a) collection of taxes, (b) attempt to collect taxes or (c) attempt to collect taxes in funds or moneys which the county treasurer shall be authorized to receive under the law other than such as the person charged with such taxes may tender or claim the right to pay.

S.C. CODE ANN. § 12-47-50 (1976). In *Elmwood Cemetery Ass'n v. Wasson*, 253 S.C. 76, 169 S.E.2d 148 (1969), the South Carolina Supreme Court held that this section and § 12-47-10 (anti-injunction statute originally enacted in 1870) barred an action for declaratory judgment. See also cases cited *supra* note 25.

44. The only significant addition since 1878 is S.C. CODE ANN. § 12-47-440 (1976), added in 1960, which will be discussed *infra* notes 94-140 and accompanying text. It may be noted here that § 12-47-440 provides an alternative route for the taxpayer. Although the statute does not require payment *under protest*, it is a refund statute and does require payment.

45. See *supra* notes 31-40 and accompanying text.

46. In 1892, for example, the court issued writs in three cases. See *State v. Boyd*, 35 S.C. 233, 14 S.E. 496 (1892); *State v. Cromer*, 35 S.C. 213, 14 S.E. 493 (1892); *State v. Covington*, 35 S.C. 245, 14 S.E. 499 (1892).

47. *Bank of Johnston v. Prince*, 136 S.C. 439, 447-48, 134 S.E. 387, 390 (1926).

In the 1907 decision in *Ware Shoals Manufacturing Co. v. Jones*,<sup>48</sup> Chief Justice Pope, writing for the court, concluded that the legislature had no power to limit the court's writ in the absence of an adequate legal remedy. The chief justice noted that "even where there is an adequate remedy provided at law, the Judges are exactly divided as to whether or not the Legislature had the power to prevent the issuance of the writs in question . . . ."<sup>49</sup> He then stated: "[W]hatever might be the law in cases where there is an adequate remedy, . . . where there is no adequate remedy, the Court may stay the collection of taxes by prohibition or injunction."<sup>50</sup>

The chief justice noted that the legal remedy of payment under protest "would not in all cases be adequate."<sup>51</sup> For example, if a municipal license tax on fruit vendors or barbers were so exorbitant as to put them out of business, he observed, payment under protest would be "absolutely no remedy at all,"<sup>52</sup> and the court would have the power to enjoin collection of the tax.<sup>53</sup>

The tax collector's position in *Ware Shoals* was that the suit could not be maintained because the court had no power to enjoin the collection of taxes. The chief justice pointed out that the taxpayer could not pay under protest and then sue for refund because the taxes involved were not within the terms of section 12-47-210 and a suit against the State would be barred by sovereign immunity. This situation, the chief justice wrote, violated "one of the fundamental principles of law that for every wrong or injury there must be an adequate remedy."<sup>54</sup>

On the basis of these arguments, the court held that "where there is no legal adequate remedy, it is beyond the power of the Legislature to say that the collection of taxes shall not be enjoined by any writ or other order of any Court or Judge thereof."<sup>55</sup> The chief justice also noted that the Constitutional Convention of 1868, in authorizing the court to issue writs, had

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48. 78 S.C. 211, 58 S.E. 811 (1907).

49. *Id.* at 214-15, 58 S.E. at 812.

50. *Id.* at 215, 58 S.E. at 812.

51. 78 S.C. at 214, 58 S.E. at 812.

52. *Id.*

53. *Id.*

54. *Id.* at 215-16, 58 S.E. at 812.

55. *Id.*

plainly intended that the court continue its prior practices, including issuance of the well-established writs of prohibition.<sup>56</sup>

The holding in *Ware Shoals* modified the earlier decisions<sup>57</sup> and is an accurate statement of the law as it stands today. Where the legislature provides an adequate remedy at law, it may restrain the court's power to provide injunctive relief. In every case, however, the adequacy of the legal remedy is an issue for the court to decide. If the court finds the remedy at law inadequate, it may exercise its constitutional power to enjoin the tax by writ or other order.<sup>58</sup> The legislature is without constitutional authority either to deny the taxpayer a hearing or to limit the court's power to provide a remedy for a wrong. In sum, the court reserved to itself the power to enjoin collection of a tax in a proper case. This result was essential, Chief Justice Pope held, because of "one of the great principles, upon which our government is founded, namely, that each of the three departments must remain forever separate and distinct."<sup>59</sup>

## V. THE SOUTH CAROLINA TAX COMMISSION

The South Carolina Constitution directs the legislature to "provide for the assessment of all property for taxation."<sup>60</sup> The constitution further directs that the "assessment of all property shall be equal and uniform" in specified constitutional classifications.<sup>61</sup>

In 1915 the legislature created the South Carolina Tax Commission "in order to effectively carry into execution the

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56. *Id.* at 215, 58 S.E. at 812.

57. In *Bank of Johnston v. Prince*, 136 S.C. 439, 134 S.E. 387 (1926), the supreme court observed that *State v. County Treasurer* and the other cases upholding the anti-injunction statute "were modified to some extent or distinguished by the holding in *Ware Shoals*." *Id.* at 447-48, 134 S.E. at 390.

58. In *Chesterfield County v. State Highway Dep't*, 191 S.C. 19, 3 S.E.2d 686 (1939), the supreme court characterized the *Ware Shoals* holding in the following manner: "It is true that a taxpayer may enjoin the collection of an illegal tax, provided he is afforded no adequate legal remedy against the exaction." *Id.* at 53, 3 S.E.2d at 701.

59. 78 S.C. at 215, 58 S.E. at 812.

60. S.C. CONST. art. X, § 5 (formerly art. X, § 13 of the 1895 constitution). For a discussion of its earlier history, see Quirk & Watkins, *A Constitutional History of the Property Tax in South Carolina*, 26 S.C.L. REV. 397 (1974).

61. S.C. CONST. art. X, § 1. For a summary of the constitutional classifications, see *supra* notes 8-9 and accompanying text.

equitable assessment of property for taxation.”<sup>62</sup> The Commission was granted all the powers conferred by law upon the former State Board of Equalization and the former State Board of Assessors. In 1922 the legislature empowered the Commission to hear matters arising from assessments and to order refunds of any tax, except a municipal tax, that had been collected under an “erroneous, improper or illegal assessment.”<sup>63</sup> In 1935 the Commission’s jurisdiction was expanded to include municipal taxes.<sup>64</sup>

### A. *Exhaustion of Remedies*

The new administrative remedy was not an undiluted pleasure for the taxpayer. The Commission seized upon the administrative remedy as a basis for restraining the taxpayer’s sole existing remedy—the right to pay under protest and sue for refund. The payment under protest remedy, despite its shortcomings,<sup>65</sup> at least provided the taxpayer with judicial review of

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62. An Act to Create a Tax Commission and to Define Its Powers and Duties, No. 99, 1915 S.C. Acts 125.

63. An Act to Authorize and Empower the South Carolina Tax Commission to Order an Abatement or Refund of Taxes in Certain Cases, No. 571, 1922 S.C. Acts 1017. This power is now conferred on the Commission by S.C. CODE ANN. § 12-47-410, -420 (1976), which limit the Commission’s power to abate or order a refund of taxes to an assessment that is “erroneous, improper or illegal.” For text of these statutes, see *infra* note 79.

According to Mr. Joe Allen, Chief Deputy Attorney General of South Carolina, § 12-47-420 can be used even by a taxpayer who has not complied with S.C. Tax Comm’n R., S.C. CODE ANN. (R. & REG.) 117-111 (1976)(requiring a taxpayer to protest the proposed assessment; *infra* note 70) or paid the tax under protest and brought suit. Judicial review would apparently be available under the South Carolina Administrative Procedures Act. See *infra* notes 141-70 and accompanying text.

