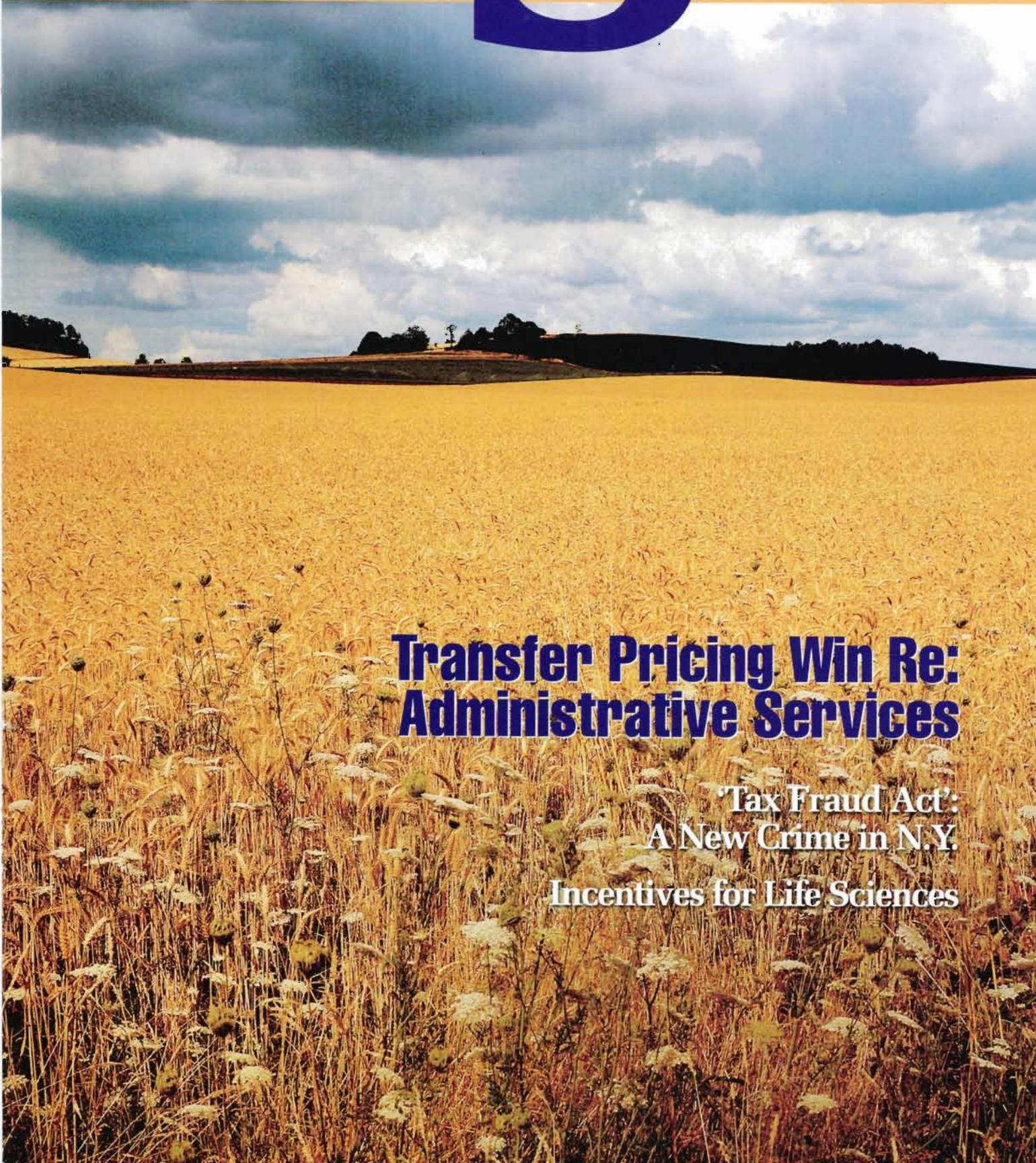


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TAXATION AND INCENTIVES



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Tax Audits, Investigations, and Appeals (Civil and Criminal) in New York

Respect for the state's procedural rules in these matters has the effect of opening the doors of the courthouse to the taxpayer, who is then free to argue the substance of the case.

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DEPARTMENT EDITORS JOHN L. COALSON, JR., LARRY J. STROBLE, AND MARGARET C. WILSON

Taxpayers confronted with an audit typically focus their attention on the substantive issues that determine whether tax is due. They often give little thought or attention to the procedural rules that govern the audit and appeals process. This disconnect between substance and procedure, compliance and controversies, often subjects taxpayers to significant losses that could easily have been avoided through a good working understanding of the tax audit and adjudication process. Given the ease with which recordkeeping rules can be violated, jurisdictional deadlines can be missed, or serious consequences can arise from seemingly minor procedural errors, taxpayers and their representatives must pay strict attention to the procedural requirements for preserving and presenting their case at a hearing.

New York's taxes, like those of the federal government and a majority of other states, are, in most instances, self-assessed. In a self-assessment system, the burden of calculating the correct tax due is placed on the taxpayer rather than on the taxing authorities. In *C.I.R. v. Lane-Wells Co.*,¹ the Supreme Court referred to our "system of self-assessment," stating that it "is so largely the basis of our American scheme of income taxation." *Lane-Wells's* description of the nature of the federal income tax is no less applicable to the income, franchise, sales, and other taxes imposed by New York. Such a system, "relying as it does upon self-assessment and reporting, demands that all taxpayers be forthright in the disclosure of relevant information to the taxing authorities."² Self-assessment puts the onus on the taxpayer to complete returns accurately and on time. By its nature, the system of self-assessment requires voluntary compliance, reliable recordkeeping, and accurate reporting of the tax due by the taxpayer.

The government's authority to audit returns and enforce the tax laws is a necessary adjunct to any self-assessment system. It is the prospect of audit and enforcement, and the possible civil and criminal consequences of failures to properly report, that encourage the voluntary compliance and accuracy that is necessary for our tax system to work efficiently. Along with the power placed in government to enforce the tax laws through

audit and assessment, however, the system is balanced by the rights of the taxpayer to dispute the agency's findings within the administrative system and the courts.

Civil Audit vs. Criminal Investigation

Whenever a taxpayer receives a notice of an audit, it is appropriate to confirm that the matter is civil rather than a criminal investigation. This is particularly important in New York State tax cases. In federal criminal investigations, IRS special agents (whose job title alone signifies that the matter is criminal) are required to give a voluntary equivalent of a Miranda warning.³ In marked contrast to the IRS procedures, New York State Department of Taxation and Finance agents engaged in a criminal investigation give no such warning. Tax agents if asked, however, must disclose the criminal nature of the investigation. Enforcement personnel in New York State and New York City tax investigations often have both civil and criminal enforcement roles, so their title is no indication as to the civil or criminal nature of the inquiry. It sometimes seems that the investigators intentionally give the inquiry the outward appearance of a civil matter, thereby lulling taxpayers and their representatives into making statements and disclosures. Once a taxpayer becomes aware that the matter is criminal, the taxpayer should, and most likely would, retain criminal counsel for representation. In 2002, the New York legislature passed a bill (drafted by this author) that would have required criminal investigators for both New York State and City to advise targets as to the criminal nature of their investigations in the same manner as the IRS. A vigorous and intense opposition from both state and city tax departments, however, resulted in then-Governor Pataki's vetoing the bill. Therefore, the prudent thing to do before proceeding is to confirm that any audit is civil only.

