

TAX SECTION

New York State Bar Association

REPORT ON TAX TRIBUNAL LEGISLATION AND PROPOSED REGULATIONS

BY COMMITTEE ON NEW YORK STATE TAX MATTERS

June 9, 1987

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June 16, 1987

BY HAND

Senator Warren M. Anderson
Senate Majority Leader
Capitol Building
Room 330
Albany, KY 12247

Re: Tax Tribunal Report

Dear Senator Anderson:

I enclose a Report on Tax Tribunal Legislation and Proposed Regulations prepared by our Committee on New York State Tax Matters. This report discusses both the current and proposed Tribunal legislation and draft regulations.

This report was written by Paul R. Comeau, Chairman of the Tax Tribunal Subcommittee. It also reflects contributions by Burt Abrams, E. Parker Brown, Peter Faber, Joseph Lipari, Arthur R. Rosen, David Sachs and Donald Schapiro.

The report was approved by the Executive Committee of the Tax Section.

If you have any questions, please contact Paul R. Comeau at Hodgson, Russ, Andrews, Woods & Goodyear, 1800 One M & T Plaza, Buffalo, New York 14203 - (716) 856-4000 or me.

Sincerely

Donald Schapiro

Enclosure

Cc: Philip Pinsky, Esq.

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June 16, 1987

BY HAND

Commissioner Roderick G.W. Chu
New York State Department of
Taxation and Finance
Building 9, State Campus
Albany, KY 12247

Re: Tax Tribunal Report

Dear Rod:

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Sincerely

Donald Schapiro

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REPORT # 565

TAX SECTION

New York State Bar Association

June 16, 1987

BY HAND

Governor Mario M. Cuomo
Executive Chamber
Second Floor
Stage Capital Building
Albany, NY 12227

Re: Tax Tribunal Report

Dear Governor Cuomo:

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Donald Schapiro

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June 16, 1987

BY HAND

Mr. Evan A. Davis
Executive Chamber
Second Floor
Stage Capital
Albany, NY 12224

Re: Tax Tribunal Report

Dear Evan:

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June 16, 1987

BY HAND

Senator Roy M. Goodman
Senate Investigation, Tax
And government Operations
Legislative Office Building
N.Y.S. Senate Room 708
Albany, NY 12247

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June 16, 1987

BY HAND

Mr. Abraham M. Lackman
Director of Fiscal Studies
Senate Finance Committee
Agency Bldg. #4, 16th Floor
Albany, NY 12247

Re: Tax Tribunal Report

Dear Mr. Lackman:

I enclose a Report on Tax Tribunal Legislation and Proposed Regulations prepared by our Committee on New York State Tax Matters. This report discusses both the current and proposed Tribunal legislation and draft regulations.

This report was written by Paul R. Comeau, Chairman of the Tax Tribunal Subcommittee. It also reflects contributions by Burt Abrams, E. Parker Brown, Peter Faber, Joseph Lipari, Arthur R. Rosen, David Sachs and Donald Schapiro.

The report was approved by the Executive Committee of the Tax Section.

If you have any questions, please contact Paul R. Comeau at Hodgson, Russ, Andrews, Woods & Goodyear, 1800 One M & T Plaza, Buffalo, New York 14203 - (716) 856-4000 or me.

Sincerely

Donald Schapiro

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June 16, 1987

BY HAND

Senator John J. Marchi
Senate Finance Committee
Legislative Office Building
N.Y.S. Senate, Room 913
Albany, NY 12247

Re: Tax Tribunal Report

Dear Senator Marchi:

I enclose a Report on Tax Tribunal Legislation and Proposed Regulations prepared by our Committee on New York State Tax Matters. This report discusses both the current and proposed Tribunal legislation and draft regulations.

This report was written by Paul R. Comeau, Chairman of the Tax Tribunal Subcommittee. It also reflects contributions by Burt Abrams, E. Parker Brown, Peter Faber, Joseph Lipari, Arthur R. Rosen, David Sachs and Donald Schapiro.

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Sincerely

Donald Schapiro

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June 16, 1987

BY HAND

Honorable Melvin H. Miller
Speaker, N.Y.S. Assembly
Legislative Office Building
Room 932
Albany, KY 12248

Re: Tax Tribunal Report

Dear Speaker Miller:

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Sincerely

Donald Schapiro

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June 16, 1987

BY HAND

Mr. Robert Plattner
New York State Assembly
Ways & Means Committee
Room 412
Albany, NY 12248

Re: Tax Tribunal Report

Dear Mr. Plattner:

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This report was written by Paul R. Comeau, Chairman of the Tax Tribunal Subcommittee. It also reflects contributions by Burt Abrams, E. Parker Brown, Peter Faber, Joseph Lipari, Arthur R. Rosen, David Sachs and Donald Schapiro.

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Sincerely

Donald Schapiro

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REPORT # 565

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June 16, 1987

BY HAND

Honorable Saul Weprin
Chairman, Ways & Means
Legislative Office Building
N.Y.S. Assembly, Room 932
Albany, NY 12248

Re: Tax Tribunal Report

Dear Assembly Weprin:

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Sincerely

Donald Schapiro

Enclosure

Cc: Mr. Carl Carlucci
Mr. Dean A. Fuleihan

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NEW YORK STATE BAR ASSOCIATION TAX SECTIONREPORT ON TAX TRIBUNAL LEGISLATION AND PROPOSED REGULATIONSBY COMMITTEE ON NEW YORK STATE TAX MATTERS^{1/}

June 9, 1987

On July 17, 1986 Governor Cuomo signed into law a bill creating an independent Tax Appeals Tribunal. This Legislation was designed to ensure taxpayer confidence in New York's Tax System by separating the assessing, rule-making and enforcement functions of the Tax Department from the quasi-judicial functions involved in tax appeal cases. Under prior law, the Commissioner of Taxation and Finance was also President of the State Tax Commission, the body charged with resolving disputes between taxpayers and the Department.^{2/} In a press release issued July 17, 1986 by the Governor's Press Office, the Governor said "the intent of the Legislation is to enhance the impartiality of the State's Tax Appeals System by eliminating any appearance of a

^{1/} This report was written by Paul R. Comeau, Chairman of The Tax Tribunal Subcommittee. Helpful comments were received from Burt Abrams, E. Parker Brown, Peter Faber, Joseph Lipari, Arthur Rosen, David Sachs and Donald Schapiro.

^{2/} See Comeau and Rosen, The Need for an Independent New York Tax Tribunal, 2 Journal of State Taxation 259 (1983), reprinting a July 12, 1983 New York State Bar Association Report. See also Pomp, Plattner and Kay, Fairness and Function in the New York State Tax Appeals System: Proposals for Reform, 49 Albany Law Review 352 (1985), based upon a report prepared for the New York Legislative Commission on the Modernization and Simplification of Tax administration in the Tax Law (Tax Study Commission).

conflict of interest." The Governor's approval memorandum, also filed on July 17, 1986, referred to studies completed by the Legislative Tax Study Commission and the New York State Bar Association.