64. An Act to Amend Sub-section 1 of section 2427, Vol. II, Code of Laws of South Carolina, 1932, No. 327, 1935 S.C. Acts 465. When the county assesses property, the Tax Commission has no tax collection function except as the agency designated to hear disputes between the taxpayer and the county. A taxpayer may appeal an adverse Tax Commission decision to the Tax Board of Review. S.C. CODE ANN. § 12-5-50 (1976). In at least one instance with which the author is familiar, the Commission has become so confused about its proper role that it has appealed a Tax Board of Review decision favorable to the taxpayer. *South Carolina Tax Commission v. Chase*, No. 86-CP-40-0212 (S.C. Cir. Ct.). Plainly, a hearing agency has no more authority than a court to become a party and appeal the decision of a higher body.

65. As noted above, this remedy requires not only payment of a tax, even though it may be erroneous and illegal, but also strict compliance with the statutory conditions. See *supra* notes 26-28 and accompanying text.

his claim. That remedy became less certain, however, when the Commission began to plead a new defense to properly brought refund suits—that the taxpayer had not exhausted his administrative remedies.

In *Meredith v. Elliott*,<sup>66</sup> the Commission successfully invoked the doctrine of exhaustion of remedies to dismiss a refund action instituted by the taxpayer in full compliance with the statutory requirements. The taxpayer claimed his property, although assessed at \$174,000, was worth no more than \$144,000. He paid the additional tax due under protest and brought an action for refund within thirty days.<sup>67</sup> The taxpayer did not, as he could have, appeal the valuation decision by the Richland County Board of Assessment Appeals to the Tax Commission.<sup>68</sup>

The South Carolina Supreme Court held that the taxpayer's failure to exhaust his administrative remedies precluded judicial review:

The respondents here had available to them an adequate administrative remedy to determine the question of fact as to whether there had been an overvaluation of their property for the purpose of the taxation thereof. Having failed to follow the administrative remedy created by the statute for the correction of errors in the valuation of their property, they are precluded from resorting to the courts for relief.<sup>69</sup>

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66. 247 S.C. 335, 147 S.E.2d 244 (1966).

67. *Id.* at 338, 147 S.E.2d at 245.

68. *Id.* at 343, 147 S.E.2d at 247-48.

69. *Id.* at 346-47, 147 S.E.2d at 249. The exhaustion of remedies holding was sufficient to dispose of the case. The Court further held, however, that the expression "wrongfully or illegally collected taxes," in § 12-47-220, does not mean "an excessive assessment or overvaluation" of the taxpayer's property. *Id.* at 346, 147 S.E.2d at 249. The court found that the statutory language permitted a refund action in the case of "a jurisdictional defect as distinguished from a mere error of judgment." *Id.* at 344-45, 147 S.E.2d at 248. The taxpayer was, consequently, foreclosed from any hearing on the merits of his claim. The court, distinguishing between "an excessive assessment" and "an erroneous assessment," concluded that the legislature had authorized the courts to review only the latter, not the former. The court reasoned that the judiciary "cannot substitute its judgment, or that of a jury, for the judgment of the tax assessor duly appointed for the purpose of making an appraisal and valuation of property for tax purposes." *Id.* at 346, 147 S.E.2d at 248-49. The court's view might be different today under the South Carolina Administrative Procedures Act, which, the court has held, grants the courts greater appellate authority than they had under prior law. See *infra* text accompanying note 148. The Tax Commission has read *Meredith* as holding that the courts have no jurisdiction on matters of valuation. It is unlikely, however, that the court intended to give the Commission such a blank check on the state's taxpayers. *Meredith*



*Meredith* thus established that a taxpayer could not secure judicial review unless he first exhausted his administrative remedies.

The Commission soon realized that a taxpayer could not exhaust his remedies if he could not initiate them in the first place. The Commission took action, therefore, to frustrate taxpayers' efforts to begin their administrative remedies. In 1975 the Commission enacted regulation 117-111, which applies to property assessments by the Property Tax Division of the Commission. This regulation directs a taxpayer to appeal a proposed assessment to the Commission within twenty days of the date of mailing by the Commission, which normally takes place in July. Further, the regulation stated that the Commission would not consider any grounds for appeal not raised by the taxpayer at that time.<sup>70</sup> To impose on taxpayers what amounts to a twenty-day statute of limitations is, of course, gross overreaching. Regulation 117-111 seems clearly to exceed the Commission's statutory authority to promulgate and adopt reasonable regulations.<sup>71</sup>

Subsequent decisions have limited the impact of the harsh rule applied in *Meredith*. In *Newberry Mills, Inc. v. Dawkins*,<sup>72</sup> the plaintiff appealed a tax assessment decision in circuit court, without first appealing it to the Tax Commission. The South Carolina Supreme Court applied the rule requiring exhaustion of administrative remedies, but also discussed and ruled on the constitutional arguments raised by taxpayer.

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probably only means the court does not intend to be a reviewing board for assessments and will not interfere if the assessment is reasonably close to actual value.

70. Regulation 117-111 provides in its entirety:

Any taxpayer aggrieved by the proposed assessment of his property by the Property Tax Division of the South Carolina Tax Commission may appeal to the South Carolina Tax Commission by giving written notice of such appeal within twenty days of the date of the mailing of the proposed assessment. The original of the notice of appeal shall be delivered to the Chairman of the South Carolina Tax Commission and shall contain all grounds for the appeal. Any grounds that are not published or contained in the notice of appeal shall not be given consideration by the Commission in hearing the appeal. The notice of the appeal shall further contain the valuation and assessment which said owner shall deem to be the fair market value and assessment of the property.

This shall be effective for the tax year 1975.

S.C. Tax Comm'n R., S.C. CODE ANN. (R. & REG.) 117-111 (1976). The appeal of a proposed assessment, first to the Tax Commission, then to the Tax Board of Review, can take a long time, perhaps as much as three years. No part of the tax need be paid until the end of this process.

71. See S.C. CODE ANN. § 12-3-140 (1976).

72. 259 S.C. 7, 190 S.E.2d 503 (1972).

In *Andrews Bearing Corp. v. Brady*,<sup>73</sup> the taxpayer, a manufacturer, paid its taxes under protest and brought an action for refund. The Commission assessed the taxpayer's real and personal property on the basis of a 9.5% ratio to the fair market value, and the local assessor for Spartanburg County assessed nonmanufacturing property at a 4.2% ratio. The taxpayer maintained that the high ratio on manufacturers violated the South Carolina Constitution. The Commission demurred, arguing that the taxpayer had not appealed to the Tax Board of Review and, consequently, had failed to exhaust its administrative remedies. The circuit court overruled the Commission's demurrer, and the supreme court affirmed. The supreme court held that exhaustion of remedies in South Carolina was not an invariable rule; it was a rule of policy, convenience, and discretion rather than of law. The court noted that "there is apparently no factual issue whatsoever involved in the present litigation, the issue being solely the asserted illegality and/or unconstitutionality of the assessment ratio applied by the Tax Commission to the valuation of respondent's property."<sup>74</sup>

The South Carolina Court of Appeals recently went a step further in *Greenville Baptist Association v. Greenville County Treasurer*.<sup>75</sup> In that case, the court, relying on *Andrews Bearing Corp.*, held that a taxpayer whose property is denied tax exempt status by the Commission is not required to exhaust all administrative remedies, including appeal to the Tax Board of Review, before bringing an action pursuant to section 12-47-220.<sup>76</sup>

In 1984, Justice Ness, writing for the supreme court, in

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73. 261 S.C. 533, 201 S.E.2d 241 (1973).

74. *Id.* at 537, 201 S.E.2d at 243.

75. 281 S.C. 325, 315 S.E.2d 163 (Ct. App. 1984).

