



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE EXEMPT, INTERPRETIVE OR PROCEDURAL
RULE**

AGENCY: Tax Appeals TITLE-SERIES: 121-01
RULE TYPE: Procedural Amendment to Existing Rule: No Repeal of existing rule: Yes
RULE NAME: Rules of Practice and Procedure Before the West
Virginia Office of Tax Appeals
CITE STATUTORY AUTHORITY: 11-10A-20

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

July 21, 2023

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Andrew Pollack -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 121
PROCEDURAL RULE
WEST VIRGINIA OFFICE OF TAX APPEALS

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

§121-1-1. General.

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

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

1.3. Filing Date. -- June 21, 2023

1.4. Effective Date. -- July 21, 2023

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

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

1.7. Save for the specific provisions of Section 52 below, these rules apply equally to appeals of property taxes and all other taxes administered by the Tax Commissioner pursuant to Article 10 of Chapter 11 of the West Virginia Code.

§121-1-2. Definitions.

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

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

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

2.3. “Chief administrative law judge” means the individual appointed by the governor, as provided in W. Va. Code §11-10A-6, to be the chief executive officer of the office of tax appeals, until the individual resigns or is removed from office.

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

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

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

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

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

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

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

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

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

2.13. "Party" means any of the following:

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

2.13.2. Any intervenor permitted to intervene by the office of tax appeals; and

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

2.15. "Petition" includes an application, petition, demand for hearing, or variation of these terms as used in the applicable sections of laws administered by the tax commissioner and for which the office of tax appeals has jurisdiction under W. Va. Code §11-10A-8.

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

2.17. "Pleading" includes any of the following:

- 2.17.1. petition for appeal;
- 2.17.2. application for appeal;
- 2.17.3. motion;
- 2.17.4. brief;
- 2.17.5. proposed findings of fact and conclusions of law; and
- 2.17.6. any other similar document formally filed with the office of tax appeals.

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

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

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

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

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

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

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

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

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

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

3.2. Office location. The principal office of the office of tax appeals shall be in Charleston, West Virginia, located at 1012 Kanawha Blvd, East, Suite 300.

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

3.4. Mailing Address.

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

West Virginia Office of Tax Appeals
P.O. Box 2751
Charleston, WV. 25330-2751

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

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

§121-1-4. Timely filing.

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

4.2. Timely deposited in U.S. mail or with other private carrier. Any petition, statement or other document required to be filed within a prescribed period, or on or before a prescribed date, that is delivered by the United States mail or other private carrier to the office of tax appeals is timely filed if the item being sent has a mark (postmark or otherwise) showing the date the item was sent stamped on the envelope that is within the prescribed period or on or before the prescribed date for filing, and the envelope was deposited in the United States mail, or with the private carrier, postage prepaid, and properly addressed to the office of tax appeals.

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

§121-1-5. Computation of time.

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

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

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

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

5.2.3. If any act is required to be taken or completed no later than (or at least) a specified number of days before a date certain, then the earliest day of the period so specified shall not be included if it is a Saturday, Sunday, or a legal holiday in the state of West Virginia, and the earliest such day shall be the next preceding day which is not a Saturday, Sunday, or a legal holiday in this state. When a legal holiday falls on a Sunday, the next day shall be considered a holiday; and, when a legal holiday falls on a Saturday, the preceding day shall be considered a holiday.

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

§121-1-6. West Virginia legal holidays.

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

New Year's Day -- January 1.

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

President's Day -- Third Monday in February.

Memorial Day -- Last Monday in May.

Juneteenth -- June 19.

West Virginia Day -- June 20.

Independence Day -- July 4.

Labor Day -- First Monday in September.

Columbus Day -- Second Monday in October.

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

Veterans Day -- November 11.

Thanksgiving Day -- Fourth Thursday in November.

The Friday after Thanksgiving Day.

Christmas Day -- December 25.

6.2. Special rule. -- When a holiday described in subsection 6.1 falls on a Sunday, then the following Monday is the legal holiday. When the holiday falls on a Saturday, then the preceding Friday is the legal holiday. This subsection does not apply to primary, general or special election days in this state.

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

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

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

§121-1-7. Enlargement or reduction of time.

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

7.2. Continuances. -- As to continuances, see section 24 of this rule.

7.3. Briefs. -- Where the dates for filing briefs are fixed, an extension of time for filing a brief or the granting of leave to file a brief after the due date shall correspondingly extend the time for filing any other brief due at the same time and for filing succeeding briefs, unless the administrative law judge shall order otherwise.

