SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

LORRAINE ASSOCIATES, L.L.C.,	)
Plaintiff,	)
vs.	) **CASE NO. ST-15-CV-438**
GOVERNMENT OF THE VIRGIN ISLANDS and IRA MILLS, in his official capacity as Tax Assessor,	)
Defendants.	)

MEMORANDUM OPINION

Pending before the Court is Defendants' Motion to Dismiss for Lack of Jurisdiction. Because the action arises under 5 V.I.C. § 80, the Court has subject matter jurisdiction under 4 V.I.C. § 76. Consequently, Defendant's motion will be denied.

RELEVANT FACTUAL & PROCEDURAL HISTORY

On September 10, 2015, Plaintiff Lorraine Associates, L.L.C. ("Lorraine") filed a Complaint against Defendants Government of the Virgin Islands ("Government") and Ira Mills, in his official capacity as Tax Assessor ("Tax Assessor"), in connection with Defendants' allegedly unlawful assessment and issuance of property taxes against commercial property owned by Plaintiff. In pertinent part, the Complaint alleges that Plaintiff owns real property located at 20 & 21-A Estate Plessen, Frederiksted, St. Croix, that is operated as "Section 8 low income housing."[1] Plaintiff asserts that the property was assessed at $3,339,300.00 in 2012, but that in 2013 the Tax Assessor assessed the property at $12,344,300.00, thereby increasing the assessed value of the property by "roughly 400% . . . in a single year . . . despite the condition of the [property] and its

[1] Compl. ¶¶ 6-7.

use being materially unchanged between 2012 and 2013" and the decline of St. Croix's real estate market during that year.[2] The assessment of $12,344,300.00 was allegedly "carried over" by the Tax Assessor for the tax years of 2014 and 2015, and Plaintiff did not receive the 2015 tax bill until "late August, 2015."[3]

Plaintiff instituted an administrative appeal on December 22, 2014, by filing "a formal Tax Appeal with the Board of Tax Review."[4] According to Defendants, the day after Plaintiff filed the Complaint in this action, a hearing on Plaintiff's appeal was held before the Board of Tax Review on September 11, 2015, and on September 14, 2015, the Board of Tax Review issued a decision changing the assessment of the property to $10,500.00,[5] though Plaintiff contends it did not receive notice of this decision and only learned of its existence after it was submitted by Defendants as an exhibit during the course of these proceedings.[6]

In the Complaint, Plaintiff invokes the Court's jurisdiction under 5 V.I.C. § 80, the Virgin Islands taxpayer statute, and 4 V.I.C. § 76, and claims that Defendants have failed to comply with its numerous requests for information regarding the Tax Assessor's methodologies and standards for assessing real property under the International Association of Assessing Officer ("IAAO") standards, *inter alia*, including informal requests made by Plaintiff's attorney and formal requests made under the Open Records Act, 3 V.I.C. §§ 881 – 884,[7] and through the administrative appeals process.[8] From these allegations, the Complaint asserts four counts against Defendants: (1) a declaration that Defendants have denied Plaintiff due process under the Fourteenth Amendment to

[2] Compl. ¶ 8.
[3] *See* Compl. ¶¶ 8, 10.
[4] Compl. ¶¶ 27-32.
[5] Def.'s Mot. to Dismiss, Ex. 1, September 14, 2015, Decision of the Board of Tax Review.
[6] *See* Defs.' Mot. to Dismiss, p. 6.
[7] Compl. ¶¶ 22-33.
[8] Compl. ¶¶ 26-29.

the Constitution of the United States by failing to disclose, produce, and/or promulgate rules and regulations necessary to implement the standards of the IAAO when assessing property;[9] (2) a declaration that Plaintiff has the right to view, and the Tax Assessor has the obligation to provide and produce, the methodology utilized in assessing Plaintiff's property, including evidence of the Tax Assessor's adherence to the IAAO standards through promulgated rules and regulations. In the absence of adherence, Plaintiff seeks a declaratory judgment that the Tax's Assessor's failure to do so is unlawful and violates Plaintiff's due process rights. Plaintiff also seeks a declaratory judgment against the Tax Assessor that the mailing of the 2015 tax bill after May 15, 2015, is unlawful in violation of 33 V.I.C. § 2412, as amended by Act. No. 7751, and that administrative proceedings before the Board of Tax Review are not an exclusive remedy requiring exhaustion before instituting this suit;[10] (3) an injunction prohibiting the Tax Assessor from assessing Plaintiff's property beyond the level of 2012 unless and until the Tax Assessor provides the requested information regarding its assessment, as well as an Order staying or relieving Plaintiff from participating in the proceedings before the Board of Tax Review or having to recognize the purportedly untimely 2015 tax bill;[11] and (4) enforcement of Plaintiff's right to examine the Tax Assessor's records through its public records requests under 3 V.I.C. § 881, whether it be by way of injunction, writ of mandamus, or other means.[12]

On September 11, 2016, the day after filing the Complaint, Plaintiff filed a Motion to Stay Proceedings Before the Board of Tax Review.[13] Defendants filed an Answer on December 16,

[9] Compl. ¶¶ 34-36.
[10] Compl. ¶¶ 37-44.
[11] Compl. ¶¶ 45-49.
[12] Compl. ¶¶ 50-53 (requesting "the Court enter an appropriate method of enforcement of [Lorraine's] right to examine the records by mandamus or injunction or other remedy pursuant to 3 V.I.C. § 881 (e)").
[13] *See* Plaintiff's September 11, 2015, Motion to Stay.