76. S.C. CODE ANN. § 12-3-145(d) (Supp. 1985), added by amendment in 1978, provides that a taxpayer may appeal an adverse decision respecting tax exempt status to the Tax Board of Review. The 1978 amendment expressly stated that the taxpayer's appeal was "in addition to any right of appeal otherwise provided by law." The circuit court granted the treasurer's demurrer based on taxpayer's failure to exhaust its administrative remedies. The court of appeals, in an opinion by Judge Cureton, reversed. The result reached was obviously correct, but the court of appeals' reasoning was woeful. First, a § 12-47-220 refund action is not an "appeal" in any normal sense of that word. Second, the *Meredith* case applied the exhaustion doctrine; it never remotely held, not even on what the court of appeals called "close analysis", that the exhaustion doctrine is "restricted to cases involving an overvaluation of property for purposes of taxation." 281 S.C. at 329, 315 S.E.2d at 165. See *supra* note 69.

*State Dairy Commission v. Pet, Inc.*<sup>77</sup> provided a clear declaration of the law: "[W]e have held the failure to exhaust administrative remedies is excused where the facts are undisputed and the issues are solely ones of law".<sup>78</sup> As a result of this holding, the Commission's defense of exhaustion of remedies should be less successful in the future. The court, in Justice Ness's opinion, has made it clear that if the issue is essentially one of law—for example, the constitutionality of a statute—there is no reason for the courts to defer to the administrative agency.

### B. Construction of Sections 12-47-410 and 12-47-420

Several decisions have addressed the scope of the remedy provided by sections 12-47-410 and 12-47-420 of the South Carolina Code, which authorize the Commission to abate or refund "erroneous, improper or illegal assessments."<sup>79</sup> The South Carolina Supreme Court has found that "assessment," as used in the constitution and statutes, means "the value placed upon property for the purposes of taxation by officials appointed for that purpose."<sup>80</sup> The exact meaning of "assessment," however, was unclear before the 1964 supreme court decision in *City of Columbia v. Glens Falls Insurance Co.*<sup>81</sup> In *Glens Falls* the taxpayer petitioned the Commission for a refund of business license taxes that the City of Columbia had collected illegally in 1959,

77. 283 S.C. 359, 324 S.E.2d 56 (1984).

78. *Id.* at 362, 324 S.E.2d at 57 (emphasis added).

79. Section 12-47-410 provides:

Whenever it shall appear to the satisfaction of the Commission that any tax has been erroneously, improperly or illegally assessed against any person within this State, the Commission may order any officer having authority to assess or collect taxes to abate the whole or any part of such taxes that may have been erroneously, improperly or illegally assessed.

S.C. CODE ANN. § 12-47-410 (1976). Section 12-47-420 provides:

Whenever after due hearing the Commission by majority vote shall determine that any tax has been paid under an erroneous, improper or illegal assessment, the Commission shall order the officer having custody of the tax so erroneously, improperly or illegally paid to refund it to the person from whom it has been unjustly collected, and such officer shall refund the tax on such order if the officer shall have in his possession the tax so improperly collected or other funds from which it may be lawfully refunded.

S.C. CODE ANN. § 12-47-420 (1976).

80. *Meredith v. Elliott*, 247 S.C. 335, 342, 147 S.E.2d 244, 247 (1966), *supra* note 69; *Owings Mills, Inc. v. Brady*, 246 S.C. 361, 364, 143 S.E.2d 717, 719 (1965).

81. 245 S.C. 119, 139 S.E.2d 529 (1964).

1960, and 1961. The taxpayer had paid the taxes, but only the taxes for 1961 had been paid "under protest."<sup>82</sup> There was no question that the taxes had been illegally collected since the supreme court had so held in a prior decision.<sup>83</sup> The only issue in the 1964 case was whether the taxpayer had any remedy for the wrongful collection of the taxes that had not been paid under protest. The South Carolina Supreme Court held that it did not.

The taxpayer maintained that South Carolina law provided two concurrent remedies for the recovery of illegally collected license taxes: (1) a judicial remedy by action after payment under protest or (2) an administrative remedy by application to the Commission for refund.<sup>84</sup> The city claimed that the taxpayer had only one remedy—by an action after payment under protest—and that he had failed to use it.<sup>85</sup> The court sustained the city's position and found that "while the word 'assessment' is sometimes used in the field of taxation in a broader sense, we think that it was used in these statutes in the sense of 'the value placed upon property for the purpose of taxation by officials ap-

82. The taxpayer had not paid the taxes under protest and, thus, could not use the one safe remedy available to him—payment under protest and action brought within 30 days under § 12-47-239. Section 12-47-230 applies to the remedies and rights given by §§ 12-47-210 and 12-47-220 to municipal taxes:

The remedies and rights given by §§ 12-47-210 and 12-47-220 for the payment of taxes under protest and the recovery thereof shall apply equally to incorporated municipalities, with respect to city or town taxes, such payments under protest to be made by any person entitled under the provisions of § 12-47-210 so to do to the city or town treasurer or other officer of the city or town having authority to receive and collect taxes and the suit to be brought against such city and the treasurer in the court of common pleas for the county in which the property lies. Upon the trial, if judgment be for the plaintiff, the final order or judgment of the court shall be certified to the city treasurer or officer sued in such action and thereupon shall be honored and the amount of taxes, with interest at six percent from the date of payment, shall be refunded to the plaintiff.

S.C. CODE ANN. § 12-47-230 (1976). It should be noted that the statute provides for the 30-day period to run from the date of "payment" without respect to the due date of the taxes. It should also be noted that the taxpayer receives statutory interest of 6% on his refund, although S.C. CODE ANN. § 12-54-40 (Supp. 1985) obliges taxpayers to pay the federal T-Bill rate of interest on any taxes they owe the Commission.

83. *Glens Falls Ins. Co. v. City of Columbia*, 242 S.C. 237, 130 S.E.2d 573 (1963).

84. The taxpayer's position was that the general 6-year statute of limitation controlled the administrative remedy. 245 S.C. at 124, 139 S.E.2d at 530-31.

85. The author believes that a taxpayer in this situation should be able to use S.C. CODE ANN. § 12-47-440 (1976), which was enacted in 1960, but not at issue in *Glens Falls*. See *infra* notes 110-31 and accompanying text.

pointed for that purpose.' ”<sup>86</sup>

The court concluded that the administrative remedy provided by sections 12-47-410 and 12-47-420 applied only to an assessment and refund of *property* taxes.<sup>87</sup> The court noted that if the legislature had intended to confer upon the Commission the authority to order abated or refunded “any tax whatsoever,” it would not have subsequently enacted section 12-47-440 in 1960.<sup>88</sup> Thus, the Commission had no jurisdiction to order the city to refund the illegally collected city license taxes.

The decision in *Glens Falls* is surprising because “assessment,” as the court noted, is not usually limited to property taxes; income taxes and license taxes are also generally described as being “assessed.” The court, however, believed these particular statutes were intended to refer exclusively to property taxes.

A few years later the court further restrained the applicability of sections 12-47-410 and 12-47-420 by ruling that they did not apply even to all property tax assessments. In *Owings Mills v. Brady*,<sup>89</sup> the taxpayer was exempt from certain county property taxes because of a five-year statutory exemption for manufacturers. After the taxpayer paid the taxes in full *without protest*, the Commission ordered a refund.<sup>90</sup> The supreme court held that the Commission had no power to do so:

[The Commission’s] jurisdiction [under sections 12-47-410 and 12-47-420] is restricted to a refund of property taxes that have been paid under an “erroneous, improper or illegal assessment,” “assessment” meaning the value placed upon the particular property for purposes of taxation. Unless the valuation placed upon the particular property is in question, the Commission has no jurisdiction under the present statutes to rebate

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86. 245 S.C. at 125-26, 139 S.E.2d at 531 (quoting *State ex rel. Morse v. Cornwell*, 40 S.C. 26, 29, 18 S.E. 184, 186 (1893)). The court explained:

This interpretation is in keeping with the stated legislative purpose in establishing the Tax Commission. We find nothing in the legislative policy reflected in the various tax statutes in this State to warrant the conclusion that the Legislature intended to vest the Tax Commission with the broad authority to order refunded any tax which might be illegally charged or imposed by the State, county, or municipalities.

