

TAX SECTION

New York State Bar Association

Letter on Location of Location of Tax Appeals Hearings

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# TAX SECTION

## New York State Bar Association

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March 1, 1996

The Hon. George M. Pataki  
 Executive Chambers  
 The State Capitol  
 Albany, NY 12224

Re: Location of Tax Appeals Hearings

Dear Governor Pataki:

I am writing on behalf of the Tax Section of the New York State Bar Association to urge you to support making proceedings of the New York State Tax Appeals Tribunal and Division of Tax Appeals available in locations other than at the offices of the Division in Troy, New York. The current practice is detrimental to the fair administration of New York State's tax system, the excellent reputation of New York State's tax appeals process, and, ultimately, the State's business climate.

Historically taxpayers were able to appeal decisions of the New York State Department of Taxation and Finance in administrative proceedings located near their homes or businesses. The independent Tax Appeals Tribunal and Division of Tax Appeals, created in 1987, continued this practice, with administrative hearings and oral arguments of the Tribunal being held at offices in New York City for taxpayers from the downstate region and with the holding of administrative hearings at several locations in upstate cities.

The availability of these administrative proceedings in locations other than in Troy was cancelled in 1991 for budgetary reasons, in a move that taxpayers and tax practitioners hoped was merely temporary. On numerous occasions since 1991, the Tax Section has raised the issue of the location of appeal proceedings with the administrators of the Department of Taxation and Finance and the Tax Appeals Tribunal. (See Report of the New York State Bar Association, Tax Section, dated December 28, 1992, attached.) Officials of these agencies have made it clear that they do not object to holding hearings in locations in addition to Troy and that budget constraints are the only bar to doing so.

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The unavailability of tax appeals administrative proceedings in locations more convenient to a taxpayer's home or place of business is fundamentally unfair, particularly to individuals and small business taxpayers. For many of these taxpayers, the expense and inconvenience of requiring the taxpayer, the taxpayer's counsel and any witnesses to travel to and spend a day or more in Troy can be substantial and out of proportion to the amount of tax at issue. As a result, pursuing an appeal may be financially impractical. Because the primary users of the tax appeals process are individuals and small businesses, the disproportionate cost of participating in the administrative process raises real concern about the availability of the tax appeals to New York's taxpayers.

We understand that the amounts required to reinstitute hearings around the state are relatively modest. The Tax Section's December 1992 report suggests several ways to minimize or eliminate these costs. We strongly urge you to take the minimal steps necessary to make the reinstitution of tax appeals hearings at locations convenient to the State's taxpayers one of your priorities this year.

If there is any additional information the Tax Section can provide you or your staff about this issue or the tax appeals process in general, please contact me.

Very truly yours

Richard L. Reinhold  
Chair

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December 28, 1992

Hon. John P. Dugan  
President, New York State Tax Appeals Tribunal  
500 Federal Street  
Troy, N.Y. 12180-28994

Dear Commissioner Dugan:

I am writing to you concerning the continuing problem of holding all administrative tax trials in Troy, N.Y., regardless of where the taxpayer resides or has its place of business.

The practice of holding all administrative tax trials in Troy is unduly burdensome and expensive to both taxpayers and the Department of Taxation and Finance. The practice also effectively denies rights guaranteed to taxpayers by the Legislature under Article 40 of the Tax Law.

As you may recall, the Tax Section wrote to Governor Cuomo in February 1991 when it was announced that administrative trials would no longer be held in locations throughout the State but, instead, all trials were to be held in Troy starting April 1, 1991. He expressed our objections in that letter and were advised in response in a letter dated May 3, 1991 from the Secretary to the Governor that the practice was because of the State's then "financial situation".

In July 1991, legislation was passed and signed authorizing and appropriating \$60,000 to the Division of Tax Appeals "[f]or services and expenses related to the conducting of formal hearings and the tax tribunal in New York City." L.1991, Ch.50, § 1 and L.1991, Ch. 407, § 1. The amount of the expenditure was later reduced to \$48,000. L.1991, Ch.408, § 2. A fee schedule was also authorized with the proceeds to be applied to the expenses.