The new world of criminal tax liability after the 2009 budget legislation.

Criminal liability begins to run from the date the offense was committed. Historically, most alleged New York State tax crimes were prosecuted under the larceny statutes with a five-year statute of limitations.⁴ The state apparently relied on the general larceny statutes because the specific defined tax crimes were relatively benign. The New York 2009-2010 budget legislation,⁵ however, revised the criminal provisions of the tax law by creating a new crime of "tax fraud acts,"⁶ which applies to all types of New York taxes. (See the sidebar accompanying this article for the definition of "tax fraud act.")

The category of felony in which a tax crime falls depends in part on the amount at issue. Thus, the offense level for a willful commission of an act of tax fraud runs from a Class A misdemeanor (tax fraud in the 5th degree⁷) to a Class B felony for underpayments or excess refunds of more than \$1 million (tax fraud in the 1st degree⁸). It takes underpayments or excess refunds of only \$3,000 to be guilty of a class E felony.⁹ In each instance, the underpayment or excess refund must have occurred as the result of intent to evade tax or to defraud the state. A similar five-year statute of limitations continues to apply for most felony tax evasions.¹⁰

Civil dangers in criminal pleas.

A major issue in resolving any criminal sales tax charge is the collateral estoppel effect of a guilty plea on corresponding civil liabilities.¹¹ The "criminal numbers" typically are used in settling the criminal case and consist solely of the liabilities that the state can prove "beyond a reasonable doubt." "Collateral estoppel" is a doctrine "barring a party from

relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one."¹² This doctrine typically deprives the taxpayer of any defense to onerous civil fraud penalties and interest rates levied upon significantly higher civil assessments for which the taxpayer has the burden of proof. In the tax context, this means that once the taxpayer takes a criminal guilty plea and agrees to pay the tax criminal numbers, he is defenseless in a subsequent civil audit covering the same periods. Even in a criminal matter, the potential civil tax liabilities should always be considered and dealt with in a comprehensive, global manner.

These concerns are more important than ever given the escalation of civil penalties in New York's recent budget legislation. The legislation increased civil fraud penalties from 50% of the tax due to 200% of the tax due.¹³ It also added or increased penalties for submitting false or fraudulent documents¹⁴ or filing frivolous income tax documents,¹⁵ and penalties imposed on paid preparers who aid or assist in preparing fraudulent returns, reports, or other documents, or who supply false information to the authorities.¹⁶

The Civil Audit

Once an audit is determined to be exclusively civil in nature, one must first determine whether the periods covered by the audit are within the statute of limitations for assessment. For a civil assessment to be valid, it must be made by a Notice of Deficiency or Determination that is mailed, within the statute of limitations, to the taxpayer's last-known address.

Statute of limitations.

The ordinary statute of limitations applicable to personal income tax adjustments is three years after the later of the tax return's due date or date filed. If the return omitted gross income in an amount that exceeds 25% of the gross income reported on the return, the limitations period is extended to six years.¹⁷ Corporate franchise taxes are subject to similar three- and six-year limitations statutes.¹⁸ If an income or franchise tax return is fraudulent, there is no statute of limitations for a civil assessment. For sales and use taxes, a three-year limitations statute also begins on the later of the due date or filing date of each required return, which in turn depends upon the filing frequency (monthly, quarterly, or annually).¹⁹ Three years is the maximum limitations period applicable to sales and use taxes, except in the case of a failure to file or the filing of a fraudulent return, tax may be assessed at any time.²⁰

None of these limitations periods begin to run until a return is filed. The statute is always open if the taxpayer has not filed the return, or cannot prove otherwise. Regardless of any records-retention policy for the source books and records, the return itself, with proof of filing, should be preserved forever to support a statute of limitations defense. Audit policy, as expressed in the state's audit manual, generally provides that an audit should not begin within 120 days of the expiration of the statute of limitations, exclusive of extensions.²¹

Critical importance of adequate books and records.

While legal issues are often present in any business audit (e.g., the taxability of particular income and transactions, or nexus for tax jurisdictional purposes), most audits typically rise or fall on the availability and quality of adequate records. The tax statutes require taxpayers to maintain adequate records. The burden of proof, other than regarding fraud,

is typically on the taxpayer in any dispute as to the existence of a liability. For example, New York's sales and use tax law (§1135) states, in part: "Every person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and of the tax payable thereon.... Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum.... Such records shall be available for inspection and examination at any time upon demand by the tax commission or its duly authorized agent or employee and shall be preserved for a period of three years...."

When books and records are adequate, the calculation of sales or use tax due must be based upon those books and records.²² Original source documents are required to constitute adequate books and records.²³ The consequences of failing to maintain adequate records can be severe, particularly under the sales and use tax laws. The New York State Department of Taxation and Finance (the "Department") may use an indirect audit methodology in a sales tax audit when the taxpayer's records are so insufficient that it is "virtually impossible to verify taxable sales receipts and conduct a complete audit."²⁴ To determine the sufficiency of the taxpayer's records, the Department must thoroughly examine such records,²⁵ because it is their inadequacy that justifies the use of an indirect audit methodology.²⁶ In order to do so, the Department must make a clear and explicit request for books and records.²⁷

If books and records are not adequate, the Department can estimate the tax due based on "external indices."²⁸ This is basically an assumption made based on other criteria, such as stock on hand, purchases, rent paid, number of employees, observations of business activity, or other factors. When external indices are applied, the Department is given enormous latitude to make a determination, with a strong presumption in favor of its calculations.

Even in the absence of adequate books and records, however, the method chosen to estimate taxes must be rational. If the Department is unable to describe the basis of its audit methodology at a hearing, the audit methodology is per se irrational.²⁹ External indices must be reasonable.³⁰ In order to overcome the presumption of accuracy for any external indices, the taxpayer must show "by clear and convincing evidence" that the audit method used was unreasonable.³¹ An auditor's methodology requires only a "rational basis."³² Nevertheless, a test period sample must be representative of general sales. Similarly, an audit may be upheld despite "deplorable" behavior by an auditor whose "competency was questionable."³³ The 2009 amendments to New York's tax law have added to the severe consequences of failing to keep adequate books and records by imposing a civil penalty of up to \$1,000 for the first quarter, and up to \$5,000 for each additional quarter, for which a vendor fails to maintain adequate books and records.³⁴ In addition, any records kept electronically must be turned over to the auditors on request, even if they have been given hard copies, and a failure to do so produces a penalty of up to \$5,000 per quarter.³⁵

When only a few months remain on the statute of limitations, and the state has not completed its audit review, taxpayers will be asked to sign a consent extending the statute of limitations. A failure to execute a requested consent will often result in the issuance of a Notice of Deficiency or Determination based on available information. Such a notice, however, may not be issued without basis solely to hold the statute open.