In its July 12, 1983 report, the Tax Section of the New York State Bar Association outlined the need for an Independent Tax Tribunal. On April 4, 1985, Henry Miller, then President of the New York State Bar Association, wrote to Governor Cuomo and Legislative Leaders outlining two areas of concern: perceptions of fairness and settlement authority. These letters suggested both an Independent Tax Tribunal and broadened settlement authority, and predicted that these changes would substantially reduce the backlog of cases under dispute. Chapter 282 of the Laws of 1986, effective September 1, 1987, addressed both of the concerns raised by Mr. Miller. It created an Independent Tax Tribunal and increased the Tax Department's settlement authority.

This report describes the major features of the new Legislation, suggests various changes which should be considered as part of proposed "clean up" Legislation, reviews draft regulations which were prepared by the Tax Commission Staff and submitted to the Bar Association for comments on January 15, 1987 and April 23, 1987, and suggests numerous technical or other changes in the draft regulations.

I. Summary of Tax Tribunal Legislation. The Tax Appeals Tribunal Legislation abolishes the State Tax Commission and creates a new Division of Tax Appeals within the Department of Taxation and Finance, effective September 1, 1987. The Commissioner of Taxation and Finance will have sole administrative and regulatory responsibility for the Department, except with regard to administration of the Division of Tax Appeals. The independent Division of Tax Appeals will be operated and administered by a Tax Appeals Tribunal consisting of three commissioners appointed by the Governor with the advice and consent of the Senate.^{3/} One of the members of the Tribunal will be the President, responsible for administration. The two remaining members will join the President in exercising adjudicatory responsibilities.^{4/}

Under the revised procedure, a taxpayer who receives an unfavorable determination from the Department of Taxation and Finance may request review of the determination by a Bureau of Conciliation and Mediation Services which will provide conciliation conferences.^{5/} At the conciliation conference, the taxpayer or the taxpayer's representative, a Departmental representative and a conciliation conferee meet in an informal

^{3/} See Tax Law Sections 2.-1; 170.-1.

^{4/} See generally Tax Law Sections 2002 & 2004, effective September 1, 1987.

^{5/} See Tax Law Section 170.3-A(a).

manner in an attempt to resolve the controversy. The Commissioner may delegate to the conferee the power to waive or modify penalties, interest and additions to tax, and this settlement power, if granted by the Commissioner, should permit the resolution of most cases. (See the discussion of draft regulation section 4000.3(c)(2), infra. for a discussion of these powers.) Taxpayers must appear at the conference either in person or through a proper representative, as defined in the statute.^{6/} Upon conclusion of the proceeding, a conciliation order is rendered. This order is binding upon all parties unless the taxpayer petitions for a hearing before the Tax Appeals Tribunal within 90 days after the conciliation order is issued. Conciliation conference orders are not published or treated as precedent, but the Commissioner of Taxation and Finance must submit an annual report to the Governor, the Senate and the Assembly regarding the number of conferences held, dispositions made and the number of conferences pending.^{7/}

If the matter is not resolved at the conciliation conference, and the taxpayer files a petition with the Division of Tax Appeals, the Division of Tax Appeals will schedule a hearing before an administrative law judge.^{8/} Most of the current

^{6/} See Tax Law Section 170.3-A(d).

^{7/} See Tax Law Section 170.3-A(g).

^{8/} See Tax Law Sections 2008 & 2010.

hearing officers will become administrative law judges on September 1, 1987. In the future, new administrative law judges will be selected according to standards established by the Tax Appeals Tribunal, acting in cooperation with the State Civil Service Commission and following standards jointly established. Hearings may be conducted by either the Small Claims Unit, where certain dollar limitations and other tests are met, or at a more formal hearing. Decisions by the Small Claims Unit are not appealable, while other decisions by administrative law judges may be appealed to the Tax Appeals Tribunal.^{9/} A determination issued by an administrative law judge must be appealed within 30 days following notice of the determination. Under certain circumstances, the Tribunal may permit oral argument. Small Claims Unit proceedings are informal, but other proceedings are formal and include a stenographic record and the publication of decisions. Although both administrative law judge and Tax Tribunal decisions will be published, only Tribunal decisions will have precedential value

A decision of the Tax Appeals Tribunal may be appealed by the taxpayer within four months after the issuance of the decision, and these appeals go directly to the Appellate Division of Supreme Court, Third Department, and are handled in other respects in accordance with normal Article 78 Rules of Practice

^{9/} See Tax Law Section 2012.

and Procedure.^{10/}

II. Suggested Legislative Changes. The Legislation satisfies most of the concerns voiced by the Bar Association in earlier reports and letters. However, we understand that the Department and Legislature are considering "clean up" Legislation, and in doing so they should consider several changes.

-- Legal and Physical Separation of Tax Tribunal.

The Legislation keeps the Tax Tribunal in the Department of Taxation Finance, but creates a functional separation between the Division of Tax Appeals and the Division of Taxation. For example, the Department of Taxation will be under the direction of the Commissioner, who shall have sole charge for the administration of the Department except with regard to the administration of the Division of Tax Appeals which will be the sole charge of the Tax Appeals Tribunal.^{11/} Similarly, the Commissioner of Taxation may appoint heads of divisions or bureaus or make other alterations, except that the Commissioner has no authority with regard to the Division of Tax Appeals. The Commissioner does not have the power to appoint, remove or transfer any personnel of the Division of Tax Appeals, and does not have any budget authority, regulatory or other responsibility with regard to the Division of Tax Appeals.^{12/} It is apparent that

^{10/} See Tax Law Section 2016.

^{11/} See Tax Law Section 170-1.

^{12/} See Tax Law Sections 170-4 & 2002.

the Legislation makes every effort to remove the Division from the Department in substance, if not in form. These separation provisions are so explicit and far-reaching that they raise a question concerning the remaining relationship, if any, between the Tax Department and the Division of Tax Appeals. Structurally, the Division will be a division of the Department, but functionally it appears that the Division will be totally separate. We understand that the Department believes certain economies of scale will result from sharing of space as well as support functions, such as personnel, business administration and purchasing. However, questions arise concerning whether this "sharing" can occur, consistent with the new language. Library facilities, office space, hearing rooms and so forth may be shared under the proposed structure, but what else? Also, who will decide numerous questions regarding the sharing of facilities or personnel? We understand that the Commissioner of General Services is involved in this process, and assume that both the Commissioner of Taxation and the President of the Tax Appeals Tribunal will participate in these decisions. However, it might be appropriate to legally and physically separate the Tax Tribunal from the Department of Taxation and Finance. In the Tax Section's January 16, 1987 letter to John-C. Egan, Commissioner of General Services, we referred to the sharing of office space

and other facilities as an undesirable aspect, and stated that an independent adjudicatory body should not share offices with one of the parties to the proceedings. We believe the new Tribunal's independence will be more clearly perceived if it is physically separated from the Tax Department, and suggested a first step toward physical separation when the Tax Department is relocated from Manhattan to Brooklyn. The New York City offices of the Tribunal could remain the World Trade Center or in some other Manhattan location, with the balance of the Department transferred to Brooklyn. We also suggested a physical separation of the Tribunal and Departmental offices in Albany.

-- Personnel.

