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April 24, 2009

The Honorable David A. Paterson
Governor of the State of New York
State Capitol
Albany, NY 12224

Re: Process for Making Appointments to the New York Tax Appeals Tribunal¹

Dear Governor Paterson:

We are writing to you to express our hope that the Tax Appeals Tribunal continue to function as originally intended and, as there is currently a vacancy on the Tribunal, we offer a recommendation for a process for filling that vacancy that is consistent with that original intent. In brief, the key consideration for nominating Commissioners should be to select individuals whose technical expertise and experience ensure both that difficult and complex issues will be fully considered by the panel, and that all parties appearing before the Tribunal will operate under the understanding that their positions will be given a fair, thorough and balanced examination. In order to assist in achieving this goal, we recommend that you consider establishing a process for reviewing candidates similar to that used to evaluate candidates for other judicial positions.

The Tribunal, and the Division of Tax Appeals, which the Tribunal administers, commenced operations on September 1, 1987, replacing the former State Tax Commission (and its Tax Appeals Bureau) as the body responsible for the initial adjudication of New York State tax disputes.

¹ The principal drafter of this letter is Arthur R. Rosen, Co-Chair of the Committee on New York State Taxes of the Tax Section of the New York State Bar Association.

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The Tax Section was one of a number of groups and individuals that recommended the establishment of the Tribunal, and was actively involved over a period of many years in its creation, including consultations with the Governor's office, legislators and tax administrators, and the drafting of proposed legislation.² We supported the establishment of the Tribunal for a number of reasons, including: (1) a quasi-judicial body should be independent from the parties whose disputes it hears; (2) the parties to the dispute, and the public, should be given a written determination by the judge who actually heard the case; and (3) the ultimate decision makers should have expertise and experience in state taxation. It is the final motive for the Tribunal's creation – expertise and experience in state taxation – on which we request you focus as you consider candidates for the vacant Commissioner position on the Tribunal.

We believe that the Tribunal can best meet its responsibility of providing fair and efficient resolutions of tax disputes if individuals appointed to the Tribunal continue not only to meet the statutory criterion of being “knowledgeable on the subject of taxes and ... skillful in matters pertaining thereto” but also, collectively and as individuals, have diverse tax backgrounds and perspectives (e.g., taxpayer advocate, academic, tax agency employee, tax policy experts). The Tax Law, with its plethora of arcane, overlapping, and sometimes inconsistent and ambiguous provisions, is a complex area for the most intelligent of people. Consequently, specific experience in understanding and applying tax principles, statutes, regulations, and case law is an essential qualification for one tasked with the responsibility of deciding the myriad of tax disputes that come before the Tribunal. Accordingly, one important criterion for selecting a nominee should be the nominee's personal qualifications as an expert in the Tax Law. In addition, having had experience in viewing tax policy from more than one point of view should help ensure that the resolution of tax disputes takes into account the interests, rights and obligations of all parties from a perspective that is broader than that of solely the tax administrator. Accordingly, a second criterion for selecting a nominee should be to ensure that the individuals appointed to the Tribunal collectively have an appropriate range of perspectives on the application and administration of the Tax Law.³

We believe that the process usually used in the nomination of judges to the U.S. Tax Court can serve as a model for a process that would assist you, as well as your successors, in ensuring that individuals with the characteristics mentioned above are appointed to the Tribunal. The process for selecting U.S. Tax Court judges starts with the administration (i.e., those appointed by the President) developing a list of possible nominees. That list (along with resumes) is furnished to the Appointments to the Tax Court Committee of the American Bar Association's Tax Section. That committee reviews the background and qualifications of those whose names are on the list. This activity is pursued through confidential inquiries; the committee meets in executive sessions only. The committee rates each candidate as “well qualified,” “qualified,” or “not qualified” and these conclusions are communicated to the

² Among the reports and materials we submitted were reports dated January 4, 1983 (*Need for and Feasibility of a New York Tax Tribunal*) and July 12, 1983 (*The Need for an Independent Tax Tribunal*), reprinted in 2 J. ST. TAX'N 259 (1983)).

³ See R. Pomp, R. Plattner & R. Kay, *Fairness and Function in the New York State Tax Appeals System Proposals for Reform*, 49 ALB. L. REV. 352 (1984-1985) (describing a “persistent criticism” of the pre-Tribunal tax appeals system that it was biased in the tax administrator's favor).

administration; the President makes the ultimate decision on whom to nominate; the Senate must confirm a nomination for the process to be completed.⁴

In connection with Tribunal appointments, a number of groups could take the role fulfilled by the ABA Tax Section committee in the federal context, such as the New York State Bar Association, the ABA Tax Section's State and Local Tax Committee, or a New York State Judicial Screening Committee. If you believe that such a process would be worthwhile and feasible, we would be happy to work with your staff in (a) identifying the appropriate review group and (b) developing procedures for the process.

As a final note, we would like to reiterate our longstanding support for providing the Tax Department with the right to appeal adverse decisions of the Tribunal. We believe that true impartiality and total fairness can be achieved only if both parties – the taxpayer and the Tax Department - - have equal rights.

We are hopeful that you find our thoughts on this subject helpful. Please let me know if additional information would be useful.

Sincerely,

Erika W. Nijenhuis
Chair

cc: Lawrence Schwartz, Secretary to the Governor
Francine James, Deputy Secretary for Appointments

⁴ We recommended a screening panel of this general kind in a report prepared after the legislation providing for the Tribunal was enacted. See New York State Bar Association Tax Section, Committee on New York State Tax Matters, *Report on Tax Tribunal Legislation and Proposed Regulations* (June 9, 1987).

Screening panels also exist at the federal, state and New York City level to review nominees for other judicial positions. The details of their operation and the manner in which they rate candidates differ in some regards. For example, we understand that the Judiciary Committee of the New York City Bar Association rates candidates as "well qualified," "not well qualified," and "exceptionally well qualified."