Potential dangers in agreeing to adjustments.

At the conclusion of an audit, the auditors typically produce a statement of proposed audit changes and solicit the taxpayer to execute a consent to their findings. The amount

and character of these proposals will often incorporate the results of negotiations and agreements between the taxpayer and the auditors. The matter is then resolved by the execution of the consent and payment of the tax and associated interest. Still, a taxpayer must be fully aware of the consequences of executing even an agreed-to consent if the taxpayer is to avoid simply substituting one problem for another.

In recent years, consensual sales tax adjustments that include increases in gross sales have been used by the Department as the basis for a corresponding income tax adjustment. For example, a sales tax auditor might propose to settle an audit by the assertion of an additional \$25,000 of sales tax based on a finding of approximately \$300,000 of unreported sales derived from "external indices," with the promise of simple interest and no penalties. The taxpayer and his representative, after considering the cost of protesting the assessment—or the even higher tax, penalties, and interest threatened by the auditors if no agreement is reached—decide that paying the \$25,000 makes economic sense. They then sign the consent "to get it over with." Months later they very well may be presented with a bill for income tax on the \$300,000 of "additional sales" to which they agreed. The state also will take the position that the taxpayer is "collaterally estopped" from denying the additional income, since the taxpayer has already agreed to it in the sales tax audit. Because the taxpayer's consent finally and irrevocably fixes the tax as having a rational basis, the audit method and audit computation cease being issues.³⁶ Finally, to add significant insult to injury, once the state income tax is sustained upon this "additional" \$300,000 of sales income, the determination becomes binding for federal income tax purposes as a matter of law.³⁷ The end result is that the taxpayer, who settled simply "to get it over with," made things much more complicated and expensive for himself than if he had continued to protest the original sales tax assessments.

Protesting Audit Determinations

If a taxpayer does not agree with a proposed adjustment, the Department will mail a formal Notice of Deficiency (income tax) or Notice of Determination (sales or use tax) to the taxpayer's last-known address. Once the Notice proposing an assessment is mailed, it must be formally protested to preserve the taxpayer's right to oppose to the assessment.

Timely formal protest is required to preserve taxpayer's rights of appeal.

The period within which the protest must be made is typically set forth on the face of the notice; in most cases its 90 days from the date of mailing of the notice.³⁸ Notices proposing taxes on the transfer of stock and other corporate certificates, however, as well as notices proposing a fraud penalty or that propose the cancellation, revocation, suspension, or denial of an application for a license, permit, registration or other credential issued by the Department, must be protested within 30 days.³⁹ A notice is valid if mailed to the taxpayer's last-known address, regardless of whether the notice is actually received.⁴⁰ It is, therefore, in a taxpayer's best interest to make the Department aware of any change of address to prevent a default when a notice is mailed to an obsolete address.

The 90- or 30-day period is jurisdictional. Both the state's Bureau of Conciliation and Mediation Services (the "Mediation Bureau") and the Division of Tax Appeals (DTA) lack the power to hear a late-filed request or petition. Generally, for income tax, and for sales tax for periods subsequent to 1996, if the normal protest periods apply, a defaulted notice can be protested by first paying the assessment after the 90 days lapse and then

seeking a refund within two years. ⁴¹ If the refund is denied, the taxpayer has two years (90 days for sales tax) from the denial to protest by request for conciliation or petition to the DTA. ⁴²

That 1996 amendment (drafted by this author) to the sales/use tax law was made to correct an inequity in the procedure. The change allowed assessments that had not been protested in a timely manner to be contested after payment, through a refund claim. If a taxpayer was late in protesting a pre-1997 notice, the sales tax law made the assessment "final and irrevocable." In many instances, taxpayers swore they never received the notice but, due to the presumption equating mailing with delivery, they were never given a chance to protest or an opportunity to prove that they did not owe any tax. In contrast, for both federal and New York State income tax assessments, a taxpayer who missed the protest deadline could pay the tax and then seek a refund. If the refund was denied, the taxpayer could petition the DTA and, upon showing that there was no liability, get the payment back. When the state legislature adopted this change, effective in 1997, it permitted the same access to the appeals process for sales tax as for income tax.

Remarkably, provisions in the new budget legislation that were effective on its 4/7/09 enactment ⁴³ turn back the clock to the "dark ages" of procedural inequity by denying certain taxpayers the opportunity to prove they are not liable for assessed taxes. Under these amendments (as noted above), the assertion of a fraud penalty in a Notice of Determination, or a written notice that advises of a proposed denial, cancellation, revocation, or suspension of a license, permit, registration, or other credential issued by the Department (other than an application to renew a certificate of authority) must be protested within 30 (rather than the usual 90) days and is subject to a significantly expedited hearing and decision schedule at the Mediation Bureau, as well as at the DTA.

This change deprives taxpayers of procedural and due process in several ways. If a taxpayer fails to respond, within the 30 days allowed, to a notice mailed to the taxpayer's last-known address, the assessment becomes "permanently and irrevocably fixed." This is just the type of inequitable "sudden death" procedural result that the earlier 1996 legislation abolished. Suppose a mailed notice is somehow lost in transit, and the taxpayer does not learn of it within the 30 days. The assessment becomes "permanently and irrevocably fixed." Or suppose, as a result of a clerical error, a notice is sent to the wrong "John Smith," who is not even associated with the business for which the assessment was made. Our John Smith is out of the country on business or vacation for a month, and comes back to find the notice with the 30-day response period already expired. Even if he had asked the Post Office to forward his mail, it is unlikely that he would have received the notice in time to appeal. At this point, of course, the liability has become "permanently and irrevocably fixed" with no opportunity for Mr. Smith even to prove the notice was sent to the wrong person.

Even the expedited hearing process operates to produce a significant denial of due process for these categories of notices. On a petition to the DTA, an expedited hearing must be scheduled within ten business days of receipt of the petition. The administrative law judge (ALJ) must render a decision within thirty days from receipt of the petition. When an exception is taken to an ALJ's determination, the Tax Appeals Tribunal must issue its decision within three months from receipt of the petition. Effectively, this expedited procedure denies the taxpayer the discovery needed to contest the liability.

New York's Freedom of Information Law (FOIL) ⁴⁴ is the primary means by which a taxpayer can determine the validity of an assessment and obtain access to the Department's audit files to prepare for the hearing on the taxpayer's petition. The Department generally takes months to deliver the requisite documents requested under

FOIL. Further, to the extent that documents are improperly withheld, the taxpayer requires months to conclude an administrative review of that denial, and months more to obtain court review of an improper denial. The new truncated and expedited hearing process will thus likely deny a taxpayer the very discovery required to support the taxpayer's protest. While the system has always favored the Department, these changes are tantamount to a denial of procedural due process.