We oppose the automatic transfer of personnel from the Tax Appeals Bureau to the Tax Appeals Division and prefer a structure which would permit the new Tribunal to select administrative law judges and other personnel from a group that would include (but not be limited to) existing Tax Appeals Bureau personnel. This automatic transfer will, nevertheless, occur. According to Section 2010 of the Tax Law, administrative law judges will be in the classified Civil Service. The Tax Appeals Tribunal, acting in cooperation with the State Civil Service Commission, will establish standards to govern the selection and appointment of administrative law judges. In effect, this

provision contemplates a screening panel for administrative law judges.^{13/} The statute does not require a similar screening panel for Tribunal members, although screening panels are used for Court of Appeals candidates, and use of such panels would help to ensure that members of the Tribunal have knowledge and skill in tax matters. We believe selection of Tribunal members is even more important than administrative law judge selection since, presumably, the Tax Appeals Tribunal will receive a high percentage of sophisticated tax cases involving technical legal questions and requiring higher levels of expertise. If the statute is not changed to require a screening panel, the Governor should consider establishing such a panel by executive authority.

-- Salaries.

According to Section 2004, each member of the Tribunal will receive annual salaries within the amounts appropriated therefore. However, the Law also amends Paragraphs D and E of Subdivision 1 of Section 169 of the Executive Law and classifies the President of the Tax Appeals Tribunal and members of the Appeals Tribunal in certain categories (D and E Commissioners). We recognize that the classification of commissioners is a difficult and sensitive subject, which requires consideration of

^{13/} We are not aware of any efforts to establish this panel, and we encourage prompt action to establish a well-qualified panel to ensure high-quality administrative law judges.

relative responsibilities, technical ability, and numerous other factors. We understand that the D and E classifications will result in salaries of approximately \$72,000 for the President of the Tribunal and \$66,000 for the other Tribunal members. It may be difficult to attract high-quality candidates at these salaries.

When the Tribunal was created, some of the legislative proposals called for creation of a separate judicial court, or a new part of Supreme Court or expanded jurisdiction for the Court of Claims. Court of Claims judges receive \$82,500 and Supreme Court judges receive \$82,000. Perhaps the Tribunal President and members should be reclassified as C and D commissioners, respectively. Ten or twenty thousand dollar increases for these commissioners should not cause budget or other problems, although we recognize that any increase could cause "ripple" effects, resulting in pressure to reclassify or increase the compensation of other commissioners in other agencies.

-- Residency.

Tax Law Section 2004 states that each member of the Tribunal must reside in New York State "at the time of his appointment." We question whether this residence requirement is necessary or appropriate in light of the additional requirement that at least two of such members "shall each have been admitted to practice as attorneys at law in this state for a total of ten

years preceding their appointments." The effect of the residence requirement will be to exclude any full-time New York tax practitioners from consideration merely because they happen to live in suburban Connecticut, New Jersey, Pennsylvania or Vermont.

If, nevertheless, it is determined that residence should be required as a policy matter, such requirement should be altered to be applicable within a reasonable time (e.g., six months) after the time the member assumes his office, rather than at the time of appointment. This would permit a qualified nonresident to be appointed and then to change his residence to New York, rather than being absolutely precluded.

-- The Burden of Proof.

The Statute does not contain clear language regarding burdens of proof. We understand that the drafters intended to give the Tribunal "de novo" review powers, but we do not see a clear statement to this effect in the Legislation. Presumably, as a taxpayer moves from tax assessment to the administrative law judge, the assessment will be presumed correct, and the taxpayer will have the burden of going forward. After all of the evidence has been submitted, the administrative law judge will weigh the evidence and will decide the case according to the preponderance of the evidence. If the case is appealed to the Tribunal, the Tribunal will rely upon the transcript and will give some weight to the administrative law judge's findings of fact, but will have

the power to review the record and, perhaps, summarize its own findings of fact. Again, based upon the preponderance of the evidence, the Tribunal will make a decision. The Tribunal will not presume that the administrative law judge's decision is correct, but will make an independent determination after weighing the entire record and, perhaps, entertaining oral arguments. The Tribunal will have the power to remand the case to the administrative law judge for additional factual determinations or evidentiary hearings, but will not conduct its own evidentiary hearings. The Statute contains oblique references to the burden of proof, and these references may imply de novo review authority on the part of the Tribunal for both factual and legal issues. For example, Tax Law Section 2010(5) states that "determinations issued by administrative law judges shall not be cited or considered as precedent or given any force or effect in any other proceeding conducted pursuant to the authority of the Division or in any judicial proceeding conducted in this State." Some practitioners believe this language may be sufficiently broad to cover Tax Tribunal review of an administrative law judge's determination, but others maintain that this reference is limited to other proceedings (other than the case at hand). A clearer statement is desirable.^{14/} If the statute is not amended to clarify this matter, the Tribunal's rules of practice and

^{14/} The draft regulations, discussed infra., create some confusion in this area by defining the Division of Tax Appeals in a way which does not include the Tribunal. According to draft regulation Section 3000.1(d), the Division "consists of an administrative law judge unit and a small claims unit."

procedure should set forth the level of probative value accorded to administrative law judge determinations, particularly factual determinations when the same case is subsequently reviewed by the Tribunal.

-- Stay of Collection.

Under the Tax Law, the amount shown on a notice of deficiency becomes an assessment, subject to collection, if a timely petition is not filed or if a decision of the Commissioner becomes final.^{15/} The same procedure will apply when the Division of Tax Appeals becomes operative, and the legislation should clearly state that the filing of a request for a conciliatory conference or appeal before the Division of Tax Appeals automatically stays collection efforts, except in jeopardy situations, and should contain jeopardy review procedures, similar to federal Tax Law Section 7429.^{16/}

-- Appeals by the Department.

A decision of the Tax Appeals Tribunal may be appealed by the taxpayer by commencing an action in the Appellate Division, Third Department.^{17/} The Division of Taxation will not

^{15/} See e.g. Tax Law Section 1082(a)(1); 1138

^{16/} Compare Tax Law Section 1138(b).

^{17/} See Tax Law Section 2016.

have the power to appeal adverse decisions. Some observers believe that this procedure is correct, and that the Division of Taxation should not have the power to appeal adverse Tribunal decisions because the Tribunal and the Division of Taxation will be part of the same Department; the Tribunal will not function in an independent manner and will defer to the Division of Taxation; and the Division of Taxation, if authorized to appeal, will appeal every adverse decision, thereby increasing costs and complexity for taxpayers. Others note that the Division of Taxation has access to the Legislature, and can obtain a legislative reversal of adverse decisions which have a major revenue impact.

By contrast, most of our members believe the Tribunal will be more independent if the Division of Taxation has the right to appeal. The Tribunal should always seek to make the right decision, and should not be swayed by the finality of a decision in favor of the taxpayer.

If the Division of Taxation and the Division of Tax Appeals are truly independent, the Division of Tax Appeals should have the right to appeal adverse decisions by the Division of Tax Appeals. We support the portions of the "clean up" bill which give the Division of Taxation the right to appeal Tribunal decisions.

-- Compromise or Settlement Authority.

