

## Checking in on New York's Division of Tax Appeals

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In this installment of Noonan's Notes, the authors review and interpret the New York State Division of Tax Appeals and Tax Appeals Tribunal's annual report to the governor and Legislature.

It's that time of year again. No, not football season. It's the time of year when the New York State Division of Tax Appeals and Tax Appeals Tribunal (collectively DTA) submits its annual report to the governor and Legislature.<sup>1</sup> This report is not as exciting as the gridiron, but does provide a scorecard of sorts from the past year and a peek into the DTA's operations. As in the past, the statistics underscore taxpayers' uphill battle litigating cases before the DTA. This article reviews the most recent annual report, provides a quantitative update of the statistics in this year's report, and offers a qualitative update on other non-quant aspects of the report.

<sup>1</sup>New York State Tax Appeals Tribunal, Annual Report Fiscal Year 2017-2018. See N.Y. Tax Law section 2006(13).

### I. Quantitative Update: The Statistics

#### A. Determinations Issued by Administrative Law Judges

We begin with a look at how taxpayers are faring at the first stage of New York's two-step tax appeal process, which is the hearing conducted before one of the DTA's administrative law judges. Unless the case is settled or resolved otherwise, this first stage concludes when the ALJ presiding over the case issues a written determination. This year's annual report reflects a continuing trend of these cases being overwhelmingly decided against the taxpayer. (See Table 1.)

The report also details statistics regarding the status of cases that were scheduled for a hearing during the fiscal year. From this, we see a slight uptick in the percentages of cases being settled over the prior year (43 percent versus 39 percent), which may account for the minor decrease in the percentage of cases for which the scheduled hearing was held (20 percent versus 23 percent). (See Table 2.)

Overall, though, the change over the prior year was not statistically significant.

#### B. Decisions Issued by the Tax Appeals Tribunal

Now consider the second stage of New York's two-step tax appeal process, which is the exception (that is, appeal) to the Tax Appeals Tribunal. The tribunal issued 50 decisions during the last fiscal year. Overall, the numbers were almost identical to the prior year, though there was an increase in taxpayer wins (that is, canceled cases) and partial wins (that is, modified cases), as compared with last year. (See Table 3.)

**Table 1. Analysis of ALJ Determinations**

	Fiscal 2017-18		Fiscal 2016-17		Fiscal 2015-16		Fiscal 2014-15		Fiscal 2013-14	
	#	%	#	%	#	%	#	%	#	%
<b>Sustained</b>	90	88%	122	85%	106	81%	45	79%	32	64%
<b>Canceled</b>	6	6%	7	5%	15	11%	3	5%	7	14%
<b>Modified</b>	6	6%	15	10%	10	8%	9	16%	11	22%
<b>Total</b>	<b>102</b>	<b>100%</b>	<b>144</b>	<b>100%</b>	<b>131</b>	<b>100%</b>	<b>57</b>	<b>100%</b>	<b>50</b>	<b>100%</b>

**Table 2. Analysis of Cases Scheduled for Hearings Before an ALJ**

	Fiscal 2017-18		Fiscal 2016-17		Fiscal 2015-16		Fiscal 2014-15		Fiscal 2013-14	
	#	%	#	%	#	%	#	%	#	%
<b>Settled</b>	64	43%	72	39%	107	41%	132	48%	130	49%
<b>Held</b>	30	20%	42	23%	59	23%	39	14%	42	16%
<b>Continued</b>	1	1%	3	2%	9	3%	3	1%	1	0.4%
<b>Adjourned</b>	42	28%	54	29%	62	24%	80	29%	61	23%
<b>Submitted</b>	1	1%	5	3%	14	5%	12	4%	16	6%
<b>Defaulted</b>	9	6%	5	3%	8	3%	5	2%	10	4%
<b>Other</b>	1	1%	4	2%	3	1%	3	1%	4	2%
<b>Total</b>	<b>148</b>	<b>100%</b>	<b>185</b>	<b>128%</b>	<b>262</b>	<b>100%</b>	<b>274</b>	<b>100%</b>	<b>264</b>	<b>100%</b>

**Table 3. Analysis of Tribunal Decisions**

	Fiscal 2017-18		Fiscal 2016-17		Fiscal 2015-16		Fiscal 2014-15		Fiscal 2013-14	
	#	%	#	%	#	%	#	%	#	%
<b>Sustained</b>	35	70%	37	73%	40	63%	15	63%	17	63%
<b>Modified</b>	8	16%	6	12%	14	22%	7	29%	5	19%
<b>Remanded</b>	3	6%	7	14%	8	13%	2	8%	3	11%
<b>Canceled</b>	4	8%	1	2%	2	3%	0	0%	2	7%
<b>Total</b>	<b>50</b>	<b>100%</b>	<b>51</b>	<b>100%</b>	<b>64</b>	<b>100%</b>	<b>24</b>	<b>100%</b>	<b>27</b>	<b>100%</b>

**Table 4. Tribunal Disposition of Exceptions Taken by Taxpayers**

	Fiscal 2017-18		Fiscal 2016-17		Fiscal 2015-16		Fiscal 2014-15		Fiscal 2013-14	
	#	%	#	%	#	%	#	%	#	%
<b>Denied</b>	37	76%	37	73%	37	60%	22	85%	14	58%
<b>Granted</b>	3	6%	2	4%	2	3%	1	4%	3	13%
<b>Granted in part</b>	4	8%	2	4%	9	15%	1	4%		0%
<b>Dismissed</b>	2	4%	2	4%	6	10%	1	4%	5	21%
<b>Remanded</b>	3	6%	6	12%	8	13%	1	4%	2	8%
<b>Total</b>	<b>49</b>	<b>100%</b>	<b>49</b>	<b>24%</b>	<b>62</b>	<b>100%</b>	<b>26</b>	<b>100%</b>	<b>24</b>	<b>100%</b>