To date, trials continue to be held in Troy and a fee schedule has not been established. He write at this time to express once again our objections and to suggest

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alternatives. We look forward to your response to our following comments and suggestions:

I\*

The Division of Tax Appeals was intended to be an improvement over the manner in which tax disputes were resolved by the former Tax Commission. The Division of Tax Appeals was established to be "responsible for providing the public with a just system of resolving controversies with [the Tax Department] and to ensure that the elements of due process are present with regard to such resolution of controversies.", Tax Law § 2000.

The elements of due process as intended by the Legislature are not present in a system that requires the parties to incur substantial and unnecessary expense in order to participate in that process. As with most issues that involve New York State, most tax controversies involve citizens and businesses located in the metropolitan area of New York City. This is a distance of approximately 150 miles from Troy. Given travel time and transportation schedules, the taxpayer from the New York City area and his or her representative and witnesses must devote a full day of time and effort for a trial in Troy that may take less than three hours. There are also related travel expenses. Trials involving several days obviously require overnight lodging. If the taxpayer lives or works in Erie County (approximately 260 miles from Troy) or Suffolk County (approximately 210 miles from Troy), the burden and expense is that much greater. This burden and expense cannot be avoided by a taxpayer if the taxpayer seeks to resolve his or her tax dispute in the Division of Tax Appeals.

Under the former Tax Commission, all evidentiary administrative - hearings were held throughout the State either in New York City, Albany or Buffalo, and at times in Rochester and Utica. This was true regardless of the amount in controversy. At least in this respect, the Division of Tax Appeals' present practice of holding all administrative tax trials in Troy is hardly an improvement over the old system. The Tribunal recently quoted its own regulations and described the mission of the Division of Tax Appeals as "...a system intended to avoid 'undue formality and complexity'". Matter of p t c Glass Corp., et al., 1992-2 NYTC T-694 (6/11/92). There is nothing informal or simple in a system that requires 150 or more of needless travel and related expense and burden before that system begins to function.

The Division of Tax Appeals should also give its procedures the appearance of fairness. You should be aware that when taxpayers are advised that if they want a trial they must go to Troy, there is an immediate perception among many that the reason is to make it more difficult to protest and participate in the system. As a result, many taxpayers at the start of the process have little confidence that they will receive a fair and just result from the Division of Tax Appeals, while this perception is probably far from unanimous, it is very much the perception of a substantial number of taxpayers.

II

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\* This letter was drafted by Robert Plautz and Robert J. Levinsohn, with comments from John A. Corry, Craig Fields, Carolyn Joy Lee Ichel, Arnold Y. Kapiloff, Arthur R. Rosen and Michael L. Schler.

New York State has established a Court of Claims for any citizen to use in resolving controversies with the State. These controversies can involve controversies of a few hundred dollars to many millions. The Court of Claims tries cases in New York City, Albany, Buffalo, Rochester, Syracuse, Happaugue, Binghamton, Utica, White Plains, Riverhead, Goshen and Plattsburg. 22 NYCRR § 206.4. It also travels to certain "hub prisons" within the State's prison system to try cases.'

Taxpayers should not be treated differently than plaintiffs with a tort, contract or civil rights dispute with the State. The legislation establishing the Division of Tax Appeals clearly intends that the Division will be traveling in order to carry out its mission. Tax Law § 2024 specifically provides that "traveling and other expenses" of the Division shall be paid "upon vouchers approved by the president of the tax appeals tribunal."

Tax Law § 2024 should be used as intended by the legislature and taxpayers should not be treated differently than other litigants with other kinds of disputes with the State.

### III

It is well established that the convenience and location of the parties and of the evidence is often the dispositive factor in determining venue in both criminal, Platt v. Minnesota Mining & Manufacturing Co., 376 US 240 84 S.Ct 769 (1964), and civil trials, Alzugary v. NY Telephone Co., 104 AD2d 776, 480 NYS2d 887 (1st Dept. 1984) and windhurst v. Town of Thompson, 78 AD2d 930, 433 NYS2d 516 (3rd Dept. 1980).