Tax Law Section 2006(12) gives the Tribunal the same power and authority as the Commissioner of Taxation and Finance to impose, modify or waive interest, additions to tax or civil penalties, and authorizes the Tribunal to delegate this power to administrative law judges and others. (Compare this with the identical power of the Commissioner to delegate this authority to conciliation conferees under Tax Law Section 170(3)-a(c).) Does this power include the compromise power given to the Commissioner under Tax Law Section 171(Eighteenth)-(a)? We do not believe that the Tribunal should have compromise power, a power which should be reserved to the Commissioner. Compromises may encompass concepts of "ability to pay," and it is inappropriate for the Tribunal or any adjudicatory body to base its decision on the taxpayer's ability to pay a tax which is otherwise due. The Tribunal should have settlement power, but how will the Tribunal exercise this apparent settlement power? Will prehearing settlement conferences occur with the administrative law judges acting as arbitrators? The draft of proposed regulations does not provide any guidance in this area. In order to expedite cases, some settlement authority along these lines might be appropriate, but a cross reference which gives the Tribunal the same powers as the Commissioner may prove unworkable.

III. Draft Regulations. The staff of the State Tax Commission has prepared drafts of rules of practice and procedure. The first draft appeared in January, 1987 and covers Part 3000, Practice and Procedure Before the Tax Appeals Tribunal. The second portion appeared in April, 1987 and covers Practice and Procedure Before the Bureau of Conciliation and Mediation Services (Part 4000) and Compromises (Part 5000).

Although it is appropriate for the Tax Department or Tax Commission to prepare rules of practice and procedure regarding the conciliation and compromise areas, areas which will remain with the Division of Taxation after the Tribunal becomes operative on September 1, 1987, it is not appropriate for the Division of Taxation or the Commission to prepare rules of practice and procedure for the Tax Tribunal. Tax Law Section 171-1 gives the Commissioner of Taxation and Finance the power to make reasonable rule and regulations necessary for the exercise of its powers, but numerous clear statements in Section 170 of the Tax Law indicate that the Commissioner of Taxation and Finance will not have any administrative or other powers in connection with the Division of Tax Appeals, including the Tax Tribunal.^{18/} Nevertheless, we recognize that the Tax Tribunal will not become operative until September 1, 1987 and will, by necessity, require some rules of practice and procedure on or about that date.

^{18/} See also Tax Appeals Tribunal Legislation Section 30.

Under the circumstances, the Tax Commission's preparation of draft regulations for the Tribunal is understandable. However, it is hoped that the Tax Tribunal members will carefully review the draft and freely accept, reject or modify the draft before it is adopted.

We appreciate the Department's willingness to circulate the draft and solicit comments, and are grateful for our opportunity to provide comments well in advance of the proposed effective date. Our comments are divided into three major portions:

- Tax Appeals Tribunal Rules of Practice and Procedure (Part 30001),
- Bureau of Conciliation and Mediation Services Procedural Rules (Part 4000) and
- Compromises (Part 5000).

A. Tax Appeals Tribunal Rules of Practice and Procedure.
(Part 3000)

Part 3000 was circulated in January, 1987 and sets forth basic rules of practice and procedure. The rules provide certain definitions, such as definitions of "administrative law judge", "tax tribunal", and so forth; describe the circumstances under which one person may appear on behalf of another person in a proceeding before the Division of Tax Appeals; describe commencement of a proceeding before the Division of Tax Appeals (by filing a petition); specify the content of a petition;

describe other pleadings, such as answers and replies; outline motion and discovery practice; describe stipulation procedures; summarize the small claims and administrative law judge hearing processes; describe appeals to the Tax Tribunal; outline the consequences of a frivolous petition; and set forth other miscellaneous rules.

Overall, the draft is excellent, and resembles existing rules of practice and procedure before the State Tax Commission.^{19/}

Several areas of the Tax Law which require clarification are not covered by the new rules. For example, Tax Law §2004 states that the Tribunal may prescribe specific powers and duties of the president not inconsistent with any provision of law. Section 2006(12) gives the Tax Appeals Tribunal the same power and authority as the Commissioner of Taxation and Finance to impose, modify or waive interest, additions to tax or civil penalties. This section also gives the Tribunal the power to designate and authorize by resolution the officers, administrative law judges or other employees who may perform these functions. The proposed rules of practice and procedure do not address either of these areas. Other areas, are touched upon but should provide a more detailed review of the legal requirements.

^{19/} See N.Y. Tax Reg Section 600 et. seq.

For example, Tax Law §2010(5) states that determinations issued by administrative law judges shall not be cited, shall not be considered as precedent or given any force or effect in any other proceedings conducted pursuant to the authority of the division or in any judicial proceedings conducted in this state. Tax Law 52016 describes judicial review of Tax Appeals Tribunal decisions. (See e.g. Draft Regulation §3000.13) Each of these items will be considered separately.

-- Powers and Duties of President. It is assumed that the president of the Tribunal will have certain specific powers and duties. Tax Law 52004 clearly contemplates this. Until the president and other Tribunal members are selected, it may be impossible to speculate upon an appropriate division of authority, but it is hoped that, once a division is established, the rules of practice will be amplified to clearly state the powers and duties of the president which may impact practice and procedure before the Tribunal.

-- Power to Modify Taxes. The Tribunal has the same power and authority as the Commissioner of Taxation and Finance in any instance where the Commissioner is authorized to impose, modify or waive interest, additions to tax or civil penalties, and the Tribunal has the power to designate this authority to other employees.^{20/} What is the scope of this authority? It is

^{20/} See Tax Law Section 2006(12).

significant to note that the new conciliation conference provisions indicate that the Commissioner of Taxation and Finance has the power to delegate to a conferee authority to waive or modify a penalty, interest and additions to tax. It is also interesting to note that under new Tax Law §171-Eighteenth-a the Commissioner has the authority to compromise civil liability, subject to certain qualifications and limitations. These compromise provisions resemble their federal tax law counterparts.^{21/} The draft rules of practice and procedure do not mention the Tribunal's settlement or compromise authority, and it is unclear whether the Tribunal will construe these powers broadly or narrowly. Will the Tribunal have the power to settle cases? Compromise cases? Hold prehearing settlement conferences? Will the Tribunal delegate greater settlement authority to administrative law judges than the Commissioner delegates to conciliation conferees? In effect, will the Division of Tax Appeals duplicate the conciliatory conference function in certain instances? The rules of practice and procedure should address this area.

It might be appropriate to distinguish "settlement" and "compromise" authority and to limit the Tribunal's ability to compromise cases. Settlements usually involve an analysis of costs and other hazards of litigation, while compromises are frequently based upon the inability to pay. While broad settlement authority may be appropriate for both the Division of

^{21/} See Internal Revenue Code of 1986 §7122.

Taxation and the Division of Tax Appeals, compromise authority, which focuses on the financial strength of the taxpayer, might, appropriately, be restricted to the taxing and collecting authorities in the Division of Taxation.

-- Precedential Value of Determinations. Tax Law Sections 2010(5) and 2012 state that determinations by the small claims unit and administrative law judges may not be cited or treated as precedent or given any force or effect in any other proceedings conducted pursuant to the authority of the Division of Tax Appeals or in any judicial proceedings conducted in the state. Draft rules of practice and procedure repeat this language.^{22/} Is this language intended to relate to the specific case which is the subject of appeal? A review of the legislation and the regulations leaves open questions concerning the burden of proof when a case moves to the Tax Appeals Tribunal. Will the Tax Appeals Tribunal afford any weight to the decision by the administrative law judge? The cited language might possibly be construed to mean that these decisions do not have any force or effect in any subsequent proceeding in the division, and presumably the-"division" includes the Tribunal. The draft regulations raise a question in this regard, however, because they refer to the "Division of Tax Appeals" as a body which

^{22/} See Proposed Regulation Section 3000.9(h)(2) & 3000.10(e)(2).

reports to the Tribunal but which consists of the administrative law judge unit and the small claims unit.^{23/} In other words, the regulations do not seem to include the Tribunal as part of the division. The regulation should be expanded to indicate that the Tribunal is, of course, part of the Division of Taxation and to indicate the extent to which an administrative law judge determination will have probative or presumptive force when the same decision is reviewed by the Tribunal.

