

Best Practices for Managing Your Audit and Litigation Portfolio

TEI Denver Chapter

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Open Weaver Banks
Counsel

Ted Friedman
Counsel

Learning Objectives

- COVID-19 Impact on Tax Proceedings
 - Understanding guidance regarding procedural issues critical to tax matters
- Audit Considerations
 - Documentation and issue identification
- Administrative Appeal Considerations
 - Timing, tribunals, and multistate considerations
- Judicial Appeal Considerations
 - Forums, judges, discovery, and confidentiality
- Settlement Considerations
 - When and how to present

COVID-19 Impact on Tax Proceedings

- Deadline extensions
- Remote online notarizations
- E-signatures
- POA issues
- Remote depositions
- Video/telephonic proceedings
- E-filing

Audit Considerations

Audit Considerations

- Planning ahead matters
 - Contemporaneous documentation to support a tax position
- Balance compliance with taxpayer rights
 - Failure to produce documentation could preclude reliance at a later point
- Keep track of documentation provided to auditors
- Put response in writing!
- Be consistent in audit responses to states
- Issue identification
 - Does issue exist in other states?
 - Recurring issue?
 - Does issue impact your positions on other tax types?
 - Amount at issue?
 - Legal or factual issue?

You received an assessment – so what's next?

Administrative Appeal Considerations

Key Considerations for Administrative Appeals

- State tax appeal systems vary dramatically.
- Most states have an administrative appeal **option** or **requirement** before a dispute has to be taken to court:
 - Illinois Informal Conference Board
 - New Jersey Conferences & Appeals Branch (“CAB”)
 - New York Bureau of Conciliation and Mediation
 - Pennsylvania Board of Appeals
 - Wisconsin Resolution Unit
- Multistate Considerations
 - Choosing the right forum

Key Considerations for Administrative Appeals

— What is the Timing?

- NJ
 - CAB protest deadline is 90 days from date of the notice of assessment.
 - At CAB it may take a year for a protest to be assigned to a “conferee.”
 - For corporate tax issues it can take 2 years to resolve an issue at CAB.
- WI
 - Petition for Redetermination must be filed with the Resolution Unit within 60 days
 - File is generally assigned to a Resolution Officer within a few weeks
- Consider all deadlines in protest/appeals process
 - PA – Offer in compromise

— Who will decide your appeal?

- CAB has conferees that specialize in either CBT, Sales Tax or GIT.
 - Often conferees are former auditors.
 - CAB is within the Division of Taxation and conferees apply the Division’s legal interpretations.
 - Conferees often have follow up questions that the auditor might not have asked.
 - Conferees can settle disputes; can also increase an assessment at CAB.
- PA – BOA Hearing Officer, BF&R
- WI – Resolution Officer

Key Considerations for Administrative Appeals

- Is it “pay-to-play?”
- Would it make sense to pay even if it isn’t required?
- Are you setting the record?
- Confidentiality?
 - Taxpayer submissions and CAB decisions (“Final Determinations”) remain confidential.
 - WI submissions are confidential.

Key Considerations for Administrative Appeals

— Is there a “hearing?”

- CO – Initial informal conference(s); / Formal hearing
- NJ CAB conferences can be conducted telephonically
- WI Resolution Office – Yes (but what does that mean?)
- We recommend an in-person meeting with the conferee

— Right to appeal

- CO final determination must be appealed to District Court within 30 days
- CAB Final Determinations may be appealed by the Taxpayer to the Tax Court of New Jersey within 90 days
- WI Resolution Office Notice of Action can be appealed within 60 days to the Wisconsin Tax Appeals Commission

Key Considerations for Administrative Appeals

- If you don't like the answers to the above questions, can you skip the administrative appeal?
 - NJ taxpayers can skip CAB and go straight to Tax Court.
 - When should NJ taxpayers consider skipping CAB:
 - The dispute is purely a legal issue and the Division will not budge from its interpretation without a court order.
 - The dispute requires discretionary relief and CAB is not likely to give adequate relief.
 - WI – No
- Multistate considerations

