

REPORT #616

TAX SECTION

New York State Bar Association

Letter Supporting Adoption of Section 11

June 19, 1989

Table of Contents

Cover Letter :.....i

TAX SECTION

New York State Bar Association

OFFICERS
HERBERT L. CAMP
 Chair
 1 Chase Manhattan Plaza
 New York City, NY 10005

WILLIAM L. BURKE
 First Vice-Chair
 330 Madison Avenue
 New York City 10017

ARTHUR A. FEDER
 Second Vice-Chair
 1 New York Plaza
 New York City 10004

JAMES M. PEASLEE
 Secretary
 1 State Street Plaza
 New York City 10004

COMMITTEES CHAIRS
Alternative Minimum Tax
 Robert A. Jacobs, New York City
 Sherwin Kamin, New York City

Bankruptcy
 Matthew A. Rosen, New York City
 Eugene L. Vogel, New York City

Consolidated Returns
 Richard D'Avino, Washington, D.C.
 Michael L. Schler, New York City

Continuing Legal Education
 Richard F. Campbell, Buffalo
 Laraine S. Rothenberg, New York City

Corporations
 Kenneth H. Heitner, New York City
 Richard L. Reinhold, New York City

Criminal and Civil Penalties
 Robert S. Fink, New York City
 Michael I. Saltzman, New York City

Depreciation and Amortization
 Bruce M. Montgomerie, New York City
 Arthur R. Rosen, New York City

Employee Benefits
 Kenneth C. Edger, Jr., New York City
 Barbara D. Klippert, New York City

Estate and Gift Taxes
 Linda B. Hirschson, New York City
 Jerome A. Manning, New York City

Exempt Organizations
 Sherman F. Levey, Rochester
 Harry E. White, New York City

Financial Institutions
 John A. Corry, New York City
 Robert J. McDermott, New York City

Financial Institutions
 Peter C. Canellos, New York City
 Thomas A. Humphreys, New York City

Foreign Activities of U.S. Taxpayers
 Sherry S. Kraus, Rochester
 Victor Zonana, New York City

Income of Estates and Trusts
 Henry Christensen, III, New York City
 Carlyn S. McCaffrey, New York City

Income From Real Property
 Michael Hirschfield, New York City
 Stuart L. Rosow, New York City

Insurance Companies
 Irving Salem, New York City
 Michelle P. Scott, Newark, N.J.

Interstate Commerce
 Robert E. Brown, Rochester
 Paul R. Comeau, Buffalo

Net Operating Losses
 William F. Indoe, New York City
 Matthew M. McKenna, New York City

New York Tax Matters
 Carolyn Joy Lee Ichel, New York City
 Robert J. Levinsohn, New York City

New York State Tax Matters
 William M. Colby, Rochester
 Hugh T. McCormick, New York City

Partnerships
 Steven C. Todrys, New York City
 R. Donald Turlington, New York City

Personal Income
 Thomas V. Glynn, New York City
 William H. Weigel, New York City

Practice and Procedure
 Richard J. Bronstein, New York City
 Sydney R. Rubin, Rochester

Reorganizations
 James A. Levitan, New York City
 Stanley L. Rubenfeld, New York City

Sales, Property and Miscellaneous
 E. Parker Brown, II, Syracuse
 Sterling L. Weaver, Rochester

Tax Accounting Matters
 James S. Halpern, Washington, D.C.
 George E. Zeitlin, New York City

Tax Exempt Bonds
 Henry S. Klaiman, New York City
 Steven P. Waterman, New York City

Tax Policy
 Alan W. Granwell, Washington, D.C.
 Richard O. Loengard, Jr., New York City

Unreported Income and Compliance
 Victor F. Keen, New York City
 Richard M. Leder, New York City

U.S. Activities of Foreign Taxpayers
 Cynthia G. Beerbower, New York City
 Charles M. Morgan III, New York City

MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE

M. Bernard Aidinoff
 Donald C. Alexander
 David H. Brockway

James S. Eustice
 David C. Garlock
 Patricia Geoghegan

Frank Green
 Ely Jacobsen
 Edward D. Kleinbard

James Locke
 Stephen L. Millman
 Stephen M. Piga

Mikel M. Pollyson
 Susan P. Serota
 David E. Watts

April 19, 1989

James W. Wetzler
 Commissioner of Finance
 New York State Department
 of Taxation and Finance
 Building 9, State Campus
 Albany, New York 12227

Dear Commissioner Wetzler:

We note that Section 11 of Departmental Bill No. 5R-89 proposes to amend the Tax Appeals Tribunal provisions to permit the Commissioner of Finance as well as the taxpayer to appeal adverse determinations of the Tax Appeals Tribunal.

Allowing the Commissioner of Finance to appeal Tax Appeals Tribunal decisions has been something that we have consistently recommended,¹ and it continues to have our full support. We encourage its adoption as a very valuable step in helping to achieve the objectives underlying the establishment of the Tax Appeals Tribunal.

¹ You may recall that this was one of the major recommendations in the June 9, 1987 Report on the Tax Tribunal Legislation and Proposed Regulations by our Committee on New York State Tax Matters.