This same law should apply to trials held by the Division of Tax Appeals.

Moreover, we are not concerned about the unfairness and undue burden to just one of the parties when venue is arbitrarily fixed in Troy. Both the taxpayer and the State suffer unfairness and undue burden. Most tax audits that end in litigation before the Division of Tax Appeals are conducted by auditors from one of the Tax Department's District Offices that is near the taxpayer's residence or place of business. As a result, if litigation ensues, both of the parties and all of the witnesses and evidence must go to Troy to resolve the dispute. For example, there have been cases in which auditors from the Hauppauge District Office and the taxpayers these auditors have audited have met—along with the witnesses and attorneys—on the same train or plane on Long Island and have traveled together—for more than four hours one way—to try a three hour case against each other in Troy. They then travel home together, similar situations occur in cases from other downstate or western parts of the State. This does not make sense to us.

### IV

All states provide a procedure for their taxpayers to resolve tax disputes and many of the states do so at places convenient to the taxpayer. The procedure may be called either a "trial" or a "hearing", and may be further described as either "administrative" or "judicial", but however the procedure is titled, it is some type of formal evidentiary proceeding that involves witnesses, documents and other evidence.

New Jersey, for example, holds its evidentiary proceedings in tax disputes in six venues throughout the state, in Hackensack, Newark, Morristown, Trenton, Camden and Atlantic City. The trial is scheduled wherever it is convenient for the taxpayer or taxpayer's representative. California holds its

evidentiary proceedings in four venues, in Sacramento, Torrence, San Diego and sometimes San Francisco. Minnesota conducts its evidentiary proceedings in any one of the state's 87 counties where the taxpayer resides. Illinois holds administrative evidentiary trials in both Springfield and Chicago, with judicial review in any one of the state's 102 counties. In Florida, the taxpayer may have either an administrative or judicial evidentiary trial in any one of the state's 67 counties where the taxpayer resides.

Similarly, the U.S. Tax Court does not limit New York Federal taxpayers to one place within New York for a trial involving Federal taxes. The U.S. Tax Court has permanent facilities and regularly tries cases in Buffalo, Westbury and New York City. All the taxpayer need do is designate one of these places as the place for trial and that is where the trial is held. The U.S. Tax court also hears small claims cases within New York State in Syracuse and Albany in addition to the other places mentioned. Thus, the national tax court headquartered in Washington, D.C., provides permanent facilities to try cases in at least three places within New York State. Surely New York State can and should provide an equal number of places for trial for its own citizens involving its own taxes. The Division of Tax Appeals frequently uses the U.S. Tax Court as a model and it should do so once again in determining venue for trials.

V

We have heard two arguments supporting the practice of holding all administrative tax trials in Troy. We believe that neither satisfies the statutory protections established by the Legislature in creating the Division of Tax Appeals.

The first argument is that the rule requiring all trials to be held in Troy does not apply to cases within snail claims jurisdiction. Cases in which the taxpayer "elects" to proceed in small claims are tried locally and, so runs the argument, these taxpayers need not suffer the needless burden and expense of traveling to Troy.

There are two fundamental and disturbing flaws in this argument. One is that taxpayers who "elect" small claims jurisdiction pay the price of being denied rights under Tax Law Art. 40. Under the statute, a taxpayer who makes an "election" to proceed in small claims may not appeal his or her case to the Tribunal, two-thirds of whose members, by law, must be lawyers. Thus, the taxpayer who is forced into small claims because of the burden and financial hardship of traveling to Troy is denied the right to have his or her case heard by the Tribunal—the body that the Legislature obviously considered more knowledgeable and important, and a forum that was to be open to all.

The statute establishing the Division of Tax Appeals does not provide for a minimum jurisdictional amount for Tribunal jurisdiction. All taxpayers—regardless of whether or not the amount involved in the case falls within small claims jurisdiction—have the right to be heard by the Tribunal. Only by administrative fiat requiring all trials to be held in Troy has a minimum jurisdictional amount now been effectively set for Tribunal jurisdiction. This violates the purpose of the Division of Tax Appeals as set forth in Tax Law Art. 40.