245 S.C. at 125-26, 139 S.E.2d at 531.

87. *Id.* at 126, 139 S.E.2d at 531.

88. *Id.* Section 12-47-440 is discussed *infra* notes 108-21 and accompanying text.

89. 246 S.C. 361, 143 S.E.2d 717 (1965) and 249 S.C. 371, 154 S.E.2d 560 (1967).

90. 246 S.C. at 362-63, 143 S.E.2d at 718.

or refund the taxes paid.<sup>91</sup>

Since the taxpayer had challenged the validity of the tax itself, rather than the validity of the valuation, the court held that the Commission had no jurisdiction to order a refund. The court's construction here certainly does not seem to have been compelled by the statutory language.

Fortunately, *Glens Falls* and *Owings Mills* appear to be the high-water mark of technical construction by the supreme court. The court's subsequent decisions, as in *American Hardware Supply Co. v. Whitmire*,<sup>92</sup> weaken the authority of *Owings Mills* and indicate a return to the view expressed by Chief Justice Pope in *Ware Shoals*: "It is one of the fundamental principles of law that for every wrong or injury there must be an adequate remedy."<sup>93</sup>

The legislature also perceived that technical rules were depriving taxpayers of basic rights. Its solution was the 1960 enactment of section 12-47-440, which the legislature thought would finally and unequivocally establish a fair and simple taxpayer remedy.

## VI. 1960: ENACTMENT OF SECTION 12-47-440

Section 12-47-440 of the South Carolina Code was enacted in 1960 upon the recommendation of the South Carolina Tax Study Commission.<sup>94</sup> The Tax Study Commission expressly designed the statute to establish an equitable system for submitting claims for refund of license fees and taxes illegally assessed or collected and to provide for judicial review of adverse decisions by the Tax Commission "without vast technicality."<sup>95</sup> Sec-

91. *Id.* at 364, 143 S.E.2d at 719.

92. 278 S.C. 607, 300 S.E.2d 289 (1983). See *infra* notes 121-24 and accompanying text.

93. 78 S.C. 211, 215, 58 S.E. 811, 812 (1907). See *supra* notes 48-59 and accompanying text.

94. The South Carolina Tax Study Commission was composed of Senators Edgar A. Brown, Dorsey Lybrand, and Marshal Parker; Representatives E. LeRoy Nettles, William L. Rhodes, Jr., and Norman W. Stevenson; and gubernatorial appointees Dr. George H. Aull, Mr. A. Crawford Clarkson, Jr., and Mr. R. J. Jeffries.

95. S.C. TAX STUDY COMM'N, FIRST ANNUAL REPORT 2 (1960) (available at Coleman Karesh Library, Univ. of South Carolina School of Law, Columbia, S.C.) [hereinafter cited as TAX REPORT]. The Tax Study Commission reported to the legislature:

IT IS RECOMMENDED that an equitable system for submitting claims

tion 12-47-440 is, substantially, a codification of the Tax Study Commission's recommendations.<sup>96</sup>

The Tax Study Commission found that the existing refund procedures resulted in unjustified "[d]eprivation of the rights of individuals" and abuse of power.<sup>97</sup> Rejecting the usual explanation that the restrictive appeal procedure was "mandatory for the proper functioning of the machinery," the Tax Study Commission held that the true cause was probably the "convenience of the members of the administrative body."<sup>98</sup> Administrative proceedings, the Tax Study Commission stated, "dead-end with the Tax Commission."<sup>99</sup> The judicial refund procedure, currently embodied in section 12-47-210 of the South Carolina Code, was "so fraught with technicality and expense as to be practically unavailable for the vast majority of taxpayers."<sup>100</sup> Judicial re-

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for refund for taxes and license fees improperly, illegally or erroneously assessed or collected be instituted, and that the claimant be granted, without vast technicality, judicial review of adverse holdings by the Tax Commission. A three year statute of limitations is recommended.

*Id.*

96. This section provides:

Notwithstanding any other provisions of this Title, whenever it shall appear to any taxpayer that any license fee or tax imposed under this Title has been erroneously, improperly or illegally assessed, collected or otherwise paid over to the Commission, the taxpayer, by whom or on whose behalf the license fee or tax was paid, may make application to the Commission to abate or refund in whole or in part such license fee or tax. Should the Commission, after having given such taxpayer a reasonable opportunity to be heard, decline to make such abatement or refund, the taxpayer may, within thirty days of the date of receipt of notice of the Commission's action declining the abatement or refund, bring an action against the Commission for recovery of the license fee or tax. The provisions of this section shall apply whether or not the license fee or tax in questions was paid under protest, but shall only be available where the application provided for here is made in writing to the Commission within a period of three years from the date the license fee or tax was due to have been paid, without regard to extensions of time for payment, or if a later date would result, within one year of payment where an additional license fee or tax is assessed and paid. Such action shall be brought in the court of common pleas for Richland County except that a resident of this State may elect to bring said action in the court of common pleas for the county of his residence. A taxpayer or licensee who brings an action provided for in §§ 12-47-210 and 12-47-220 shall be considered as having elected his remedy and is denied the benefits of this section.

S.C. CODE ANN. § 12-47-440 (1976).

97. TAX REPORT, *supra* note 95, at 2.

98. *Id.*

99. *Id.*

100. *Id.* For example, in *Epworth Orphanage v. Wilson*, 185 S.C. 243, 193 S.E. 644

view was available "only to a taxpayer who realizes in advance of payment that he will claim a refund."<sup>101</sup>

The Tax Study Commission did not lay "at the door step of the Tax Commission," either "abuse of authority [or] autocratic method and manner,"<sup>102</sup> but concluded that abuse was inevitable unless the legislature enacted "the two basic and essential safeguards" recommended: a broad claim-for-refund procedure to the Tax Commission and judicial review of Tax Commission determinations.<sup>103</sup>

The Tax Study Commission noted that the taxpayer "who is most vulnerable is not the more substantial taxpayer necessarily but, in the opinion of the Commission, is the one who cannot afford the expense of litigation, and who alone cannot walk gingerly down the tight-rope of technicality."<sup>104</sup>

Both the Tax Study Commission and the legislature recognized that in most tax disputes the amount involved does not justify the large expense of a judicial action. They intended that a taxpayer of moderate means be able to get a fair hearing from the Tax Commission without incurring the cost of a judicial proceeding. The Tax Study Commission believed that the remedy for existing abuses was straight-forward: "a claim for refund, required to be filed within three years of the date the tax was originally due, with an appeal to the Court of Common Pleas within thirty days of notice of denial by the Tax Commission."<sup>105</sup>

Section 12-47-440 appears to accomplish the Tax Study Commission's objectives. The statute provides a three-year statute of limitations within which an application for refund can be submitted to the Tax Commission, without regard to whether the taxes were originally paid under protest. It also expands the categories of taxes for which a refund can be sought from the Commission.

Section 12-47-440 authorizes the refunding of taxes illegally "assessed," or "collected," or "otherwise paid over to the Com-

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(1937), the county argued that the taxpayer had no remedy because it had paid its taxes under protest to the county sheriff rather than to the county treasurer. The supreme court rejected this argument as a "refinement of technicality." *Id.* at 254, 193 S.E. at 648.

101. TAX REPORT, *supra* note 95, at 2.

102. *Id.*

103. *Id.*

104. *Id.* at 2-3.