§121-1-8. Office records.

8.1. Removal of records. -- No original record, paper, document, or exhibit filed with the office of tax appeals shall be taken from the hearing room or from the offices of the office of tax appeals or from the custody of an administrative law judge or employee of the office, except as authorized by an administrative law judge or except as may be necessary for the executive director to furnish copies or to transmit the same for appeal or other official purposes. With respect to return of exhibits after a decision of the office becomes final, see subdivision 38.2 of this rule.

8.2. Copies of Records.

8.2.1. Administrative decisions; with the exception of Property Tax Appeals.

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

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

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

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

8.3. Fees.

8.3.1. The executive director shall maintain a fee schedule showing the costs for per page copying and transcript preparations. Upon written request, any person seeking copies of documents from the Office of Tax Appeals may obtain a copy of the current fee schedule.

8.4. Destruction of records.

8.4.1. If an administrative decision is not appealed to the West Virginia Intermediate Court of Appeals, the record of the proceeding and any other documents and papers pertaining to the proceeding may be destroyed three years after the day the administrative decision was issued by the office of tax appeals.

8.4.2. If an administrative decision was appealed timely to a circuit court, or after July 1, 2022, was appealed to the West Virginia Intermediate Court of Appeals, the record of the proceeding and any other documents and papers pertaining to the proceeding may be destroyed six (6) years after the day the administrative decision was issued by the office unless a party to the proceeding notifies the office in writing that the administrative decision has not become final and that the decision is still subject to revision by a court. The records may then be destroyed six (6) months after the administrative decision is no longer subject to judicial review.

§121-1-9. Confidentiality of records and information.

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

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

§121-1-10. Proceedings not open to public.

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

§121-1-11. Seal; authenticating records; judicial notice.

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

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

§121-1-12. Payment of fees or charges.

12.1. Payments to the office of tax appeals for fees or other charges shall be made in United States currency, or by check, money order or other draft payable in United States currency that is made payable to the order of the "State of West Virginia". Payments shall be mailed or delivered to the executive director of the office of tax appeals in Charleston, West Virginia. The Office of Tax Appeals does not accept cash or credit cards for payments of any kind.

§121-1-13. Disability of administrative law judge.

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

or her discretion, order the matter reheard.

§121-1-14. Form and style of papers.

14.1. Caption, date, and signature required. -- All papers filed with the office of tax appeals shall have a caption, shall be dated, contain the Docket Numbers, (if known) and shall be signed.

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

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

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

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

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

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

§121-1-15. Docketing of cases.

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

15.1.1. Time-stamp all pleadings.

15.1.2. Assign an individual docket number to the proceeding.

15.1.3. Secure all original pleadings for safekeeping.

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

15.2. The docket number assigned to each case shall be the permanent number of the proceeding and shall be affixed by the parties to all future filings in the case.

§121-1-16. Appearances and representation of parties.

16.1. In general. -- A petitioner may appear before the office of tax appeals in his or her own behalf, or by a representative. When a Petitioner chooses to have the assistance of a representative they must sign a written waiver of the confidentiality provisions of West Virginia Code Section 11-10-5d. A Petitioner may use the West Virginia Tax Department form WV-2848 (designation of a power of attorney) to waive

confidentiality, or they may do so by signing the waiver of confidentiality that can be found attached to the petition. A petitioner may be represented, for example, by a lawyer qualified to practice law in this state (or by co-counsel of record so qualified); or by a certified public accountant; or by a registered public accountant; or by a person who is an enrolled agent for Internal Revenue Service purposes; or by virtually any other adult person.

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

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

16.3.1. While a person who is not authorized to practice law in this state may generally represent a petitioner before the office of tax appeals, that person may not engage in the unauthorized practice of law. Specifically, a representative may not appear on behalf of a Petitioner at any prehearing or evidentiary hearing. This does not prevent a representative such as a CPA from attending a hearing as a witness.

16.4. Visiting attorney.

16.4.1. Any person who has not been admitted to practice before the supreme court of appeals of West Virginia, but who is a member in good standing of the bar of the supreme court of the United States, the bar of the highest court of any other state in the United States, or the bar of the District of Columbia (which bar shall extend like privileges to members of the West Virginia state bar), shall be permitted to appear *pro hac vice* as a visiting attorney in a particular case, in association with a person admitted to practice before the West Virginia supreme court of appeals, and in good standing as a member of its bar, in accordance with rule 8.0 of the West Virginia rules for admission to the practice of law.

