

A Call for Clarity: New York Tax Appeal Deadlines

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In this installment of A Pinch of SALT, the authors review the state of procedural affairs in New York regarding COVID-19 and call on Gov. Andrew Cuomo (D) to provide clarity to taxpayers by issuing an executive order confirming that his prior executive orders tolling statutes of limitations apply to proceedings before both the state and city tax appeals agencies.

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As the COVID-19 health crisis caused private and government offices to close throughout the country in the spring, many state governments and tax agencies issued guidance extending deadlines for the submission of tax protests.¹ One may have assumed that New York — one of the hardest-hit regions in the United States — would have issued similar guidance. However, while Gov. Andrew Cuomo (D) has issued numerous executive orders tolling statutes of limitations for judicial proceedings, the New York state and New York City tax tribunals have contrasting interpretations regarding the applicability of the executive orders to their procedural deadlines.

This article discusses the current state of procedural affairs in New York, and calls on Cuomo to provide clarity to taxpayers by issuing an executive order confirming that his prior executive orders tolling statutes of limitations

¹ See, e.g., Daniel H. Schlueter et al., “COVID-19 and State Courts — 7 Measures Affecting Tax Proceedings,” *Tax Notes State*, May 4, 2020, p. 617 (addressing how state tax tribunals and agencies responded to the COVID-19 emergency).

apply to proceedings before the New York State Division of Tax Appeals and Tax Appeals Tribunal (collectively, State DTA) and the New York City Tax Appeals Tribunal (City Tax Appeals Tribunal).

New York Administrative Protest Process

The State DTA and the City Tax Appeals Tribunal are separate administrative tax appeals agencies. The State DTA resolves protests of notices (such as tax assessments and refund denials) issued by the New York State Department of Taxation and Finance, while the City Tax Appeals Tribunal resolves protests of notices issued by the New York City Department of Finance. Both administrative tax appeals agencies have jurisdiction over: (1) direct protests of tax notices and (2) protests of conciliation orders issued after a taxpayer initially seeks conciliation of a notice by the appropriate conciliation bureau.²

At both the state and city appeals agencies, a protest of a tax notice or conciliation order must be filed within statutory time limitations.³ Protests at both administrative tax appeals agencies are initially heard by administrative law judges, who hold hearings and issue decisions outlining the relevant facts established by the parties, any necessary legal analysis, and the conclusions of law relevant to the issues.⁴

Decisions of the ALJs are subject to administrative appeal — at the state level, to the

² Notices issued by the state tax department may be appealed to its Bureau of Conciliation and Mediation Services, while notices issued by the city department may be appealed to its Conciliation Bureau.

³ For example, protests of tax deficiencies generally must be filed within 90 days of the issuance of an appealable notice or conciliation order. See, e.g., N.Y. Tax Law section 1089(b) (addressing protests of corporate tax assessments from the state); and N.Y.C. Admin. Code section 11-680(2) (addressing protests of corporate tax assessments from the city).

⁴ See, e.g., New York State Tax Appeals Tribunal, Annual Report Fiscal Year 2019-2020 (July 30, 2020) (outlining the adjudicatory process at the State DTA).

State Tax Appeals Tribunal, and at the city level, to the City Tax Appeals Tribunal's Appeals Division. ALJ decisions must be appealed within 30 days.⁵ The two appeals agencies issue decisions after reviewing: (1) the record of the prior administrative proceeding before an ALJ and (2) any briefs or oral arguments.⁶ Such decisions are appealable by taxpayers (but not the state or city) to the New York State Supreme Court, Appellate Division.⁷

Cuomo's Executive Orders and Differing Administrative Responses

In connection with his prior declaration of a disaster emergency related to COVID-19,⁸ on March 20 Cuomo released Executive Order 202.8, which tolled deadlines "for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding" from March 20 until April 19, 2020. Six subsequent executive orders have extended the tolling period until October 4, 2020.⁹

While the initial executive order did not explicitly state that it applied to administrative tax proceedings before the State DTA or the City Tax Appeals Tribunal, it stated that it applied to any proceeding "as prescribed by the procedural laws of the state," including by any "statute, local law, ordinance, order, rule or regulation, or part thereof."¹⁰

Although the language of the executive orders would appear to suggest that they may broadly apply to toll deadlines to commence administrative proceedings (including administrative tax proceedings), the State DTA

and the City Tax Appeals Tribunal have provided contradictory guidance on the issue.

The City Tax Appeals Tribunal has provided guidance on its website stating that the executive orders toll "the time limitations relating to the 'commencement, filing, or service' in connection with a New York City Tax Appeals Tribunal proceeding."¹¹ Guidance on the New York City Department of Finance's Conciliation Bureau website has similarly suggested that the executive orders "extended" the time limitation for filing a request for a conciliation conference.¹²

But the State DTA has consistently stated on its website that it does not have "the authority to waive statutory deadlines" and that therefore "any petition, exception, or request for an extension of time to file an exception must be filed (postmarked or put in the custody of an authorized delivery carrier) by the current statutory deadline."¹³ Notably, the State DTA does not refer to the executive orders on its website.¹⁴

Cuomo Should Confirm That His Prior Executive Orders Apply to Administrative Tax Proceedings

Since the City Tax Appeals Tribunal has asserted for months that the executive orders toll statutory filing deadlines for proceedings before the City Tax Appeals Tribunal, it is reasonable that a taxpayer would believe the executive orders broadly applied to administrative tax appeals, whether brought before the city or the state.

