

**REPORT #697**

**TAX SECTION**

**New York State Bar Association**

New York City Tax Appeals Tribunal

August 21, 1991

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August 21, 1991

The Honorable Carol O'Cleireacain  
Commissioner of Finance  
City of New York  
Municipal Building - Room 500  
One Centre Street  
New York, NY 10007

Re: New York City Tax Appeals Tribunal

Dear Commissioner O'Cleireacain:

On March 6, 1990, we wrote to you regarding the City's then proposed tribunal legislation. We conveyed to you the Tax Section's generally favorable reaction to the City's proposal and also a number of suggestions for specific changes. A copy of our letter is attached. We now wish to offer our comments on the City's latest proposal, embodied in a draft dated December 14, 1990, which we understand was introduced in identical form in the recent legislative session as A. Intro. No. 8774, S. Intro. No. 6315 by Assembly Members Weprin and Friedman and Senator Goodman. We also comment on the competing proposal to transfer jurisdiction over certain City taxes to the State Tax Appeals Tribunal.<sup>1</sup>

<sup>1</sup> This letter was prepared by Robert J. Levinsohn and Anshel David for the Committee on New York City Tax Matters.

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## Comments on City Proposal

First, we wish to express satisfaction that so many of the important changes we sought have now been incorporated in the City's draft bill. These include our suggestions that appeals from tribunal decisions be commenced directly in the Appellate Division, First Department, that the Department of Finance be required to serve an answer in response to a taxpayer's petition, that there be no filing fees for petitions to the tribunal, that the rules of the tribunal provide for "reasonable discovery" rather than "reasonable limited discovery", and that proceedings pending as of the effective date of the tribunal legislation be transferred to the tribunal. We believe that these are significant amendments and that their adoption will create a fairer and more efficient dispute resolution program.

There remain, however, several areas in which we continue to have reservations in regard to the City's proposal. First, and most important, we reiterate our recommendation that the City's proposal provide that the tribunal "follow", rather than merely "take into consideration as precedent," prior precedential decisions which pertain to any substantive legal issues currently before the tribunal, including such decisions of the New York State Tax Appeals Tribunal. Since the City would have the right to seek judicial review of any City tribunal decision, the City would not be precluded from contesting in court the correctness of a State tribunal decision which had been followed by the City tribunal.

Second, in order that all pertinent statutes contain consistent provisions in regard to the tribunal, we repeat our recommendation that the State enabling legislation for the corporate and unincorporated business taxes be specifically amended. This is a purely technical matter which should present no problem.

Third, we again suggest that, where a taxpayer's time in which to file a petition has not expired as of the effective date, the taxpayer's time to answer be extended by 90 days. We believe that this would insure that the understandable confusion as to proper form, time and place of filing petitions under the new system would not cause any taxpayers to be deprived of a hearing on the merits.

We note that, unlike the Bureau of Conciliation and Mediation Services which is mandated by Tax Law §170, subd. 3-a, as part of the Division of Taxation of the State Department of Taxation and Finance and the procedures of which are set forth in some detail in that statute, the City's bill would merely authorize the Commissioner of Finance to establish a procedure for providing conciliation conferences, with most of the details to be left to rules to be promulgated by the Commissioner. This is consistent with our report dated May 31, 1989, enclosed with our letter to Commissioner Shorris dated June 9, 1989, in which we recommended legislation that would permit, but not mandate, the establishment of an informal conciliation process within the Department of Finance. Nevertheless, we strongly urge that, if the City's bill is enacted, the authorization for a conciliation procedure should be promptly implemented by regulation, in order to fulfill the recommendation in our report dated October 18, 1988, enclosed with our letter to Commissioner Grayson dated October 31, 1988, that the dispute resolution procedure for all City taxes should begin with a conciliation conference within the Department of Finance that is similar to the State procedure.

The City's bill provides that proceedings before the Tax Appeals Tribunal, as to the taxes the bill would bring within its jurisdiction, shall be governed by rules prescribed by the tribunal. We reiterate the recommendation in our 1988 report that the procedural rules to be adopted by a City tribunal should be, to the greatest extent possible, the same as currently apply at the State tribunal level.

## Comments on Combined Tribunal Proposal

We are aware that competing legislation has been introduced in the State Senate which would transfer jurisdiction over certain City taxes, including the corporation and unincorporated business taxes, to the State Tax Tribunal. Under the latest version of that legislation, which has not yet been introduced, State tribunal jurisdiction would be given to ten specified City taxes which are stated to be similar to taxes presently or formerly imposed by the State, and both the State and City taxing authorities would be given the right to appeal adverse decisions of the State tribunal.