2015, but did not respond to Plaintiff's Motion to Stay.[14] Plaintiffs then filed a Motion for Expedited Consideration of Request for Partial Preliminary Injunction ("Motion for Partial Preliminary Injunction") on January 20, 2016, seeking a preliminary injunction on a portion of the injunctive relief requested in Count III of the Complaint. Specifically, Plaintiff requests in its Motion for Partial Preliminary Injunction that the Court issue an Order "[s]taying the legal effect of the 2015 real property tax bill and all tax bills issued for its [p]roperty during the pendency of this action, to include (1) suspending the accrual of penalties and interest thereon; (2) staying the running of the appeal date thereon, pending final adjudication in this matter; (3) staying all proceedings of the Board of Tax Review on its pending appeals during the pendency of this matter; and (4) set [sic] the most prompt possible hearing date available to the Court."[15]

In a Memorandum Opinion entered on March 22, 2016, the Court granted Plaintiff's Motion for Partial Preliminary Injunction in part as to Plaintiff's request for a prompt hearing. An evidentiary hearing on Plaintiff's motion was held on May 17, 2016, and June 1, 2016.

On May 25, 2016, Defendants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. Plaintiff filed an Opposition on July 1, 2016, to which Defendants replied on July 15, 2016.

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[14] Defendants note in their Opposition that "[o]n January 22, 2016, this Court entered an order directing Defendant to respond to Plaintiff's Motion to Stay Proceedings Before the Board of Tax Review by February 3, 2016. However, by that date the Plaintiff's appeal to the Board was concluded." Defs.' Opp'n to Pl.'s Mot. for Expedited Consideration of Request for Partial Prelim. Inj., p. 4 n. 7.

[15] Mot. for Expedited Consideration of Request for Partial Prelim. Inj., p. 8. Defendants filed a timely Opposition to Plaintiff's Motion for Expedited Consideration of Request for Partial Preliminary Injunction on February 9, 2016. *See* January 22, 2016, Order. Though Plaintiff filed its reply one day late, the Court accepted the untimely filing in a Memorandum Opinion entered on March 22, 2016. *See* February 24, 2016, Order; March 22, 2016, Mem. Op.

STANDARD

The Court applies Fed. R. Civ. P. 12(b)(1) when considering motions to dismiss for lack of subject matter jurisdiction.[16] "The applicable standard of review under Rule 12(b)(1) differs depending on whether the moving party has made a facial attack or a factual attack on the court's power to hear the case."[17] A facial attack "is an argument that considers a claim on its face and asserts that it is insufficient to invoke the subject matter jurisdiction of the court based on a jurisdictional defect."[18] "Under a facial attack, 'the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff[,]'" the same standard applicable to motions to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).[19]

Conversely, the moving party makes a factual attack by "disput[ing] the existence of certain jurisdictional facts alleged by [the] plaintiff."[20] However, "[a] factual attack to the Court's subject matter jurisdiction may only occur after the allegations of the complaint have been controverted."[21] When considering a factual attack, the Court has discretion to examine and weigh "other relevant evidence outside the pleadings to determine the existence of jurisdiction"[22] and "its

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[16] In the absence of a local statute, case law, or Superior Court of the Virgin Islands rule addressing the issue adequately, the Federal Rules of Civil Procedure are applicable to the Superior Court through SUPER. CT. R. 7. *See Vanterpool v. Gov't of the Virgin Islands*, 63 V.I. 563, 576 (V.I. 2015) (citing *Sweeney v. Ombres*, 60 V.I. 438, 442 (V.I. 2014)).
[17] *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *6 (V.I. Super. Ct. June 25, 2015) (citing *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).
[18] *Id.* at *6-7 (citing *Constitution Party of Pennsylvania v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014)) (internal quotation marks omitted).
[19] *Id.* at *7 (citing *Constitution Party*, 757 F.3d at 358; *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012)).
[20] *Id.*
[21] *Id.* at *7-8 (citing *Mortensen*, 549 F.2d at 892, n. 17 ("A factual jurisdictional proceeding cannot occur until plaintiff's allegations have been controverted.")); *see also Askew v. Church of the Lord Jesus Christ*, 684 F.3d 413, 417 (3d Cir. 2012) ("As the defendants had not answered and the parties had not engaged in discovery, the first motion to dismiss [for lack of subject matter jurisdiction] was facial.")).
[22] *Northshore Realty, Inc. v. First Bank*, 2014 V.I. LEXIS 65, *7-8 (V.I. Super. Ct. Aug. 18, 2014) (citing *Ference v. V.I. Family Sports & Fitness Center, Inc.*, 45 V.I. 345, 350 (V.I. Super. Ct. 2004) (other citations omitted).

power to hear the case."[23] Under a factual attack, "no presumptive truthfulness attaches to plaintiff's allegations and the existence of disputed issues of material fact will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims."[24] "[T]he burden of proving the existence of subject matter jurisdiction [under a factual attack] lies with the plaintiff."[25]

Regardless of whether the motion constitutes a facial or factual attack, "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."[26] "Any such dismissal should be without prejudice because a determination that subject matter jurisdiction is lacking does not constitute a decision on the merits of the case."[27]

Here, Defendants filed their Motion to Dismiss for Lack of Jurisdiction after filing an Answer to the Complaint. In addition, the parties have submitted exhibits in relation to Plaintiff's Motion for Partial Preliminary Injunction. Therefore, the Court will consider Defendants' Motion to Dismiss as a factual attack and Plaintiff will bear the burden of proving the existence of subject matter jurisdiction and the Court may weigh the relevant evidence in determining the merits of Defendants' jurisdictional claims.

