

NYC's Tax Appeals Tribunal: Have the Wheels of Justice Stopped Turning?

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In this installment of Noonan's Notes, Noonan and Banks review the appeal system that New York state lawmakers intended to provide New York City taxpayers and how we got to where we are now with no effective option for challenging the actions of the Department of Finance.

There's an ancient Greek proverb from the biographer Plutarch about the justice system: "The wheels of justice turn slowly but grind exceedingly fine."¹ But what happens when the wheels don't turn at all? Practitioners dealing with the New York City Department of Finance (DOF) can probably tell you what that's like. In this article we review the current state of affairs in New York City's tax appeals system and discuss what, if anything, taxpayers can do about it.

¹This is definitely the first time in the 18 years we've been doing Noonan's Notes that an ancient Greek proverb has made an appearance. What took so long?

Background

In 1988 the New York Legislature created an independent tax appeals tribunal to hear and determine cases initiated by the filing of a petition protesting a notice issued by the DOF.² Patterned after a similar process for state tax cases, the New York City Tax Appeals Tribunal appeal system involves a two-step process. Appeals are first heard by an administrative law judge within the "ALJ Division" of the tribunal.³ The ALJs hold pre-hearing conferences, hear motions, conduct formal hearings, and issue determinations.⁴ A determination issued by an ALJ finally decides the matters in controversy unless a party to the appeal takes "exception" by requesting review by the tribunal's "Appeals Division."⁵

The Appeals Division consists of three commissioners appointed by the city's mayor, one of whom is designated by the mayor to serve as the president of the tribunal.⁶ In addition to hearing appeals, the president of the tribunal appoints the ALJs and is in charge of the administration and operation of the tribunal.⁷

As far as state and local tax appeal systems go, the structure is sound and generally works well, both at the state and city levels. But as we discuss below, none of this works as intended if the city does not employ the personnel necessary to make the tribunal operational.

²N.Y.C. Charter section 168(a).

³N.Y.C. Charter sections 168(d) and 169(d).

⁴N.Y.C. Charter section 169(d).

⁵N.Y.C. Charter sections 168(d) and 169(d).

⁶N.Y.C. Charter section 168(b).

⁷N.Y.C. Charter section 168(b) and (d).

The Tribunal's Most 'Recent' Annual Report

By law, the tribunal is required to submit an annual report on its operations that includes the number of proceedings initiated, the types of dispositions made, and the number of proceedings pending.⁸ The most recent report on the tribunal's website covers the period July 1, 2022, through June 30, 2023, so it isn't that recent at all.

As reported in the June 2023 report, the tribunal had the three required commissioners, but only two ALJs. This was down from the tribunal's roster in pre-pandemic years, when at times it had as many as four ALJs hearing taxpayer petitions. And during the reporting period, there wasn't much activity in the ALJ Division. The ALJ Division had an "opening inventory" of 70 cases, and 16 additional new petitions were received, resulting in 86 cases in total. But during this period, the ALJ Division issued only two substantive determinations, both involving real property transfer taxes.⁹

In stark contrast, at the Appeals Division, the reporting period started out with an opening inventory of only three appeals. After the filing of two taxpayer exceptions and the issuance of two decisions and one dismissal, the Appeals Division was left with a closing inventory of two appeals. Of course, this light docket is a direct consequence of the logjam at the ALJ Division: If there aren't any cases coming from ALJs, the Appeals Division won't have much to do.

Update From the Front Lines

But now that we're out of the pandemic, things are much better, right? Unfortunately, this is not the case; things are actually much worse on that front. Indeed, for the past several months, there has been *just one* ALJ in the entire ALJ Division.¹⁰ And just recently, that ALJ left. So as of this writing, the ALJ Division is missing an important piece: an *actual* ALJ! That said, it is our understanding that the tribunal is actively

looking to add a couple of new ALJs, so this is likely a temporary vacuum. But still, given the limited roster of ALJs over the past several years, the wheels of justice have essentially stopped rolling. Tax litigation in the city is at a near standstill. Taxpayers continue to file petitions, but there aren't enough (or currently any) ALJs to hear their cases.

Of course, this problem does not just affect newly filed petitions. Over the last several years, as the roster of ALJs has experienced turnover, matters have been bounced from one ALJ to another, and some matters just sit in limbo, with no assigned ALJ and no hearing date in sight.

This is a serious problem. Indeed, access to a legitimate and (relatively) speedy tax appeals system is a hallmark of healthy state tax administration. Across all states, there are effective tax appeals systems that offer taxpayers a real shot at winning, and there are others that have more of a kangaroo court reputation as being nothing more than rubber stamps for the tax agency. And while the New York state and city appeals systems have generally been lauded in this space and by practitioners generally as being better than those in many states, recent developments threaten this status. Indeed, while the city's appeals system is — and hopefully will remain — far from a kangaroo court, it is turning into something like a "ghost court." It's as if there is no court at all.

