**REPORT #816**

**TAX SECTION**

# New York State Bar Association

Report on Proposed Amendments to the
Rules of Practice and Procedure of the
Division of Tax Appeals
December 19, 1994

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# TAX SECTION
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December 19, 1994

Ms. Roberta Mosely Nero
Secretary to the Tax Appeals Tribunal
Tax Appeals Tribunal
Riverfront Professional Tower
500 Federal Street
Troy, New York 12180-2893

Division of Tax Appeals
Revised Proposed Rules of Practice and Procedure

Dear Ms. Nero:

Enclosed is a Report by the New York State Bar Association Tax Section commenting on the revised proposed regulations issued by the Division of Tax Appeals concerning its rules of practice and procedure.

The Report states that the proposals thoughtfully address prior comments, represent a job well done, are generally sound, and strike the proper balance between formality and informality.

The Report goes on to make a number of comments on the proposal. Among other things, the Report:

(1) suggests a procedure to require initial testimony or an affidavit from the auditor specifying the issues and the evidence,

(2) comments that the procedures for moving for recusal of an administrative law

judge are awkward at best because the identity of the judge is not known in advance,

(3) questions some aspects of the newly required hearing memorandum, and

(4) suggests modifications to the procedures for moving to reopen the record or to reargue before the Tribunal.

In addition, while it is beyond the scope of the proposed regulations, the Report strongly urges that an administrative law judge should be assigned to a matter promptly after the answer is received, and that administrative law judge hearings should be resumed outside of Troy.

Please let us know if we can be of further help in the development of these regulations.

Very truly yours,

Michael L. Schler
Chair, Tax Section

NEW YORK STATE BAR ASSOCIATION

TAX SECTION

COMMITTEE ON NEW YORK STATE INCOME TAXES

# Report on Proposed Amendments to the Rules of Practice and Procedure of the Division of Tax Appeals

December 19, 1994

This report[1] provides comments on the September 29, 1994 proposed amendments to the Rules of Practice and Procedure of the Division of Tax Appeals. At the outset, the Committee wishes to compliment the Division of Tax Appeals for a job well done. The current proposed amendments thoughtfully address the extensive comments received by the Division from this Committee and others in response to its January 1994 proposal. The present proposal is generally sound, striking the proper balance between formality and informality.

The Committee's comments, on a section by section basis, follow.

Section 3000.1 - Definition. The definition of a “party” is broadened to include all persons or political subdivisions of New York necessary to the resolution of a controversy. This change is intended to clarify that the term “party” applies to

[1] The principal author of this report is Paul R. Comeau. Helpful comments were received from William Colby, Peter Faber, Robert S. Herbst, Carolyn Joy Lee, James A. Locke, Robert D. Plattner, Bud Plautz, Art Rosen and Michael Schler. This report should be read in conjunction with the Tax Section's report dated May 26, 1994, which addressed the January 1994 proposed rules.

local governments that have clear legal standing with respect to certain taxes - e.g., mortgage recording tax.

Comments. No comments.

Section 3000.2 - Representation. A new subdivision requires the filing of a power of attorney to authorize a representative, but permits the use of a copy of a power of attorney filed with the Division of Taxation for this purpose. A power of attorney under the General Obligations Law or "any other form creating a legal power of attorney" may be also used. The new rule also requires a declaration by the representative that he or she is authorized under the Rules of Practice to act as a representative before the Division of Tax Appeals.

Comments. Generally, this change is desirable. Questions have occasionally arisen in the past regarding the authority of an individual to represent a taxpayer in a Division of Tax Appeals proceeding. See Jenkins Covington, N.Y., Inc., 1991-2 NYTC T-1341. The addition of a requirement that a power of attorney be filed with the Division of Tax Appeals in every instance should help to eliminate such questions.

Section 3000.2(a) - Representation of a Partnership. According to this provision, a partnership may act through one of its general partners without filing a power of attorney if the partner is authorized to act for the partnership and certifies that he or she has such authority.

Comments. Generally, this provision seems appropriate. We assume partners in a New York or foreign LLP are intended to be included within the terms of the proposed rule, although this should be clarified because they are not

literally “general partners”. In light of new limited liability company legislation in New York and other states, it would also be appropriate for the rules to address the representation of a limited liability company by one of its members.