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

§121-1-17. Ex parte communications.

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

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

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

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

tax appeals.

§121-1-18. Commencement of proceedings.

18.1. Petition required. -- All proceedings before the office of tax appeals shall be commenced by timely filing with the executive director a written petition that meets the requirements of this section.

18.2. Form of petition.

18.2.1. A form for a petition is available from the office of tax appeals, upon request. The form is also available on the internet at www.taxappeals.wv.gov

18.2.2. A petition shall be prepared on letter-size paper (8 ½" x 11") by computer or typewriter, if possible. If a computer or typewriter is not available, the petition may be completed by handwriting that is legible (printing is preferred over cursive).

18.2.3. A petition shall include the following information:

18.2.3.a. The petitioner's name, including any "doing business as" name;

18.2.3.b. The petitioner(s) mailing address (street address and any post office box or drawer), e-mail address (if any), telephone number(s), and fax number (if any);

18.2.3.c. The type(s) of tax(es) involved or the specific nature of the non-tax matter involved (such as a charitable bingo license revocation);

18.2.3.d. The division, section, unit, or other organizational part of the state tax department that issued the notice of assessment, denied the claim for refund or credit, suspended or refused to issue the license or business registration certificate, or took any other action prompting the filing of the petition;

18.2.3.e. The date on which the petitioner received the written notice that prompted the filing of the petition;

18.2.3.f. If applicable, the taxable period(s) or year(s) involved and the amount of tax, additions, penalty, interest or other amount in controversy;

18.2.3.g. Separately numbered paragraphs stating, in clear, concise, and, as much as possible, specific terms, each and every material error, factual or legal, that the petitioner alleges has been made by the state tax department;

18.2.3.h. The specific relief sought by the petitioner(s);

18.2.3.i. If desired by the petitioner(s), a request that the matter, if eligible and approved by the office of tax appeals, be processed as a small claim case under section 51 of this rule;

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

18.2.3.k. Any necessary signatures regarding a waiver of the confidentiality provisions of West Virginia Code Section 11-10-5d.

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

18.2.3.m. It is not necessary that the petition be notarized.

18.3. Required attachment.

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

18.3.2. Exception. -- The only exception to subdivisions 18.3.1 is a petition for refund or credit that is filed because the state tax department failed to act on a claim for refund or credit. In this latter instance, a true copy of the claim for refund or credit shall be attached, along with evidence of the date the claim was filed with the state tax department, such as a certified mail return receipt card signed by an employee or agent of the state tax department.

§121-1-19. Filing of petition and other papers of the case.

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

19.2. U.S. mail/private carrier delivery. -- The petition, including the required copy and attachments, may be mailed, postage prepaid, to the office of tax appeals. A Petitioner may use the U.S. Postal Service or a private carrier (such as FedEx) may be used.

19.3. Timely mailing is timely filing. -- The earliest U.S. postmark date shown on the envelope or other wrapper is the date of filing. If the U.S. postmark date is illegible or missing, the date of physical receipt of the petition in the office of tax appeals is the date of filing.

19.4. Facsimile transmission. -- The petition may be filed by facsimile transmission to the office of tax appeals at (304) 558-1670. The Office of Tax Appeals fax machine operates 24 hours a day, seven (7) days a week. A document filed by fax shall be considered filed when it is received by the Office of Tax Appeals, as reflected on the fax transmission information from the OTA equipment. Any document received by eleven fifty-nine p.m., will be considered as received that day.

19.5. E-mail delivery. -- While the filing of a petition by email is permitted, petitioners should be aware that any email filing runs the risk of being seen by parties outside of the Office of Tax Appeals. The petition may be sent by e-mail to the executive director of the office of tax appeals at the following e-mail address: wvota@wv.gov. Under no circumstance will the Office of Tax Appeals accept an email as a petition. The petition and any attachments must be a Microsoft Word or Adobe Acrobat PDF attachment to the email. The Office of Tax Appeals will not accept attachments that are not Microsoft Word or Adobe Acrobat PDF.

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

19.7. Wrong address. -- If instead of mailing or otherwise delivering the petition to the office of tax appeals, the petitioner, or the petitioner's representative, causes the petition to be delivered to a place other than the office of tax appeals, such as, for example, the office of secretary of tax and revenue, the office of

state tax commissioner or another office in the state tax department, receipt by that office is not receipt by the office of tax appeals.