The rationale for the State DTA's unwillingness to state that the executive orders apply to their matters might stem from its numerous decisions finding that taxpayer appeals were not filed timely. The State DTA issues scores

⁵ See, e.g., N.Y. Tax Law section 2006(7) (addressing appeals to the State Tax Appeals Tribunal); and N.Y.C. Charter section 169(d) (addressing appeals to the City Tax Appeals Tribunal's Appeals Division).

⁶ See, e.g., State DTA annual report, *supra* note 4.

⁷ See, e.g., *id.*

⁸ See Executive Order 202 (Mar. 7, 2020).

⁹ See Executive Orders 202.14 (Apr. 7, 2020), 202.28 (May 7, 2020), 202.38 (June 6, 2020), 202.48 (July 6, 2020), 202.55 (Aug. 5, 2020); and 202.60 (Sept. 4, 2020).

¹⁰ Executive Order 202.8 identified examples of procedural laws subject to tolling, including "the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts." However, the executive order made clear that this was not an exclusive list, stating that it applied to "procedural laws . . . including but not limited to" those listed above (emphasis added).

¹¹ See the City Tax Appeals Tribunal's website (last accessed Sept. 14, 2020), which states: "In light of the Governor's Executive Orders 202.8, 202.14, 202.28, 202.38, 202.48, 202.55 and 202.60 the time limitations relating to the 'commencement, filing, or service' in connection with a New York City Tax Appeals Tribunal proceeding are, as of March 20, 2020, tolled until October 4, 2020." The authors are aware that similar guidance has appeared on the City Tax Appeals Tribunal's website since at least April 3.

¹² See the New York City Department of Finance Conciliation Bureau website (last accessed Sept. 13, 2020), which references four of the executive orders extending filing deadlines and states that "the time limitation for filing a Request for Conciliation Conference with the New York City Department of Finance's Conciliation Bureau has been extended from March 20, 2020, to July 6, 2020."

¹³ See the State DTA website (last accessed Sept. 13, 2020).

¹⁴ *Id.*

of decisions each year dismissing tax protests on the basis that they were not timely filed.¹⁵ And “it is well established” under prior State Tax Appeals Tribunal decisions that the “statutory time limit for filing” tax protests “is strictly enforced” because absent a timely protest, the State DTA “is without jurisdiction to consider the substantive merits of [a] protest.”¹⁶ Because a taxpayer could lose their appeal rights by relying on the executive orders if it is later determined that they do not apply to administrative tax appeals, it is understandable that the State DTA would choose to be conservative in its guidance if it believes the executive orders are in any way ambiguous.

Notably, a recent decision from the Kings County Family Court held that the executive orders apply to toll deadlines in the New York Family Court Act, even though the executive orders do not specifically mention that law.¹⁷ The court pointed out that interpreting the executive orders to apply to a Family Court Act limitations period was “consistent with the Governor’s apparent motivations” in issuing the executive orders to address “efforts to slow the spread of COVID-19,” which “have resulted in an unprecedented shutdown of public life.”¹⁸

If faced with a case raising the issue of whether the executive orders apply to deadlines for administrative tax cases, the State DTA could rule in a taxpayer’s favor. However, based on the time it can take for the State Tax Appeals Tribunal to issue a decision addressing the applicability of the executive orders, the current state of confusion may remain in place for years.¹⁹

To date, the governor has issued more than 60 executive orders regarding COVID-19. It is

imperative for Cuomo to step in now and issue an executive order unambiguously stating that the previous executive orders tolled filing deadlines for all administrative tax protests. As suggested by a New York court,²⁰ the purpose of the executive orders was to prevent New Yorkers facing statutes of limitations from potential exposure to COVID-19 when trying to comply with a statutory deadline to commence a proceeding, especially during a period when government operations would be limited. This purpose applies to administrative tax appeals just as it does to a proceeding in the New York courts. A simple clarification in a future executive order addressing the COVID-19 crisis would go a long way toward clearing up the current confusion faced by taxpayers. ■

¹⁵ The State DTA dismissed more than 50 tax protests during 2019 and 2020 on the basis that they were untimely filed.

¹⁶ *Matter of Ikhnis & Sarsour*, DTA No. 829577 (N.Y.S. DTA, ALJ Det. July 23, 2020) (citing *Matter of Lukacs*, DTA No. 821248 (N.Y.S. Tax App. Trib. Nov. 8, 2007)); *Matter of American Woodcraft*, DTA No. 819201 (N.Y.S. Tax App. Trib. May 15, 2003); *Matter of Maro Luncheonette*, DTA No. 813605 (N.Y.S. Tax App. Trib. Feb. 1, 1996); and *Matter of Sak Smoke Shop*, DTA No. 804911 (N.Y.S. Tax App. Trib. Jan. 6, 1989).

¹⁷ *Matter of M.R.*, Case No. D-08439/20 (N.Y. Fam. Ct. Aug. 10, 2020).

¹⁸ *Id.*

¹⁹ For example, a recent State Tax Appeals Tribunal decision, *Matter of Andrea J. Coleman*, DTA No. 828743 (June 8, 2020), addressed whether a taxpayer filed a timely administrative tax petition. The petition was filed in June 2018 — meaning that it took *two years* for the taxpayer to get decisions from a State DTA administrative law judge and the State Tax Appeals Tribunal on whether her petition was timely filed.

²⁰ *Matter of M.R.*, D-08439/20 (N.Y. Fam. Ct. 2020).