Section 3000.2(a)(2)(iii) - Enrolled Agents. Under this provision, agents enrolled for practice before the Internal Revenue Service will have the power to act as representatives of the taxpayer in all proceedings if authorized by a proper power of attorney.

Comments. This rule is consistent with the underlying statutory provision.

Section 3000.3(b)(8) - Conciliation Conference Order. This section requires submission of a copy of the conciliation conference order for purposes of establishing the timeliness of a petition.

Comments. While we acknowledge that the statute is less than clear, the Committee would like to suggest that a petition from a BCMS conciliation conference be treated as an appeal of the conciliation order. Under this procedure, if a conferee's order ruled in favor of a taxpayer on certain issues, these issues would not be addressed again at hearing. For example, if a conciliation order stated that the taxpayer had proven he was a Florida domiciliary but had failed to prove he had not spent more than 183 days in New York for any of the three audit years, the only issue remaining for hearing would be the issue of statutory residency. Under this scheme, the substance of the order, not only its timeliness, is critical.

If, however, the petition from a BCMS conference is from the underlying Notice and not the BCMS order, other policy concerns emerge. In this circumstance, the order has no value other than to prove timeliness. Yet conciliation conference orders may, for example, resolve an issue against the taxpayer based on a particular finding. If these orders are required as part of the petition for purposes of establishing timeliness and jurisdiction, they will be seen by the administrative law judges, who might be inappropriately influenced by their contents. To prevent this, orders should be screened by the supervising administrative law judge and should not be included in the administrative law judges' files. Thus, requiring that a document be used “for the sole purpose of establishing the timeliness” also requires that any substantive matters set forth in the document not become a part of the hearing record or be allowed to influence the administrative law judge.

Section 3000.3(f) - DTA Number. A DTA number will be assigned to every case once a petition is signed and this number shall be used by the parties on all papers thereafter.

Comments. This procedure is desirable and consistent with existing practice. The provision does not contain a sanction for failure to comply.

Section 3000.4 - Answers. Section 3000.4(b) extends the time to answer from 60 to 75 days and permits the supervising administrative law judge to extend this period to 90 days upon receipt of a written request. This section also requires a copy of the answer with proof of service to be filed with the supervising administrative law judge.

Comments. Generally, this is a desirable provision. However, we believe the rule should be clarified to indicate

that the written request for an extension of time to answer must be filed within the original 75-day period.

Section 3000.4(bH2) - Contents of the Answer. This section requires a specific admission or denial of each statement contained in the petition, but permits the Division of Taxation to answer that it does not have sufficient knowledge or information to form a belief as to the truth of the statement.

Comments. This is a desirable change and eliminates controversies regarding whether a particular statement was material (as required under the prior rules).

Section 3000.4(bH3)&(4) - Failure to Answer or to Admit or Deny - Material allegations of fact which are not expressly admitted or denied in an answer will be deemed admitted, and failure to file an answer in a timely manner will result in all material allegations of fact being deemed admitted.

Comments. We applaud the manner in which the new proposed rule deals with a failure by the Division to file a timely answer. We note, however, that while the language in Section 3000.4(b)(2)(i) takes out the concept of materiality, subdivisions (3) and (4) retain or add this requirement with respect to the consequences of a failure to file an answer or a failure to admit or deny statements in the petition. We believe the concept of materiality should be taken out of subdivisions (3) and (4) as well, with the result that all allegations of fact in a petition would be deemed admitted if they are not specifically denied. Under the proposed rule, it is likely disputes over the materiality of facts will occur (i.e., the taxpayer arguing a fact is material and therefore deemed admitted; the

Division arguing the opposite) and that the outcome of such disputes could prove determinative to the outcome of cases as a whole. It strikes the Committee as unnecessary and unwise to distinguish between and treat differently material and immaterial allegations of fact under this provision.

An alternative to the proposed scheme regarding late answers suggested by one committee member would require that a default be issued against the Division for its failure to file a timely answer with the Division then given the opportunity to move to reopen based on a showing of both a meritorious case and good cause for the default. Alternatively, the failure to file a timely answer could result in "flipping" the burden of proof to the Division, that is, the taxpayer's petition would be presumed correct with the burden on the Division to overcome this presumption.