19.8. Filing of other papers in the case. -- Any pleadings, motions, notices, demands, briefs, appearances, letters or other similar documents or papers relating to a case before the office of tax appeals, may be filed in the same manner as the Petition, pursuant to Sections 19.1 through 19.4 as described above.

19.9. All papers filed with the Office of Tax Appeals should be prepared in the style of the case. Papers filed without basic information, such as name of the case, docket number or the filer's contact information run the risk of being misfiled and may delay proceedings in the matter. Additionally, all papers filed with the Office of Tax Appeals should be legible and if they are not, this too may delay proceedings in the matter.

19.9.1. Filing of other papers in the case by email. -- Except for motions to continue, under no circumstance will the Office of Tax Appeals accept an email as a pleading in a case. The pleading or paper must then be sent as a Microsoft Word or Adobe Acrobat PDF attachment to the email. However, the Office of Tax Appeals will accept a motion to continue via email.

§121-1-20. Service of papers.

20.1. When required. -- Except as otherwise required by this rule or directed by the office of tax appeals, all pleadings, motions, orders, decisions, notices, demands, briefs, appearances, or other similar documents or papers relating to a case or other proceeding before the office of tax appeals, also referred to as the papers in a case, shall be served on each of the parties or if the parties have an attorney or representative, the papers shall be served on them.

20.2. Manner of Service.

20.2.1. General.

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

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

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

20.2.1.d. Method of service.

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

20.2.1.d.2. By email. -- Service of document may be made by email directed to the party, or the party's representative of record. The parties are encouraged to generate a delivery receipt.

20.2.1.d.3. Alternative delivery. -- As an alternative to service by mail, service may be made by delivery to a party, or a party's representative of record.

§121-1-21. General rules of pleading.

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

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

§121-1-22. Amending the Petition.

22.1. Amendments.

22.1.1. A party may amend a Petition once, as a matter of course, at any time before the Tax Commissioner's answer is served.

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

22.1.3. Otherwise, a party may amend a Petition only by leave of the presiding administrative law judge or by written consent of the adverse party, and leave shall be given freely when justice so requires. However, no Petitioner may utilize this Section in an attempt to defeat a missed filing deadline. In all cases, original petitions, and amended, this Tribunal will follow West Virginia Code Section 11-10A-9 and look back sixty (60) days prior to receipt of the filing to determine if jurisdiction has been established. A motion for leave to amend a Petition shall state the reasons for the amendment and shall be accompanied by the proposed amendment. Any motion regarding amending a Petition shall be governed by the provisions of Section 23 below.

§121-1-23. Motions.

23.1. General. -- All requests to the office of tax appeals shall be made by written motion. Motions shall be served concurrently by the moving party on all other parties of record and proof of service shall be filed. Written opposition, if any, to motions shall be filed within seven (7) days after service. A stipulation requiring action by the office of tax appeals is treated as a motion.

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

23.3. Oral argument. -- Oral argument on motions shall be at the discretion, of the presiding administrative law judge.

§121-1-24. Continuances.

24.1. Continuances of hearings. -- Any party may request a continuance of a prehearing conference or evidentiary hearing, either orally, with all parties present, or by written motion. A continuance requested by written motion shall be filed pursuant to Section 19 above. If a party requesting a continuance obtains the consent of all other parties, and so states in their motion, the request will ordinarily be granted, unless the presiding administrative law judge has already advised the parties regarding the availability of further continuances. Continuances where all the parties are not in agreement or that have been filed without allowing the other party or parties an opportunity to respond are looked upon with disfavor. Continuance requests that do not comport with this Section and Section 19 will be treated as an unexcused absence. However, under no circumstance, will an unexcused absence from an evidentiary hearing be allowed.

24.2. Continuances of Status Conferences. -- The OTA will accept a motion to continue a status conference via email. Due to the large number of *pro se* litigants that appear before the Office of Tax Appeals, parties are generally allowed one unexcused absence from a status conference before this Tribunal will begin the process of dismissing the matter.

§121-1-25. Parties.

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

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

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

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

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

25.3.3. Order the proceedings consolidated; or

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

§121-1-26. Change or correction in party name.

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

§121-1-27. Depositions and discovery.

27.1. A party may obtain depositions and discovery for purposes of evidentiary hearings before the office of tax appeals by following Rules 26 through 37 (except Rule 35) of the West Virginia Rules of Civil Procedure. For these purposes, whenever the words "trial" or "court" are used in rules 26 through 34 and rules 36 and 37, they shall mean, respectively "evidentiary hearing" and "office of tax appeals."

