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Honorable Jacques Jiha
Commissioner
New York City Department of Finance
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Dear Commissioner Jiha:

On behalf of the New York City Bar Association's State and Local Taxation Committee, we thank you, Diana Beinart and Michael Hyman for your visit to our committee meeting in September. Your opening comments and the ensuing dialogue with the committee members was very helpful in developing our understanding of some of the goals of your administration.

As promised, below I have summarized a few of the issues and recommendations we discussed at the meeting.

Creation of the Taxpayer Advocate Office

The Committee applauds your decision to create the Office of Taxpayer Advocate within the Department of Finance ("DOF"). The tax ombudsman role is well established at the Federal tax level. The Internal Revenue Service ("IRS") Office of the Taxpayer Advocate, which was established in 1979, plays an important role in assisting in resolving specific disputes with the IRS and in working with the IRS to improve processes on a cost-effective basis.

In 2009, the New York State Department of Taxation and Finance ("Department") created the Office of the Taxpayer Rights Advocate ("OTRA"). The Department's stated goals for OTRA were very much in line with those of the IRS, that is, to assist in resolving disputes and to improve the Department's processes. For the most part, the Department's OTRA has been seen as a success by both the taxpayer community and Department management and, in many ways, can serve as a model for the DOF.

However, there are a few issues that our committee would like to raise as you develop the role of the NYC Taxpayer Advocate position.

1. **Codification of the Taxpayer Advocate Position** – We understand that the Taxpayer Advocate Position will be created administratively rather than by act of the City Council. In our opinion, anything short of a formal, legislatively created position will weaken the office and its effectiveness for the following reasons.

   First, as one of the roles of the Taxpayer Advocate will be to improve processes within the DOF, the Taxpayer Advocate will likely have to challenge long standing DOF policies and procedures and in some cases highlight issues that are very sensitive to certain DOF employees. In so doing, the Taxpayer Advocate will run the risk of irritating supervisors and other DOF management. This will put the Taxpayer Advocate in a very difficult position as he or she will have to balance doing a good job with keeping his or her position . Similarly, if the Taxpayer Advocate position is established by administrative discretion, it can be disbanded by administrative discretion as well. Again, we believe this will have a chilling effect, either consciously or unconsciously, on the issues the Taxpayer Advocate will be willing to raise. A statute could protect against these risks by setting a set term of office with a provision for termination with cause.

   Second, we believe that by not institutionalizing the Taxpayer Advocate Position through legislation, the number of qualified candidates that will apply for the position will be limited. One great allure to working in City government is the relative stability and tenure such work can provide. By asking someone to come in to constructively disrupt an organization with no promise of a long term position will not have much appeal.

   Third, a statute would ensure minimum funding and staffing for the office so that OTRA could not be subject to retaliation through budget or staffing cuts. Fourth, a statute would set forth the purpose and authority of the Advocate position, which would set the stage for formal regulations. This clarity would help foster an environment in which the Advocate could operate with some minimal authority even in the face of a hostile administration.

   Fifth, a statute would establish the Advocate as a Deputy Commissioner level position to ensure a minimum pay and authority level in the Department. Finally, the DOF has a real opportunity to distinguish its Taxpayer Advocate program from the State's OTRA. Although, we think that the State's OTRA is providing benefits, we do believe the program would be much more successful if the OTRA were codified in State law. The DOF should take the lead on this issue and serve as a role model for New York and other states that wish to implement a similar program.

2. **Taxpayer Advocate Should be Familiar with New York City Tax Law** – From our experience with the State's OTRA, it has become clear that in addition to having excellent administrative and personnel skills, the Taxpayer Advocate has to be familiar with the tax laws. Oftentimes, disputes between taxpayers and the DOF revolve around very technical interpretations of the law. It is our opinion that the Taxpayer Advocate should be well versed in the tax laws so that he or she can competently distinguish between an issue that is a legal difference of opinion and one that is driven by policy or procedure. A statute could set forth the minimum qualifications for the office, such as requiring the candidate to be an attorney or certified public accountant with a minimum number of years of experience, and also should require that the person be well versed in the New York City tax law.

3. **Taxpayer Advocate Should not have Parking Violations Obligations** – Although the DOF has responsibilities over the administration of parking violations and its related revenue, we do not

believe it would be a valuable use of the Taxpayer Advocate's time or resources to address matters concerning this division within the DOF. Rather, the Taxpayer Advocate's Office should focus primarily on tax matters.