Section 3000.4(c)&(d) - Filing the Reply and Amending Pleadings - The proposal indicates that a copy of the reply with proof of service on the Law Bureau shall be filed with the Supervising Administrative Law Judge. Subdivision (d) indicates that pleadings may be amended liberally with the consent of the adverse party or by the Supervising Administrative Law Judge or Administrative Law Judge or presiding officer assigned to the matter. Furthermore, when issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated as if they had been raised in the pleadings. It will not be necessary to bring a motion to conform the pleadings to the proof. An issue may be raised for the first time at hearing by a party and evidence may be introduced by the party on that issue unless the other party proves to the administrative law judge that it would be prejudiced by such action.

Comments. Generally, these provisions seem appropriate.

Section 3000.5 - Motions. Generally, the new procedures remove more general references to the CPLR and replace them with specific language covering motion practice before the Division of Tax Appeals. For example, an adverse party shall have 30 days after the date of service of a motion to file a response and to serve a copy on the moving party. Rules for briefs, oral arguments, issuance of orders, postponement of hearings and so forth are set forth. Generally, orders on motions will be issued within 90 days after a response has been served, and the filing of a motion will not constitute cause for postponement of a hearing unless specifically ordered by the administrative law judge. Orders on motions generally are not reviewable by the Tribunal until the administrative law judge has also rendered a determination on all remaining matters and issues.

Comments - This is an extremely difficult area of practice. The relatively long 90-day period (as compared to CPLR § 2219) allowed between the motion return date and a resulting order will likely result in instances in which motions having a bearing on a hearing remain unresolved as of the commencement of the hearing. This circumstance would deprive the parties of the opportunity to adjust their strategy at the hearing. At the same time, we recognize that the Division of Tax Appeals cannot allow taxpayers or Law Bureau attorneys to obtain delays simply by filing motions. This is an area where monitoring by the Division of Tax Appeals would be appropriate to determine whether further changes are called for.

Section 3000. 6(a)(3) - Preclusion Motion. An administrative law judge may issue an order precluding a party

from giving evidence with respect to certain items if a motion is made by the opposing party after the party fails to furnish a bill of particulars. The motion must be made within 30 days of the expiration of the date specified for compliance with the request.

Comments - Again, this is another difficult procedural issue. Frequently, a demand for a bill of particulars will be served only a few months before the hearing date. If a motion for preclusion is made and a hearing is already scheduled, the administrative law judge may not have an opportunity to respond to the motion until after the hearing date. As a result, the preclusion order may be rendered moot. Ideally, a time period for these motions should be established so that they are resolved before the hearing occurs.

Section 3000.7 - Subpoenas - Under this provision, any party may ask an administrative law judge or presiding officer to issue a subpoena to require the attendance of witnesses or the production of documentary evidence. The administrative law judge may modify the subpoena if he or she concludes that it is unreasonable, oppressive, excessive in scope or unduly burdensome. Attorneys representing any party in a proceeding may issue a subpoena pursuant to Section 2302 of the CPLR. Interestingly, although decisions on motions are generally not appealable until the entire case is finally resolved, the regulations permit a party to appeal an order of an administrative law judge or presiding officer granting or denying the request to withdraw or modify a subpoena. Thereafter, pursuant to the provisions of Section 2304 of the CPLR, a motion to quash, fix conditions or modify may be made in the Supreme Court.

Comments - Generally, it is expected that the use of subpoenas will be minimal. Taxpayers can obtain information under the Freedom of Information Law and auditors should have obtained all of the information needed to support the assessment during the audit. However, one practice by the Division of Tax Appeals and the Law Bureau may necessitate increased use of subpoenas in the future. In certain cases, auditors either do not appear at the hearing or appear but do not testify. Law Bureau attorneys introduce jurisdictional papers but not necessarily audit work papers, and the auditor may have brought only a portion of the work papers to the hearing. Taxpayers who expect to commence the hearing with an explanation from the auditor may find that this procedure is not followed, or is used only in certain field audit cases (e.g., sales, fuel tax audits) but not in others (e.g., residency audits). Taxpayers who seek an explanation of the audit may guarantee this procedure only if the taxpayer subpoenas the auditor and all of the auditor's work papers and puts the auditor on the stand as a witness in order to question the auditor regarding the way the audit was conducted, the auditor's conclusions, and the evidence supporting the conclusions.