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[23] *James-St. Jules*, 2015 V.I. LEXIS 74, *7 (citing *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000)).
[24] *Northshore*, 2014 V.I. LEXIS 65, at *7 (citing *Mortensen, supra*, 549 F.2d at 891).
[25] *James-St. Jules*, 2015 V.I. LEXIS 74, at *7 (citing *Carpet*, 227 F.3d at 69) (internal quotations omitted).
[26] FED. R. CIV. P. 12(h)(3). FED. R. CIV. P. 12 (h)(3) provides the procedural mechanism for dismissing a case for lack of subject matter jurisdiction during the course of the proceedings. While the Supreme Court of the Virgin Islands has discussed the issue, it has not delineated a specific procedure, apart from that delineated in the Federal Rules of Civil Procedure, nor is the procedure addressed by the Superior Court Rules. *Vanterpool*, 63 V.I. at 576 (citing *Sweeney*, 60 V.I. at 442); *See Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 187 (V.I. 2009) ("[S]ubject matter jurisdiction which can be raised and addressed by the court at anytime") (citations omitted); *In re Guardianship of Smith*, 54 V.I. 517, 526 (V.I. 2010) ("[I]f a court lacks jurisdiction, its order and all subsequent orders are void and need not be followed") (citations omitted).
[27] *Dennie v. Government*, 55 V.I. 1237, 1246-47 (D.V.I. App. Div. 2011).

ANALYSIS

The principle of judicial economy requires the Court to resolve doubts about its subject matter jurisdiction before proceeding with a case on its merits.[28] Consequently, it is necessary to address Defendant's Motion to Dismiss for Lack of Jurisdiction before ruling on Plaintiff's pending Motion for Partial Preliminary Injunction. Defendants argue that the Court lacks subject matter jurisdiction over this action because Plaintiff failed to avail itself of the exclusive administrative remedy for challenging the Tax Assessor's assessment of real property by pursuing, to conclusion, an appeal with the Board of Tax Review under the procedure set forth in 33 V.I.C. §§ 2451 – 2456. In contrast, Plaintiff argues this administrative appeals process is a non-exclusive remedy that does not deprive the Court of subject matter jurisdiction because the Court is authorized to hear this case under the Virgin Islands taxpayer statute, 5 V.I.C. § 80, or, alternatively, that exhaustion of its administrative remedies is futile.

4 V.I.C. § 76 "broadly confers the Superior Court with original jurisdiction in all civil actions."[29] In addition, the Superior Court also has jurisdiction under 5 V.I.C. § 80 over taxpayer suits against "the Government or one of its officers or employees to prevent a violation of the law."[30] However, the doctrines regarding the exhaustion of administrative remedies and primary jurisdiction may affect the Court's willingness or authority to hear a case. Under the exhaustion of administrative remedies doctrine, "plaintiffs suing government agencies may be statutorily or judicially required to first exhaust any available administrative remedies before seeking redress

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[28] *See Abednego v. St. Croix Alumina, LLC*, 63 V.I. 153, 178-179 (Super. Ct. 2015) (discussing federal courts' custom of addressing issues regarding subject matter jurisdiction first before reaching the merits of a case).
[29] *V.I. Narcotics Strike Force v. Gov't of the V.I. Pub. Emples. Rels. Bd.*, 60 V.I. 204, 216 (V.I. 2013) (citing 4 V.I.C. § 76).
[30] *Haynes v. Ottley*, 61 V.I. 547, 567 (V.I. 2014) (citations omitted).

through the Court."[31] Similarly, "[t]he doctrine of primary jurisdiction ... is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties."[32] The difference is

> "'[e]xhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."[33]

A. Exhaustion of Administrative Remedies.

Defendants contend that the exhaustion doctrine applies because Plaintiff's claims are cognizable in the first instance only through the administrative appeals process set forth in 33 V.I.C. §§ 2451 – 2456, a specific statutory scheme that "precludes a cause of action under the more general provisions of [5 V.I.C. § 80]."[34] Neither the Superior Court nor the Supreme Court of the Virgin Islands have specifically addressed the interplay between 5 V.I.C. § 80 and the statutory scheme under 33 V.I.C. §§ 2451 – 2456.

Defendants are correct that the Supreme Court of the Virgin Islands has held that "specific statutes establishing comprehensive schemes for attaining judicial review in particular types of cases supplant statutes that broadly confer general jurisdiction."[35] However, contrary to Defendants' suggestion, the Supreme Court of the Virgin Islands has never held that specific

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[31] *Pate v. Gov't of the V.I.*, 62 V.I. 271, 288 (V.I. Super. Ct. 2015).
[32] *V.I. Conservation Soc'y v. Golden Resorts, LLLP*, 55 V.I. 613, 620 (V.I. 2011).
[33] *Id.* (citing *United States v. Western Pacific R. Co.*, 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126, 135 Ct. Cl. 997 (1956)); *See Klotzbach v. V.I. Water & Power Auth.*, 2016 V.I. LEXIS 28, *5-6 (V.I. Super. Ct. Mar. 29, 2016) (discussing the doctrines of exhaustion and primary jurisdiction).
[34] Defs.' Mot. to Dismiss, p. 5.
[35] *V.I. Narcotics Strike Force*, 60 V.I. at 216 (citations omitted).

statutory schemes for attaining judicial review automatically deprive the Court of subject matter jurisdiction.[36] Rather, to "conclude that the Legislature intended to make a particular statutory requirement jurisdictional, ... [the Court] must find that the Legislature's intent to do so is 'clear.'"[37] In order to ascertain legislative intent, the Court must interpret 33 V.I.C. §§ 2451 – 2456 and 5 V.I.C. § 80 by applying the rules of statutory construction,[38] and, since both 33 V.I.C. §§ 2451 – 2456 and 5 V.I.C. § 80 pertain to grievances of taxpayers, the Court must also apply the following rules governing the interpretation of statutes that "touch on the same subject."[39] According to the Supreme Court of the Virgin Islands,