FORMER CHAIRS OF SECTION

Howard O. Colgan
 Charles L. Kades
 Carter T. Louthan
 Samuel Brodsky
 Thomas C. Plowden-Wardlaw
 Edwin M. Jones
 Hon. Hugh R. Jones

Peter Miller
 John W. Fager
 John E. Morrissey Jr.
 Charles E. Heming
 Richard H. Appert
 Ralph O. Winger
 Hewitt A. Conway

Martin D. Ginsburg
 Peter L. Faber
 Renato Beghe
 Alfred D. Youngwood
 Gordon D. Henderson
 David Sachs
 Ruth G. Schapiro

J. Roger Mentz
 Willard B. Taylor
 Richard J. Hiegel
 Dale S. Collinson
 Richard G. Cohen
 Donald Schapiro

We believe that the question of whether the Commissioner should be given the right to appeal should be approached from the perspective of the effect on the status of the Tribunal and the practical effect on responsible and efficient tax administration.

We have always felt that the Tax Appeals Tribunal was to be perceived as truly independent. The Commissioner of Finance must stand—and be seen to stand—on the same footing before the Tribunal as the taxpayer. The tribunal should always seek to make the right decision and should be free from any pressure of the finality of a decision in favor of a taxpayer.

We are aware that when the question of giving the Commissioner the right to appeal was last considered, some felt that such a right was inappropriate because the Tribunal was part of the same department with the Division of Taxation and would defer to the Division of Taxation. Such an assertion only detracts, of course, from the basic objective for establishing the tribunal and in that respect implicitly supports further steps that may enhance the Tribunal's independence and stature. But in our view, the experience we have now had with the Tribunal suggests no foundation for such a concern.

We also believe that giving the Commissioner the right to appeal will, as a practical matter, promote responsible and efficient tax administration.

We recall that when this question was last considered, some expressed concern that the Division of Taxation would appeal every adverse decision, and others felt that such a right of appeal was unnecessary because of the ability of the Division of Taxation to get legislation to reverse major errors or unintended major revenue losses. As to the latter, we feel no need to comment at length on the surprise both the Division of Taxation and the legislature may feel about a claim that taxpayers do not have effective access to the legislature on issues of major revenue significance. The view expressed would appear to be more an argument for the Commissioner and taxpayers to have the same right or lack of right to appeal Tribunal decisions, rather than for assymetry of treatment. We believe, however, that the real issue is not access, but whether it is wise to structure a system which tends to push any party onto the legislature as a court of first resort. The complexity, intensity and difficulty of the budget process in recent years suggests that, even more than in other areas of state law, there is reason not to cast the legislature in that role Use of further review by the

judiciary to conserve the need for further legislative action therefore should be welcomed and adopted.

As to excessive litigation and appeals, a view that the Division of Taxation will irresponsibly make appeals is unwarranted in our opinion. In any event, there is no reason to believe that the legislature will be any less able to monitor and take controlling steps if this should prove to be the case than with overzealous administrative action in other areas of the law.

More significantly, we believe that rather than increasing costs and complexity for taxpayers, allowing appeals by the Commissioner can actually reduce litigation cost and improve the efficiency of administration for taxpayers. It should not be supposed that all taxpayers will prefer the same outcome on an issue. A decision favorable to one taxpayer's particular situation frequently can be unfavorable to other taxpayers differently situated. If the other taxpayers believe the decision incorrect, unless and until legislative action to correct the decision, they will have to take a contrary position in their return, endure a deficiency determination and an adverse Tribunal decision, then after that expense and delay file the appeal that the Commissioner is now denied from making. If, as not uncommonly may be the case, there is more than one such "contrary" taxpayer, all of them will potentially have to go through at least some part of the same steps unless they are willing (and the Division of Taxation agrees) to have their tax year held open while the appeal is processed through the courts. Overall litigation costs for taxpayers thus are not reduced, and all that is achieved is delay and uncertainty plus possibly a windfall to the first, favored taxpayer (because his decision is not reversed) if the final resolution differs from his decision.

Even the other taxpayers similarly situated to the favored taxpayer will rest in doubt until the statute of limitations on their returns expires if the Tribunal decision is a controversial one that another adversely situated taxpayer may challenge successfully on appeal from the Tribunal. In short, the interests of all parties is frequently served by certainty – at the earliest time with the least litigation – as to what the final outcome will be. Denying the right of appeal to the Commissioner hinders the accomplishment of that objective.

We therefore support your proposal to permit the Commissioner of Finance to appeal adverse determinations of the Tax Appeals Tribunal.

Sincerely,

Wm. L. Burke
Chair

cc: The Honorable Mario R. Cuomo
Evan Davis, Esq.
The Honorable Ralph J. Marino
The Honorable Melvin H. Miller
The Honorable Manfred Ohrenstein
The Honorable Clarence D. Rappleyea, Jr.
The Honorable Tarky J. Lombardi, Jr.
The Honorable Saul Weprin
The Honorable Donald Halperin
The Honorable John C. Cochrane
The Honorable Roy Goodman
Mr. Abraham Lackman, Director, Senate Finance Committee,
Fiscal Studies
Mr. Dean Fuelihan, Secretary of Assembly Ways and Means
Committee
William F. Collins, Esq.
Saul Heckelman, Esq.