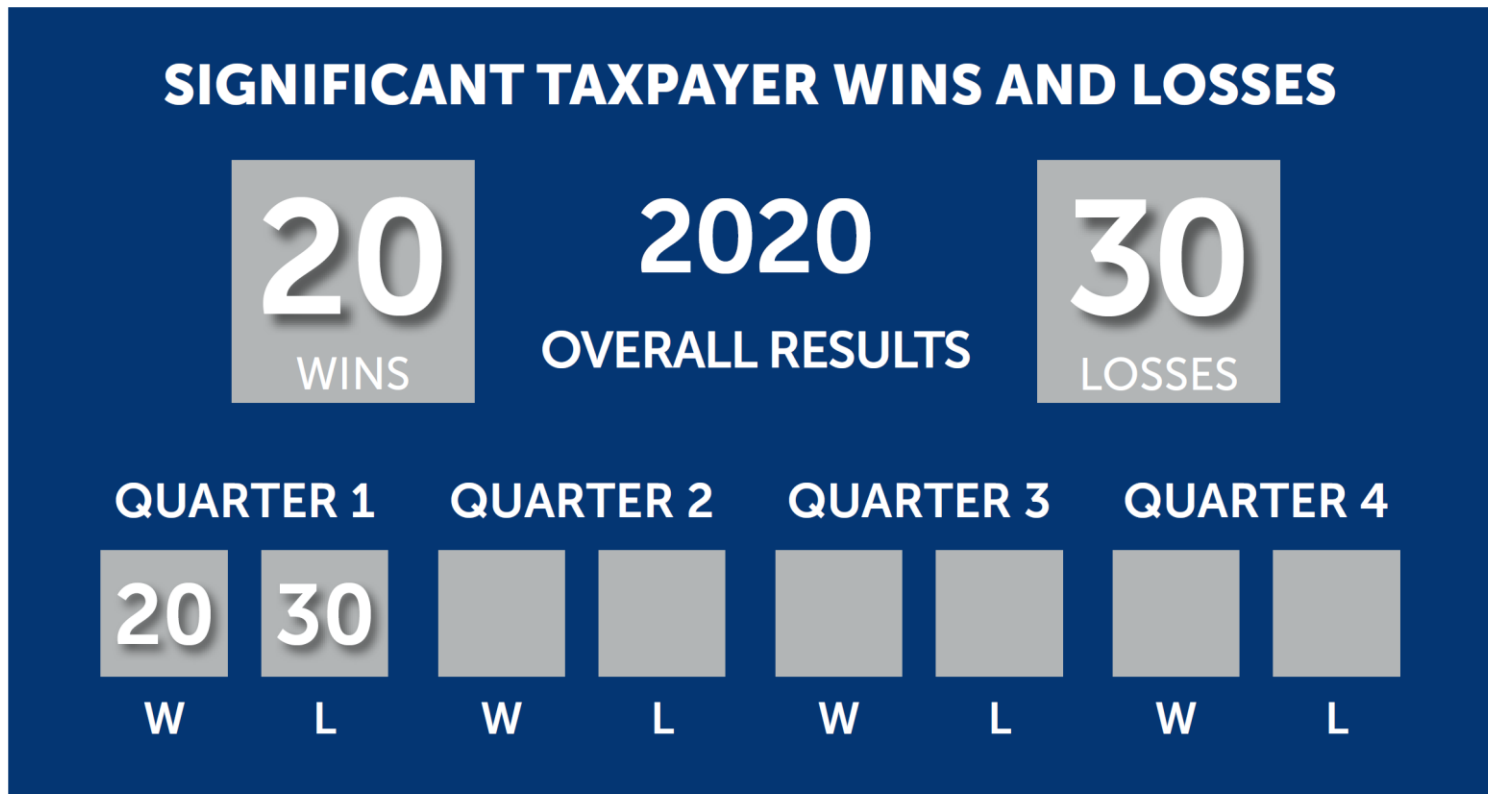
Judicial Appeal Considerations

Key Considerations for Judicial Appeals

- What kind of “court” are we talking about?
 - Illinois Independent Tax Tribunal
 - Illinois Circuit Court of Cook County
 - Tax Court of New Jersey
 - New York Division of Tax Appeals
 - Oregon Tax Court
 - Commonwealth Court of Pennsylvania
 - Texas District Court
 - Wisconsin Tax Appeals Commission
- Who will hear your appeal?

Key Considerations for Judicial Appeals

- Multistate Considerations
- SALT Scoreboard



Key Considerations for Judicial Appeals

- Many of the same considerations apply.
 - Timing
 - NJ Tax Court has plenty of available judges but litigation is protracted because of dwindling attorneys to represent the Division.
 - NY Division of Tax Appeals has the opposite problem, with it taking over a year for an ALJ to be assigned to a case.
 - WI example (2013 Petition; 2016 trial; 2017 TAC decision).
 - Pay-to-play states (Illinois and Texas are examples).
 - Discovery
 - Setting the Record
 - Confidentiality/Availability of Protective Orders
 - NJ Tax Court is an open court and public access to filed documents is available online.
 - OR and WI TAC - confidential materials can be protected if steps taken.
 - Appeals – how many levels?
 - NJ taxpayers can appeal a losing decision to the Appellate Division of the Superior Court.
 - Any party may appeal a WI TAC decision to the Circuit Court.

Key Considerations for Judicial Appeals

- Major differences between an administrative appeal and judicial appeal
 - Opposing Counsel
 - Discovery
 - New Jersey is known for fairly extensive discovery requests in Tax Court (written and depositions).
 - Stipulations of Fact
 - Briefing
 - Some disputes can be resolved by a judge with briefing on the parties' legal positions.
 - Trials/Summary Judgment Motions
 - Some disputes require a trial for a judge to hear the testimony of the taxpayer's witnesses.
 - Settlement

Settlement Considerations

Settlement Considerations

Overview

- When can you settle?
 - In NJ, settlement can happen at CAB, at the NJ Tax Court, and while appeals are pending at higher courts.
 - In WI, settlement can happen at Resolution Office, at the WI TAC, and while appeals are pending at higher courts.
- How does the NJ Division settle?
 - The Division prefers a settlement based on a methodology and not hazards of litigation.
 - Compare to NYS and NYC which regularly negotiate based on the hazards of litigation.
- How long does settlement take?
 - At CAB settlement might only take a couple of months once the parties have presented their positions.
 - At NJ Tax Court settlement can take over a year to finalize after the parties have agreed to “settlement in principle.”

Questions?



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Contact us

Open Weaver Banks

Counsel

Eversheds Sutherland (US) LLP

212.389.5081

openweaverbanks@eversheds-
sutherland.com

Ted Friedman

Counsel

Eversheds Sutherland (US) LLP

212.389.5008

tedfriedman@eversheds-
sutherland.com

stateandlocaltax.com

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