Conforming the New York City General Corporation Tax with 2014 NYS Corporate Tax Reform

On March 31, 2014 New York Governor Andrew Cuomo signed into the law the most comprehensive corporate tax law changes New York has seen in fifty years. In addition to collapsing the Bank Tax into the Corporation Franchise tax, the tax law changes affected: 1) what entities may be included in a combined report; 2) the tax bases, including a phase out of the tax on capital; 3) apportionment methodologies; 4) net operating loss computations and utilization; 5) tax rates; and 6) tax benefits for manufacturing companies. As mentioned, the changes are sweeping and are designed to encourage businesses to expand, or at least stay in New York.

Prior to the enactment of the State tax law changes, Governor Cuomo established two commissions to study the then current tax regime and to make recommendations for changes. We understand that an overriding goal of the commissions was to keep the tax law changes revenue-neutral. That is, for every dollar of tax savings that would be derived by taxpayers, there had to be a corresponding increase in taxation either by increasing the number of taxpayers subject to the tax or by sourcing more revenue to the State from existing taxpayers. Although the success of this revenue-neutral plan will not be known for some time, tax neutrality was undeniably an underlying tenet of the tax law changes.

Historically, corporate taxpayers have had difficulty not just in understanding New York's unique taxing regime, but also in comprehending New York City's imposing its own corporate-level tax. While the two taxing regimes have overlapped in many regards, there are a number of instances where the State and City law, regulation or policies have been decoupled. These de-couplings have often frustrated taxpayers and may account for the majority of errors that corporations commit in complying with the City tax law.

Unless the City adopts the State law changes, we foresee taxpayer frustration and confusion intensifying and ultimately leading to errors in their tax filings. For example, under the new State law, taxpayers will be required to source receipts from services to the location of the customer, while under the City rules those same receipts will be sourced to where the services are performed. These types of inconsistencies will certainly cause confusion and add another layer of gathering, organizing, and maintaining information burden on taxpayers. At a certain point, when the compliance becomes too difficult, the risk of taxpayers deciding not to file will increase. This will have obvious negative consequences for the City's coffers.

Accordingly, we recommend that the City conform its tax law, in total or in substantial part, to New York State's new corporate tax law. As of the date of this letter, we understand that the DOF is in the process of drafting conforming legislation to be included in the Governor's 2015-2016 Executive Budget. The members of this Committee applaud this effort and offer our support in reviewing, commenting and making recommendations to the draft language.

Communicating with the Department of Finance

As you are well aware, robust communication between the DOF and taxpayers is a critical component of effective administration. Taxpayers and their representatives need to have access not only to DOF tax laws,

rules and other published guidance, but also to those individuals who administer the tax as well. To that end, our committee recommends the following:

1. Directory of Contacts - Although the organization chart posted on the DOF website has been helpful in determining with whom a particular issue should be raised, the chart fails to provide any means to communicate with the relevant individual either by email or by telephone. Rather, taxpayers and tax practitioners are required to proceed through the City's 311 telephone system. From our collective experience, the 311 system is wholly ineffective, even in cases where one can provide a name of a person in the DOF with whom the caller would like to speak. We strongly recommend that the DOF publish telephone numbers, email addresses or some other means by which taxpayers and their representatives can access appropriate DOF employees.

2. Practitioner Hotline - Recently, the Department implemented a taxpayer representative hotline. By dialing this dedicated number, taxpayer representatives are able to bypass the state's general information hotline. There are two direct benefits to using this hotline. First, since it is used primarily by taxpayer representatives, there is less volume and thus less waiting time. Second, the State has staffed this call center with more seasoned Department employees who have more experience in understanding the issues raised and how to direct those calls. We strongly recommend that the DOF implement a similar hotline.

3. Tax RAPP – Beginning in or about 1993, the Tax RAPP program provided taxpayers, their representatives and other interested parties not only valuable updates on tax law and administration, but also the opportunity to interface directly with the State and City taxing authorities. From the practitioner community, this program has always been viewed as a unique and invaluable program. We strongly support the reviving of the Tax RAPP program.

4. Commissioner's Taxpayer Advisory Committee – As one of the roles of the Commissioner is to administer the City tax laws in a fair and equitable manner, it is important for the Commissioner to have a forum available to allow for the free flow of ideas and information between the DOF executives and the taxpayers of New York City. To that end, we fully support the revival of an advisory committee to be chaired by the Commissioner.

Offer in Compromise Program

Offers in Compromise and Installment Payment Agreements (respectively "OICs" and "IPAs") are important tools for the collection of delinquent taxes. Such agreements ensure that taxpayers unable to pay taxes due (including penalties and interest) are not denied basic living necessities by having the taxing authority accept some lesser amount in satisfaction of the full liability. IPAs are arrangements in which the entire tax liability is collected over an agreed-upon span of time.