In our October 18, 1988 report, we commented in detail on the then version of the legislation giving jurisdiction over certain City taxes to the State tribunal as an alternative to the then pending amendment to the New York City Charter to create a new City tribunal with jurisdiction over all City taxes not administered by the State. We there stated that our primary goal was the establishment of an independent dispute resolution process for New York City taxes. We said that such goal could be well served by the establishment of a joint State and City tax appeals tribunal if (1) its members were appointed in specified numbers by both the Governor and the Mayor; (2) decisions were appealable by either party; and (3) the tribunal would have jurisdiction over all taxes administered by the City. However, the report concluded that at that time the Tax Section did not support the transfer of the responsibility for administrative adjudication of New York City tax disputes to the State. Instead, the report urged the passage of the Charter proposal by the voters, to be followed by implementing legislation for a City tax tribunal that would make a number of significant changes in the procedures as set forth in the Charter amendment. All of the major changes we recommended have by now been incorporated in the latest version of the City's tribunal

legislation, with one exception. This is our very strongly stated recommendation that the City tax tribunal should be clearly required to adopt prior un-reversed decisions of the State Tax Tribunal as precedent where the issue of law has been decided first at the State level, and, where the issue has arisen first at the City level, should be required to accede to any relevant subsequent un-reversed State tribunal decisions as being controlling precedent, in cases coming before the City tribunal thereafter, where such State decisions are inconsistent with prior City tribunal decisions. As noted above, some of our other recommended changes would, under the City legislation, only be implemented by the exercise of rule-making authority.

We are making a study of the latest version of the legislation which would give jurisdiction to the State tribunal, referred to above, and hope to present a separate report on it in the near future. In the meantime, it is our present position that we would support legislation giving jurisdiction over New York City taxes to the State Tax Tribunal, provided that it incorporates at least the second and third of the three points mentioned in the immediately preceding paragraph. Point (1), regarding the appointive process, involves an essentially political decision, and while we still think this feature would be desirable, we do not make its inclusion in the legislation a condition for our support. We believe point (2), giving both sides a right of appeal, is essential in order to validate the position of the tribunal as an independent adjudicative agency and not a mere administrative arm of the taxing authorities. (In our 1988 report, we recommended that the Division of Tax Appeals should be removed structurally from the Department of Taxation and Finance, and we adhere to that position.) Likewise, point (3), requiring a single tribunal to adjudicate all City and State tax disputes, is essential to eliminate the expense and procedural confusion that would result if a separate City tribunal

were retained to adjudicate the small number of so-called nonconforming City taxes. (There would be seven taxes left to City tribunal jurisdiction under the latest version of the State tribunal bill.)

Section 1 of Chapter 407 of the Laws of 1991, the Supplemental Budget, provides funds for the conduct of formal hearings of the State Tax Tribunal in New York City. This would modify the recent announcement by the State tribunal that all its hearings will be held in Troy. We understand that this change will be implemented in due course when a site for hearings in New York City is located. Our support for a combined tribunal is on the assumption that, following its establishment, all hearings involving New York City taxpayers will in fact be held in New York City.

#### Conclusion

More than two and a half years have now gone by since the voters of New York City endorsed the position of the Tax Section that there should be review of New York City tax disputes by an independent tribunal. Yet this goal still remains unfulfilled for the major taxes borne by the City's taxpayers. At this stage, perhaps the most important factor in choosing between the City proposal and the combined tribunal alternative is which has the greater chance of resulting in a functioning tribunal for City taxes in the near future. To a large extent, predicting the outcome of competing legislative proposals requires a political rather than a legal judgment. If it appears that there can be early agreement on single tribunal legislation that incorporates the changes therein recommended above, applicable to both New York State and City taxes, we now support the enactment of such legislation. One advantage of this approach is that it will result in automatic conformity of interpretation. If such agreement is not imminent, we believe the most expeditious way to

achieve a fair and rational system for adjudicating New York City tax disputes would be to press for early enactment of the City's Tax Tribunal bill, with the three changes we have recommended in the third to fifth paragraphs of this letter.

We thank you again for your consideration of our views and for your clear commitment to an impartial and efficient review process.

Respectfully submitted,

James M. Peaslee  
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March 6, 1990

The Honorable Carol O'Cleireacain  
Commissioner of Finance  
City of New York  
Municipal Building - Room 500  
One Centre Street  
New York, New York 10007

Re: New York City Tax Appeals Tribunal

Dear Commissioner O'Cleireacain:

On June 9, 1989, the Tax Section of the New York State Bar Association submitted a Report by our Committee on New York City Tax- Matters on "Legislative Proposals for the Establishment of a New York City Tax Appeals Tribunal" to your predecessor, Commissioner Anthony Shorris. A copy of that submission is enclosed.

That Report provided specific comments on your Department's then pending legislative proposal relating to the resolution of tax disputes and set forth an alternative proposal for implementing fair and efficient procedures for contested tax matters.

In general, we sought to have the City procedures follow, where practical, the existing State tax resolution procedures, thus eliminating the multiple fact-finding proceedings that can be required under existing

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law and the Department's former bill. Our proposal suggested an initial informal dispute resolution system within the Department of Finance (conciliation conferences) followed, if necessary, by a formal hearing held by a hearing officer employed by the independent Tax Appeals Tribunal, review of the hearing officer's determination by the Tribunal en banc and judicial review pursuant to Article 78 of the Civil Practice Law and Rules.