105. *Id.* at 3.



mission.”<sup>106</sup> This language helps ensure that the statute will retain the intended broad expansion of jurisdiction and will not be subject to the kind of restrictive judicial construction accorded sections 12-47-410 and 12-47-420 in the *Glens Falls* decision.<sup>107</sup>

Section 12-47-440 provides relief for the taxpayer who has failed either to pay under protest or to bring suit within thirty days of payment. Nevertheless, the statute has failed to provide the simple taxpayer remedy that was intended. Two basic reasons underlie this failure. First, the responsibility for a fair hearing should not have been placed in the hands of the Tax Commission, whose primary responsibility is the collection of taxes. Second, the drafters underestimated the ability of the Tax Commission to create confusion out of a clear statute. Unfortunately, what the legislature intended as a taxpayer relief provision has been converted by the Tax Commission into a minefield of technicality.

## VII. CONSTRUCTION OF SECTION 12-47-440

Section 12-47-440 contains four requirements that must be met before a taxpayer can obtain a refund. First, the taxpayer is required to pay a “license fee or tax.”<sup>108</sup> Second, the tax must have been illegally “assessed,” “collected,” or “otherwise paid over to the Commission.”<sup>109</sup> Third, the taxpayer must make written application to the Commission within “three years from the date the license fee or tax was due to have been paid.”<sup>110</sup> Fourth, the taxpayer must elect to bring the matter to the Commission rather than the court of common pleas, since a taxpayer “who brings an action [in court] provided for in §§ 12-47-210 and 12-47-220 is considered as having elected his remedies and is denied the benefits of [section 12-47-440].”<sup>111</sup> When these conditions are met, the taxpayer is authorized to proceed even though he did not pay under protest. Despite the clear statutory language, however, the Commission has created new thickets of

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106. S.C. CODE ANN. § 12-47-440 (1976).

107. See *supra* notes 81-88 and accompanying text.

108. S.C. CODE ANN. § 12-47-440 (1976).

109. *Id.*

110. *Id.*

111. *Id.* Simply paying a tax under protest is not “bringing an action” and should not deprive the taxpayer of the right to use section 12-47-440.

“vast technicality” surrounding section 12-47-440.

### A. *Taxes Paid to Local Government*

It has been much disputed whether the Tax Commission has jurisdiction to order the refund of taxes paid to a local governmental entity. The Commission has asserted that it lacks such authority and can order a refund only of taxes that were paid to the Commission itself. Similarly, the Commission maintains that section 12-47-440 is not available to recover property taxes since they are paid to the county or city. The following discussion will not only shed light on this important issue, but will also demonstrate how the various elements of section 12-47-440 operate.

Section 12-47-440 authorizes the Commission to order a refund of two classes of illegally collected taxes: “any license fees” or “[any] tax imposed under [Title 12].”<sup>112</sup> Since the second class, taxes imposed under Title 12,<sup>113</sup> includes various *state* license fees, “any license fees” must refer to *municipal* license taxes that are imposed under Title 5 of the South Carolina Code.<sup>114</sup>

Prior to the enactment of section 12-47-440 in 1960, the

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112. *Id.*

113. S.C. CODE ANN. tit. 12 (1976 & Supp. 1985) authorizes the imposition of the following fees and taxes: (1) Income Tax (12-7-230 to -2780); (2) Estate Tax (12-15-10 to -1616); (3) Gift Tax (12-17-10 to -310); (4) License Fees of Corporations (12-19-10 to -180); (5) Documentary Stamp Tax (12-21-310 to -470); (6) Tobacco, Ammunition Playing Cards (12-21-610 to -1610); (7) Beer and Wine License Taxes (12-21-1010 to -1350); (9) Producers and Wholesalers of Beer and Wine (12-21-1510 to -1610); (10) Soft Drinks Tax (12-21-1710 to -2340); (11) Admissions Tax (12-21-2410 to -2620); (12) Motion Pictures (12-21-2710); (13) Electric Power (12-23-10); (14) Carriers (12-23-210); (15) Foreign Land Associations (12-23-310); (16) Theatrical Shows, Carnivals and Circuses (12-23-410 to -460); (17) County Tax on Conveyances (12-25-10 to -50); (18) Gasoline Taxes (12-27-10 to -50); (19) Taxes on Gasoline Sales (12-27-210 to -431); (20) Taxes on Stored Gasoline (12-27-510 to -610); (21) Tax on Motor Fuels Other Than Gasoline (12-29-10 to -150); (22) Road Tax on Motor Carriers (12-31-10 to -50); (23) Alcoholic Beverage Taxes (12-33-10 to -630); (24) Retail License, Sales and Use Taxes (12-35-10 to -1560); and (25) Tax on Casual Sales of Motor Vehicles, Motorcycles, Boats, Motors and Airplanes (12-35-1710 to -1730).

114. S.C. CODE ANN. §§ 5-1-10 to -39-440 (1976 & Supp. 1985) govern the powers of local governments. It may be that certain taxes fall into neither category. For example, the Radwaste Tax, imposed by § 23 of the 1983 Appropriations Act, No. 151, § 23, 1983 S.C. Acts 424, 1162, is not codified in Title 12. Similarly certain localities attempt to impose what they call “impact fees.” Section 12-47-440, of course, was intended to be comprehensive, but a technical amendment may be necessary.

Commission clearly had no authority to order the refund of municipal license fees. In *City of Columbia v. Glens Falls Insurance Co.*,<sup>115</sup> the South Carolina Supreme Court held that the Commission was without authority to order the refund of municipal license taxes under sections 12-47-410 and 12-47-420<sup>116</sup> because those provisions applied only to *property taxes*, not to license fees.<sup>117</sup> The court provided the following rationale for its holding:

This is evidenced by the enactment in 1960 of [section 12-47-440] wherein the Tax Commission is granted authority to order refunded certain taxes, including State license fees . . . . If [section 12-47-410] and [section 12-47-420] were intended by the Legislature to have the broad application contended by the respondents, it would have been unnecessary to subsequently provide the remedy set forth in [section 12-47-440].<sup>118</sup>

Thus, according to the court's analysis, the legislature intended that the new remedy provided by section 12-47-440 would broadly expand the Commission's jurisdiction.

The Commission interpretation—that the remedy is available only for taxes paid to the Commission—is not required by the statutory language. The statute designates three categories of illegal taxes: those illegally “assessed,” those illegally “collected,” and those “otherwise paid over to the Commission.” These three categories seem clearly disjunctive. If “to the Commission” is a requirement of each category, the statute must be read to state: “any license fee . . . illegally assessed *to the Commission*, collected *to the Commission* or otherwise paid over to the Commission” may be refunded.<sup>119</sup> That is a very awkward reading.

Prior to enactment of 12-47-440, taxpayers' remedies for both classes of taxes were limited to the judicial procedures provided under sections 12-47-210 to 12-47-270, which required both payment of the tax under protest and the commencement of a court action within thirty days. Failure to meet either con-

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115. 245 S.C. 119, 139 S.E.2d 529 (1964). See *supra* notes 81-88 and accompanying text.

116. *Id.* at 123, 139 S.E.2d at 530.

117. *Id.* at 126, 139 S.E.2d at 532.

118. *Id.*

119. *Id.* The italicized portions do not actually appear in the statute as drafted.

dition meant that the taxpayer was without any remedy, even though taxes had been illegally collected from him.

Section 12-47-440 established a concurrent, coherent, and equitable system that provided the taxpayer with a meaningful election. The taxpayer could continue to use the remedy provided by sections 12-47-210 to 12-47-270, which would take him directly into circuit court,<sup>120</sup> if he met the jurisdictional prerequisites. If the taxpayer failed to meet those conditions, however, he could use the new administrative remedy, provided under section 12-47-440, which required that the Tax Commission hold a hearing before the taxpayer could proceed to court.