The Division of Tax Appeals may wish to consider a procedure that would require the introduction of jurisdictional papers by the Division of Taxation followed by either testimony or an affidavit from the auditor specifying the issues in the case and the evidence supporting the auditor's conclusions. In Video Wisconsin Ltd. v. Wise. Dept, of Revenue, 1991 Wise. Tax Lexis 3 (1/11/93), the Wisconsin Tax Appeals Commission (concurring

opinion) discussed the rationale for this procedure, noting that:

> A taxpayer has the burden of production and persuasion to prove his theory of the case, but ought not to have to disprove the Department's theory unless and until evidence supporting that theory has been introduced. How can we expect a litigant to rebut the evidence underlying his opponent's theory until he has first heard the evidence supporting the theory?

Absent a procedure of this type, taxpayers may feel increased pressure to subpoena auditors and their work papers to ensure that they and the judge have a clear understanding of the issues and of the evidence against them.

Also, the proposed rule provides that subpoenas may be issued by an administrative law judge pursuant to the Tribunal's rules or by an attorney pursuant to CPLR 2302. It then states that objections to any subpoena served pursuant to Reg. Sec. 3000.7 may be made to the administrative law judge assigned to the matter, or if none has been assigned, to the person who issued the subpoena. Are subpoenas issued by attorneys issued “pursuant” to Reg. Sec. 3000.7 or are they issued solely pursuant to CPLR 2302? If the former is the case, and no administrative law judge has been assigned, to whom can objections be made? If the latter is the case, it seems inefficient to require the objecting party to seek the intervention of a Supreme Court justice to resolve the objection. The Tribunal's rules, we believe, should allow attorney subpoenas without reference to CPLR 2302.

Section 3000.8 - Recusal - Either party may move for recusal of an administrative law judge for bias. The motion to recuse must be accompanied by an affidavit setting forth the facts upon which the assertion is based. The adverse party may respond to the motion to recuse, and the supervising administrative law judge may assign a different administrative law judge to the case or deny the motion. A party may not file an exception to such a decision until the administrative law judge has rendered a determination on the remaining matters and issues. A similar procedure exists for requesting recusal of a Tribunal member.

Comment - This procedure is awkward at best. Under current Division of Taxation procedures, the identity of the administrative law judge is not known until the date of the hearing. At this point, the taxpayer may have travelled great distances with witnesses and records, only to find that a problem may exist with the administrative law judge. We believe this problem could be avoided by identifying the administrative law judge in advance.

The Committee would like to emphasize strongly the benefits it believes could be realized by assigning an administrative law judge to a matter promptly after the answer is received. In the federal Tax Court, judges are assigned early and are able to use their powers of persuasion to get parties to stipulate to narrow the areas of dispute. In contrast, the current stipulation process in the Division of Tax Appeals works or doesn't work depending upon the abilities of the particular Law Bureau attorney and/or the reasonableness of the taxpayer. In New York City, administrative law judges are assigned to cases as soon as an answer is received and subsequently conduct mandatory

pre-hearing conferences. These conferences have proven highly effective in focusing and organizing cases and in promoting settlements. Having motions returnable to the administrative law judge who will hear the matter also seems highly desirable. Overall, the Committee believes the early assignment of administrative law judges would make the Division more “user friendly” and help parties resolve cases in a more efficient and less costly fashion.

Section 3000.9 - Accelerated Determination. The proposed regulations permit a “party” to move for dismissal of a “petition” based on documentary evidence, lack of subject matter jurisdiction by the Division of Tax Appeals, the statute of limitations or other infirmities related to the petition or the petitioner. An administrative law judge may treat the motion as a motion for summary determination. Only one motion is permitted in a proceeding. An administrative law judge may make such order “as may be just.” A determination of an administrative law judge denying a motion to dismiss is not subject to review by the Tribunal. In addition to the motion to dismiss, the rules permit a motion for summary determination. Once the motion is made by either party, the administrative law judge may provide a determination in favor of either party without the necessity of a cross motion. A determination denying a motion for summary determination is not subject to review by the Tribunal.

Comment. A motion to dismiss requests a dismissal of a “petition”. If this occurs, what is the result? Is the assessment valid and collectible? Are there situations where a petitioner would request dismissal of its own petition? Is it appropriate to broaden the motion to cover dismissal of a petition or an assessment?