§121-1-28. Stipulations for evidentiary hearing.

28.1. The parties in any matter before the West Virginia Office of Tax Appeals may attempt to stipulate to any relevant facts that they are able to agree on. If one party believes that a fact or facts cannot reasonably be disputed but the other party is unwilling to stipulate, the party so believing may move for entry of an order stipulating to the fact or facts. Any motion filed pursuant to this subsection shall adhere to the provisions in Section 23 above, regarding motions. Any party may request a hearing on a motion regarding stipulations and such a hearing will be granted at the discretion of the presiding administrative law judge. Once an order stipulating to a fact or facts is entered those facts shall be considered proven, both for the current proceeding and for any time period to which the fact or facts apply. However, in no circumstance shall stipulated facts be applied to dates, time periods or tax years after the date of the evidentiary hearing in the matter to which the stipulations are applied.

§121-1-29. Prehearing conference.

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

29.2. Filing of prehearing statement. -- Prehearing statements shall be filed on the following schedule:

29.2.1. The Petitioner's prehearing statement shall be due by the close of business thirteen (13) business days prior to the prehearing conference.

29.2.2. The respondent's prehearing statement shall be due by the close of business three (3) days prior to the prehearing conference.

29.2.3. It is preferable that the prehearing statement be filed with the executive director electronically, as a PDF or Microsoft Word document. However, paper copies of the prehearing statement will be accepted.

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

29.3.1. To specify all sum(s) in controversy and the particular issue(s) to which they relate.

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

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

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

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

29.3.6. To identify all witnesses.

29.3.7. To ascertain if there are issues involving the admission of any document(s) and to remind the parties, that absent extraordinary circumstances, no document(s) will be admitted during the evidentiary hearing that has not been shared with all parties.

29.3.8. To estimate the time required for hearing.

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

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

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

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

29.6. Failure to appear. -- Failure to appear at a duly scheduled prehearing conference may result in the dismissal of the appeal.

29.7. Exchange of documents and evidence. -- During the period between the prehearing conference and the evidentiary hearing (if not before) the parties shall exchange all documents and other evidence which will be introduced during the evidentiary hearing. Except for documents used for impeachment purposes, no document(s) will be admitted at the evidentiary hearing, that has not been shared with all parties. If a party feels that they have had insufficient time to review any particular document or other piece of evidence, they may, during the evidentiary hearing, advise the presiding administrative law judge, who will then rule on its admissibility. Documents or other evidence shared at the last minute, such as a day or two prior to the evidentiary hearing, will be looked upon with disfavor.

§121-1-30. Disposition without evidentiary hearing.

30.1. Prior to the evidentiary hearing, any party may file a motion, requesting that the presiding administrative law judge issue a decision in their favor. The motion shall be based upon either stipulated facts or upon what the moving party contends are uncontroverted facts. Such motion shall be filed at least twenty-one (21) days prior to the evidentiary hearing. The party opposing such a motion shall have fourteen (14) days to file a response.

30.2. The parties may jointly move to have any matter decided based upon stipulated facts and the filing of legal briefs. In such a circumstance, the parties shall, in writing, inform the presiding administrative law judge of their desire to have the matter decided in this manner, and shall request a briefing schedule. In addition to the legal briefs, the parties shall provide a separate copy of the stipulated facts.

§121-1-31. Dismissal.

31.1. Pursuant to West Virginia Code Section 11-10A-12, the presiding administrative law judge may, upon the motion of any party, or upon his or her own motion, dismiss a matter at any time, including for the failure of a party to properly prosecute an appeal or to comply with this rule or any order of the office of tax appeals or for other cause which the presiding administrative law judge deems sufficient. Any motion filed by any party requesting dismissal shall state the grounds upon which it is based and shall comply with the provisions of Sections 19 and 23 above regarding the filing of motions.

§121-1-32. Notice of hearing.

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

§121-1-33. Place of evidentiary hearing.

33.1. All in person hearings shall be held at the Office of Tax Appeals offices in Charleston, West Virginia.

33.2. Special needs. -- A person who has a disability and who needs to be accommodated for effective participation in a hearing shall inform the Office of Tax Appeals at the time of the filing of the Petition, by filling out lines 27 & 28 of the Petition for Appeal or lines 26 & 27 of the Petition for Property Tax Appeal.

§121-1-34. Proceedings conducted by videoconferencing.