-- Judicial Review. Tax Law Section 2016 describes procedures for appealing a Tax Appeals Tribunal decision to the Appellate Division, Third Department, and contains numerous cross-references to the various provisions of the tax law. Draft regulation Section 3000.13 describes the record of the hearing, availability of a transcript and certain other aspects, but does not provide even a summary of the introductory Appellate procedures. It does not contain the same degree of detail as Section 2016. Although practice and procedure before the Third Department is obviously outside of the scope of the Tribunal's powers, it would be helpful to, at a minimum, repeat the language of Tax Law Section 2016 to provide a rough outline of introductory Appellate procedures in tax cases.

^{23/} See Proposed Regulation Section 3005.1(d).

In addition to these general comments, we have a number of specific technical comments concerning Part 3000. These comments are arranged to follow the section numbers of Part 3000.

Section 3000.1(d) - Definitions - Division of Tax Appeals. As stated previously, the definition of "Division, of Tax Appeals" is confusing, because it does not seem to include the Tax Tribunal. This should, of course, be corrected. Consistent with this comment, the language which defines the responsibilities of the Division of Tax Appeals should be expanded to include a review of determinations by administrative law judges. That section also states that the Division of Tax Appeals reports directly to the Tribunal. This language should be changed to indicate that the Division of Tax Appeals is administered by the Tribunal. The last sentence, which currently indicates that the division consists of an administrative law judge unit and a small claims unit should be expanded to indicate that the division consists of the Tribunal, an administrative law judge unit and a small claims unit.

Section 3000.1(f) - Definitions - Proceeding. The term "proceeding" is defined as all practice commencing with the filing of a timely petition in response to a statutory notice. This definition seems to exclude a review by the Tribunal. A petition filed in response to a statutory notice will result in an administrative law judge or small claims hearing. The term

“proceeding” should be defined in a manner which includes review of an administrative law judge's determination by the Tribunal.

Section 3000.2 - Representation - Partnerships. In determining appearances before the Tribunal or administrative law judges, certain rules apply. A partnership may act through one of its members. This language mirrors the statute. Should partnership representation be limited to general partners? If so, a statutory change may be required.

Section 3000.3(a) - Copy of Rules. Rules of practice will be available from the Division of Tax Appeals upon written request. Each statutory notice should include a copy of the petition form and a copy of the rules of practice. The proposed regulation implies that a taxpayer will have to request these items, and this could result in confusion or delay.

Section 3000.3(b)(10) - Taxpayer Identification Number. According to this rule, a taxpayer identification number or social security number must be provided on each petition, and this information will be used solely for purposes of assisting the Tax Department in handling administrative matters. If the petition is being filed with the Division of Tax Appeals, a separate and independent body, the information contained in such a petition should not be used solely by the Tax Department for any purpose, and should not be used as a device to facilitate general administration. It might be more appropriate to require this as part of the conciliatory conference rules, since

conciliatory conferences will be handled by the Department. Furthermore, since the taxpayer must attach to the petition a copy of the notice of determination, and since the notice should contain the taxpayer identification number, it does not seem appropriate to mandate the furnishing of this number in connection with the preparation of a petition.

Section 3000.3 (c) - Time Limits for Filing Petition.

This rule indicates that petitions must be filed within specified time limits, but does not provide the time limits. The limits should be set forth in the regulations.

Section 3000.3(d)(2) and Section 3000.4(a)(4) - Review of Petitions. The cited sections are not consistent. The first section states that if the taxpayer files a defective petition, the supervising administrative law judge of the Tribunal will return the petition and give the taxpayer 30 days to perfect or correct the petition. If the taxpayer does not do this, the taxpayer's petition will be dismissed. If the statute of limitations for filing a petition has expired, the taxpayer will be denied a hearing. By contrast, if the taxpayer files a proper petition and the Law Bureau does not answer within the required 60 day period, the Tribunal will not take any action against the Law Bureau unless the petitioner files a motion requesting relief. Even where the taxpayer files such a motion, the relief

does not consist of an automatic grant of the petition or a determination in the taxpayer's favor. Rather, the remedy is "appropriate relief" as determined by the Tribunal. This contrast exists under existing Commission regulations, and has been irksome to practitioners for many years. The Tribunal should exercise its authority so that treatment of the taxpayer and the Law Bureau is the same (either equally harsh or equally lenient).

The "supervising administrative law judge" concept is not contemplated in the statute, although it may be a logical extension of the statute. According to Tax Law Section 2008, all proceedings in the Division of Tax Appeals are commenced by the filing of a petition. Section 2006(4) authorizes the Tribunal to provide a hearing as a matter of right to any petitioner pursuant to such rules, regulations, forms and instructions as the Tribunal may prescribe. Arguably, these provisions, coupled with provisions regarding appointment of administrative law judges, can be expanded to permit the appointment of a supervising administrative law judge and delegation of "petition review" responsibility to the supervising administrative law judge. However, none of this is in the statute. This procedure parallels the current rules of practice and procedure before the State Tax Commission, whereby a distinction is made between a "petition" and a "perfected petition". It is questionable whether the drafters of this legislation intended a continuation of this dichotomy, and whether they intended to give a supervising administrative law judge the power to dismiss a timely petition

because of its failure to comply with certain technical requirements. Procedural questions arise where a taxpayer files a petition in a timely manner, is notified by the supervising administrative law judge that the petition is not acceptable, and corrects the petition within the 30 day period. If the original filing fell within the statute of limitations, but the corrected filing does not fall within the statutory time frame, will the taxpayer lose its right to a hearing? Presumably not, but this should be clearly stated in the rules. Any amended petition or corrected petition should relate back for purposes of the statute of limitations to the date the first petition was filed.

Where the petition does not satisfy the requirements of the section, the supervising administrative law judge must return the petition with a notice stating that the petition does not comply with the requirements of the section, and giving the taxpayer an additional 30 days within which to file a corrected petition.^{24/} The regulation should be clarified to state that the supervising administrative law judge should provide, where possible, a statement indicating the areas where the petition does not comply, rather than merely rejecting the petition. In other words, if the petition is defective for particular reasons, those reasons should be stated.

^{24/} See Proposed Regulation Section 3000.3(d).

Section 3000.3(e) - Reference to Conciliation and Mediation. Generally, a taxpayer who files a petition will request a conciliation conference, and the case will move to the administrative law judge level of the Division of Taxation after an unsuccessful conference. If the taxpayer has not requested a conference, this section of the proposed regulations permits the Division of Tax Appeals to refer the matter back to the conciliation section. However, the proposed rule requires the consent of the Law Bureau and a request by the taxpayer. It is unclear whether this is required by statute. It would be preferable to automatically refer matters to the conciliation level within the Department when a petition is filed, with the taxpayer being given the power to waive this conference by signing a waiver form. The consent of the Law Bureau should not be a factor. Generally, the Law Bureau is not involved in a case at this early stage. Unless the Law Bureau intends to provide automatic consent in these situations, this additional requirement could result in unnecessary delays and burdens, or could result in the denial of conferences in situations where they would prove useful.