The regulations governing motion practice permit issuance of “such order as justice requires” or “such other order as may be just”. Prior regulations governing discovery have been modified to eliminate “a form of discovery by order” for “good cause”. This provision was eliminated because without specific rules to take the place of the CPLR procedure that defined “good cause” in this context, the parties and the administrative law judges were without direction in determining whether a discovery request was or was not appropriate as well as what form a discovery order might take. Motion practice raises similar concerns, and it may therefore be necessary to provide more specificity regarding remedies or responses to motions by an administrative law judge.

Section 3000.10 - Ex Parte Communications. Proposed regulations state that ex parte communications with the administrative law judges assigned to a case shall not occur, although it is possible to seek clarification of procedural matters from the supervising administrative law judge. Whenever a party wishes to communicate with an administrative law judge, a copy of the communication must be delivered to the opposing representative, and any oral communication must involve prior notice to the opposing party. At the Tribunal level, access to the Tax Appeals Tribunal shall be through the office of the Secretary to the Tax Appeals Tribunal.

Comment. No comment. This seems reasonable and consistent with current practice.

Section 3000.12(b) - Submissions;. The proposed regulations require submission by the Law Bureau of all documentary evidence relevant to the issues, including

stipulations, with a copy sent to the Administrative Law Judge and to the opposing party. Petitioner may then submit additional documents in accordance with the submission schedule established by the Administrative Law Judge.

Comment. No comment.

Section 3000.13(b) - Small Claims. Small claims jurisdiction has been increased from $10,000 to $20,000 (excluding penalties and interest) for any 12-month period for taxes other than sales taxes. For sales taxes, the level has been increased to $40,000 (rather than $20,000).

Comment. We applaud this increase, which should expand the use of small claims hearings. However, we believe it would be appropriate to further expand significantly the dollar limit, as is authorized by the statute. Many cases, such as residency personal income tax cases, routinely involve more than $20,000 in tax yet may not merit the expense and inconvenience of a formal hearing in Troy, New York, or an appeal if the taxpayer loses at the lowest hearing level. Small claims hearings, in contrast, are held throughout the State, making the forum far more convenient for taxpayers. Statistics published by the Division of Tax Appeals demonstrate that the Tribunal routinely sustains administrative law judges on factual issues. Therefore, in fact-driven cases, the “appeals” advantages of administrative law judge proceedings (compared to non-appealable small claims hearings) may be of little practical value. A combination of cost, convenience and statistical trends indicate that there might be a wider use of small claims hearings if the jurisdictional limits were significantly increased.

The Committee believes, first and foremost, however, that taxpayers should not be required to choose between a convenient location and the rights provided by a formal hearing. All taxpayers should be entitled to a formal hearing in a convenient forum. Expanding the small claims jurisdictional limits cannot accomplish this goal; only the reinstitution of hearings outside Troy can. The costs and burdens of formal hearings for taxpayers could be greatly reduced by resuming administrative law judge hearings at least in the New York City area and possibly in Syracuse, Rochester and Buffalo as well.

Section 3000.14 - Hearing Memorandum. The proposed regulation states that each party shall prepare a hearing memorandum and shall submit copies to the Supervising Administrative Law Judge and the opposing party not less than 10 days before the hearing. This memorandum must list all witnesses, a summary of anticipated testimony, a list of all exhibits, a statement of the issues, a statement of legal authorities and a copy of any stipulations. Amendments are permitted, but if a party fails to make a good faith effort to comply with the hearing memorandum requirements, the Administrative Law Judge may preclude the testimony of witnesses or the introduction of evidence not included in the hearing memorandum. Documents and testimony introduced only for purposes of rebuttal or to impeach a witness may be allowed even if they are not included in the hearing memorandum.

Comment. Some form of hearing memorandum is clearly desirable. It may be difficult, however, to prepare a memorandum complete in all details ten days before a hearing, because the identity of witnesses may change, because stipulations may be incomplete, unreviewed or

unagreed upon, and because considerable work frequently takes place during the two weeks immediately before a hearing, work which may have a major impact on the nature and amount of evidence presented. The rules imposing the memorandum should recognize these limitations. Nevertheless, the overall purpose of the hearing memorandum is laudable, and its presence should help parties focus on issues, stipulate facts, and resolve cases when possible.

There may be a question concerning the authority of the Division of Tax Appeals to issue a preclusion order for failure to provide a hearing memorandum. The statute does not mention hearing memoranda, and they could be viewed as a form of unauthorized, forced discovery imposed on both sides requiring each side to disclose its case to the other.