Nevertheless, until successfully challenged or changed, these draconian amendments are now the law of New York State. Taxpayers and their representatives must be critically vigilant so as not to miss these very short time limits. Further, to the extent that these rules are implemented to deny basic discovery and preparation for hearing, they should be challenged in the appropriate judicial forum based on a denial of procedural due process.

Protest procedure: the conciliation conference.

Protests of a Notice of Deficiency or Notice of Determination are made by a request to the Mediation Bureau for conciliation or by a petition to the DTA.⁴⁵ If a timely request for conciliation is made to the Mediation Bureau, a taxpayer will still be able to protest the assessment by a petition to the DTA filed within 90 days⁴⁶ of the mailing of a conciliation order sustaining the assessment.⁴⁷ It is therefore preferable in most cases to make the request for conciliation to the Mediation Bureau first, since that approach still allows for a formal petition to the DTA if the taxpayer is unable to resolve the matter at the Mediation Bureau.

A conciliation conference is intended to afford taxpayers a quick and inexpensive means of resolving tax disputes without the need for a formal hearing at the DTA.⁴⁸ At a conciliation conference, a taxpayer or the taxpayer's representative presents the taxpayer's position, while representatives of the audit division, in turn, submit support for their determination. The conference is very informal. The conciliation conferee is expected to try to narrow or define any factual issues. While the conferee theoretically has the power to make a determination in favor of the taxpayer over the objections of the auditor, that rarely happens under current practice.

Although, at first blush, the inexperienced person might compare a conciliation conference to an appeal brought before the IRS Appeals Office, the two proceedings are different at their core. IRS Appeals Officers have an independent power and authority to determine taxpayers' audit liabilities.⁴⁹ Moreover, IRS Appeals Officers actually exercise their authority to resolve tax disputes, regardless of the position of the audit staff, when the Appeals Officer deems it appropriate under the facts and law. IRS Appeals Officers are typically very experienced and knowledgeable and understand that they have a mission to resolve taxpayer appeals fairly and equitably on the facts so as to avoid unnecessarily burdening the Tax Court with unresolved taxpayer grievances. A major consideration in the resolution of disputes by IRS Appeals Officers is the concept of "hazards of litigation," i.e., the risks inherent in any litigation that the opposing position will prevail on the law and/or facts if the matter is litigated in Tax Court. IRS Appeals Officers attempt to quantify this risk and develop an assessment discount for settlement purposes. Not only are IRS Appeals Officers willing to settle with taxpayers when they believe settlement is warranted based on the equities and "hazards of litigation," they do so completely without regard to the audit staff's preferences. In fact, since 2000, no IRS Appeals Office employee is permitted to discuss a matter before the Office with any IRS employee outside the Appeals Office if the taxpayer is not present.⁵⁰ This outright ban on ex parte communications with the audit staff, among others, ensures the independence and impartiality of the Appeals Office in evaluating a taxpayer's appeal and leads to the

Appeals Office's resolving the vast majority of cases before it. Quite simply, IRS Appeals Officers independently evaluate the legal and factual basis of appeals before them, and develop a settlement that they impose on the audit division as necessary.

In contrast, conciliation conferees essentially have had their roles reduced to mediators rather than impartial arbiters. The basic thrust of conciliation conferences takes the tone of the conferee's attempting to mediate the dispute with the parties by pointing out possible strengths and weaknesses in positions, but without any willingness to impose a settlement on recalcitrant auditors. It is the "can't we all just get along" approach to settlement rather than an objective review designed to eliminate unnecessary litigation. While the conferees are generally knowledgeable and diligent, the apparent policy of requiring audit concurrence to settle a dispute can often render the process ineffective if the auditors are intransigent, thereby deferring its resolution to a formal hearing which is costly not only for the taxpayers, but for the state as well.

Preparing for the conference.

A taxpayer engaged in conciliation before the Mediation Bureau or in a formal hearing at the DTA should obtain the entire audit file and any other related documents or records, prior to the first conference or hearing. Access to and review of these records will often disclose deficiencies or failures in the audit process that can be used to overturn or minimize the assessment at issue. It is often the mistakes of the Department personnel that provide the best chance of success at hearing or conference, and those mistakes are often memorialized in the audit file.

The audit file should be obtained as soon as possible after the issuance of the Notice at issue. These files are available at a very reasonable cost through a request filed under New York's Freedom of Information Law (FOIL).⁵¹ While FOIL contains some exceptions to disclosure, the vast majority of information relevant to the proposed assessment should be disclosed. In recent years, the Department has often been less than forthcoming in producing documents required under FOIL, often ignoring significant portions of the record requests without disclosing the existence of withheld records or any basis for withholding them. Taxpayers should be vigilant in reviewing the documents produced under FOIL for indications that unspecified documents have been withheld. In addition to paper records, taxpayers should be certain to request any electronic records, such as the files from the auditors' computers that were used in the audit at issue or any electronic communications, such as e-mail. Any failure or suspected failure to deliver requested documents under FOIL should be appealed within the Department. Adverse determinations by the Department can then be appealed by an Article 78 (i.e., judicial review) proceeding if the issues and economics warrant.⁵² Taxpayers, however, should make sure not to run afoul of the time restrictions posed for "expedited" hearing (discussed above) when fraud or license revocation/denial issues are involved.

Mediation Bureau agreement: consider the effect on other taxes.

If the parties reach an agreement, the conciliation conferee will issue a consent that, upon execution, will finally determine the tax in the amount and on the basis set forth in the consent. Great care must be taken, however, to consider all of the consequences that can arise from the consent, particularly with regard to sales taxes, lest it cause the taxpayer more problems. As in the case of negotiated consents with the auditors, discussed above, the Department also has taken Mediation Bureau consents regarding sales tax adjustments and used them to make income and/or franchise tax liability

assessments. These assessments often are based on an increase in gross sales in the sales tax dispute, using "external indices" (discussed above ⁵³). Despite the fact that there is no corresponding specific authorization for assessment upon "external indices" under the income or franchise tax, the Department uses these agreed sales tax estimates to generate an income tax. Further, the Department uses the estimates of increased sales but does not estimate corresponding costs that would logically be necessary to service such increased sales. As in criminal settlements and those embodied in agreed audit reports, the Department relies on collateral estoppel to deprive the taxpayer of any defense to the additional assessments. To make matters worse, to the extent this estoppel results in a final determination of additional state income tax, the determination will be reported to the IRS, which can then use the state income tax determination as binding and conclusive against the taxpayer for federal income tax adjustment purposes. ⁵⁴

Until this change in policy became widely known, numerous taxpayers who attempted to put a sales tax dispute behind them through settlement were "blindsided" by income or franchise tax assessments based on their consents in the sales tax matters. Although a statement that sales tax audit results may be used to generate income tax adjustments is now often included in the first letter advising a taxpayer of an audit, it is often too abstract to adequately warn a taxpayer of the potential consequences of consent. The taxpayer must consider all of the possible consequences of a proposed consent before accepting one for the sales tax alone. For example, while an assessment based on a change in taxable vs. nontaxable sales ratios will not have an income tax consequence, an assessment that is based on an increase in gross sales will generate additional income tax and should be avoided or provided for in the settlement. Of course, if the settlement is made subsequent to the expiration of the statute of limitations for income or franchise tax assessments, this situation becomes moot. One should remember, however, that if the settlement increases gross income by more than 25% of that reported on the income tax return, the six-year statute of limitations will apply to the income tax return rather than the ordinary three-year statute. ⁵⁵

Protest procedure: petition the DTA or declaratory judgment action in the supreme court.