> "the more specific statute takes precedence over the more general one, unless it appears the Legislature intended for the more general to control," or for both statutes to apply concurrently.[40] ... In other words, when two statutes touch on the same subject, "we give effect to both unless doing so would be impossible."[41] ... [This is because] the Virgin Islands Legislature, when enacting a new law, is deemed to have knowledge of existing law[42] . . . [and thus] is presumed to intend for the new law to operate in harmony with existing statutes and common law.[43] ... [As a result] it is presumed that the Legislature ... would not enact superfluous statutes, or statutes that directly contradict each other, but instead intended for each

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[36] *See United Corp. v. Hamed*, 64 V.I. 297, 304 (V.I. 2016). In fact, the Supreme Court of the Virgin Islands recently clarified that its discussions under the precept have largely focused on the issue of "standing" to seek judicial relief "in the context of statutes granting rights to particular individuals in various contexts[,]" which "goes to the merits of the cause of action — not the Superior Court's authority to hear the case in the first place." *Id.* (internal and other citations omitted).

[37] *Brooks v. Gov't of the V.I.*, 58 V.I. 417, 424 (V.I. 2013) (citations omitted).

[38] Statutory interpretation is governed by the "Rules of Construction." 1 V.I.C. §§ 41 – 52. The Supreme Court of the Virgin Islands has described the standard for statutory interpretation, as follows:

> "The first step when interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning. If the statutory language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed. In analyzing a statutory scheme, we must give effect to every provision, making sure to avoid interpreting any provision in a manner that would render it — or another provision — wholly superfluous and without an independent meaning or function of its own. But even where a statutory scheme is plain and internally consistent, no statute should be read literally if such a reading is contrary to its objective [and] this Court must consider whether applying the statute's literal language leads to ... absurd consequences or is otherwise inconsistent with the Legislature's intent."

In re L.O.F., 2015 V.I. Supreme LEXIS 13, *8-9 (V.I. 2015) (internal and other citations omitted).

[39] *Haynes*, 61 V.I. at 561.

[40] *Id.* (citing *V.I. Pub. Servs. Comm'n v. V.I. Water & Power Auth.*, 49 V.I. 478, 485 (V.I. 2008)).

[41] *Id.* (citing *Ray v. Spirit Airlines, Inc.*, 767 F.3d 1220, 1225 (11th Cir. 2014)).

[42] *Id.* at 566 (citing *Murrell v. People*, 54 V.I. 338, 352-353 (V.I. 2010)).

[43] *Id.* at 566-567 (citing *Cascen v. People*, 60 V.I. 392, 404-05 (V.I. 2014)).

> provision to be effective."[44] ... [Consequently, for one statute to operate to the exclusion of another,] the statutes must be in some sort of irreconcilable conflict.[45]

Applying those rules here, the Court concludes that administrative appeals process set forth in 33 V.I.C. §§ 2451 – 2456 does not supplant the Court's jurisdiction under 4 V.I.C. § 76 over claims arising under 5 V.I.C. § 80.

a. Relevant statutes regarding assessments by the Tax Assessor.

Title 33 establishes a comprehensive framework for governing property taxes in the Virgin Islands and includes several provisions that pertain to challenging the Tax Assessor's assessment of real property. Chapter 81 of Title 33 contains the general provisions and rate of tax, Chapter 85 of Title 33 contains the framework for the assessment of property by the Tax Assessor, and Chapter 87 of Title 33 sets forth a process for appealing the Tax Assessor's assessment to the Board of Tax Review.[46] Below, the Court recounts the relevant portions of these statutory provisions regarding the administrative appeals process.

First, the Court reviews the relevant statutory provisions in Chapters 81 and 85 of Title 33 regarding the Tax Assessor's valuation of properties in making tax assessments. Under 33 V.I.C. § 2301(a) "[a]ll real property in the Virgin Islands subject to taxation must be assessed at 100 percent of its fair market value as calculated by using the assessment methods set forth in sections 2403 and 2404 of this chapter[.]" 33 V.I.C. § 2402(b) provides that "[t]he tax assessor shall at least once every five years, in accordance with the standards established in section 2404, upon actual

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[44] *Id.* at 567-568 (citing *Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009)).
[45] *Id.* (citing *V.I. Pub. Servs. Comm'n*, 49 V.I. at 485).
[46] The Board of Tax Review is an administrative agency of the executive branch created and existing under Title 3, Chapter 8, of the Virgin Islands Code. *See* 3 V.I.C. § 180.

view, value and assess all commercial property subject to taxation in the Virgin Islands." 33 V.I.C. § 2404 states:

> (a) In assessing the fair market value of real property, the Tax Assessor shall use the applicable standards promulgated by the International Association of Assessing Officers ("IAAO"), and shall promulgate such rules and regulation as necessary to implement the IAAO standards for all classifications of property set forth in section 2301(b) of this title.
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> (b) The Tax Assessor may promulgate any rules necessary for the implementation of this chapter.
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> . . .

Under 33 V.I.C. § 2412,

> The Tax Assessor shall—
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> (1) whenever he makes any changes in the existing assessment of property of a taxpayer; or
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> (2) whenever he assesses the real property of a taxpayer not previously assessed; or
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> (3) whenever he makes any changes in the list and assessment of property as returned by a taxpayer who has been called upon to fill in a schedule showing his property subject to taxation—
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> mail by regular mail notice of such action, which may be in the form of a tax bill to the taxpayer or person in charge of the property, to the address of the property or such other address as the taxpayer may have provided to the Tax Assessor. If a new assessment is made on the property, such notice shall be mailed no later than May 15th of the year the assessment is made. Any taxpayer aggrieved by the action of the Tax Assessor may institute a review of assessment under the provisions of chapter 87, Title 33, not later than September 15th of the year in which said notice is received. If a new assessment has not been made, the prior year's assessment must be applied to the current year's assessment.