We expect that the hearing memorandum will increase costs for taxpayers and practitioners, with practitioners taking extra care (and spending extra time) to ensure that all the evidence they wish to offer into the record is covered in the memorandum for fear that such evidence will otherwise be the subject of a preclusion order and not be permitted into the record.

We also question the way in which the impeachment or rebuttal exception will apply. The Division of Taxation, for example, might not provide any information in its hearing memorandum, saving all of its information for submission when it cross-examines the taxpayer. Since taxpayers generally have the burden of proof, taxpayers must present documentary and testimonial evidence, and the Division of Taxation will then have the ability to rebut or impeach the taxpayers' “witnesses” through the introduction of material

which was not part of the hearing memorandum. If this provision remains, it will be important to monitor whether it is operating in a fair and even-handed way, or whether it provides an advantage to one party over the other.

Section 3000.15(d) - Conduct of Hearing - Statutory Notice. Under the proposed regulations, the Law Bureau shall introduce a copy of each statutory notice at issue or satisfactory evidence that each such statutory notice has in fact been issued. A copy of a federal determination relating to the issues may be received in evidence to show such determination. Subpoenas may be used, and if a party refuses or fails without reasonable cause to obey any subpoena issued by an administrative law judge, the judge shall have the power to preclude the non-complying party from introducing proof regarding the subpoenaed witnesses and their documents and may draw the inference that the precluded evidence is unfavorable to the non-complying party's position.

Comment. It is reasonable to insist upon production of a copy of the statutory notice. In fact, the original statutory notice should be required in virtually all cases. This is a fundamental jurisdictional document, and it seems inappropriate for the Division of Taxation to rely upon the statutory notice attached to the taxpayer's petition or “inferences” of a statutory notice as the only indication that this fundamental jurisdictional requirement has been satisfied. This portion of the regulations does not address whether the statutory notice was forwarded in a timely and proper matter, but merely whether the statutory notice was issued. Without a statutory notice, the Division of Tax Appeals lacks subject matter jurisdiction. Therefore, it is

reasonable to expect strict adherence to this requirement in all cases.

Provisions dealing with the failure to respond to a subpoena should be broadened to include subpoenas issued under the CPLR as well as subpoenas issued by the Administrative Law Judge. If subpoenas by an administrative law judge are entitled to greater protection (in the Division of Tax Appeals) than subpoenas issued under the CPLR, practitioners may have the added cost and inconvenience of seeking all subpoenas through the administrative law judge rather than simply through the CPLR.

Section 3000.16(b) and (c) - Motion to Reopen the Record. A party may move to reopen the record at the Administrative Law Judge level or to reargue the case at the Tribunal level. Motions to reopen the record at the administrative law judge level shall be made to the judge who rendered the determination within 30 days after the determination has been served, but the motion does not extend the time for taking an exception. However, the motion constitutes good cause for requesting an extension of time to take an exception. An administrative law judge cannot grant the motion after the filing of an exception. At the Tribunal level, a motion for reargument must be made within four months after the decision has been served, and the Tribunal shall have no power to grant the motion after a petition for judicial review has been commenced under § 2016 of the Tax Law.

Comment. Is it a correct interpretation of the rule that a party may move to reopen the record or move to reargue before an administrative law judge? If so, are the standards

the same? Does a motion to reargue require either newly found evidence or fraud, etc., as does a motion to reopen? We believe a motion to reargue should not require either of these findings. Further, we believe a motion to reopen the record could be appropriately made to an administrative law judge before a determination has been rendered. The rule, however, does not seem to contemplate this.

Overall, we believe a procedure for reconsidering a decision is a sound idea, but practical concerns suggest that the implementation of this practice requires more comprehensive rules and possibly statutory revisions. For example, as currently proposed, if one party wins in part and loses in part at the administrative law judge level and seeks to reopen the record, the other party can terminate this right by simply filing an exception. The party seeking to reopen the record may request an extension of time to file its exception, but the other party will not be bound by the extension and may effectively negate the motion by filing its own exception. At the Tribunal level, this problem does not exist because the taxpayer is the only party entitled to appeal from an adverse Tribunal decision. Presumably, the Division of Taxation will not seek reargument if it prevails at the Tribunal level. However, if the taxpayer - loses at the Tribunal level and seeks reargument before the Division of Tax Appeals, the taxpayer may still have an obligation to commence the Article 78 proceeding within the four month period, even if the Tribunal has not yet decided upon the motion for reconsideration, because there is no mechanism for creating a “stay” of the Article 78 appeal pending the Tribunal's decision on the reargument motion. Even if the Tribunal decides favorably regarding reargument, the taxpayer may

feel a need to commence and maintain the Article 78 proceeding, fearing that failure to do so could result in a permanent loss of its appeal rights.