The Internal Revenue Service has long provided for OICs and IPAs with standards promulgated in the Internal Revenue Manual ("IRM"). These standards set forth the amounts that a taxpayer will be allowed to pay toward "necessary expenses" for health, welfare and production of income (ability to keep working) and proscribe collection that would render taxpayers unable to pay necessary expenses. In doing so, the federal government has recognized economic hardship as a basis for seeking these agreements. This was done, in

part, in response to criticisms that attempting collection from taxpayers undergoing economic hardships was uneconomical for the IRS and unfair.

Until a year ago, New York State did not allow for OICs based on economic hardship, but instead based its determination upon what could be obtained from judicial enforcement against that particular taxpayer. This standard was changed by statute to recognize economic hardship as a basis for OICs. Regulations promulgated under this provision imported the standards of the IRM as the basis for review of OIC applications. Likewise, a recent report issued by a committee of the New York State Bar Association recommended adopting transparent standards for IPAs.

New York City still follows the rule that New York State abandoned with respect to OICs, per Section 43-02(c): "Hardship or any other issue that does not have a direct bearing on the Department's legal ability to collect from the taxpayer cannot be considered in assessing doubt as to collectability." This result is mandated by Section 1504 of the Administrative Code: "but the amount payable in compromise shall in no event be less than the amount, if any, recoverable through legal proceedings."

New York City does, nevertheless, provide for economic hardship as a basis for granting IPAs. This is set forth in the New York City Taxpayers' Bill of Rights as follows: "In cases of hardship, to enter into installment agreements at Finance's discretion in order to facilitate collection of payments due. Finance may require financial statements prior to and during the administration of such agreements and may cancel such agreements in the event of default or change in the taxpayer's financial condition."

The DOF does not publish the standards for what it considers to be recoverable with respect to OICs, and treats such standards as exempt from disclosure under the Freedom of Information Act. While the DOF in Rule 34-04(b), says that "The Department will work with the taxpayer, to the extent possible, to try to effect a compromise likely to be accepted by the Commissioner of Finance," in practice this directive is frequently not followed. Rule 35-04(b)(2) provides: "Written notification of the taxpayer of the decision to reject the offer-in-compromise will not constitute a statutory notice. The acceptance or rejection of an offer-in-compromise is within the exclusive authority of the Commissioner of Finance and is not subject to administrative review by the Conciliation Bureau or the Tribunal;" accordingly, taxpayers currently have no recourse if the DOF fails to follow its own rules.

Likewise, the DOF does not publish the standards for what are considered to be acceptable IPAs. As with the OIC, taxpayers seeking IPAs have no recourse if the DOF exercises its discretion in a manner that appears inconsistent with the requirement to make IPAs available in cases of hardship.

Finally, we note that the City does not currently have forms in place for taxpayers seeking to enter the OIC program. Rather, the City has been accepting New York State forms in lieu thereof (NYS DTF-5; NYS DTF 4 and NYS DTF 4.1).

It is therefore proposed as topics for discussion and cooperation between the Commissioner and the New York City Bar Association State and Local Taxation Committee:

- Consideration of whether the absence of an economic hardship standard is consistent with what is regarded as conscionable by the population, practitioners, and by Mayor de Blasio;
- The proper disclosure of past, current and future standards for granting OICs and IPAs and the amounts thereof;

- The proper recourse so that there is confidence that inappropriate determinations are subject to review; and
- The need for forms for taxpayers to use in the OIC program or provide explicit instructions to use the New York State forms (NYS DTF-5; NYS DTF 4 and NYS DTF 4.1).

SCRIE and DRIE Guidance Requested

In 1970, the City of New York began the Senior Citizen Rent Increase Exemption (or SCRIE) program. The SCRIE program helps seniors (aged 62 or over) who have limited means remain in affordable housing. The SCRIE program is designed to protect from most rent increases eligible seniors who live in:

- rent controlled apartments;
- rent stabilized apartments; or
- rent-regulated residential hotel units.

Building owners (landlords) are credited for the difference between the actual rent and what SCRIE tenants are responsible for paying.

In 2005, the City of New York began the Disability Rent Increase Exemption (or DRIE) program. The DRIE program helps disabled tenants who have limited means remain in affordable housing. The DRIE program is designed to protect from most rent increases eligible disabled tenants who live in:

- rent controlled apartments;
- rent stabilized apartments;
- rent-regulated residential hotel units;
- Mitchell-Lama apartments;
- HDFC Cooperatives; or
- Apartments located in a building where the mortgage is federally insured under Sec. 213 of the National Housing Act.