In addition to conforming the City's procedure to the State's, we sought substantive conformity regarding the interpretation of identical laws. We recommended that the City Tribunal be required to follow decisions of the State Tax Appeals Tribunal.

We have received the latest Department of Finance proposal ('89 Finance #7, Revised 11/27/89), and commend your Department for its efforts in seeking conformity with the State's procedures. We are encouraged that the Department has adopted many of your proposals, which will, we believe, enhance the perception and operation of the City Tax Appeals Tribunal as an independent and efficient forum for the resolution of tax disputes.

We offer the following comments on the revised bill for your consideration.

(a) Section 1 of the bill amends Section 506 of the CPLR to provide that an appeal to review the decision of the Tax Appeals Tribunal is to be brought in the Supreme Court, New York County, and is to be transferred directly to the Appellate Division, First Department.

We have no objection to the venue being placed in New York County, but mandating that the proceeding be transferred to the Appellate Division is inconsistent with both the general Article 78 procedures and the special procedures applicable to State Tribunal decisions. Under current law, an Article 78 proceeding is

generally commenced in the Supreme Court, New York County. See CPLR §7804(g). Where the issue on appeal is not one of "substantial evidence", the Supreme Court is itself enjoined to dispose of the issues in the proceeding. Where a "substantial evidence" issue is raised, the Supreme Court is required to transfer the proceeding to the Appellate Division, though it may decide objections in point of law. In an appeal from State Tribunal decisions the Article 78 proceeding is commenced directly in the Appellate Division, Third Department. Tax Law §2016.

Rather than adopt a third standard -- which the revised bill appears to do -- we recommend that either the general Article 78 rule or the special rule applicable to the State Tribunal should apply. On balance, we recommend that the State rule be followed, and that appeals from City Tribunal decisions be commenced directly in the Appellate Division, first Department.

(b) Sections 134 and 135 of the bill delete the existing Charter provisions (169(b) and 170(b)) which require the Commissioner of Finance to serve and file an answer responding to the taxpayer's petition within 30 days after service of the petition. The memorandum in support indicates that the deletion is not intended to preclude the City Tribunal from requiring the service of an answer. We recommend that the service and filing of an answer remain a statutory requirement and not be left to the discretion of the Tax Tribunal. We have no objection to providing that the time limit for filing the answer shall be as set forth in the Tribunal's rules. Thus we recommend retaining the reference to the answer in Section 169(b), and deleting the reference to a 30-day time limit in Section 170(b).

(c) The revised bill contains no proposed amendments to the State enabling legislation for the city's corporate and unincorporated business taxes (Chapter 772 of the Laws of 1966, as amended), but instead contemplates that the State legislature make amendments directly to the local laws. We repeat our recommendation that the enabling act for these taxes be specifically amended. This will better incorporate the new procedures, and will reduce the potential for conflicts or confusion between statutory provisions.

(d) We also reiterate our recommendation that the City bill amend Charter Section 170 to provide that the City Tribunal "follow", rather than merely "take into consideration", controlling precedential decisions. Since the City bill gives the City the right to seek judicial review of City Tribunal decisions, the city is not precluded from contesting the correctness of a State Tribunal decision in court.

(e) We believe it is not appropriate to charge a fee for filing a petition with the City Tribunal, and we therefore recommend that Section 134(c) of the bill (page 108) be deleted.

(f) Section 134(e) of the bill (page 109) refers to "reasonable limited discovery." We think that the concept of "limited" discovery in this context is unnecessary. The standard of "reasonable discovery" is sufficient to ensure prompt and efficient proceedings, and we therefore recommend deleting the word "limited."

(g) Concerning the effective date of the bill (section 139), there will doubtlessly be a good deal of confusion among taxpayers concerning the proper form, time and place for filing petitions under the new tribunal system. We recommend that, with respect to notices issued by the Department of Finance prior to the effective date of the bill, if the time to petition has not expired as of such date the taxpayer should

be granted a grace period of 90 days, from the effective date to petition the Tribunal for a hearing. Further, any petition timely filed during the grace period should be deemed to be in the proper form and to have been filed with the Tribunal regardless of whether addressed to the "new" Tribunal or the "old" Department of Finance Hearing Bureau.

We also recommend that, if a petition was timely filed with the Department of Finance prior to the effective date but the hearing has not been held by such date, the matter should be automatically transferred to the Tribunal.

If a hearing has been held prior to the effective date, but no decision has been rendered by such date, the taxpayer should have the option of transferring the case to the City Tribunal and requesting a new hearing. If the taxpayer does not request a new hearing, the decision of the Commissioner should be treated as a decision of an administrative law judge of the Tribunal.

(h) Of a technical nature, the word "appeal" should be changed to "proceeding" in the two places it appears in the last sentence of subdivision (a) of Charter §170, found on page 110 of the bill.

The Tax Section remains committed to supporting legislation that fosters a fair and efficient tax dispute resolution program. We are of course available to meet with you and your staff if we can be of any further assistance.

Respectfully submitted,

Arthur A. Feder  
Chair

Enclosure

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