Moreover, all taxpayers, not just the taxpayers who "elect" small claims jurisdiction, are denied rights as long as all trials continue to be held in Troy. All taxpayers are entitled to the due process rights under Tax Law § 2000 and should not be abused and taken advantage of by the system. Whether

the dispute involves ten dollars or ten million dollars, every taxpayer is entitled to conserve his or her resources as he or she sees fit and should not be not required to needlessly spend money, and time, participating in a system ostensibly "...intended to avoid 'undue formality and complexity'". Matter of D & C Glass, Coro., et al., supra.

The second argument advanced in favor of the current practice is that a trial in Troy can be avoided by stipulating evidence or submitting affidavits. However, there are many cases in which the facts and evidence simply can not be stipulated or submitted on affidavits. Article 40 and 20 NYCRR § 3000, et seg., recognize this fact and specifically grant the right to call and cross-examine witnesses. For instance, in responsible officer cases, testimony from a neutral witness is often critical. However, unless a party, in these cases usually the State, has a right to cross-examine the affiant, the affidavit from such a neutral witness will be given little weight. And in cases where an affidavit from a neutral person is not possible, an affidavit from the alleged responsible officer is automatically disputed by the State as self-serving.

Similarly, the weight to be credited to hearsay evidence is critical when the State-offers purported third-party verification or confirmations. The weight to be credited to such evidence can only be established on cross-examination of the auditor. The same is true to a lesser extent with respect to evidence concerning external indices in sales tax cases. Accordingly, cross-examination is necessary and, thus, under the current practice, a trial in Troy is necessary.

## VI

Another argument we have heard in support of holding all trials in Troy is that it is more efficient for the Division of Tax Appeals in that there is less "down time" of administrative law judges. As we understand the argument, because fully one-third of the cases scheduled for trial are settled immediately before trial, the administrative law judge scheduled to try such settled case is thus "free" to work on other matters in Troy, but would somehow be unable to do so if in other parts of the state.

Settlements, however, even those on the court house steps, are a fact of life in any litigation process. Indeed, they are usually encouraged at any stage of the process.

Moreover, if cases are tried locally, the docket of an administrative law judge will include only those cases from that particular locality and will probably include cases that might not have been docketed at all if the petitioners had to travel to Troy. As a result, there will be many other cases to keep the ALJ busy. Taxpayers from that particular locality will be lined up on the docket waiting to have their cases tried after the AU disposes of the settled cases.

To improve efficiency and handle the cases on dockets from localities outside of Troy, we suggest that the Division of Tax Appeals schedule some cases on a "stand-by" or "ready" calendar in localities outside Troy, similar to the practice in State court under the individual assignment system. See. 22 NYCRR § 202.22(a)(6) and (8). Petitioners and practitioners could be notified that trial of their case is "Imminent" during a particular week and be ordered to be on telephone alert for that week. Thus, when one case "folds" or is "settled", one phone call should be able to produce another case for trial within a reasonable time. The State courts do this for the very reason of

avoiding "down time" of the "part". The U.S. Tax Court operates under a similar procedure, see. U.S. Tax Ct. R. 132. From the taxpayers' viewpoint, this is a more efficient system than having to coordinate the logistics of transporting witnesses and evidence to Troy.

Finally, to consider only the "down time" of ALJs while ignoring the "down time" of taxpayers, auditors, lawyers, accountants, third-party witnesses and others traveling back and forth to Troy feeds the perception that was raised earlier in this letter that the reason trials are held in Troy is to discourage the public from participating in the process. Obviously, we share your concerns about the efficiency of the Tribunal, but the ALJs are only one part of the picture. Whatever time savings they enjoy under the current system, it is vastly outweighed by the considerable inconvenience to everyone else.

## VII

We urge that the Division of Tax Appeals change the practice of holding all administrative tax trials in Troy. We recommend, among other things that in lieu of this practice the Division of Tax Appeals adopt procedures that are now applicable in all ordinary civil cases, both Federal and State, including the U.S. Tax Court. We suggest that the expense for holding trials outside Troy be paid, at least in part, by the petitioners in the form of fees for the filing of petitions and for the conducting of formal hearings similar to the fee schedule enacted in Ch. 407 of the Laws 1991.\*\* We note that the newly created New York City Tax Appeals Tribunal has a filing fee of \$35.