**Table 5. Tribunal Disposition of Exceptions Taken by the Division of Taxation**

	Fiscal 2017-18		Fiscal 2016-17		Fiscal 2015-16		Fiscal 2014-15		Fiscal 2013-14	
	#	%	#	%	#	%	#	%	#	%
<b>Denied</b>	3	100%			2	50%	2	100%		
<b>Granted</b>			3	60%	1	25%				
<b>Granted in part</b>			1	20%	1	25%			1	100%
<b>Remanded</b>			1	20%						
<b>Total</b>	<b>3</b>	<b>100%</b>	<b>5</b>	<b>100%</b>	<b>4</b>	<b>100%</b>	<b>2</b>	<b>100%</b>	<b>1</b>	<b>100%</b>

Drilling down to the disposition of exceptions (appeals) taken by taxpayers and the tax department's Division of Taxation, respectively, reveals that, at least last year, the tribunal mostly agreed with how ALJs handled cases. There were few reversals. The tribunal granted just 6 percent of the exceptions taken by taxpayers (plus another 8 percent of the exceptions taken by taxpayers that were granted in part), and it denied 100 percent of the exceptions taken by the Division of Taxation. (Compare Table 4 with Table 5.)

## II. Other Noteworthy Items

There are a few other developments, aside from the numbers, that we would be remiss not to mention.

First, on June 10 the longtime commissioner and former president of the Tax Appeals Tribunal, James H. Tully Jr., passed away about a year after retiring from the tribunal. His legacy in the world of state taxation will be a lasting one considering that his efforts and ideas have shaped much of modern state tax policy, particularly in New York.

Next, we applaud the Legislature for rejecting a proposal in Democratic Gov. Andrew Cuomo's executive budget for fiscal 2019 that would have granted the tax department the right to appeal an adverse tribunal decision. Only taxpayers have this right, and it should stay that way. For one, allowing the department the right to appeal an adverse tribunal decision could create undue burdens on taxpayers. As noted by the New York State Bar Association's tax section, by the time a taxpayer's case reaches the tribunal, the taxpayer (whether an individual or a corporation) has typically gone through several stages of administrative proceedings, including an audit by the department, a protest before the department's Bureau of Conciliation and Mediation Services, and then a hearing before the DTA.<sup>2</sup>

These proceedings collectively — and sometimes even individually — can go on for years and can require taxpayers to expend

<sup>2</sup>NYSBA, "Comments on 2018-2019 New York State Executive Budget," at 18-19 (Mar. 9, 2018).

significant resources. The concern in this regard is that for many taxpayers, this type of protracted litigation is cost-prohibitive or otherwise unfeasible, leading to a potential imbalance in “staying power” between the government and taxpayer that could undermine the reason why the DTA was established,<sup>3</sup> namely, to provide 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.”<sup>4</sup> And besides, as the tax section also observed, the department has on multiple occasions successfully used the tribunal’s rehearing process to convince the tribunal to overturn its own decisions.<sup>5</sup>

So while only a taxpayer has the right to appeal an adverse tribunal decision, the department is not without recourse. Finally, of course, the tribunal is part of the tax department. So it would seem weird to allow the department to appeal a decision coming out of . . . the department.

The proposal to grant the tax department the right to appeal an adverse tribunal decision came on the heels of another questionable proposal in Cuomo’s executive budget last year, which would have created a new statewide Division of Central Administrative Hearings for all state agencies — effectively replacing the DTA’s administrative hearing functions.<sup>6</sup> We’ve said it before and we’ll say it again: The DTA’s system for handling tax controversies is arguably the best in the nation. Is it perfect? Probably not. The process still moves fairly slowly, and it would help if the vacancies stemming from recent ALJ retirements would be filled. It’s also time to look at the DTA’s. Indeed a review and revamp of the 1987 regulations probably makes sense in light of various changes to the process over the years. But in general, the process works. As the old saying goes: If it ain’t broke, don’t fix it!

Finally, as we’ve noted before, these numbers don’t tell the whole story for practitioners. Yes, it’s hard to win these cases. And yes, the taxpayers usually bear the burden of proof in these proceedings. But the numbers can be deceiving. If you were to analyze all cases coming out of DTA weekly,<sup>7</sup> you’ll see that most cases are layup wins for the tax department on basic issues like late-filed appeals, driver’s license suspension cases, and other straightforward procedural questions. Sprinkled in there, however, are some meaty SALT topics with big dollars and hotly contested issues. In these cases, especially when taxpayers are well-represented, the numbers likely tell a different story, and the department’s batting average is significantly lower. Indeed, a level playing field and a real chance to win are hallmarks of a good appeals system. For practitioners battling those cases daily, that’s all we can ask for. ■

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<sup>3</sup> *Id.* at p. 19.

<sup>4</sup> N.Y. Tax Law section 2000.

<sup>5</sup> Section Comments on 2018-2019 New York State Executive Budget, *supra*, note 2, at 20. See 20 NYCRR 3000.16(c).

<sup>6</sup> See Timothy Noonan and Ariele Doolittle, “A Quick Look at Proposed Legislation in New York,” *State Tax Notes*, Mar. 13, 2017, p. 919.

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<sup>7</sup> Incidentally, our colleague Chris Doyle does exactly that in his weekly “Taxes in New York” blog.