In *American Hardware Supply Co. v. Whitmire*,<sup>121</sup> the South Carolina Supreme Court ordered the Commission to refund taxes that had been illegally collected by a local government. Although the holding in *American Hardware* did not directly address section 12-47-440 or a municipal license fee, it presented an analogous situation and demonstrated the court's impatience with the Commission's hypertechnical approach.

The taxpayer in *American Hardware* had paid personal property taxes to Greenville County without protest. Subsequently, the taxpayer realized that it had identified as taxable certain property that was actually tax exempt. The taxpayer sought an order from the Commission directing the county treasurer to refund the taxes erroneously collected. Greenville County conceded that the property in question was exempt from taxation, but asserted that there was no statutory mechanism under which the taxpayer could obtain a refund. The county argued that exemption from taxation did not present a question of valuation and, under *Owings Mills v. Brady*,<sup>122</sup> section 12-47-420 was limited to questions of valuation. The Commission accepted this technical limitation on its authority and, finding it had no jurisdiction, refused to order the refund. Both the circuit court and the supreme court recognized that the central issue was that the taxes had been *unlawfully* collected and directed the Com-

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120. This assumes, of course, that the taxpayer can get past the hurdle of exhaustion of administrative remedies set up by *Meredith v. Elliott*, 245 S.C. 335, 147 S.E.2d 244 (1966). See *supra* notes 66-69 and accompanying text.

121. 278 S.C. 607, 300 S.E.2d 289 (1983).

122. 246 S.C. 361, 143 S.E.2d 717 (1965) and 249 S.C. 371, 154 S.E.2d 560 (1967). See *supra* notes 89-91 and accompanying text.

mission to order the refund.<sup>123</sup> The circuit court held the relief to be appropriate under sections 12-47-410 to 12-47-440 and analyzed the interplay between those sections.

The supreme court, in an opinion by Justice Ness, went directly to the heart of the matter and found that since the property had been illegally taxed, the Commission had jurisdiction to order the refund sought. The court held that "an assessment of tax exempt property is an 'erroneous, improper or illegal assessment' within the meaning of the statute, entitling respondent to a refund of the taxes erroneously paid."<sup>124</sup>

The court has, on three occasions, confronted the Commission's theory of limited jurisdiction, but has so far failed to rule on the issue. In *Harrison v. South Carolina Tax Commission*,<sup>125</sup> the taxpayer had paid *ad valorem* taxes to Richland County without protest. The Commission argued that section 12-47-440 was applicable only to license fees and taxes collected by the Commission.<sup>126</sup> The court, however, expressly found that it need not decide that issue because the taxpayer had not made application to the Commission for refund within three years from the date the taxes were due, as required by section 12-47-440.<sup>127</sup>

In *Bobo Brothers, Inc. v. South Carolina Tax Commission*,<sup>128</sup> the taxpayer brought an action against the Commission under section 12-47-440 for abatement of assessed taxes. The complaint, however, had failed to allege that the taxpayer either had paid the disputed taxes or occupied the position of one on whose behalf the taxes had been paid, as required by section 12-47-440.<sup>129</sup> The court, therefore, sustained the Commission's demurrer.

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123. 278 S.C. at 609, 300 S.E.2d at 290.

124. *Id.* The court qualified its holding in *Meredith v. Elliott*, 245 S.C. 335, 147 S.E.2d 244 (1966), which had distinguished between an erroneous assessment and an excessive assessment. *See supra* note 69.

125. 261 S.C. 302, 199 S.E.2d 763 (1973).

126. *Id.* at 304-05, 199 S.E.2d at 764-65.

127. *Id.* at 307, 199 S.E.2d at 765.

128. 271 S.C. 18, 244 S.E.2d 519 (1978). Action was also brought under S.C. CODE ANN. § 12-7-2300 (1976), but was dismissed because that section does not authorize an action against the Commission for the abatement of tax assessments. *Id.* at 19, 244 S.E.2d at 520.

129. In *Slater Corp. v. South Carolina Tax Comm'n*, 280 S.C. 584, 314 S.E.2d 31 (Ct. App. 1984), the court of appeals found that the right to seek a refund pursuant to § 12-47-440 could be assigned.

In *Dale v. South Carolina Tax Commission*,<sup>130</sup> the taxpayers brought a class action against state and local tax authorities to recover portions of documentary stamp taxes. The action against the Commission was dismissed because there was no allegation that any application for a refund had been filed with the Commission. Request for and denial of a refund, the court observed, "are conditions precedent to a suit brought pursuant to section 12-47-440."<sup>131</sup>

Section 12-47-440 was intended to provide relief for taxpayers, and the supreme court has, where possible, construed it that way. The court has not denied a hearing to a taxpayer who has met the conditions prescribed in section 12-47-440.

### B. *Applicability of Section 12-47-440 to Sales and Gift Taxes*

In 1951 South Carolina enacted a general "sales and use tax" statute,<sup>132</sup> which contains a number of provisions that parallel the general procedural limitations in chapter 47 of title 12 of the South Carolina Code, including the anti-injunction, payment under protest, suit within thirty days, and exclusivity of remedy provisions.<sup>133</sup>

The payment under protest requirement is less troublesome for the sales tax because this tax must be paid monthly.<sup>134</sup> Thus, the taxpayer can pay under protest soon after he realizes that the tax is illegal and bring an action within the required thirty days. In the case of the property and license taxes, which are paid annually, the taxpayer may have a long wait before he can seek redress.

130. 276 S.C. 110, 276 S.E.2d 293 (1981).

131. *Id.* at 112, 276 S.E.2d at 294-95 (citing *Edisto Fleets, Inc. v. South Carolina Tax Comm'n*, 256 S.C. 350, 182 S.E.2d 713 (1971)). The action against the local officials was dismissed because there was no allegation that any taxes were paid under protest as required by § 12-47-220. *Id.* at 111, 276 S.E.2d at 294.

132. Appropriations Act of 1951, No. 379, 1951 S.C. Acts 546, 677-78. (Currently S.C. CODE ANN. § 12-35-10 to -180 (1976 & Supp. 1985)). The constitutionality of the Act was upheld in *Roddy v. Byrnes*, 219 S.C. 485, 66 S.E.2d 33 (1951).

133. Section 12-35-1420 (1976) follows the anti-injunction provisions of § 12-47-410; § 12-35-1430 follows the payment under protest provisions of § 12-47-210; § 12-35-1440 follows the suit within 30 days provisions of § 12-47-220; and § 12-35-1440 follows the exclusive remedy provisions of § 12-47-50.

134. S.C. CODE ANN. § 12-35-570 (Supp. 1985).

One issue may, however, be raised by the Commission: Can a taxpayer who has made a number of sales tax payments *not* under protest go back three years and apply to the Commission for a refund pursuant to section 12-47-440? In *Colonial Stores, Inc. v. South Carolina Tax Commission*,<sup>135</sup> the supreme court, without discussion, permitted the use of section 12-47-40 in a sales tax case. The decision was clearly correct since the taxpayer satisfied all the conditions in the section. It should be noted that because sales taxes are paid to the Commission, the jurisdictional issue discussed above<sup>136</sup> does not arise.

There is, however, a problem of conflicting statutory language. Section 12-47-440 purports to have effect "[n]otwithstanding any other provisions of this Title."<sup>137</sup> Section 12-35-1440, on the other hand, states: "There shall be no other remedy [except by payment under protest and suit] in any case of the illegal or wrongful collection of the sales or use tax imposed by this chapter, or attempt to collect such taxes, than that provided in this section."<sup>138</sup> The terms of section 12-47-440 should override section 12-35-1440 for two reasons. First, it is presumptively controlling because it is the later enactment. Second, the whole intent of section 12-47-440 was to provide a uniform remedy and relief from this type of technical question.