Section 3000.4(a)(2)(i) - Contents of Law Bureau Answer. A petition filed by the taxpayer must state, in clear and concise terms, each and every error which the petitioner alleges has been made by the Division of Taxation, together with a statement of the facts upon which the petitioner relies to establish each

error. The Law Bureau's answer, by contrast, needn't state the Law Bureau's position or the facts. It is sufficient if the answer admits or denies each of the allegations contained in the petition. We assume that the Law Bureau, in preparing its answer, will discuss the facts and law with its "client", the Division of Taxation. In order to make the answer a more meaningful document in certain circumstances, it would be desirable to encourage (but not require) a statement by the Law Bureau in clear and concise terms, regarding the facts upon which the Division of Taxation relies to establish each denial.

Section 3000.4(c) - Amended Pleadings. Generally, pleadings may be amended within 30 days after service. Additional amendments require consent of the supervising administrative law judge or the administrative law judge or presiding officer assigned to the case. Under certain circumstances, extensions can be granted. Generally, these rules are overly technical and should be simplified to the greatest extent possible. The rules state that a pleading may be amended at t h e hearing to conform to the proof if the amendment would not work to the prejudice of the adverse party, affect a person not present at the hearing, or unduly delay the proceeding good cause exists. These requirements are excessively burdensome. "Good cause" might exist as an alternative ground for permitting an amendment, but should not be an additional ground where all of the other requirements have been met.

The last sentence of Section 3000.4(c) specifies that "no...amended pleading can revive a point of controversy which is barred by the time limitations of the Tax Law unless the original pleading gave notice of the point of controversy to be proved under the amended pleading." A problem may arise when a practitioner is forced (because of the imminent running of the period for petitioning, an uninformed client, the lack of a field audit report, etc.) to submit a bare bones petition with the general assertion that no taxes are due. The practitioner should be permitted to amend the initial petition as of right to flesh out the details of the taxpayer's grievance, so long as this is done well in advance of the hearing, without having to worry that the Law Bureau attorney will invoke the quoted sentence against him.

Section 3000.5 - Motion Practice. Motion practice has been unsatisfactory under the existing Commission. In one instance, the taxpayer attempted to request an evidentiary ruling at a formal hearing, and the hearing officer referred the matter to the Commission, which treated the request as a motion and which denied the relief because it was not filed within 90 days after filing the petition. Since the evidentiary question arose at the hearing, it was impossible to anticipate the question many months in advance of the hearing, and compliance with the rules of motion practice would have been impossible. The draft of Tribunal regulations does not address this situation. How will the new Tribunal handle motions or requests for evidentiary rulings which arise at the hearing? The 90 day requirement found

in Section 3000.5(a)(1) is not set forth in the statute, and many practitioners wonder whether a time limit of this type is desirable in an “informal” proceeding aimed at resolving rather than prolonging disputes.

Section 3000.5(a)(5) & (c) - Interlocutory Appeals. The proposed rules prohibit Tribunal review of any order by an administrative law judge which does not finally determine all matters contained in the petition. In some circumstances, such as denial of a motion for summary determination, an interlocutory appeal could eliminate the need for a costly trial. It might be preferable to give the administrative law judge discretion to certify an appeal for an interlocutory order if, in his view, the motion is not frivolous and the delay resulting from the appeal will be justified by the potential elimination of the need for a trial or a reduction in the time of trial.

Section 3000.5(a)(6). According to this section, the “appropriate sections” of the CPLR regarding motions are applicable. It would, of course, be desirable to spell out the applicable provisions, rather than referring the taxpayer to another complicated set of regulations.

Section 3000.5(b)(1)(vii). If, for example, a defense is based upon documentary evidence or a necessary party is missing from the action or the Tribunal does not have jurisdiction

over the taxpayer, either side may file a motion, and if the motion is sustained, the petition is dismissed. What are the consequences of dismissing a petition? Does the taxpayer win or lose? What are the consequences if the time for filing a petition has expired? Is the tax irrevocably fixed and subject to immediate collection proceedings? Are these rules designed for the benefit of the Department only? Perhaps the motion rules should indicate that the Tribunal may grant the relief requested in the petition, dismiss the petition, or grant other appropriate relief.

Section 3000.7 & 3000.8 - Stipulations and Submissions.

These sections deal with stipulations for hearings or submissions without a hearing, but do not describe stipulations in lieu of a hearing, which is a course followed by certain practitioners. Perhaps it would be appropriate to treat these stipulations as submissions, and modify Section 3000.8(b) accordingly.

Section 3000.9(a) - Small Claims Hearings. Under certain circumstances, taxpayers may request a simplified small claims hearing, but the decisions are not reviewable by the Tribunal or any court. If a taxpayer requests a small claims hearing, the case may be transferred to an administrative law judge for a "full" or formal hearing at any time "before the conclusion of the small claims hearing". This could be used as a dilatory tactic and could create practical problems for the Department and

the Tribunal. It might be better to permit such a transfer before the commencement of such a hearing.

Section 3000.11 - Review by Tribunal. A party who disagrees with an administrative law judge determination may ask the Tribunal to review the determination by filing an exception within 30 days after the notice of determination. The 30 day period may be extended upon a showing of "good cause", and Tax Law Section 2006(7) states that the Tribunal shall promulgate rules and regulations as to what constitutes good cause. The rules state that good cause depends on the circumstances of each case, but would include any cause which appears to an ordinary prudent person as reasonable ground for failure to file an exception within the prescribed period. Perhaps this is sufficient, but we believe a more detailed statement, coupled with some examples, would be more desirable.

When an appeal is taken to the Tribunal, will the Tribunal discuss the case with the administrative law judge? The rules do not contain any guidance in this area, and we believe such communication should be prohibited.

The rules do not state whether the Tribunal will take evidence or reserve the right to do so under unusual circumstances. Is the Tribunal's review limited to the record before the administrative law judge? If the proceeding is de novo, the Tribunal should have the right to review additional material. The standard should be clearly stated in the regulations.

Section 3000.11(d)(3) - Participation by Commissioners and Substitution of Administrative Law Judges. If the Tribunal grants oral argument, but some of the Tribunal members are not present, the absent members may participate after reviewing the transcript of the oral argument. The statute does not specifically cover this situation, although this appears to be a logical and permissible extension of the rule-making authority of the Tribunal.

Perhaps the rules should contain some guidance regarding the availability of an administrative law judge to write a determination following a hearing. If a particular administrative law judge heard the testimony but is unwilling or unable to write the determination, there should be language restricting the substitution of another administrative law judge. Absent physical incapacity, a termination of employment with the Division of Tax Appeals, or other unusual circumstances, the administrative law judge who hears the case should also write the determination.

Section 3000.14 - Frivolous Petitions. The rule regarding frivolous petitions is very harsh. Penalties can be imposed if the petition is frivolous, and most of the examples of frivolous petitions are understandable. For example, if the taxpayer maintains that wages are not taxable as income, the petition may be deemed frivolous. However, this section states that a petition will also be considered frivolous if it fails to

set forth a basis in fact or in law for opposing the statutory notice. The Law Bureau could allege the lack of a legal or factual basis in virtually every case as part of its standard answer, and the frivolous petition rules could have an unintended affect. This language must be reviewed and revised.