If the parties cannot agree to a settlement at the Mediation Bureau, the conciliation conferee will issue a Conciliation Order that will, in most instances, sustain the original assessment proposed in the Notice of Deficiency/Determination. ⁵⁶ A taxpayer then has 90 days from the date of mailing of the conciliation order to file a petition with the Division of Tax Appeals for a formal hearing. Of course, a taxpayer who, for some reason, does not want to go to the Mediation Bureau first, can choose to go directly to the DTA within 90 days of the mailing of the assessment notice. In both circumstances, the petition must be filed within 90 days to obtain DTA review.

As remarkable as it may seem, numerous cases each year revolve around whether or not the 90-day time limit was met. As noted above, the normal 90-day period is reduced to 30 days in each instance when the notice involves a fraud assessment or license revocation or denial. Ninety days is *not* three months—it is *90 days*. Similarly, 30 days does *not* mean one month. This is the area with the greatest disaster potential, but one that is easily dealt with by getting the petition out via certified mail early enough to avoid any question of timeliness.

If time is insufficient to prepare a detailed formal petition, a "skeleton" petition may be filed within the time limit to establish jurisdiction in the DTA and then amended later. One must be extra careful in doing so, however, when the time limitations of the new

"expedited" hearings apply. Also, one must be careful to raise any affirmative defenses that could otherwise be waived, e.g., the statute of limitations.

Filing a request for conciliation or a DTA petition too early can be just as bad as filing too late. Neither the Mediation Bureau nor the DTA has jurisdiction prior to the mailing of the Notice of Deficiency/Determination. Thus, a request for conciliation or a DTA petition filed *prior to* the issuance of the notice is a nullity.⁵⁷ If the taxpayer fails to file a subsequent request or petition within 90 (or 30) days, as applicable, *after* the notice is actually issued, the taxpayer will default and the tax will become due and owing regardless of whether a premature request or petition was filed. Further, if this default relates to the new 30-day time limit items, such as a fraud assessment, the default becomes final and irrevocable.

For requests or petitions sent via the U.S. Postal Service, timely mailing is timely filing, with the regular mail postmark date controlling.⁵⁸ A better approach is to use certified or registered mail, return receipt requested where available. The taxpayer gets a dated receipt from the Post Office, and the date of registration or certification is deemed the date of delivery.⁵⁹ Also, a massive body of case law confirms filing upon delivery to the Post Office of the certified or registered mail. Where delivery is made by courier, messenger, overnight delivery, or a similar service, the date of delivery is deemed the date of filing.⁶⁰

A petition to the DTA is available to commence a protest of any written notice from the Department that has advised the petitioner of a tax deficiency; a determination of tax due; a denial of a refund or credit application; a denial of an application for, or a cancellation, revocation, or suspension of, a license, permit or registration; or any other notice that gives a person the right to a hearing at the DTA.⁶¹ If a statute of limitations defense applies to any periods covered by a Notice of Deficiency or Determination, it must be raised upon petition to the DTA or it is deemed waived.⁶²

In certain relatively rare circumstances, taxpayers may have the option of bypassing New York's administrative tax review process entirely by seeking a Declaratory Judgment from the supreme court (a New York trial court), rather than submitting a petition to the DTA.⁶³ Although administrative review of tax determinations is specifically provided for by the tax law as the sole means of protesting tax assessments, courts have at times permitted taxpayers direct access to the supreme court when the underlying cause of action asserts that the authority for application of the tax is unconstitutional on its face, that the tax statute does not apply to the taxpayer, or that the Department has exceeded its jurisdiction in asserting the tax liability. In essence, a declaratory judgment may be available when the facts are not in dispute and the sole issue is a matter of law.⁶⁴ When a taxpayer challenges the applicability and/or constitutionality of a provision of the tax law, and not merely the amount of an assessment, declaratory relief is appropriate and the taxpayer is not obligated to exhaust its administrative remedies before instituting a declaratory judgment action. Further, the taxpayer can protect itself against the possible eventual need to seek administrative relief by obtaining an injunction suspending the 90- or 30-day limitations period in which to file an administrative challenge to a tax assessment.⁶⁵

The DTA was created in 1986 to provide New Yorkers with an independent and impartial body for the resolution of tax and licensing disputes.⁶⁶ Its creation was in response to a perceived lack of impartiality by its predecessor, the State Tax Commission. Formal hearings are conducted by a DTA administrative law judge (ALJ) who hears testimony, evaluates evidence, and prepares and issues a written determination within six months after the completion of the hearing or the submission of briefs, whichever is later.⁶⁷

If the amount of personal income or corporate franchise tax at issue is not more than \$20,000 (or for sales and use taxes, \$40,000) for any 12-month period, exclusive of penalty and interest, a taxpayer can request a small claims hearing at the DTA as an alternative to a formal hearing. Small claims hearings are informal and conducted by a Department employee who is empowered to make a binding determination. A taxpayer may change his or her mind at any time before the conclusion of a small claims hearing and transfer the matter to the DTA for a formal hearing before an ALJ.⁶⁸ In general, small claims hearings should be requested only when the amounts at issue do not warrant the effort and expense of a formal hearing. In making that determination, however, one should be careful to consider all the ramifications of the assessment being upheld, including any corresponding collateral effect on both state and federal income taxes.

A petitioner can represent oneself or can be represented by a spouse, a parent (for a minor child petitioner), a general partner (for a partnership petitioner), or an officer or employee (for a corporate petitioner, which must file a power of attorney if represented by an employee). A petitioner also may be represented by an attorney, CPA, public accountant, or enrolled agent, pursuant to a power of attorney.⁶⁹ Given the judicial nature of the proceedings, it is not advisable for anyone lacking in litigation experience to represent a client at hearing.

