

REPORT #649

TAX SECTION

New York State Bar Association

Letter on the Department of Finance

March 6, 1990

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March 6, 1990

The Honorable Carol O'Cleireacain
Commissioner of Finance
City of New York
Municipal Building - Room 500
One Centre Street
New York, New York 10007

Re: New York City Tax Appeals Tribunal

Dear Commissioner O'Cleireacain:

On June 9, 1989, the Tax Section of the New York State Bar Association submitted a Report by our Committee on New York City Tax Matters on "Legislative Proposals for the Establishment of a New York City Tax Appeals Tribunal" to your predecessor, Commissioner Anthony Shorris. A copy of that submission is enclosed.

That Report provided specific comments on your Department's then pending legislative proposal relating to the resolution of tax disputes and set forth an alternative proposal for implementing fair and efficient procedures for contested tax matters.

In general, we sought to have the City procedures follow, where practical, the existing State tax resolution procedures, thus eliminating the multiple fact-finding proceedings that can be required under existing law and the Department's former bill.

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Our proposal suggested an initial informal dispute resolution system within the Department of Finance (conciliation conferences) followed, if necessary, by a formal hearing held by a hearing officer employed by the independent Tax Appeals Tribunal, review of the hearing officer's determination by the Tribunal en banc and judicial review pursuant to Article 78 of the Civil Practice Law and Rules.

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In addition to conforming the City's procedure to the State's, we sought substantive conformity regarding the interpretation of identical laws. We recommended that the City Tribunal be required to follow decisions of the State Tax Appeals Tribunal.

We have received the latest Department of Finance proposal ('89 Finance #7, Revised 11/27/89), and commend your Department for its efforts in seeking conformity with the State's procedures. We are encouraged that the Department has adopted many of your proposals, which will, we believe, enhance the perception and operation of the City Tax Appeals Tribunal as an independent and efficient forum for the resolution of tax disputes.

We offer the following comments on the revised bill for your consideration.

(a) Section 1 of the bill amends Section 506 of the CPLR to provide that an appeal to review the decision of the Tax Appeals Tribunal is to be brought in the Supreme Court, New York County, and is to be transferred directly to the Appellate Division, First Department.

We have no objection to the venue being placed in New York County, but mandating that the proceeding be transferred to the Appellate Division is inconsistent with both the general Article 78 procedures and the special procedures applicable to State Tribunal decisions. Under

current law, an Article 78 proceeding is generally commenced in the Supreme Court, New York County. See CPLR §7804 (g). Where the issue on appeal is not one of "substantial evidence", the Supreme Court is itself enjoined to dispose of the issues in the proceeding. Where a "substantial evidence" issue is raised, the Supreme Court is required to transfer the proceeding to the Appellate Division, though it may decide objections in point of law. In an appeal from State Tribunal decisions the Article 78 proceeding is commenced directly in the Appellate Division, Third Department. Tax Law §2016.

Rather than adopt a third standard -- which the revised bill appears to do -- we recommend that either the general Article 78 rule or the special rule applicable to the State Tribunal should apply. On balance, we recommend that the State rule be followed, and that appeals from City Tribunal decisions be commenced directly in the Appellate Division, first Department.

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(b) Sections 134 and 135 of the bill delete the existing Charter provisions (169(b) and 170(b)) which require the Commissioner of Finance to serve and file an answer responding to the taxpayer's petition within 30 days after service of the petition. The memorandum in support indicates that the deletion is not intended to preclude the City Tribunal from requiring the service of an answer. We recommend that the service and filing of an answer remain a statutory requirement and not be left to the discretion of the Tax Tribunal. We have no objection to providing that the time limit for filing the answer shall be as set forth in the Tribunal's rules. Thus we recommend retaining the reference to the answer in Section 169(b), and deleting the reference to a 30-day time limit in Section 170(b).

(c) The revised bill contains no proposed amendments to the State enabling legislation for the City's corporate and unincorporated business taxes (Chapter 772 of the Laws of 1966, as amended), but instead contemplates that the State legislature make amendments directly to the local laws. We repeat our recommendation that the enabling act for these taxes be specifically amended. This will better incorporate the new procedures, and will reduce the potential for conflicts or confusion between statutory provisions.

(d) We also reiterate our recommendation that the City bill amend Charter Section 170 to provide that the City Tribunal "follow", rather than merely "take into consideration", controlling precedential decisions. Since the City bill gives the City the right to seek judicial review of City Tribunal decisions, the City is not precluded from contesting the correctness of a State Tribunal decision in court.

(e) We believe it is not appropriate to charge a fee for filing a petition with the City Tribunal, and we therefore recommend that Section 134(c) of the bill (page 108) be deleted.

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(f) Section 134(e) of the bill (page 109) refers to "reasonable limited discovery." We think that the concept of "limited" discovery in this context is unnecessary. The standard of "reasonable discovery" is sufficient to ensure prompt and efficient proceedings, and we therefore recommend deleting the word "limited."

(g) Concerning the effective date of the bill (section 139), there will doubtlessly be a good deal of confusion among taxpayers concerning the proper form, time and place for filing petitions under the new tribunal system. We recommend that, with respect to notices issued by the Department of Finance prior to the effective date of the bill, if the time to petition has not expired as of such date the taxpayer should be granted a grace period of 90 days from the effective date to petition the Tribunal for a hearing. Further, any petition timely filed during the grace period should be deemed to be in the proper form and to have been filed with the Tribunal regardless of whether addressed to the "new" Tribunal or the "old" Department of Finance Hearing Bureau.

We also recommend that, if a petition was timely filed with the Department of Finance prior to the effective date but the hearing has not been held by such date, the matter should be automatically transferred to the Tribunal.

If a hearing has been held prior to the effective date, but no decision has been rendered by such date, the taxpayer should have the option of transferring the case to the City Tribunal and requesting a new hearing. If the taxpayer does not request a new hearing, the decision of the Commissioner should be treated as a decision of an administrative law judge of the Tribunal.

(h) Of a technical nature, the word "appeal" should be changed to "proceeding" in the two places it appears in the last sentence of subdivision (a) of Charter §170, found on page 110 of the bill.

The Tax Section remains committed to supporting legislation that fosters a fair and efficient tax dispute resolution program. We are

of course available to meet with you and your staff if we can be of any further assistance.

The Honorable Carol O'Cleireacain -5- March 6,
1990 Commissioner of Finance

Respectfully submitted,

Arthur A. Feder
Chair

Enclosure

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