The Committee believes that the proposed rule is thus inadequate because, as a practical matter, motions to reargue before the Tribunal would be available only to the Division and not to taxpayers. As stated, this problem arises because the proposed rule provides that the Tribunal does not have jurisdiction to grant a motion to reargue if a petition for judicial review has been commenced. Thus, a taxpayer who wishes to seek judicial review of an adverse decision of the Tribunal (and who must commence such judicial review within four months of the adverse Tribunal decision), will not be certain of receiving a decision on the motion unless the taxpayer is prepared to waive his or her rights to commence proceedings seeking judicial review of the Tribunal's initial decision.

It may be that the proposed rule does not intend this result and that the four month clock for taxpayers to commence judicial review should start anew after the taxpayer receives an adverse decision from his or her motion to reargue. Given the fact that there is no statutory authority for motions to reargue, however, a taxpayer might file a motion to reargue an adverse decision of the Tribunal under the proposed rule, receive an adverse decision on that motion more than four months after the original adverse decision, and then file a petition for judicial review (within four months of the adverse decision on the motion to reargue) only to be faced with a motion to dismiss the petition for judicial review as untimely. The argument would be that the original decision, as the statute clearly

states, “finally and irrevocably” decided all issues in the Division of Tax Appeals and it was from that decision that the taxpayer was to appeal, not from the decision on the motion to reargue. The Article 78 proceeding could in fact be dismissed by the Appellate Division on its own motion without a motion being filed by the Attorney General.

Even apart from the problems of coordinating with Article 78 petitions, the Committee believes that the time period allowed for filing motions to reargue is unreasonably long. The Committee is aware of the rule that provides that motions to reargue under the CPLR may be made at any time prior to the expiration of the period of time to take an appeal, see Seigel, Practice Commentaries, C2221:8. However, practice in the Division of Tax Appeals should not necessarily be patterned entirely after the CPLR; part of the reason for the proposed new rules is to correct and change many of the old rules that were patterned after the CPLR and found to be deficient or inappropriate. If a rule providing for motions to reargue is to be enacted, the time for filing such motions should be limited to 30 days after the decision by the Tribunal. This would be similar to the present rule that requires exceptions to determinations by administrative law judges to be filed within 30 days (20 NYCRR § 3000.11(a)(i)). Additionally, any such rule should, if possible, be legislatively coordinated with the ability to bring an Article 78 proceeding. The motion to reargue should extend the statute of limitations for bringing an Article 78 until the motion is finally determined.

In the alternative, if motions for reconsideration were required to be brought within thirty days and were subsequently decided within thirty days, a party would be

able to receive a determination on its motion with ample time remaining to file an Article 78 petition if its motion failed.

Finally, the Committee questions; whether the Tribunal has the authority to authorize motions for reconsideration by regulation, particularly in light of the Tribunal's prior decisions in thus area (see Matter of Goldome Capital Investments 11/3/88; Matter of Jenkins Covington, 11/21/91).

Section 3000.23 - Service of Decisions. Decisions by the Division of Tax Appeals served by mail are sent via registered and certified mail, and service is deemed complete upon deposit in a post office for depository under the exclusive care and custody of the United States Postal Service.

Comment. Taxpayers change addresses from time to time, and it is not clear where decisions will be “served,” or whether a taxpayer's representative will receive copies of all decisions. The regulation should specify that a copy will be sent to the taxpayer at an address specified by the taxpayer in its petition, with a copy to the taxpayer's representative as shown in the most recent power of attorney filed with the Division of Tax Appeals.

Other issues. We believe the regulations should address certain issues that are not addressed by the proposed regulations. These include provisions:

-- providing for the correction of transcripts (as problems have arisen in this area);

-- allowing post-determination computation disputes to be brought before an administrative law judge within a specified time after determination;

-- clarifying the secrecy status of Division of Tax Appeals files; and

-- addressing cross-exceptions (although this might instead be done by statute).