Section 3000.15 - Service. The metered mail problem will continue to exist under the new Tribunal. Filing requirements for petitions are jurisdictional, but if the taxpayer has, in fact, mailed the document within the 90 day period, but it is not received by the Department or the Tribunal within the 90 day period, there should be some flexibility. Under the proposed rules, the date of service is the date of the United States postmark stamped on the envelope, but if a machine metered stamp is used, the date of service is the date of receipt. The term "receipt" is not defined, and there should be flexibility to cover situations where an item is actually mailed within the 90 day period but is not marked "received" by the Department within the 90 day time frame because of a backlog of departmental mail, an improper address, delivery to the wrong bureau within the department, or other problems.

B. Bureau of Conciliation and Mediation Services Procedural Rules (Part 4000)

Under new Section 170-3-a of the Tax Law, the Bureau of Conciliation and Mediation Services is established within the

Division of Taxation and is responsible for providing conciliation conferences at the option of the taxpayer. These conferences are appropriate after the taxpayer has received a notice of determination. The Commissioner of Taxation (the head of the Division of Taxation) has the authority to establish rules and regulations outlining the procedural aspects of conciliation conferences. These conferences are conducted in an informal manner, and a transcript is not taken. In addition, the law clearly gives the Tax Commissioner the power to grant settlement authority to conferees, and Section 171-Eighteenth-a indicates that the authority of the Commissioner covers the power to compromise civil liabilities. (The compromise portion is dealt with in subsection C of this report, below.) Generally, conciliation orders are rendered within 30 days after the proceeding is concluded, and these orders are binding unless the taxpayer requests a hearing before the Division of Tax Appeals. Conciliation orders are not "required to be published," and are not considered precedent.^{25/} However, we assume that they may be published, if the Department chooses to do so, and may be available under the Freedom of Information Act.

In general, we support the creation of this bureau, and the scope of the powers given to the bureau. The intention of course, is to provide a statutory substitute for the current informal prehearing conference procedures utilized by the Tax Department.

The proposed procedural rules for the Bureau of Conciliation and Mediation Services contain definitions; a list

^{25/} See Draft Regulation Section 4000.3(c)(5).

of those who may act or behalf of others; a description of the procedures which must be followed in requesting a conciliation conference; a description of the scope of a conciliation conference; and procedures for the conclusion or discontinuance of a conference.

We have a number of technical comments which are organized according to the rule sections.

Section 4000.2 - Request for a Conciliation Conference.

A person who has received a statutory notice may request a Conciliation conference by filing a written request on a printed form with the Bureau of Conciliation and Mediation Services. The rules should clearly indicate that filing a petition with the Division of Tax Appeals and requesting a prehearing conference, settlement conference, conciliation conference or other conference constitutes a request for conciliation conference, and will be treated as such. Part 3000 of the proposed regulations contemplates a referral of cases from the Division of Tax Appeals to the Bureau of Conciliation and Mediation Services, and Part 4000 of the rules should contain a similar reference.

Section 4000.3(b) - Notice of Conferences. All parties must be given at least 30 days notice of the time and place of a conference and at least 10 days notice of any adjourned or continued conciliation conference. These rules should be modified in three respects. First, the regulations should specify the time within which conferences should take place. Perhaps the regulations should require the scheduling of a conference within six months following the filing of the request. Second, all notices should be written, unless a written notice is waived by a particular party. Third, in order to permit more expeditious hearings, the parties should have the power to sign a written

waiver of notice in order to schedule a conference in a shorter period of time.

Section 4000.3(b)(3) - Failure to Appear at the Conference. If the taxpayer or his representative fails to appear at a conference, the conferee may dismiss the matter because of the non-appearance. By contrast, if the Tax Department does not appear, the conferee may receive evidence presented by the taxpayer and render a decision. Presumably, if a taxpayer does not appear and a conciliation order dismissing the request for conference is issued, the taxpayer may still proceed with the formal hearing. A safety valve is built into the proposed rules to permit a taxpayer to reopen the conference by filing an application within 90 days after the dismissal order. The taxpayer must show both a reasonable excuse for the non-appearance and a meritorious case. Is the "meritorious case" requirement justified? Presumably, the meritorious case can best be presented at the conference itself, and a reasonable excuse for non-appearance, without more, should justify rescheduling the conference.

If the taxpayer appears at the conference but the Department does not appear, the conferee may receive the taxpayer's evidence and issue an order based on the record, but the record consists of the statutory notice, other correspondence or written information given by the operating division or bureau to the taxpayer prior to the conference, the request, and any other evidence submitted by the taxpayer at the conference. Frequently, the taxpayer will wish to submit material after the conference, and the rules should be modified to permit additional submissions by the taxpayer after the conference (whether or not the Department appears), with the consent of the conferee. These

submissions might consist of briefs or documentary evidence deemed appropriate by the conferee.

Section 4000.3(c)(2) - Settlements. Under the proposed rules, the Commissioner empowers the conferee to propose any resolution, provided there is a basis in fact and in law. Tax Law Section 170-3-a(c) states that the Commissioner of Taxation and Finance has the power to delegate authority to the conferee to waive or modify penalties, interest and additions to tax to the same extent as such Commissioner is permitted under the Tax Law. Section 171-Eighteenth-a gives the Commissioner the authority to compromise civil liability under certain circumstances. The regulations indicate that the Commissioner has not given this power to the conferees. We believe the power to compromise based upon ability to pay is a tool which should be reserved for the Commissioner. Conferees should have the broadest settlement authority, including the power to settle based upon hazards of litigation, and we recommend a modification of the proposed rules to broaden the settlement power of conferees.

Section 4000.3(c)(3) - Disagreement with Proposed Settlement. Within 20 days after the conferee gives notice of a proposed order, the operating division within the Tax Department may disagree by setting forth its reasons in writing, serving the comments on the conciliation conferee, and serving a copy on the taxpayer. Within 15 days after service, the taxpayer may file with the conciliation conferee written arguments in response. We have three comments in this area.

First, the 15 and 20 day time periods may be too short, especially if the time period commences with the mailing of notice. Perhaps these periods should be extended to 20 and 25

days, respectively. A similar comment applies to draft regulation Section 4000.3(c)(4), which gives the taxpayer only 20 days to accept the conferee's proposed resolution.

Second, we understand that there will be an absolute prohibition against any other ex parte communication between the operating division or bureau and the conferees. The conferees will be isolated from the Department as much as possible. Some practitioners question the wisdom of this separation. Conferees will be employed by the Division of Taxation, the same division that employs the Audit Bureau. Conferees will have considerable settlement authority, but may be reluctant to resolve cases against the Audit Bureau without prior discussions. These practitioners cite the federal experience, whereby the Appeals office frequently discusses cases with auditors on an ex parte basis in an attempt to understand and resolve issues. Other practitioners believe this separation will help to ensure independent, impartial determinations by conferees. They do not believe that the separation will impede the settlement process. These practitioners note that the proposed structure will parallel and formalize the current structure within the Tax Appeals Bureau, a structure which discourages ex parte communications, and will ensure that discussions are held in an open manner which includes all necessary parties. We have considered both sides of this issue, and believe that the separation envisioned by the drafters of the legislation will encourage the even-handed, open discussion of issues and resolution of disputes.