Chapter 87 of Title 33 outlines the administrative appeals process for challenging assessments by the Tax Assessor, the pertinent provisions for which the Court describes below. Under 33 V.I.C. § 2451(a), "[a]ny person aggrieved by the action of the Tax Assessor in relation to the valuation of his property may make written complaint thereof to the Board of Tax Review[.]" 33 V.I.C. § 2452 provides that "[t]he Board of Tax Review shall with respect to real property assessments hold such hearings within one hundred twenty (120) days of the filing of a written complaint ...." 33 V.I.C. § 2453 states:

> ...
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> (c) ... the final substantive decision in all appeals or complaints under this chapter shall be made by the Board of Tax Review.
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> (d) The decision of the Board of Tax Review in all matters coming before it under this subtitle shall be final unless the taxpayer, within 30 days after receipt from the Board of the notice provided in section 2454 of this title, petitions the Superior Court of the Virgin Islands for a review. ...
>
> The Superior Court may modify, reverse or affirm the decision of the Board of Tax Review.

Additionally, under 33 V.I.C. § 2454(a),

> [T]he appellant or owner of the property, the valuation of which has been changed or whose rights have been affected by [the Board's] decision shall be notified of the same in writing and entry shall be made in the record of the Board that the notices required by this section to be sent to taxpayers have been given or mailed, which entries shall be conclusive evidence of the giving or mailing of the notices required.

Finally, 5 V.I.C. § 80 provides that "[a] taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds."

b. Statutory interpretation.

As to the literal language of the applicable statutory provisions, by stating "[a]ny person aggrieved by the action of the Tax Assessor in relation to the valuation of this property *may* make written complaint thereof to the Board of Tax Review[,]"[47] the plain text of 33 V.I.C. § 2451(a) suggests that appeals to the Board of Tax Review are not mandatory.[48] In addition, because "statutes granting power to administrative agencies are strictly construed as conferring only those powers granted expressly or by necessary implication[,]"[49] the plain text of 33 V.I.C. § 2451(a) also indicates that the scope of the Board of Tax Review's authority is limited to grievances involving the Tax Assessor's valuation of property, which in turn, involves a determination of "the fair market value of real property" under "the applicable standards promulgated by the International Association of Assessing Officers ('IAAO')[.]"[50]

Under 33 V.I.C. § 2453(d), the Board of Tax Review's "decision ... in all matters coming before it under this subtitle shall be final unless the taxpayer ... petitions the Superior Court of the Virgin Islands for a review" within 30 days of receiving notice of the decision from the Board of Tax Review.[51] This language implies that decisions of the Board of Tax Review are appealable to the Superior Court in accordance with the general statutory procedure for seeking writs of review under 5 V.I.C. §§ 1421 – 1423, which is a civil action within the Superior Court's original subject matter jurisdiction under 4 V.I.C. § 76.

When read together, the aforementioned provisions clearly denote that *one* mechanism for challenging the Tax Assessor's valuation of property is to file an appeal with the Board of Tax Review in accordance with 33 V.I.C. §§ 2451 – 2456, and, if unsatisfied, to file an appeal of that

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[47] 33 V.I.C. § 2451(a) (emphasis added).
[48] *See Shoy v. People*, 55 V.I. 919, 927 (V.I. 2011) ("The use of the mandatory word 'shall' normally serves to create an obligation impervious to judicial discretion . . . In contrast, the use of the permissive auxiliary verb 'may' as opposed to 'shall' strongly suggests a discretionary rather than a mandatory action") (citations omitted).
[49] *V.I. Narcotics Strike Force*, 60 V.I. at 213 (citing *Walker v. Luther*, 830 F.2d 1208, 1211 (2d Cir. 1987) (citing 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 65.02 (Sands 4th ed. 1986))); *See Gov't Emps. Ret. Sys. v. Gov't of the V.I. Office of the Attorney Gen.*, 64 V.I. 205, 220 (Super. Ct. 2016).
[50] 33 V.I.C. § 2301(a); 33 V.I.C. § 2404(a).
[51] *See* 33 V.I.C. §§ 2453, 2454.

decision with the Superior Court in accordance with the procedure governing petitions for writs of review. However, this does not mean that the administrative appeals process under 33 V.I.C. §§ 2451 – 2456 is the *only* mechanism for obtaining judicial review when another statute, such as 5 V.I.C. § 80, provides a separate avenue of relief. Indeed, no provisions of Title 33 contain explicit language that the remedy afforded through the administrative appeals process under 33 V.I.C. §§ 2451 – 2456 is exclusive, mandatory, or a jurisdictional prerequisite for judicial review when the statutory requirements for invoking the Court's jurisdiction under 5 V.I.C. § 80 are present. Moreover, unlike other specific statutory schemes delineating administrative processes in the Virgin Islands Code, none of the statutes in Title 33 contain explicit language mandating the exhaustion of administrative remedies.[52]

With respect to 5 V.I.C. § 80, the Virgin Islands taxpayer statute "is amongst the original provisions found in the Virgin Islands Code[,]" "remedial[,]" and with "intentionally broad"