The petition may be amended once without leave at any time before the period for responding to it expires. The Department must respond with an answer to the petition within 75 days after the acknowledgement of the petition by the DTA. Where the Department fails to answer within the prescribed time, all material allegations of facts set forth in the petition are deemed admitted. The petitioner can serve a reply on the Department within 20 days after service of the answer and can amend without leave within this 20-day period after the answer is served by the Department. Once the reply is served, or the time to reply expires, the issue is considered joined and the matter will be scheduled for hearing.⁷⁰ As detailed above, however, an entirely different set of procedural deadlines and hearing time limits apply when the expedited hearing procedures of the new law apply for notices affecting licensing or asserting a fraud penalty.

Hearings at the Division of Tax Appeals.

Hearings are generally held at the DTA's offices in Troy and New York City. Hearings in larger cities located throughout the state (e.g., Buffalo, Rochester, Syracuse), and on Long Island, may be available at the discretion of the DTA upon request. Although the ALJ's rules and procedures are the same in all locations, it has been this author's experience that the superior courtroom facilities available in Troy, as opposed to the "borrowed" conference rooms used in New York City, lend a more formal judicial air to the proceedings, which in turn provides an environment more conducive to the proponent in a complex case or presentation.

The hearing is conducted in the same manner as a trial in a court of law, subject to somewhat relaxed rules of evidence and with somewhat less formality in general. The parties call and examine witnesses, introduce exhibits, cross-examine and impeach opposing witnesses. All witnesses must testify under oath or by affirmation. In contrast to a court of law, affidavits of relevant facts are admissible in lieu of the oral testimony of the persons making such affidavits. The ALJ, however, typically gives less weight to testimony by affidavit. Technical rules of evidence are disregarded if the evidence offered is relevant and material to the issues, but privileges are respected. Where the record appears unclear, the ALJ may ask questions of the parties or of witnesses for the purpose of clarifying the record. Copies may be submitted in lieu of originals, and noncompliance

with subpoenas may result in preclusion of the noncompliant party's proofs and a negative inference regarding the relevant issues.⁷¹

An ALJ determination will state the issues, relevant facts established at hearing, and the conclusions of law upon which the determination is based. The ALJ determination is binding upon both the taxpayer and the Department unless a party appeals the determination to the Tax Appeals Tribunal. This appeal is commenced by the filing of an exception with the Tribunal within 30 days of notification of the determination of the ALJ. This time limit is jurisdictional and strictly enforced. The Tribunal may extend the 30-day period for filing an exception if the application for extension is filed within the 30-day period and served on the other party, and good cause is shown. "Good cause" depends on the circumstances of each case and includes those grounds that, to an ordinarily prudent person, would be a reasonable basis for the additional required time.⁷² Further, as detailed above, when the new expedited procedures apply, a decision is required by the Tribunal within three months from receipt of the petition. If the appeal is not made within the 30-day limit, the ALJ determination becomes final and binding.⁷³ Decisions of an ALJ, however, do not establish precedent that can be used in other matters in dispute.⁷⁴

The Tax Appeals Tribunal is the highest authority within the DTA. The Tribunal consists of three commissioners appointed by the governor and confirmed by the state Senate.⁷⁵ Thus, the Tribunal is designed to be independent of influence or pressure from the Tax Commissioner or the Division of Taxation.

The Tribunal is an appellate body and does not hear evidence or testimony but will do a "de novo" review. It bases its decisions on the record established in the formal hearing before the ALJ who issued the determination from which the appeal is taken. The Tribunal will hear oral argument on the exception.

Appeals to the courts.

The Tax Appeals Tribunal is the final level of administrative review permitted under the New York administrative tax adjudication system. Decisions of the Tribunal are precedent and may not be appealed by the Department. Taxpayers, however, can appeal an adverse Tribunal decision and obtain judicial review of the decision under Article 78 of the New York Civil Practice Law and Rules. Regardless of a taxpayer's location, all Article 78 proceedings to appeal a decision of the Tax Appeals Tribunal must be brought in the Appellate Division of the supreme court in New York's Third Judicial Department within four months after notice of the decision is served.⁷⁶

The proceeding is commenced by personal service of a notice of petition or order to show cause upon the Tax Appeals Tribunal and the Commissioner of Taxation and Finance and, in certain cases, the Attorney General.⁷⁷ Posting a bond or deposit of the tax, penalty, and interest at issue, plus a bond for costs and charges, are jurisdictional prerequisites for many of the taxes for which judicial review may be sought under Article 78.⁷⁸

The Article 78 standard of proof for review of determinations of the Tax Appeals Tribunal is whether the administrative action was arbitrary and capricious or supported by substantial evidence, and whether the sanction imposed was "shocking to one's sense of fairness."⁷⁹ Unless there is some egregious error of fact or law, the Tribunal's decision is likely to be sustained by the Appellate Division.

Appeal from a final adverse decision of the Appellate Division is made to the Court of Appeals (New York's highest court). A taxpayer is entitled to a review by the Court of

Appeals "as of right" within 30 days of service of notice of entry of the judgment of the Appellate Division (1) if there were at least two justices dissenting in the taxpayer's favor on a question of law, (2) if the lower court's decision involved an interpretation of the federal or state constitution or a determination of the constitutionality of a statute, or (2) where the appeal is from the lower court's order granting a new trial where, upon affirmance, judgment absolute will be entered against the taxpayer.⁸⁰

When the prerequisites for an appeal as of right do not exist, an appeal can be made to the Court of Appeals with permission, which must be sought by motion to either the Appellate Division or the Court of Appeals.⁸¹ The high court's rules of practice indicate that it likely will grant permission to appeal if the questions presented for review concern issues that (1) are novel or of public importance, (2) present a conflict with prior Court of Appeals rulings, or (3) involve a conflict among the various departments of the Appellate Division.⁸² The Court of Appeals, either through its acceptance of and decision in an appeal, or its denial of a permissive appeal, is the end of the process for contesting a tax determination in New York, absent the rare constitutional question that would permit an appeal to the U.S. Supreme Court.

Conclusion

A taxpayer's failure to abide by the strict procedural rules for submitting tax disputes all too often results in the taxpayer's being denied a day in court and forfeiting any chance to prevail on the merits. In contrast, respect for these procedures has the effect of opening the doors of the courthouse to the taxpayer, who is then free to argue the substance of the case. At the end of the day, the devil is in the details.

Sidebar

Practice Note: New York's Newest Crime: Tax Fraud Acts

New York's 2009-2010 budget legislation (A.B. 157, 4/7/09; Laws of 2009, ch. 57) has revised the criminal provisions of the state's tax laws by creating a new crime of "tax fraud acts," which applies to all types of New York taxes.

The term "tax fraud act" is defined in N.Y. Tax Law §1801 (added by A.B. 157, Part V-1, Subpart I, §15, and amended by A.B. 8180, 5/7/09 (Laws of 2009, ch. 25), Part F, §4), as follows:

N.Y. Tax Law §1801—Tax fraud acts.