34.1. General. -- At the discretion of the chief administrative law judge, the office of tax appeals may utilize videoconferencing to conduct any evidentiary or non-evidentiary hearing, prehearing conference or other proceeding before the office of tax appeals, and may permit any witness to testify or be deposed by videoconferencing.

34.2. Documents. -- All documents which the parties intend on introducing during a hearing conducted via videoconferencing shall be provided to the presiding administrative law judge and to all parties prior to the hearing. Any document filed in a proceeding conducted by videoconferencing may be transmitted by electronic facsimile; signatures on a document transmitted by electronic facsimile shall have the same force and effect as original signatures.

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

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

34.4.1. The person(s) communicating must be able to simultaneously see and speak to one another;

34.4.2. The signal transmission must be live;

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

34.4.4. Any other standards established by the West Virginia Supreme Court of Appeals for videoconferencing systems used in judicial proceedings in this state.

§121-1-35. Consolidation; separate evidentiary hearings.

35.1. Consolidation.

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

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

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

§121-1-36. Evidentiary hearings in cases, other than small claim cases.

36.1. In all cases, except small claim cases to which the provisions of section 51 of this rule apply, the chief administrative law judge shall schedule a hearing for a date that is within forty-five (45) days after the due date of the tax commissioner's answer to the petition.

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

36.3. The chief administrative law judge shall notify the parties of the date, time, and place of the hearing by a written notice served at least twenty (20) days in advance of the hearing. If a matter has been continued at the request of either party then the notice provisions of this subsection shall not apply to any subsequently scheduled evidentiary hearings.

§121-1-37. Conduct of hearing.

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

37.2. Recording of evidence at hearing.

37.2.1. The evidence at a hearing, except small claim hearings to which the provisions of section 58 of this rule apply, will be recorded by an audio recording device suitable for use in court proceedings in this state or will be stenographically reported and transcribed by a qualified court reporter selected by the office of tax appeals.

37.2.2. If the presiding administrative law judge deems it necessary, a transcript of the evidentiary hearing shall be prepared and the parties shall share the cost of preparation of the transcript.

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

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

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

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

37.6. At the hearing, the parties may:

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

37.6.2. Introduce exhibits;

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

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

37.6.5. Rebut any evidence against them.

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

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

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

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

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

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

37.13. Stipulations. -- Any time prior to the evidentiary hearing the parties are able, if they so desire, to provide this Tribunal with stipulated facts.

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

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

37.15. Legal briefs, or proposed findings of fact and conclusions of law.

37.15.1. The administrative law judge may order the parties to file legal briefs, or proposed findings of fact and conclusions of law within the time permitted by the administrative law judge.

37.15.2. A party filing a legal brief, or proposed findings shall serve a copy on the other party at the time the brief or findings are submitted to the administrative law judge and proof of service on the other party shall be attached.

§121-1-38. Evidence.

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

38.1.1. Ordinarily, witness testimony will be presented in person before the presiding administrative law judge. Any party desiring to present witness testimony that has been prerecorded or will be presented via telephone shall file a motion so requesting. Any motion making such a request shall comport with the provisions of Sections 19 and 23 above.

38.2. Return of exhibits. -- A party desiring the return at such party's expense of any exhibit belonging to the party, shall, within ninety (90) days after all possible appeal periods have expired, make written application to the executive director, suggesting a practical manner of delivery. If the application is not timely made, the exhibits in the case will be retained with the rest of the case file and handled according to the Office of Tax Appeals record retention policy.

38.3. Interpreters. -- The parties ordinarily will be expected to make their own arrangements for obtaining and compensating interpreters. However, pursuant to Sections 19 and 23 above, any party may file a motion, challenging another party's choice of interpreter.

§121-1-39. Exceptions unnecessary.

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

§121-1-40. Exclusion of proposed witnesses from hearing room until called to testify.

40.1. Exclusion. -- At the request of a party, the presiding administrative law judge shall order witnesses excluded from the hearing room so that they cannot hear the testimony of other witnesses. The presiding administrative law judge may also make the order on his or her own motion.

§121-1-41. Subpoenas for persons, papers or other tangible things.

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

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

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

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

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

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

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

41.5. Proof of service.

41.5.1. Except as provided in subdivision 41.5.2, proof of service of a subpoena or subpoena duces tecum shall be made to the executive director of the office of tax appeals by written statement of the date and manner and the name of the person served, that is certified by the person who made the service.

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

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

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

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

41.7. Duties in responding to a subpoena duces tecum.

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

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

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

§121-1-42. Failure to appear or to adduce evidence.