Third, parallel procedures should exist for a taxpayer who disagrees with a proposed order. Some practitioners believe this parallel approach will result in delays, and note that, under the proposed structure, a loss by the Tax Department at the conference level is final and not appealable, but a taxpayer who loses at the conference level may request a formal hearing before the Division of Tax Appeals. These practitioners maintain that the Tax Department's right to file an objection and request reconsideration of a conferee's tentative decision is appropriate because it is the Audit Bureau's last gasp, its last opportunity to keep the case open and, possibly, prevail. A taxpayer's loss at the conference level does not have these consequences. After balancing these positions, and recognizing the additional delays inherent in a system which permits the taxpayer to request reconsideration by the conferee, we believe a parallel structure is desirable and will further the goals of fairness and final resolution at the lowest level with a better understanding of the issues and without the expense of a formal hearing. If the conferee proposes a decision which is not acceptable to the taxpayer, the taxpayer should have an opportunity to file comments with the conferee and the operating division or bureau, with the operating division or bureau filing responsive arguments within a specified period of time.

Section 4000.4 - Discontinuance. Before the conciliation order is issued, the taxpayer may discontinue the conference by filing a written request with the bureau. The taxpayer then has 90 days from the date the request is filed to petition for a hearing in the Division of Tax Appeals. The term "filed" is not defined, and it would be appropriate to provide a definition. Furthermore, the proposed rules state that the Bureau of Conciliation and Mediation will notify the Division of Tax Appeals when a person requests a discontinuance. This language

should be modified to state that the Bureau of Conciliation and Mediation Services will promptly notify the Division of Tax Appeals....

Section 4000.5 - Miscellaneous. Comments regarding service", metered mail, and so forth in connection with Part 3000, supra, apply to this area as well. The proposed rules contain numerous addresses for mailing, and it would be best to consolidate all of the addresses in one section, indicating that all notices to the Bureau of Conciliation and Mediation Services should be sent to a specified address. Finally, the conciliation conference process is designed to be informal, and designed to promote expeditious resolution of controversies. Under the circumstances, it seems inappropriate to refer to the civil practice law and rules. For example, Section 4000.5(a)(1) states that "the provisions of the civil practice law and rules regarding service shall apply to this part unless they clearly conflict." This could produce confusion, and would be better handled through incorporating the appropriate provisions of the CPLR in the proposed rules.

C. Compromises. (Part 5000)

Tax Law Section 171-Eighteenth-a gives the commissioner of Taxation and Finance the authority to compromise civil liability pursuant to such rules and regulations as he may prescribe. At any time before the tax becomes finally irrevocably fixed and no longer subject to administrative review. The Attorney General may compromise any such liability after it has been referred to the Department of Law for prosecution or defense and prior to final judicial review. Whenever a compromise is made by the Department of Taxation and Finance, there must be filed in the office of the Commissioner of Taxation and Finance the opinion of counsel for the Department regarding the amount of tax, interest and penalties involved and the amount actually paid, along with a statement of reasons for the compromise. This opinion is not required if the amount in question is less than \$2,500 including interest and penalties. These provisions resemble Federal Tax Law Section 7122.

Part 5000 of the proposed regulations limits the compromise authority, and indicates that a compromise will be appropriate only where there is doubt as to liability or doubt as to collectability. No compromise will occur if the liability is certain and there is no doubt as to collectability. Offers in compromise must be filed on particular forms and must be accompanied by a remittance representing the amount of the compromise or a deposit if the offer provides for future installments. Filing an offer in compromise does not stay collection proceedings, although collection may be deferred under certain circumstances. If the offer is rejected, the amount tendered is refunded without interest, unless the taxpayer has agreed that the amount may be applied against the tax liability.

If the offer is accepted, an opinion of counsel must be filed where the amount involved is over \$2,500.

Where the issue is doubt as to liability, the submission must be supported by appropriate documents and briefs, and the amount acceptable will depend upon the degree of doubt. Where doubt as to collectability is involved, there must be a showing of bankruptcy or insolvency, and the offer must reflect all that can be collected from the taxpayer's present or prospective income. Where the offer rests upon doubt as to liability, the secretary to the Commissioner of Taxation and Finance will refer the offer to the director of the taxpayer services division, the director of the audit division and the director of litigation of the Law Bureau, and within 60 days these directors must submit a joint recommendation to accept or reject the offer. Where the offer rests upon doubt as to collectability, the secretary must refer the offer to the director of the Tax Compliance Division for a recommendation.

In general, we believe the proposed rules are a step toward the expeditious resolution of controversies, but we do not believe the rules move far enough in that direction. Although compromise authority should not be delegated to the Bureau of Conciliation and Mediation Services, conciliation conferees should have the broadest possible settlement authority, including the power to settle based upon hazards of litigation.^{26/} Furthermore, compromise authority within the Department should include hazards of litigation, such as costs of litigation

^{26/} Perhaps the Department's failure to give conferees greater settlement authority raises questions regarding their perceived honesty or competence. In the past, the Department has been concerned about improper conduct by auditors and others. The number of conferees will be small, they will be well-trained, and their work will be reviewed. Consequently, we do not believe that impropriety will be a problem at the conference level.

relative to benefits. In other words, even where the liability is clear, if a small amount is involved and a considerable amount will be expended to pursue the claimed taxes, settlement authority should exist. This authority may already exist in Section 171-Twentieth which gives the Commissioner the authority to abate any small unpaid balance of an assessment of tax if the Commissioner determines under uniform rules that the administration and collection costs involved would not warrant collection of the amount due. Settlement authority also exists in Sections 171-Fifteenth, Sixteenth, Eighteenth & 170-3-a(c). None of these sections are addressed in existing or proposed regulations.

Submissions of offers in compromise to either the Tax Compliance Division or the combined taxpayer services, audit and litigation divisions may be appropriate in some instances, but seems inappropriate when a case is before a conciliation conferee or a law bureau representative in connection with an assessment or the commencement of litigation. In these instances, greater settlement authority should be provided.

Section 171-Fifteenth indicates that if the amount in question is over \$25,000, Supreme Court Approval may be required. What is the interaction of Section 171-Fifteenth and 171-Eighteenth-a? To an extent, these provisions seem inconsistent, or perhaps they overlap and require both forms of approval. This should be clarified in the regulations.

Where the amount in question exceeds \$2,500, a divisional review (e.g., taxpayer services, audit and litigation) is required and, in addition, the matter must be submitted to counsel for the Department of Taxation and Finance. This is a person, other than the director of litigation, who heads the Law

Bureau. In other words, the Law Bureau is asked to pass upon the matter twice. Where counsel recommends acceptance, an opinion must be rendered with a favorable recommendation. This is peculiar. If the directors of audit, taxpayer services and litigation recommend acceptance, but counsel for the department does not agree with this recommendation, is the collective judgement of the other participants overruled by counsel? This is an extremely burdensome and cumbersome procedure, and should be reviewed to determine whether it achieves the goals of

- uniformity,
- expeditious resolution, and
- protection of revenue.