(a) As used in this article, "tax fraud act" means willfully engaging in an act or acts or willfully causing another to engage in an act or acts pursuant to which a person:

- ((1)) fails to make, render, sign, certify, or file any return or report required under this chapter or any regulation promulgated under this chapter within the time required by or under the provisions of this chapter or such regulation;
- ((2)) knowing that a return, report, statement or other document under this chapter contains any materially false or fraudulent information, or omits any material information, files or submits that return, report, statement or document with the state or any political subdivision of the state, or with any public office or public officer of the state or any political subdivision of the state;
- ((3)) knowingly supplies or submits materially false or fraudulent information in connection with any return, audit, investigation, or proceeding or fails to supply

information within the time required by or under the provisions of this chapter or any regulation promulgated under this chapter;
((4)) engages in any scheme to defraud the state or a political subdivision of the state or a government instrumentality within the state by false or fraudulent pretenses, representations or promises as to any material matter, in connection with any tax imposed under this chapter or any matter under this chapter;
((5)) fails to remit any tax collected in the name of the state or on behalf of the state or any political subdivision of the state when such collection is required under this chapter;
((6)) fails to collect any tax required to be collected under articles twelve-A, eighteen, twenty, twenty-two, twenty-eight or twenty-eight-A of this chapter, or pursuant to the authority of article twenty-nine of this chapter;
((7)) with intent to evade any tax fails to pay that tax; or
((8)) issues an exemption certificate, inter-distributor sales certificate, resale certificate, or any other document capable of evidencing a claim that taxes do not apply to a transaction, which he or she does not believe to be true and correct as to any material matter, which omits any material information, or which is false, fraudulent, or counterfeit.

(b) For purposes of this subdivision, "this chapter" includes any "related statute" or any "related income or earnings tax statute," as defined in section eighteen hundred of this article.

(c) For purposes of this subdivision, the term "willfully" shall be defined to mean acting with either intent to defraud, intent to evade the payment of taxes or intent to avoid a requirement of this chapter, a lawful requirement of the commissioner or a known legal duty.

¹

² 31 AFTR 970, 321 US 219, 88 L Ed 684, 44-1 USTC ¶9195, 1944 CB 539 (1944).

³ U.S. v. Arthur Young & Co., 53 AFTR 2d 84-866, 465 US 805, 79 L Ed 2d 826, 84-1 USTC ¶9305, 1984-1 CB 270 (1984).

⁴ See Internal Revenue Manual (IRM) 9.4.5.11.3.2 (2/1/05). The IRM may be accessed via the IRS website at www.irs.gov/irm.

⁵ N.Y. Criminal Proc. Law §30.10.2(b)

⁶ A.B. 157, 4/7/09 (Laws of 2009, ch. 57).

⁷ Codified at new N.Y. Tax Law §1801 *et seq.* The term "tax fraud act" is defined in N.Y. Tax Law §1801, added by A.B. 157, *supra* note 5, Part V-1, Subpart I, §15, and as amended by A.B. 8180, 5/7/09 (Laws of 2009, ch. 25), Part F, §4.

⁸ N.Y. Tax Law §1802, added by A.B. 157, *supra* note 5, Part V-1, Subpart I, §16.

⁹ N.Y. Tax Law §1806, added by A.B. 157, *supra* note 5, Part V-1, Subpart I, §20.

¹⁰ N.Y. Tax Law §1803, added by A.B. 157, *supra* note 5, Part V-1, Subpart I, §17.

¹¹ See note 4, *supra*.

¹² See, e.g., Matter of Pirrera, N.Y. Tax App. Trib., Nos. 819693 and 819694, 12/15/05.

Black's Law Dictionary, (7th ed., West 1999).

[13](#)

See, e.g., N.Y. Tax Law §1145(a)(2) (sales and use taxes), as amended by A.B. 157, *supra* note 5, Part V-1, Subpart J, §14.

[14](#)

See, e.g., Tax Law 1145(j) (sales and use tax), as added by A.B. 157, *supra* note 5, Part V-1, Subpart J, §15 (\$100 per document or \$500 per tax return).

[15](#)

See N.Y. Tax Law §685(q) (personal income tax), as amended by A.B. 157, *supra* note 5, Part V-1, Subpart J, §9 (maximum penalty increased from \$500 to \$5,000).

[16](#)

See N.Y. Tax Law 1145(i) (sales and use tax), as added by A.B. 157, *supra* note 5, Part V-1, Subpart J, §15 (maximum penalty of \$5,000).

[17](#)

IRC §§6501(a) and (e); N.Y. Tax Law §§683(a) and (d).

[18](#)

N.Y. Tax Law §§1083(a) and (d).

[19](#)

N.Y. Tax Law §1147.

[20](#)

N.Y. Tax Law §1147(b).

[21](#)

N.Y. Income Tax District Office Audit Manual, .8(A)(1) (11/26/97).

[22](#)

See, e.g., Matter of Marine Midland Bank, N.A., N.Y. Division of Tax App., ALJ Determination, DTA No. 807533, 7/16/92, *aff'd* N.Y.S. Tax App. Trib., 5/13/93; Chartair, Inc. v. State Tax Comm'n, 65 App Div 2d 44, 411 NYS2d 41 (3d Dept., 1978).

[23](#)

Matter of Humphrey House, Inc., N.Y.S. Tax App. Trib., DTA Nos. 813375 and 813376, 7/31/97, *aff'g and modifying* N.Y. Division of Tax App., ALJ Determination, 8/1/96.

[24](#)

Chartair, Inc., *supra* note 22.

[25](#)

King Crab Restaurant, Inc. v. Chu, 134 App Div 2d 51, 522 NYS2d 978, 1987 WL 29119 (3d Dept., 1987).

[26](#)

Chartair, Inc. *supra* note 22.

[27](#)

Matter of Top Shelf Deli Inc., N.Y.S. Tax App. Trib., DTA No. 807115, 2/6/92.

[28](#)

N.Y. Tax Law §1138(a)(1).

[29](#)

Matter of Auriemma, N.Y.S. Tax App. Trib., DTA No. 806542, 9/17/92; Matter of Paladino, N.Y.S. Tax App. Trib., DTA No. 808197, 6/30/94, *aff'g* N.Y. Division of Tax App., ALJ Determination, 3/4/93.

[30](#)

Matter of 1866 Restaurant Corp., N.Y. Division of Tax App., ALJ Determination, 9/1/88.

[31](#)

Matter of RYKG, Inc., N.Y. Division of Tax App., ALJ Determination, DTA Nos. 819983 and 819984, 1/12/06; Matter of Joseph Roma & Sons Construction, Inc., N.Y.S. Tax App. Trib., DTA Nos. 819508, 819509, and 819510, 10/27/05.

[32](#)

Matter of SRS News, Inc., N.Y.S. Tax App. Trib., DTA No. 817006, 9/12/02.

[33](#)

Matter of Toomer, N.Y.S. Tax App. Trib., DTA No. 819279, 11/18/04, quoting Matter of Toomer, N.Y. Division of Tax App., ALJ Determination, 3/25/04 (internal quotation marks

omitted).