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

§121-1-43. Record of proceedings.

43.1. General. -- Evidentiary hearings before the office of tax appeals shall be recorded or otherwise reported, and a transcript thereof shall be made, and the parties shall share equally in the cost of transcription.

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

§121-1-44. Legal briefs.

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

44.2. Time for Filing Briefs. -- Briefs may be filed simultaneously or seriatim, as the presiding administrative law judge directs.

44.3. Additional rules for briefs.

44.3.1. Extension of time. -- A motion for extension of time for filing any brief shall be made in writing prior to the due date and shall recite that the moving party has advised the party's adversary and whether or not the adversary party objects to the motion. As to the effect of extensions of time, see section 7.3 of this rule.

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

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

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

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

44.5. Service of decision. -- Written notice of decisions, shall be served upon the parties by certified mail. Service of notice of decisions or by certified mail is valid if accepted by the party, or if addressed to

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

§121-1-46. Computation by parties for entry of decision.

46.1. Agreed computations.

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

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

46.1.3. After receipt of the subdivision 46.1.2 filing, the office of tax appeals will then enter its decision.

46.2. Procedure in absence of agreement.

46.2.1. If the parties are not in agreement as to the amount of the liability or overpayment to be entered in the decision in accordance with the findings and conclusions of the office of tax appeals, then they both shall file, and serve upon the other party, their proposed calculations, along with an explanation of how the calculations were arrived at. In the case of an overpayment, the computation shall also include the amount and date of each payment made by the petitioner(s).

46.2.2. If, in accordance with subdivision 46.2. of this section, computations are submitted by the parties which differ as to the amount to be entered as the decision of the office of tax appeals, then the parties may, at the office of tax appeals discretion, be afforded an opportunity to be heard in argument thereon and the office of tax appeals will determine the correct liability or overpayment and will enter its decision accordingly.

46.3. Limit on argument. -- Any argument under subdivision 46.2.2 of this section shall be confined strictly to consideration of the correct computation of the deficiency, liability, or overpayment resulting from the findings and conclusions made by the office of tax appeals. No argument will be heard upon or consideration given to the issues or matters disposed of by the office of tax appeals findings and conclusions or to any new issues. This section may not be regarded as affording an opportunity for retrial or reconsideration.

§121-1-47. Publication of administrative decisions, except small claim decisions.

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

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

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

§121-1-48. Harmless error.

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

§121-1-49. Motion to correct clerical or computational mistakes, reopen the record, request reconsideration or vacate decision.

49.1. General. -- within twenty (20) days after receipt of a final decision in any matter, any party may file a motion to:

49.1.1. correct clerical or computational mistakes,

49.1.2. reopen the record,

49.1.3. request reconsideration of findings or opinion,

49.1.4. vacate decision and hold new hearing.

49.2. The only grounds upon which a motion to reopen the record will be heard are:

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

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

49.3. A motion to vacate decision and hold a new hearing shall demonstrate good cause as to why a new hearing shall be held. For purposes of this section, "good cause" means any of the following:

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

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

49.3.3. Fraud; or

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

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

49.5. Reply to motion. -- The opposing party may file a response to any motion filed under this

section. Such response must be in the hands of the other parties and the Office of Tax Appeals at least twenty-four (24) hours prior to any hearing to hear the motion.

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

§121-1-50. Preparation of the record on appeal.

50.1. General. -- Upon receiving written notice of any appeal by a party from a decision or other final order of the office of tax appeals, to the West Virginia Intermediate Court of Appeals, the office of tax appeals shall be responsible for seeing that the record of the case is prepared for submission to the intermediate court of appeals pursuant to the provisions of West Virginia Code Section 29A-5-4.

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

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

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

50.2.2.a. Petitions,

50.2.2.b. Pleadings,

50.2.2.c. Notices,

50.2.2.d. Stipulation,

50.2.2.e. Motions,

50.2.2.f. Briefs,

50.2.2.g. Intermediate rulings,

50.2.2.h. The decision or order being appealed,

50.2.2.i. The original transcript(s) of the hearing(s), and

50.2.2.j. Original exhibits.

50.3. Payment of costs. -- The reasonable cost of preparing the record for transmission to the Intermediate Court of Appeals shall be paid by the party appealing. If both parties appeal to the Intermediate Court of Appeals the reasonable cost of preparing the record shall be shared equally by both parties. Any party to the Intermediate Court of Appeals appeal will be provided with a copy of the Office of Tax Appeals' record, upon a written request and payment of the cost of copying the same.