The 1961 estate and gift tax law raises a similar problem.<sup>139</sup> Section 12-15-840 requires the taxpayer to file a petition in the circuit court within ninety days after the notice of deficiency is mailed.<sup>140</sup> This remedy, despite its statute of limitations, is attractive because it permits the taxpayer to go directly into court. The Commission will probably attempt to limit taxpayers seeking refund of estate and gift taxes to the remedy afforded by section 12-15-840, with its ninety-day statute of limitations, by arguing that the taxpayer cannot use section 12-47-440 in an estate and gift tax case. The Commission's argument, however, should not be accepted. The taxpayer should be able to use either remedy.

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135. 253 S.C. 14, 168 S.E.2d 774 (1969).

136. See *supra* text accompanying notes 120-131.

137. S.C. CODE ANN. § 12-47-440 (1976).

138. S.C. CODE ANN. § 12-35-1440 (1976).

139. An Act to Provide for a South Carolina Estate Tax, No. 382. 1961 S.C. Acts 631.

140. S.C. CODE ANN. § 112-15-840 (1976).

## VIII. 1977: THE ADMINISTRATIVE PROCEDURES ACT

The legislature, by passing the Administrative Procedures Act (APA) in 1977,<sup>141</sup> provided South Carolina taxpayers with a new avenue of appeal. For almost ten years, however, the Tax Commission has consistently argued that, while the APA may apply to every other agency in the state, it does not apply to the Tax Commission. The lower courts have upheld the Commission's position.<sup>142</sup> Although the South Carolina Supreme Court has not yet had an opportunity to resolve the matter, the South Carolina Court of Appeals has held that the APA is applicable to the Tax Board of Review.<sup>143</sup>

The issue is significant for several reasons. First, if the APA applies to the Commission the various "sunshine" provisions of the APA will, of course, also apply.<sup>144</sup> Second, the APA requires both a notice of hearing containing a statement of legal authority and jurisdiction and a hearing conducted in accord with the statute.<sup>145</sup> Third, under the APA, the record below is fixed unless the court is persuaded there "were good reasons for failure to present" the evidence below.<sup>146</sup> Finally, the court may order a stay of enforcement of a Commission order with respect to matters such as payment of taxes.<sup>147</sup> Although these features would normally benefit the taxpayer, in the long run the APA will probably prove more advantageous to the Commission because of the limited scope of judicial review. Section 1-23-380(g) provides that the "court shall not substitute its judgment for that of the agency as to the weight of the evidence *on questions of fact*."<sup>148</sup> It is important to note, however, that the court's defer-

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141. Administrative Procedures Act, No. 176, 1977 S.C. Acts 391. The Administrative Procedures Act is codified at S.C. CODE ANN. § 1-23-310 to -400 (1976). The issuance of regulations is governed by § 1-23-10 to -160 (1976). Section 1-23-120 requires all regulations except those specifically exempted to be submitted to the general assembly for approval.

142. *Jan L. Chapman v. South Carolina Tax Comm'n*, No. 83-CP-40-4053 (S.C. Cir. Ct. February 8, 1984); *Shasta Beverages v. South Carolina Tax Comm'n*, Nos. 78-CP-40-2832 to 78-CP-40-2838 (S.C. Cir. Ct. January 19, 1981).

143. *Owen Steel Co. v. South Carolina Tax Comm'n*, 281 S.C. 80, 313 S.E.2d 636 (Ct. App. 1984).

144. See S.C. CODE ANN. § 1-23-320 (Supp. 1985).

145. *Id.* § 1-23-320 (1976).

146. *Id.* § 1-23-320(e).

147. *Id.* § 1-23-320(c).

148. *Id.* § 1-23-380(g) (emphasis added). In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276



ence to the agency should not include questions of law.

In *Owen Steel Company, Inc. v. South Carolina Tax Commission*,<sup>149</sup> the South Carolina Court of Appeals noted that, prior to enactment of the APA, an aggrieved taxpayer was compelled to pay the disputed tax under protest and bring suit for a refund in circuit court pursuant to section 12-47-220.<sup>150</sup> The court added, however, that enactment of the APA afforded the taxpayer an additional remedy:

"Since the enactment of the APA, the taxpayer has an additional avenue for seeking judicial review of an assessment. . . .

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S.E.2d 304 (1981), the supreme court found that the APA standard of review was a "grant of greater appellate authority to the courts" than previously existing rules. Nonetheless, the court concluded that "a judgment upon which reasonable men might differ will not be set aside." *Id.* at 136, 276 S.E.2d at 307.

149. 281 S.C. 80, 313 S.E.2d 636 (Ct. App. 1984). The APA requires that proceedings for review be instituted by filing "a petition in the circuit court within thirty days after the final decision of the agency." S.C. CODE ANN. § 1-23-380(b) (1976). The provision also provides that if a rehearing is requested within 30 days of the agency decision, the time will not begin to run until the decision on the rehearing. This, however, seems perilous for the taxpayer, at least until the agency's authority respecting rehearings is clarified. If the agency has no such authority, it seems possible that a taxpayer seeking a rehearing will find himself beyond the 30-day period and precluded from going to circuit court.

In *Owen Steel* the taxpayer filed his petition within 30 days after the decision of the Tax Board of Review. The Commission demurred and argued that the petition was untimely because more than 30 days had passed since the filing of the *Commission's* decision. 281 S.C. at 82, 313 S.E.2d at 637. Had the taxpayer not appealed to the Tax Board of Review, the Commission would probably have demurred and argued that the taxpayer had not exhausted his administrative remedies as required by *Meredith*, *supra* notes 66-69 and accompanying text. Judge Bell, writing for the court of appeals, rejected the Commission's "Catch 22" argument.

150. Section 12-47-220 provides:

Any person paying any taxes under protest may at any time within thirty days after making such payment, but not afterwards, bring an action against the county treasurer or the Commission, as the case may be, for the recovery thereof, in the case of a county treasurer in the court of common pleas for the county in which such taxes were payable and in the case of the Commission in any county having jurisdiction, and, if it be determined in such action that such taxes and penalties, if any, were wrongfully or illegally collected for any reason going to the merits, the court before whom the case is tried shall certify of record that such taxes were wrongfully collected and ought to be refunded and thereupon the county treasurer shall refund the taxes and penalties, if any, so paid to him or, in the case of any taxes levied or assessed by the Commission shall issue its order to the State Treasurer to refund such taxes and penalties, if any, so paid, which shall be paid in preference to other claims against the State Treasury.

S.C. CODE ANN. § 12-47-220 (1976). This section dates back to 1878. The history surrounding its original enactment is discussed *supra* notes 25-59 and accompanying text.

Code Section 1-23-380 provides that a party who has exhausted all administrative remedies and who is aggrieved by a final agency decision is entitled to judicial review. Judicial review under the APA is cumulative to any other means of review available to the aggrieved party.<sup>151</sup>

The Commission has given *Owen Steel* a very narrow reading, attempting to limit the case to its precise facts. The Commission contends that the case held only that APA section 1-23-380 provides judicial review of property assessments after appeal to the Tax Board of Review. In other situations, according to the Commission, the APA provides no “additional avenue” of judicial review.<sup>152</sup>

The Commission’s interpretation, however, is inconsistent with the APA’s purpose and language, as well as with judicial construction of the Act. Section 1-23-380 of the APA provides for judicial review of an agency’s final decision in a contested case. The South Carolina Supreme Court has found that the purpose of the Act “is to formalize, and make uniform, appeals from administrative agencies.”<sup>153</sup> In addition, the APA defines the term “agency” as “each state board, commission, department or officer, other than the legislature or the courts, authorized by law to make rules or to determine contested cases.”<sup>154</sup> The plain language of this definition certainly includes the South Carolina Tax Commission, which is a state commission, authorized by law to make rules and determine contested cases, and is not the legislature or a court.<sup>155</sup>

South Carolina case law lends further support to the proposition that the APA should apply to the Commission. In *Lark v. Bi-Lo, Inc.*,<sup>156</sup> the supreme court found that the term “agency” in the APA is intended to be “all inclusive.”<sup>157</sup> In fact,

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151. 281 S.C. at 83, 313 S.E.2d at 638.