[52] *See* 27 V.I.C. § 441(d) (regarding real estate appraiser business licensing, "[a]ny person who has exhausted all administrative remedies available within this chapter and who is aggrieved by a final decision in a contested case is entitled to judicial review in the Superior Court of the Virgin Islands"); 24 V.I.C. § 346 (regarding labor disputes, "[n]o restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation fixed by the laws involved in the labor dispute in question, or who has failed to make every effort to settle such dispute either by negotiation or with the aid of the Department of Labor and voluntary arbitration"); 30 V.I.C. § 33 (regarding appeals of the decisions by the Public Services Commission, "[n]o appeal shall lie from any order of the Commission unless an application for reconsideration shall have been first made and determined"); *but see Prosser v. Pub. Servs. Comm'n of the U.S.V.I.*, 56 V.I. 391, 401 (V.I. 2012) (declining to decide whether 30 V.I.C. § 33 is a jurisdictional or claim-processing rule). *See also V.I. Conservation Soc'y*, 55 V.I. at 620 n. 3 ("We recognize that section 913(b)(1) [of Title 12], unlike section 913(d), does not mandate that a litigant exhaust administrative remedies prior to seeking injunctive relief"); 12 V.I.C. § 913(d) (mandates the exhaustion of administrative remedies before a person aggrieved "by the granting or denial of an application for a coastal zone permit" may seek judicial review); 12 V.I.C. § 913(b)(1) (does not mandate that a litigant exhaust administrative remedies before seeking "declaratory and equitable relief to restrain any violation of … chapter [21, Title 12]" governing the Virgin Islands coastal zone management). In construing federal statutes to determine whether the exhaustion of administrative remedies is required, "where Congress has not clearly required exhaustion, sound judicial discretion governs … [but,] where a statute requires exhaustion of administrative remedies, a court has no jurisdiction to review the order in question, and the exhaustion requirement is not a matter for the court's discretion." 2 AM. JUR. 2d Administrative Law § 451, 409 (2014); *See McCarthy v. Madigan*, 503 U.S. 140, 144, 112 S. Ct. 1081, 1086, 117 L. Ed. 2d 291 (1992).

language,[53] "having the salutary purpose of affording to Virgin Islands taxpayers full and adequate relief from illegal actions of the territorial government and its officers."[54] While the Virgin Islands has also long recognized a procedure for challenging property tax assessments through an administrative board,[55] "[i]t is well established that 'the powers of courts of local or special jurisdiction are restricted to the subject matter or territory designated by statute,' and that 'when jurisdiction is once granted it will not be deemed to have been taken away by similar jurisdiction grant to another tribunal unless the statute is repealed.'"[56] Further, since 33 V.I.C. §§ 2451 – 2456 and 5 V.I.C. § 80 touch on the same subject, the rules of statutory construction instruct that there must be some irreconcilable conflict between the statutory provisions for the administrative appeals process under 33 V.I.C. §§ 2451 – 2456 to supplant the Court's jurisdiction over taxpayer suits under 5 V.I.C. § 80. In the Court's view, there is no irreconcilable conflict here.

The Court has jurisdiction under 4 V.I.C. § 76 for claims arising under 5 V.I.C. § 80 where a plaintiff demonstrates that (1) he or she is Virgin Islands taxpayer; (2) the defendant is a Territorial officer or employee who engaged in illegal or unauthorized conduct; and (3) the taxpayer requests relief, whether it be injunctive or declaratory, to compel the defendant to refrain from that illegal or unauthorized conduct.[57] Clearly, every grievance regarding the Tax Assessor's

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[53] *Haynes*, 61 V.I. at 567 (citing *Smith v. Gov't of the V.I.*, 329 F.2d 131, 133, 4 V.I. 489 (3d Cir. 1964)).
[54] *Id.* (citing *Holmes v. Gov't of the V.I.*, 370 F. Supp. 715, 717-18, 10 V.I. 365 (D.V.I. 1974)).
[55] The first administrative appeals process was implemented in 1936 through the "regulations for the levy, assessment, collection and enforcement of an assessed valuation of real property tax" issued by the President of the United States for the islands of St. Thomas and St. John, which was reportedly enacted into law for the entire Virgin Islands in 1955. *See Ricardo v. Ambrose*, 211 F.2d 212, 216-218 (3d Cir. 1954); *See also* Act Mar. 31, 1955, No. 24, § 17.
[56] *Gov't of the V.I. v. Crooke*, 54 V.I. 237, 246 (V.I. 2010) (citing 3A SUTHERLAND STATUTORY CONSTRUCTION § 67:3 (6th ed. 2003) (collecting cases)).
[57] *See McBean v. Gov't of the V.I.*, 1995 V.I. LEXIS 21, *13 (V.I. Terr. Ct. 1995) (Under 5 V.I.C. § 80, "[t]he court must therefore determine whether the defendants engaged in illegal or unauthorized conduct in effectuating the rollback of the salary increases. If so, a restraining order must be issued. If not, the action must be dismissed"); *Donastorg v. Virgin Islands*, 2003 V.I. LEXIS 8, *20 (V.I. Terr. Ct. 2003) ("The Legislature of the Virgin Islands

valuation of real property will not arise under 5 V.I.C. § 80 because the statutory pleading requirements will not be satisfied in every case. For example, grievances involving mere clerical or mathematical errors by the Tax Assessor would not rise to the requisite level of "illegal or unauthorized conduct" so as to confer jurisdiction on this Court under 5 V.I.C. § 80, nor would grievances that do not seek injunctive or declaratory relief. However, some grievances regarding the Tax Assessor's valuation of real property may satisfy the pleading requirements of 5 V.I.C. § 80. In those instances, it is presumed that the Legislature intended for 33 V.I.C. §§ 2451 – 2456 and 5 V.I.C. § 80 to be effective and operate harmoniously. Defendants have failed to identify any evidence of legislative intent to overcome this presumption, nor has the Court discovered any.

