

REPORT #635

TAX SECTION

New York State Bar Association

Letter on Rules of Procedure

November 20, 1989

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November 20, 1989

BY HAND

Commissioner Mark Friedlander
 President
 N.Y.C. Tax Appeals Tribunal
 253 Broadway
 3rd Floor
 New York, NY 10007

Re: Rules of Procedure of the
New York City Tax Appeals Tribunal

Dear Commissioner Friedlander:

The Committee on New York City Tax Matters of the Tax Section of the New York State Bar Association has reviewed the proposed Rules of Procedure governing practice before the New York City Tax Appeals Tribunal (the "Rules"), and offers the comments set forth below for your consideration.

In commenting on the Rules, we do not in any sense withdraw from the recommendations of the Tax Section's earlier reports. We wish to reiterate the importance of establishing an independent tribunal with jurisdiction over the entire range of New York City taxes and procedures that ensure an impartial review of factual and legal matters in dispute. Accordingly, we recommend that full hearings be made available to taxpayers whenever possible (see comment "d," below).

- a. Rule 2(f) - The Rules should state that, if a taxpayer applies for a refund, credit or reimbursement and the application is not acted upon by the Commissioner -- that is, it is neither allowed nor denied -- within

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six months, the taxpayer shall, upon proof of the date such application for refund was filed, be deemed to have received a denial of such refund, credit or reimbursement application. Compare Section 6532 of the Internal Revenue Code. This procedure will give the Commissioner ample time to consider the application, yet provide the taxpayer with some outside date after which he can seek Tribunal review.

- b. Rule 6(a)(2). It would be helpful to specify the addresses of both the tribunal and the Commissioner of Finance to which the petitions are to be delivered or mailed. In addition, the last sentence of this Rule raises a question as to its interaction with Rule 17. In any event, filing by either certified or registered mail should be permitted.
- c. Rule 6. This Rule also should contain provisions allowing for the correction of petitions as to form (see 20 NYCRR §3000.3(d)), and allowing the pleadings to be amended to conform to the evidence presented at the hearing (see 20 NYCRR §3000.4(c)).
- d. Rule 6(a)(1)(vi), 6(f). The Rules should specify how and when the tribunal is to decide whether to confine its factual review to the record established before the Commissioner of Finance, hear and determine issues of fact de novo, or remand to the Commissioner of Finance, and how the parties will be advised of such decision.

If the tribunal decides to confine its review to the record established below, no evidentiary hearing is needed. Instead, the Rules should provide for the transmittal to the tribunal of the record established at the Department of

Finance within a certain time frame, and then for oral argument and the submission of briefs.

As stated in its previous reports, the Tax Section believes that the tribunal should function as the fact finding body in resolving disputes between taxpayers and the Commissioner of Finance, and should have broad authority to consider the legal issues presented by such disputes. We recognize that the provisions of Rule 6(f) as drafted essentially follow the language of the Charter. We recommend, however, that the Rules affirmatively state that the tribunal shall hear and determine issues of fact de novo, and shall grant leave to raise new issues of fact or law, in any case in which de novo review or the consideration of new issues may assist in achieving the fair and just application of the tax laws.

- e. Rule 8. Given that a petitioner may not raise any factual or legal issues or make any request for relief not raised or made earlier before the Commissioner of Finance without leave of the tribunal, the problem of surprise should never arise. Query therefore whether the procedures respecting bills of particulars are needed. It may be preferable for Rule 8 instead to provide for "reasonable limited discovery," as follows:

"For good cause shown, the tribunal may grant a form of discovery, as provided for in the CPLR, by order on such terms and conditions as it may require."

In addition, a provision relating to the issuance of subpoenas should be adopted. See 20 NYCRR §3000.6(c).

- f. Rule 11. The thirty-day time period for notice of a pre-hearing conference may well prove to be too short, and probably will require adjournments almost as a matter of course. In addition, a time period for notice of the hearing itself should be specified. In each case, we think a sixty-day period would be appropriate.
- g. Rule 13. Small claims treatment deprives the taxpayer of certain substantive and procedural rights. The waiver of such rights should not be forced upon him. Accordingly, we believe that a taxpayer should have the right to elect out of the small claims procedures.
- h. Rule 15. This Rule should track the statutory language of Charter §172.b, so that the submission of a paper not warranted by existing law but containing "a good faith argument for the extension, modification, or reversal of existing law" would not give rise to a sanction.
- i. Rule 19(d) - We do not believe it is appropriate to impose a charge to obtain copies of the Rules.

Respectfully submitted,

Robert J. Levinsohn
Co-Chair

Carolyn Ichel
Co-Chair

cc: Commissioner Ramon Cintron
Commissioner Dorothy F. Henderson

CI/md