152. See cases cited *supra* note 142.

153. *Parker v. South Carolina Dairy Comm’n*, 274 S.C. 209, 213, 262 S.E.2d 38, 40 (1980).

154. S.C. CODE ANN. § 1-23-310(1) (1976).

155. For a discussion of the meaning of the word “court” in § 1-23-310(1), see *Kores Nordic (USA) Corp. v. Sinkler, Gibbs & Simon*, 284 S.C. 513, 327 S.E.2d 365 (1985).

156. 276 S.C. 130, 276 S.E.2d 304 (1981).

157. The court stated: “[T]he comments of the Commissioners who proposed the Uniform Administrative Procedures Act indicate that it was the intent of the drafters that the term ‘agency’ in the model act be all inclusive. 14 ULA Model State Administrative Procedures Act, p. 372.” *Id.* at 134, 276 S.E.2d at 306.

since passage of the APA, six South Carolina cases have held that a particular state board, commission, or department was an "agency" and, therefore, subject to the provisions of the APA.<sup>158</sup>

The APA should override inconsistent legislation relating to a particular agency. The supreme court has held that the APA provisions supplant prior inconsistent statutes addressing judicial review of specific agencies. In *Bi-Lo* the supreme court stated:

While we recognize the principle that repeal of a statute by implication is not favored, . . . we think the legislative intent to repeal the scope of review provisions of Section 42-17-60 [any evidence rule] is explicitly implied from the provisions of the later general Administrative Procedures Act and that Act's legislative history.<sup>159</sup>

In *Guerard v. Whitner*,<sup>160</sup> the supreme court concluded that all state boards and commissions are included within the terms of the APA unless expressly excluded by statute. The court held that the South Carolina Coastal Council was an "agency" as defined by section 1-23-310(1) because there were no "express legislative provisions to the contrary."<sup>161</sup>

In *Todd's Ice Cream, Inc. v. South Carolina Employment Security Commission*,<sup>162</sup> the court of appeals cited the line of supreme court cases holding the APA applicable to particular "agencies,"<sup>163</sup> along with the APA's provisions and legislative history, as "overwhelming evidence of the intent to repeal scope of review provisions" in statutes relating to a specific agency.<sup>164</sup>

The Commission, however, has continued to argue that it is

158. *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981)(South Carolina Coastal Council); *Schudel v. South Carolina Alcoholic Beverage Control Comm'n*, 276 S.C. 138, 276 S.E.2d 508 (1981)(South Carolina Alcoholic Beverage Control Comm'n); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981)(South Carolina Industrial Comm'n); *Parker v. South Carolina Dairy Comm'n*, 274 S.C. 209, 26 S.E.2d 38 (1980)(South Carolina Dairy Comm'n); *Todd's Ice Cream, Inc. v. South Carolina Employment Security Comm'n*, 281 S.C. 254, 315 S.E.2d 373 (Ct. App. 1984)(South Carolina Employment Security Comm'n); *Owen Steel Co. v. South Carolina Tax Comm'n*, 281 S.C. 80, 313 S.E.2d 636 (Ct. App. 1984)(Tax Board of Review).

159. 276 S.C. at 134, 276 S.E.2d at 306 (citations omitted).

160. 276 S.C. 521, 280 S.E.2d 539 (1981).

161. *Id.* at 524, 280 S.E.2d at 540.

162. 281 S.C. 254, 315 S.E.2d 373 (1984).

163. See cases cited *supra* note 158.

164. 281 S.C. at 257, 315 S.E.2d at 375.

not subject to the APA. To support this contention, the Commission cites section 12-47-50, which provides that "[t]here shall be no other remedy than those provided in this chapter"<sup>165</sup> in any case of illegal collection of taxes. This exclusivity provision, which dates back to 1870, must now, of course, be read to conform to the APA. Despite the Commission's claims to the contrary, the later, general APA controls.

The South Carolina Tax Commission was created by the legislature as a "commission" composed of three members,<sup>166</sup> who were to be appointed by the Governor with the advice and consent of the Senate.<sup>167</sup> The Commission is authorized by law to determine contested cases<sup>168</sup> and promulgate rules and regulations.<sup>169</sup> The Commission is also required to publish "its findings and decisions in all controversies resolved by it."<sup>170</sup> These characteristics plainly satisfy the APA's definitional requirements for an "agency." There should be no question, then, that the South Carolina Tax Commission is an "agency" within the intended coverage of the APA. It is unfortunate that for ten years the Commission has felt obliged to resist a statute that so obviously applies to it.

## IX. THE 1978 AMENDMENT

In 1978 the legislature added a new taxpayer remedy that is puzzling in both intent and effect. The legislation recites the legislative finding "that property taxes are sometimes assessed and collected when not lawfully due [and] that the remedies for the abatement or refund therefor are limited."<sup>171</sup> The legislative solution bypasses the Tax Commission entirely. The statute provides for the refund or abatement of what it calls an "incorrect property tax assessment or collection,"<sup>172</sup> and the provisions are expressly not applicable to "claims based upon the property's

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165. S.C. CODE ANN. § 12-47-50 (1976).

166. S.C. CODE ANN. §§ 12-3-10, -140 (1976).

167. *Id.* § 12-3-20.

168. *See, e.g., id.* §§ 12-3-220, -230, -440 (1976 & Supp. 1985).

169. *Id.* § 12-3-130 (1976).

170. *Id.*

171. An Act to Provide for the Abatement or Refund of Property Taxes That Are Assessed or Collected Erroneously, No. 509, 1978 S.C. Acts 1522 (codified at S.C. CODE ANN. §§ 12-47-70, -80, -90 (Supp. 1985)).

172. S.C. CODE ANN. § 12-47-70 (Supp. 1985).

valuation.”<sup>173</sup> The exact aim of the legislation is unclear.

In any event, the claim is to be submitted to the county auditor who will notify other specified financial officers. These officers can allow the claim or notify the taxpayer of an opportunity to be heard. After hearing, the officers are to determine whether the abatement or refund should be granted, and that determination “shall be binding and effective.”<sup>174</sup> The statute also identifies the funds from which any refund is to be made.<sup>175</sup>

The 1978 amendments were not intended as a comprehensive revision of taxpayer remedies. They do, however, show a clear legislative dissatisfaction with the way the Commission has handled refunds in the past.

## X. CONCLUSION

It seems clear to the author that justice has failed when technical rules deprive taxpayers of basic rights and when taxpayers incur great expense simply to obtain a hearing on the merits. It seems equally clear that this has happened often in the past and continues to happen today.

What taxpayers need is not complicated. They need the substantial equivalent of what they had following the Revolution and up to the time of the Civil War. They should be able to challenge a tax in court without first making payment of the disputed amount. They should be able to sue for a refund of taxes wrongfully paid without having to walk through a procedural minefield. It should be possible to provide what section 12-47-440 intended—a fair and impartial hearing for taxpayers of moderate means without the expense of going to court.

The requirements of payment under protest and suit within thirty days should certainly be abolished. Further, the requirement that a taxpayer exhaust his administrative remedies has proven, in practice, to be a trap for taxpayers and a source of confusion and delay. The *Meredith* case should be overruled.

The power to tax, as Chief Justice Moses wrote long ago, is the most extensive and unlimited power the legislature has. It is without restraint except by constitutional limitation. The state’s

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173. *Id.*

174. *Id.* § 12-47-80.

175. *Id.* § 12-47-90.

taxpayers are entitled to more security in the tenure by which they hold their property than they now have. The bench and bar should draft a fair and simple plan and present it to the people for their approval.