The Supreme Court of the Virgin Islands has made clear that "the fact that one statute provides one avenue for obtaining relief does not — without more — render all other statutes inapplicable."[58] Defendants' argument that 33 V.I.C. §§ 2451 – 2456 supplants the Court's jurisdiction under 5 V.I.C. § 80 ignores fundamental procedural differences between the remedies available under each statute. As discussed above, appeals to the Superior Court regarding decisions of the Board of Tax Review rendered in accordance with 33 V.I.C. §§ 2451 – 2456 involve seeking a writ of review under 5 V.I.C. §§ 1421 – 1423, but taxpayer suits under 5 V.I.C. § 80 involve civil

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enacted standing upon taxpayers, without the demonstration of a particularized injury, pursuant to 5 V.I.C. § 80 . . . Here, the plaintiff has invoked jurisdiction pursuant to V.I. Code Ann. tit. 5, § 80; alleged he is a Virgin Islands taxpayer; requested declaratory relief to mandate the Government to perform its statutory duties; and alleged wrongful disbursement of territorial funds. Accordingly, the plaintiff has standing to bring this action") (citing *Smith v. Government of the Virgin Islands*, 329 F.2d 131, 133, 4 V.I. 489 (3d Cir. 1964) ("If there has been a violation or evasion of the law… damage is presumed to result to all taxpayers. The object of the suit is to prevent the violation of the law"); *Olive v. deJongh*, 2012 V.I. LEXIS 39, *21 (V.I. Super. Ct. 2012) ("To sustain a taxpayer suit under Title 5, Section 80, a plaintiff must show: (1) that he is a Virgin Islands taxpayer; and (2) that territorial funds were wrongfully disbursed . . . Plaintiff does not need to show any actual or particularized injury to himself to recover under Title 5, Section 80") (citations omitted).

[58] *Haynes*, 61 V.I. at 568.

actions for injunctive and declaratory relief, and, "[t]he process followed in a civil action for injunctive and declaratory relief are [sic] far different from those utilized on a writ of review."[59]

> In a civil action for injunctive and declaratory relief ... after being served with a complaint, a [defendant] ... files and serves an answer which meets Rule 8(b) of the Federal Rules of Civil Procedure, and then discovery and motion practice would ensue. Additionally, in such a case, the Superior Court sits in its trial capacity, receives evidence, and has all of the authority of a court of general jurisdiction. ... [In a civil action seeking a writ of review,] the defendant files a response which is more in the nature of a brief, and, if the Court believes the complainant's request has merit, the administrative record is gathered and a briefing schedule follows. In this setting, the Superior Court sits in its appellate capacity, does not take evidence, and has a more circumscribed decision-making role.[60]

Clearly, 33 V.I.C. §§ 2451 – 2456, as the first step in invoking the statutory administrative review process, and 5 V.I.C. § 80 constitute separate avenues for obtaining relief. But, without clearer evidence of legislative intent, the Court cannot conclude that the Legislature intended for 33 V.I.C. §§ 2451 – 2456 to render the avenue for obtaining relief through a taxpayer suit under 5 V.I.C. § 80 inapplicable.[61] Such a conclusion would lead to absurd consequences in that, despite the Legislature specifically authorizing taxpayer suits under 5 V.I.C. § 80, a taxpayer satisfying the criteria for bringing suit under 5 V.I.C. § 80 would be denied the right to file a taxpayer suit merely because the grievance involves "the action of the Tax Assessor in relation to the valuation of ... property" and, therefore, could have been raised in an administrative appeal before the Board of Tax Review. This outcome is inconsistent with the underlying purpose of 5 V.I.C. § 80 and

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[59] *Gov't Emps. Ret. Sys.*, 64 V.I. at 218-19.
[60] *Id.*
[61] *C.f. Lindon Corp. v. Virgin Islands*, 313 F. Supp. 2d 528, 531 (D.V.I. 2004) (internal citations omitted); *E.g. Equivest St. Thomas, Inc. v. Gov't of the V.I.*, 208 F. Supp. 2d 545, 549 (D.V.I. 2002) ("Equivest I"); *Berne Corp. v. Virgin Islands*, 262 F. Supp. 2d 540, 553 (D.V.I. 2003) ("Berne II"); *Berne Corp. v. Virgin Islands*, 313 F. Supp. 2d 522, 524 (D.V.I. 2004) (clarifying that the District Court had "supplemental jurisdiction over the plaintiffs' taxpayer's suit against the Tax Assessor for illegally assessing their property" under 5 V.I.C. § 80 in the individual decisions that followed its ruling in *Berne II*, 262 F. Supp. 2d 540) (referencing *Sharp v. Government of the Virgin Islands*, 278 F. Supp. 2d 585, 587 (D.V.I. 2003); *Lindon Corp.*, 278 F. Supp. 2d 579, 581 (D.V.I. 2003); *Shell Seekers, Inc. v. Gov't of V.I.*, 308 F. Supp. 2d 592 (D.V.I. 2004)).

violates "the 'common law tradition [that] … the denial of a remedy [is] the exception rather than the rule,'" and that "[i]f a statute was enacted for the benefit of a special class, a remedy was recognized for members of that class."[62]

Given the foregoing, the Court concludes that the administrative appeals process under 33 V.I.C. §§ 2451 – 2456 does not function as a jurisdictional prerequisite to judicial review in cases arising under 5 V.I.C. § 80.[63] The Court having already found that Plaintiff's Complaint satisfies the criteria for bringing a taxpayer suit under 5 V.I.C. § 80, Defendants' contention that the Court lacks subject matter jurisdiction because Plaintiff failed to exhaust its administrative remedies under 33 V.I.C. §§ 2451 – 2456 lacks merit.[64]