The other problem with the current lack of remedies at the tribunal is that it has the effect of potentially infecting the rest of the tax enforcement process as well. For instance, at the most basic level, if the city's tax auditors know that taxpayers do not have a real appeal option, what is the downside to taking arbitrary positions or demanding unreasonable settlements? Similarly, if taxpayers believe they have no realistic option for winning an appeal, much less even getting their day in court, what other choice do they have when facing such a situation?¹¹ And even for taxpayers willing to wait for their day in

⁸ N.Y.C. Charter section 168(f).

⁹ *In the Matter of CT 157-162 LLC*, TAT(H)21-5(RP) (N.Y.C. Tax App. Trib. Aug. 9, 2022); and *In the Matter of Patrick McCauley*, TAT(H)20-8(RP) (N.Y.C. Tax App. Trib. Mar. 2, 2022).

¹⁰ While the ALJ Division has an "acting chief administrative law judge," that ALJ does not currently preside over cases at the tribunal.

¹¹ While there is a Conciliation Bureau in the city that appears to be picking up speed again after the pandemic-related slowdown, conciliation is optional, and it is not the right forum for many cases. Taxpayers have a right to have their disputes heard by an ALJ and decided at the tribunal. And many cases that go to the tribunal have already made their stop at the city's Conciliation Bureau.

court, interest clips along at rates well above market rates while an appeal languishes, and DOF auditors have historically been resistant to offer interest relief as part of any resolution.

In short, when there is no check, there is no balance. And that lack of balance can over time turn what has been an effective and fair system of tax administration into a dysfunctional system that hurts all parties, including the taxing jurisdiction.

Options for Relief

We understand that hiring ALJs is a top priority at the tribunal, but since this problem has gone on for a number of years, taxpayers also have to start thinking about other options. Indeed, our clients often ask us whether they are stuck with the tribunal as their only remedy, and whether they can have their claims heard in a New York state or federal district court. In many cases, this kind of process is likely either unavailable or inefficient. But more recently, given the dire situation at the tribunal, it may be time to think outside the box and explore these options more closely.

Appeals to New York State Court

Generally, the state courts don't allow claims against the DOF to be heard until the taxpayer has exhausted their administrative remedies.¹² Depending on the nature of a taxpayer's particular dispute, however, an exception may apply. Agency action that is challenged as either unconstitutional or wholly beyond the agency's grant of power are two recognized exceptions to

the exhaustion requirement.¹³ In addition, when resorting to an administrative remedy would be futile,¹⁴ or when its pursuit would cause irreparable injury,¹⁵ then exhaustion of administrative remedies may not be required.

The "unconstitutional" exception is most often pursued by taxpayers seeking a direct path to state court through a declaratory judgment action. For the exception to apply, the taxpayer must challenge the constitutionality of the tax statute, and New York courts have held there must be an absence of factual issues surrounding the claim.¹⁶ Although not too long ago, New York's Appellate Division allowed an "as applied" constitutional challenge to proceed, finding the circumstances were "exigent enough to warrant review now" because the plaintiffs were "conducting an ongoing business, and require finality and clarity as to the extent of their present obligations."¹⁷

As an example, over 20 years ago a taxpayer successfully challenged a New York state tax as unconstitutional in *Tennessee Gas Pipeline Co. v. Urbach*.¹⁸ In that case, following correspondence between the taxpayer and the state tax department, and before any state administrative proceedings, the taxpayer brought a declaratory judgment action challenging the facial constitutionality of a gas import tax. At the first judicial level, the New York Supreme Court found the tax was constitutional and that the taxpayer failed to exhaust its administrative remedies. The

¹³ *Watergate II Apartments*, 46 N.Y.2d at 57; *Matter of First National City Bank v. City of New York Finance Administration*, 36 N.Y.2d 87, 92 (1975); *W.T. Wang Inc. v. New York State Department of Taxation and Finance*, 88 A.D.2d 825 (1st Dep't 1982), *aff'd*, 58 N.Y.2d 1021 (1983).

¹⁴ *Watergate II Apartments*, 46 N.Y.2d at 57 (citing *Usen v. Sipprell*, 41 A.D.2d 251 (1973)).

¹⁵ *Id.* (citing *Pierre v. Valentine*, 291 N.Y. 333 (1943); and *Utah Fuel Co. v. Coal Commission*, 306 U.S. 56 (1939)).

¹⁶ *See Dun & Bradstreet v. City of New York*, 276 N.Y. 198, 206 (1937) (finding declaratory judgment available "in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved"); and *Allstate Insurance Co. v. Tax Commission of the State of New York*, 115 A.D.2d 831, 834 (3d Dep't 1985), *aff'd*, 67 N.Y.2d 999, 502 N.Y.S.2d 1004 (1986) (same finding).