50.4. Index of record. -- At the time the executive director forwards the record on appeal to the clerk of the Intermediate Court of Appeals, the executive director shall forward to each of the parties a copy of the index to the record on appeal.

§121-1-51. Small claim cases.

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

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

51.2.1. With the exception of Property Tax Appeals, those cases in which the amount in controversy does not exceed ten thousand dollars (\$10,000) for any one taxable year. For this purpose, the "amount in controversy" means the total amount of tax and any additions or penalties, but excluding interest, for any one taxable year that is in controversy.

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

51.3.1. The nature of the case;

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

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

51.4. Answer. -- Within five (5) days of receipt of a timely filed petition pursuant to subsection 51.3 of this section, the executive director of the office of tax appeals shall provide the tax commissioner with a copy of the small claim petition. The tax commissioner shall file a written answer to the petition within forty (40) days of his or her receipt of the petition. The answer shall succinctly state:

51.4.1. The nature of the case;

51.4.2. The facts relied upon by the commissioner; and

51.4.3. An answer to each question presented for review.

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

51.6. Appearance and representation.

51.6.1. Petitioner. -- The provisions of West Virginia Code Section 11-10A-15 shall govern appearances in small claims cases. Specifically, the petitioner may appear before the office of tax appeals in his or her own behalf, or may be represented by an attorney or by any other person as he or she may choose. However, in no circumstances shall any person be permitted to conduct the unauthorized practice of law.

51.6.2. Tax commissioner. -- In a small claim case, the state tax department will ordinarily not be represented by legal counsel. The state tax department may be represented in a small claim case by an

employee of the department who is not a lawyer but who is familiar with the facts of the case.

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

51.8. Scheduling of hearing. -- The office of tax appeals will not schedule a hearing in a small claim case, until the petitioner or the state tax department advises the administrative law judge that the issues in controversy cannot be resolved without a hearing.

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

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

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

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

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

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

51.12.3. A small claim hearing will not be recorded.

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

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

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

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

51.14. Time for issuance of decision. -- The administrative law judge shall issue the small claim

decision within ninety (90) days after the case was fully submitted for decision, that is, within ninety (90) days after the case was fully submitted on documents only, or within ninety (90) days after any small claim hearing was held and any and all post hearing evidentiary submissions (and any post hearing submissions of written argument) were received by the office of tax appeals.

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

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

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

51.16. No precedential value. -- A decision in a small claim case is not precedent for any other contested matter.

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

121-52-1. Property Tax Appeals.

52.1. Style of property tax cases.

52.1.1. If an appeal is brought pursuant to West Virginia Code Section §11-3-15i, the case shall be styled "Taxpayer Name" v. "_____, Assessor of _____ County".

52.1.2. If an appeal is brought pursuant to West Virginia Code Section §11-3-24a, or West Virginia Code Section §11-3-23a(c), the case shall be styled either "Taxpayer Name" v. "_____, Assessor of _____ County" or "Taxpayer Name" v. "_____, as State Tax Commissioner of West Virginia."

52.1.3. If an appeal is brought pursuant to West Virginia Code Section §11-3-23a(d), the case shall be styled "Taxpayer Name v. _____, as State Tax Commissioner of West Virginia."

52.1.4. If an appeal is brought pursuant to West Virginia Code Section §11-3-24, the case shall be styled "Taxpayer Name" v. "County Commission of _____ County."

52.2. Unauthorized practice of law not allowed.

52.2.1. Pursuant to West Virginia Code Section §11-10A-15, during the pendency of any property tax appeal, and prior to any property tax prehearing conference or evidentiary hearing, any party may be represented by any person he/she/it may choose. However, pursuant to West Virginia Code Section §11-10A-15(b), the unauthorized practice of law before the Office of Tax Appeals is not allowed. As such, at any prehearing or evidentiary hearing in a property tax case, the Tax Commissioner, Assessor, or County Commission must be represented by an attorney licensed to practice law in West Virginia, or an attorney admitted *pro hac vice*. Additionally, unless the property owner is an individual, married couple or sole proprietor, they too must be represented by counsel as described above.

52.3. Payment of taxes while appeal is pending.

52.3.1. All taxes levied and assessed against the property for the year in which the protest or an

appeal has been filed shall be paid before they become delinquent. If the taxes are not paid by May 1st after the property tax year in question, the Office of Tax Appeals shall, pursuant to West Virginia Code Section §11-3-25a, dismiss any appeal concerning property so delinquent.