B. Primary Jurisdiction.

As a "secondary" issue, Defendants contend that the Court lacks subject matter jurisdiction because Plaintiff commenced an administrative appeal before the Board of Tax Review, but, "on the day before the hearing," filed this action. Since the Court has already concluded that Plaintiff's

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[62] *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 548 (V.I. 2015) (citing *Miller v. V.I. Hous. Auth.*, 46 V.I. 623, 627 (D.V.I. June 3, 2005) (internal quotation marks omitted); *See Defoe v. Phillip*, 56 V.I. 109, 121 (V.I. 2012) ("It is well established that 'a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment'") (citing *Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966)).

[63] "[A] statute is 'jurisdictional' if 'it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction,' while a statute is 'claims-processing' if it 'seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times,' but do[es] not intend to limit a court's authority to hear a case." *Public Emples. Rel. Bd. v. United Indus. Workers-Seafarers Int'l Union*, 56 V.I. 429, 438 n. 4 (V.I. 2012) (citing *First Am. Dev. Group/Carib, LLC v. WestLB AG*, 55 V.I. 594, 611 (V.I. 2011)). Claims-processing rules or statutes may "be equitably tolled or even waived[,]" but, with respect to jurisdictional statutes, the Court has "no authority to create equitable exceptions to jurisdictional requirements and litigants cannot by waiver or forfeiture confer jurisdiction where it is otherwise lacking." *Brady v. Cintron*, 55 V.I. 802, 815 (V.I. 2011) (citing *Menominee Indian Tribe of Wisconsin v. United States*, 614 F.3d 519, 524, 392 U.S. App. D.C. 202 (D.C. Cir. 2010) (internal quotation marks and citations omitted).

[64] Though not raised by the parties, the Court also notes that 3 V.I.C. § 881(e) also confers on Plaintiff a right to pursue injunctive relief with respect to its claims alleging Defendants violated the Virgin Islands Open Records Act, 3 V.I.C. §§ 881 – 884. *See* 3 V.I.C. § 881(e) ("The provisions of this chapter and all rights of citizens under this chapter may be enforced by mandamus or injunction *whether or not any other remedy is also available*") (emphasis added).

claims are originally cognizable in this Court under 5 V.I.C. § 80 and 4 V.I.C. § 76, this argument is properly considered under the doctrine of primary jurisdiction.

Under the doctrine of primary jurisdiction, the Court has the discretion to "refer" the matter to the administrative agency, which here is the Board of Tax Review, "by staying further judicial proceedings so as to give the parties a reasonable opportunity to seek an administrative ruling as to issues which, under a regulatory scheme, are within the agency's special competence[,]" but such a "referral" is not mandatory, nor does it deprive the Court of subject matter jurisdiction.[65]

Here, Plaintiff filed the Complaint on September 10, 2015, and, according to Defendants, a hearing before the Board of Tax Review was held the following day on September 11, 2015, and the Board of Tax Review's decision was issued on September 14, 2015, though Plaintiff contends it did not receive notice of this decision until it was submitted as an exhibit by Defendants during the course of these proceedings.[66]

Despite Defendants' contention, a "jurisdictional flaw" is not created merely because an appeal was instituted before the Board of Tax Review, since the Court independently has jurisdiction over the action as a taxpayer suit under 5 V.I.C. § 80 and 4 V.I.C. § 76. Further, dismissal is not warranted under the doctrine of primary jurisdiction because "referral" back to the Board of Tax Review would be pointless since, according to Defendants, the Board of Tax Review has already issued a decision and there is no administrative agency that possesses jurisdiction to review the Board of Tax Review's decisions.[67]

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[65] 2 AM. JUR. 2d § 456, at 413 (footnotes omitted).
[66] *See* Defs.' Mot. to Dismiss, p. 6 & Ex. 1.
[67] *C.f. V.I. Conservation Soc'y*, 55 V.I. at 621.

Moreover, the Complaint contains allegations regarding the purported unlawfulness of the Tax Assessor's actions in performing his statutory duties and actions by the Tax Assessor and Government that allegedly deprive Plaintiff of procedural due process in proceedings before the Board of Tax Review. While Plaintiff seeks a review of the Board of Tax Review's decision, to the extent it violated Plaintiff's right to procedural due process, such a determination could not be made by the Board of Tax Review, which has no jurisdiction to consider constitutional issues.[68]

Consequently, the Court will not dismiss the action merely because an appeal was instituted with the Board of Tax Review, as this neither deprives the Court of subject matter jurisdiction nor warrants an application of the doctrine of primary jurisdiction.

CONCLUSION

In light of the foregoing, the Court will not dismiss this action on the grounds alleged by Defendants. Accordingly, Defendants' Motion to Dismiss for Lack of Jurisdiction will be denied.

An Order consistent with this Memorandum Opinion shall follow.

Dated: December 13, 2016

ATTEST: Estrella George
Acting Clerk of Court __/__/__
by:
Donna D. Donovan
Court Clerk Supervisor 12/15/16

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

[68] *supra* n. 49; *See* 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 8:60, 282-283 (3d ed. 2010) (noting that some courts have held that the narrowing of an administrative agency's jurisdiction "removes constitutional challenges from the [administrative agency's] jurisdiction and places them instead under the jurisdiction of the appropriate court system") (citing *Owsley v. Idaho Industrial Com'n*, 141 Idaho 129, 106 P.3d 455, 460 (Idaho 2005)).