As under the SCRIE program, Building owners (landlords) are credited for the difference between the actual rent and what DRIE tenants are responsible for paying.

As the DOF administers both the SCRIE and DRIE programs, we have two specific issues for which we would like to seek additional guidance and clarification.

The first issue relates to the lack of regulations defining "countable income," and the issues which flow therefrom. Specially, there has been inconsistent interpretation when a nonrecurring source of income is received. When the taxpayer retires on or after the commencement of a taxable year, but prior to applying for SCRIE/DRIE, the income must be adjusted by excluding salary and projecting the person's retirement income. We have found that DOF has treated nonrecurring income (e.g., personal injury awards, cancellation of debt income) as income, thereby inflating the retiree's income for the SCRIE/DRIE calculation. After discussions with the DOF employees involved, in this matter they have been consistently removing the nonrecurring income from the calculation

Our request is for the DOF to promulgate regulations subject to comment so as to provide guidance as to its interpretation of the statutory provisions regarding countable income. The definition of income in the NYC Administrative Code states that income means income received by the eligible head of household combined with income of all other members of the household from all sources, after deduction of income and social

security taxes and includes without limitation social security and retirement benefits, supplemental security income and additional state payments, public assistance benefits, and other things that are generally considered income under a tax return, such as interest and salary. However, the definition of income does not include gifts or inheritances, nor increases in benefits accorded pursuant to the Social Security Act which take effect after the eligibility date. Regulations would allow for interpretation as to specific situations, thereby increasing clarity for DOF employees, advocates, and individuals who may be eligible for SCRIE and DRIE.

The second issue relates to whether the so-called preferential rent under SCRIE and DRIE programs are permanent for the life of the tenancy or whether the preferential rent is limited to the current lease. DOF's policy appears to be that if a preferential rent is permanent for the life of the tenancy, the preferential rent is frozen at that amount. Conversely, if the preferential rent is limited to the current lease, the preferential rent is frozen at the higher legal registered rent and the individual is liable only for the lower, preferential rent amount. This policy has not been put into guidance, and is often unevenly applied.

In addition, while the notice of SCRIE eligibility informs the tenant how much of the rent increase is being abated, the DRIE notice is silent on the abatement amount that notice informs the tenant only of the amount of the rent he or she is legally required to pay. If the DOF has determined that the preferential rate is permanent, but later determines the preferential rate is not permanent, the tenant may be liable for the difference in the rent.

Our request is that DOF promulgate regulations to provide interpretation of the statutory provisions regarding preferential rent, specifically as those provisions relate to a rent freeze for the life of the tenancy in contrast to a rent freeze for current lease. We also request that the DOF promulgate regulations to provide additional information on the notices regarding what rent is being used as the benchmark for the abatement under the SCRIE and DRIE programs.

Promulgation of Rules Requiring Taxpayer Representative Notification of Collection Efforts

Under current rules, once a valid Power of Attorney is accepted by the DOF, the taxpayer's representative/designee is included in all communications between the DOF and the taxpayer. This is an important aspect of the administration of the tax law in that often taxpayers do not always fully comprehend or have the expertise to properly respond to communications from the DOF.

Curiously, when tax matters enter the collections bureau in the DOF, the rule whereby taxpayer's duly empowered representative is included on all communications is no longer applicable. There is little just rationale for this position and it only causes confusion and additional problems for the taxpayer. From the taxpayer's point of view, there is an assumption that the representative is copied on the communications, when in fact, the representative is not. There is nothing on the collections communications that indicates that the representative is not included in the communication. Beyond annoyance, the potential for misunderstanding by the taxpayer can have dire results. That is, without timely responses, taxpayers can be subject to garnishments, liens and other untoward collection devices.

We strongly recommend that the DOF change its policy with respect to this issue and require all collections communications to include the duly empowered representative.

Closing

Again, we wanted to thank you for taking the time to attend our Committee meeting and share with us your agenda and your thoughts on the various matters discussed. We hope these recommendations are helpful to you. Following your review, we will be available to discuss them with you or your team.

Finally, although active members of the committee, both Glenn Newman and David Bunning recused themselves from the preparation of this report.

Sincerely,

Raymond J. Freda
Chair

Cc: Michael Hyman, Deputy Commissioner of Tax Policy & Planning
Diana Beinart, Deputy Commissioner General Counsel
Debra Raskin, President, New York City Bar Association
Alan Rothstein, General Counsel, New York City Bar Association