¹⁷ *Amazon.com LLC v. New York State Department of Taxation and Finance*, 81 A.D.3d 183, 203 (2010), *aff'd sub nom, Overstock.com Inc. v. New York State Department of Taxation and Finance*, 20 N.Y.3d 586 (2013). The court rejected the state tax department's argument that the exception for constitutional challenges only applies when the issues are purely legal, and do not require the resolution of factual issues.

¹⁸ *Tennessee Gas Pipeline Co. v. Urbach*, 96 N.Y.2d 124 (2001). The authors' firm represented the taxpayer in this case.

¹² *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 57 (1978) ("It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law."). In addition, separate city tax provisions limit taxpayers' access to judicial remedies. For example, for purposes of assessments of unincorporated business tax, "review of a decision of the tax appeals tribunal provided by this section shall be the exclusive remedy available to any taxpayer for the judicial determination of the liability of the taxpayer for the taxes imposed by this chapter." N.Y.C. Admin. Code section 11-530.

taxpayer appealed to the Appellate Division, which again sided with the department. But finally, at the New York Court of Appeals, the strategy paid off because New York's highest court struck down the tax as violating the commerce clause.

In another example, a taxpayer successfully skipped over the state's tax appeals process by arguing that the state's action was both unconstitutional as applied and not based on any applicable statute, asserting in part that the tax department was trying to tax a service that was not subject to tax under the law.¹⁹ In rejecting the tax department's motion to dismiss, a New York State Supreme Court judge noted that the typical tax case "generally involve[s] factual issues as to the amount of tax that is owed, not whether the statute is constitutional as applied to the challenger in the first place," and further, that "[e]xhaustion of administrative remedies is not required where the claim presents a purely legal question that can be resolved without regard to the facts."²⁰

So, despite the general requirement that a taxpayer must proceed through the tribunal in a city tax case, practitioners should explore these alternative options for judicial relief in the state courts, especially in cases that involve purely legal questions.

Appeals to Federal District Court

So, what about federal court? The typical way into federal court is to establish jurisdiction based on a dispute arising under the U.S. Constitution or other federal laws.²¹ Taxpayer claims against the DOF can involve constitutional issues, typically under the commerce clause, so "federal question" jurisdiction may be established. Alternatively, "diversity jurisdiction" is another avenue when the matter in controversy exceeds \$75,000 and the parties are diverse (for example, citizens of different states).²²

¹⁹ *Vital Records Inc. v. New York State Department of Taxation and Finance*, No. 900088-19 (N.Y. Sup. Ct. Aug. 18, 2020). The authors' firm also represented the taxpayer in this case.

²⁰ *Id.*

²¹ 28 U.S.C. section 1331.

²² 28 U.S.C. section 1332.

But don't get too excited about this option yet, because taxpayers who have tried one or both of these avenues to federal district court are routinely blocked by the federal Tax Injunction Act, which bars federal district courts from enjoining, suspending, or restraining the "assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."²³

The Second Circuit recently noted in the context of a property tax exemption dispute that New York does provide a plain, speedy, and efficient forum for challenging its tax laws and "the fact that the proceeding took four years — and that any appeal will take additional time — does not establish procedural inadequacy."²⁴ So, clearly the federal courts have a unique interpretation of what "speedy" and "efficient" mean under the Tax Injunction Act. That said, might a federal court consider a forum where there is practically no remedy at all? We're hearing that there may be several city taxpayers who are ready to find out.

What's Next?

At the risk of using another ancient axiom, we refer to an old prayer attributed to St. Francis of Assisi: "Where there's despair, hope."²⁵ The city's tax appeals system has (mostly) worked well for decades. And the similarly structured system at the state level — while recently plagued with its own set of concerns and delays²⁶ — continues to be well-staffed and is churning out decisions on a regular basis. So, as the tribunal is working on filling the ALJ vacancies, hopefully it will reach pre-pandemic staffing levels to respond to the growing glut of cases. We also know of many creative practitioners who may be willing to take one of the outside-the-box approaches and seek

²³ 28 U.S.C. section 1341.

²⁴ *Global Leadership Foundation v. City of New York*, No. 22-2095, at *1 (2d Cir. Apr. 28, 2023).

²⁵ From the Prayer of St. Francis, which according to Wikipedia first arose in a small spiritual magazine called *La Clochette* (The Little Bell), published by a Catholic organization in Paris named La Ligue de la Sainte-Messe (The League of the Holy Mass). Wikipedia, "Prayer of St. Francis" (last rev. Jan. 5, 2025).

²⁶ At present, it is taking more than a year, and sometimes closer to two, for the assignment of an ALJ to a state case. This logjam is also a serious concern for taxpayers, especially with state interest rates hitting double digits.

alternative remedies in state or federal court, which could provide a roadmap to other taxpayers seeking similar remedies.

So, one way or another, better days are hopefully ahead. Taxpayers facing a difficult city tax challenge should not give up. And practitioners, frustrated about the wheels of justice not moving, have only one option: to get out of the car and push as hard as they can! ■

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