If the statutory authority for the fee schedule enacted in 1991 has lapsed, we suggest that the Division of Tax Appeals propose and sponsor legislation to reinstate such authority. We would, of course, enthusiastically join in this support and use our best efforts to obtain legislative approval.

## VIII

As we already noted, we were advised in a letter to us from the Governor's secretary dated May 3, 1991, that the rule requiring that all trials are to be held in Troy was temporary and due to budgetary reasons. We had been previously advised that the major expense was the rental of space in New York City. You suggested at our annual meeting at Lake Mohonk this past September that we assist in finding the Tribunal space for such trials.

Enclosed please find a brochure from the New York County Lawyers' Association advising that it has available in lower Manhattan excellent facilities for rental on a per diem basis. As you can see from the brochure, the facilities are dignified and would easily accommodate administrative tax trials. These facilities can be rented for less than \$300 a day. Also available is court room space at 71 Thomas Street in lower Manhattan. At 71 Thomas Street there are seven very modern and excellent court rooms. They are not in use all of the time. The Office of Court Administration spent a vast amount of money constructing these court rooms for visiting upstate judges. The space includes a New York State library and new furniture. The space has been used in the past by the U.S. Customs Bureau and U.S. Coast Guard. We see no reason why the Division of Tax Appeals should not also use these facilities.

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\*\* The authorized fee schedule was: \$25 for the filing of a petition, \$50 for the conducting of a formal hearing and \$50 for a hearing of the Tax Appeals Tribunal.

Also available from time to time is court room space at the U.S. Tax Court at 26 Federal Plaza in lower Manhattan. While it appears that coordinating the time the space is available might require some work, the U.S. Tax Court has advised that it is feasible. The U.S. Tax Court frequently lends its court rooms to other Federal agencies for administrative trials. They have advised that use by a state agency is not a problem as long as the Tax court has priority and the matter is scheduled in advance. Enclosed is some written information from the U.S. Tax Court concerning the availability of their court rooms by outside agencies. You can call Ms. Cathy Choffrey at the Tax court at (202) 606-8745 to discuss the matter further. The space would be rent free.

We also suggest the possibility of sharing space with the newly created New York City Tax Appeals Tribunal. The NYC Tribunal is in the process of looking for space to hold its administrative trials in Manhattan. With two agencies contributing to the use and expense, excellent space should not be difficult to obtain.

Finally, while we have not explored the possibilities at the State Office Buildings at either 270 Broadway in Manhattan or 55 Hanson Place in Brooklyn, these two facilities either separately or jointly, always seem to have adequate space available. We are also sure that adequate space can be found in other parts of the State, either in State office buildings or shared space with the U.S. Tax Court or the State Court of Claims.

You have suggested that space for trials must be "permanent." We do not understand why space that is needed occasionally, albeit regularly, can not be shared with other public agencies or rented on an as needed basis. It would seem that "permanent" space, while optimal, is a luxury that neither the public nor the Division of Tax Appeals can currently afford. Given the availability of shared space that is excellent and reasonably priced, there seems to be no reason to abandon altogether the important responsibility of providing trials in convenient venues simply because the trial space would not be optimal.

We look forward to your comments and working with you on improving the Division of Tax Appeals.

Very truly yours,

John A. Corry  
Chair, Tax Section

Cc: Hon. Mario M. Cuomo  
Executive Chambers  
The State Capitol Albany,  
N.Y. 12224

Elizabeth D. Moore  
Counsel to the Governor  
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Hon. Ralph J. Marino  
Senate Majority Leader  
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Hon. Saul Weprin  
Speaker, New York State Assembly  
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Hon. Ronald B. Stafford  
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Albany, N.Y. 12247  
Hon. Manfred Ohrenstein  
Senate Minority Leader  
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Hon. Clarence D. Rappleyea  
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