[34](#)

See N.Y. Tax Law 1145(i) (sales and use tax), as added by A.B. 157, *supra* note 5, Part V-1, Subpart A, §2.

[35](#)

See N.Y. Tax Law 1145(k) (sales and use tax), as added by A.B. 157, *supra* note 5, Part V-1, Subpart A, §4.

[36](#)

Matter of Brewsky's Goodtimes Corporation, N.Y.S. Tax App. Trib., DTA No. 817439, 2/22/01.

[37](#)

Sunik v. C.I.R., 91 AFTR 2d 2003-1085, 321 F3d 335, 2003-1 USTC ¶50275 (CA-2, 2003).

[38](#)

See, e.g., N.Y. Tax Law §§689(b) (personal income tax), 1089(b) (corporate franchise tax), 1139(b) (sales and use tax).

[39](#)

N.Y. Tax Law §279-a (stock transfer tax); N.Y. Tax Law §§170.3-a(b) and (h) and 2008.2, as amended by A.B. 157, *supra* note 5, Part V-1, Subpart C, §§1, 2, and 3.

[40](#)

See, e.g., N.Y. Tax Law §§681(a) (personal income tax), 1081(a) (corporate tax).

[41](#)

N.Y. Tax Law §§687(a) (personal income tax), 1139(c) (sales and use tax).

[42](#)

N.Y. Tax Law §§689(c) (personal income tax), 1089(c) (corporate tax), 1139(b) (sales and use tax).

[43](#)

See note 39, *supra*, and accompanying text.

[44](#)

N.Y. Pub. Off. Law §84 *et seq.*

[45](#)

N.Y. Tax Law §170.3-a; 20 N.Y. Codes, Rules & Regs. §§3000.3 and 4000.3.

[46](#)

Thirty days, if a fraud assessment or license revocation or denial is involved.

[47](#)

N.Y. Tax Law §170.3-a(e).

[48](#)

20 N.Y. Codes, Rules & Regs. §4000.5(c)(1)(i).

[49](#)

Treas. Reg. §601.106(a)(1)(ii)(c).

[50](#)

Rev. Proc. 2000-43, 2002-2 CB 404.

[51](#)

N.Y. Pub. Off. Law §87 ("Access to agency records").

[52](#)

N.Y. Pub. Off. Law §§89.4(a) and (b).

[53](#)

See note 28, *supra*, and accompanying text.

[54](#)

See Sunik v. C.I.R., *supra* note 37.

[55](#)

See note 17, *supra*, and accompanying text.

[56](#)

N.Y. Tax Law §170.3-a(e).

[57](#)

See, e.g., N.Y. Tax Law §1089(b) (corporate franchise tax); Matter of Multi Trucking, Inc., N.Y. Division of Tax App., ALJ Determination, TSB-D-88(8)C, 10/06/88.
[58](#)

20 N.Y. Codes, Rules & Regs. §3000.22(a). (Part 3000 of Title 20 comprises the Tax Appeals Tribunal's Rules of Practice and Procedure.)
[59](#)

20 N.Y. Codes, Rules & Regs. §3000.22(c).
[60](#)

20 N.Y. Codes, Rules & Regs. §3000.22(a).
[61](#)

N.Y. Tax Law §2008.
[62](#)

See N.Y. Civ. Prac. Law and Rules §3211(e); *Adamides v. Chu*, 134 App Div 2d 776, 521 NYS2d 826, 1987 WL 4471 (3d Dept., 1987), *app. den.* 71 N.Y.2d 806, 530 N.Y.S.2d 109, 525 NE2d 754 (1988); *Convissar v. State Tax Comm'n*, 69 App Div 2d 929, 415 NYS2d 305 (3d Dept., 1979); *Servomation Corp. v. State Tax Comm'n*, 60 App Div 2d 374, 400 NYS2d 887 (3d Dept., 1977).
[63](#)

N.Y. Civ. Prac. Law and Rules §3001.
[64](#)

See, e.g., *Allstate Insurance Co. v. State Tax Comm'n*, 115 App Div 2d 831, 495 NYS2d 789 (3d Dept., 1985), *aff'd* 67 N.Y.2d 999, 502 N.Y.S.2d 1004, 494 NE2d 109 (1986); *Xerox Corp. v. Dept. of Tax'n and Finance*, 140 App Div 2d 945, 529 NYS2d 623, 1988 WL 65496 (4th Dept., 1988), *app. den.* 72 N.Y.2d 809, 534 N.Y.S.2d 666, 531 NE2d 298 (1988).
[65](#)

See, e.g., *Two Twenty East Ltd. Partnership v. N.Y.S. Dept. of Tax'n and Finance*, 185 App Div 2d 202, 586 NYS2d 596, 1992 WL 171574 (1st Dept., 1992).
[66](#)

N.Y. Tax Law §2000 *et seq.*
[67](#)

N.Y. Tax Law §2010; 20 N.Y. Codes, Rules & Regs. §3000.15(e).
[68](#)

N.Y. Tax Law §2012.
[69](#)

20 N.Y. Codes, Rules & Regs. §3000.2; N.Y. Tax Law §2014.
[70](#)

20 N.Y. Codes, Rules & Regs. §3000.4.
[71](#)

20 N.Y. Codes, Rules & Regs. §3000.15.
[72](#)

20 N.Y. Codes, Rules & Regs. §3000.17.
[73](#)

N.Y. Tax Law §2006.7.
[74](#)

N.Y. Tax Law §2010.5.
[75](#)

N.Y. Tax Law §2004.
[76](#)

N.Y. Tax Law §§2006 and 2016. Also see N.Y. Tax Law §1090 (corporate tax). Article 78 is codified at N.Y. Civ. Prac. Law and Rules §7801 *et seq.*
[77](#)

N.Y. Civ. Prac. Law and Rules §7804(c).
[78](#)

See, e.g., N.Y. Tax Law §§288(5) (tax on motor fuels); 279-a (transfer tax on stock and other corporate certificates); 430 (alcoholic beverages); 478 (cigarettes and other

tobacco products); 510 (highway use tax); 1138(a)(4) (sales and use taxes); 1411(a) (real estate transfer tax). N.Y. Civ. Prac. Law and Rules §8503 discusses the bond for costs.

[79](#)

See *Pagano Beer & Soda Corp. v. N.Y.S. Liquor Authority*, 119 App Div 2d 647, 500 NYS2d 793 (2d Dept., 1986), citing *Pell v. Bd. of Education of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 NE2d 321 (1974).

[80](#)

N.Y. Civ. Prac. Law and Rules §§5513 and 5601.

[81](#)

N.Y. Civ. Prac. Law and Rules §5602.

[82](#)

Court of Appeals Rules of Practice, 22 N.Y. Codes, Rules & Regs. §500.22(b)(4).

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