June __, 2009

[Cover Letter to Governor, Mayor,
State and City Legislative Leaders,
and Presidents of State and City
Tribunals]

Re: Tax Tribunals' Lack of a Quorum: The Problem, and Suggested Solutions

Ladies and Gentlemen:

Enclosed please find a Report of the State and Local Taxation Committee of the Association of the Bar of the City of New York. The Report addresses a problem that has affected the proper functioning of both the New York State Tax Appeals Tribunal and the New York City Tax Appeals Tribunal. The problem arises when a Tribunal lacks the statutorily mandated quorum of two Commissioners needed to issue a decision -- a paralysis we refer to as the "quorum problem." That problem can arise because of vacancies on the three-member panel of Commissioners, as occurred with the State Tribunal in the 1990's. It can also arise if one or more of the sitting Commissioners is conflicted out of deciding a case, as occurred with the City Tribunal in a 2007 case, one that remains adjourned *sine die*.

The State and City Tax Appeals Tribunals were established in 1986 and 1992, respectively, to afford a just and efficient method for resolving tax controversies. As structured, each Tribunal provides for a hearing and Determination by a single Administrative Law Judge, with that Determination appealable, by either the taxpayer or the taxing authority, to the three-Commissioner Tribunal. This system has functioned very well overall, rendering impartial the resolution of tax disputes, and providing to both taxpayers and tax collectors a knowledgeable forum for the resolution of disputes. New York's Tax Tribunal system is now widely respected,

and frequently considered a model for the fair, efficient and professional resolution of tax controversies.

When a Tribunal is unable to act, however, its purpose cannot be fulfilled. This disadvantages taxpayers and the government alike. The quorum problem has in fact occurred, and is clearly capable of recurring; it is therefore important to solve it. Our Report suggests some solutions, and urges that prompt action be taken so that these important governmental agencies will not be stymied in their mission to resolve tax disputes.

We are very willing to pursue this issue further with you, on both the State and City levels, and whether that entails a legislative effort or the adoption of administrative changes. What is most important is that we choose and implement some solution. That solution will likely entail minimal cost to the fisc, yet will correct a problem that currently has the capacity to render two important government agencies simply inoperative.

Thank you for your consideration of this Report.

Very truly yours,

NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON STATE AND LOCAL TAXATION

THE QUORUM PROBLEM AFFECTING THE NEW YORK STATE AND NEW YORK CITY TAX APPEALS TRIBUNALS: DESCRIPTION OF THE PROBLEM, AND PROPOSED SOLUTIONS

This Report addresses an issue relating to the New York State and New York City Tax Appeals Tribunals.[1]

Background

In 1986, New York State enacted legislation[2] establishing the New York State Division of Tax Appeals. That legislation included a legislative "Statement of purpose," which provides as follows:

> "This article is enacted to establish an independent division of tax appeals within the department of taxation and finance which shall be responsible for providing the public with a just system of resolving controversies with such department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies."[3]

In 1988, the New York City Charter was amended to establish a "Tribunal for tax appeals," modeled on the State's. This Tribunal was intended to function as "[a]n independent tax appeals tribunal."[4] Initially, the City Tribunal had jurisdiction only over City excise taxes; in 1992 its jurisdiction was extended to all taxes administered by the City.

[1] This Report was drafted by Carolyn Joy Lee, with substantial commentary from Stephen Berkovitch, Debra Silverman Herman, Kenneth Moore, Jonathan Robin, Irwin Slomka, and Arthur R. Rosen, all members of the Committee. Ms Lee and Ms Herman were involved in the Bray Terminals and Friedman cases, cited below. Glenn Newman, a member of the Committee and also the President of the New York City Tax Appeals Tribunal, took no part in the consideration of this Report.

[2] N.Y. Tax Law Article 40, sections 2000 et seq.

[3] N.Y. Tax Law § 2000.

[4] N.Y.C. Charter Chapter 7, sections 168 et seq.

The State and City Laws governing the Tribunals both provide for a Tribunal of three Commissioners.[5] In the State Tribunal, the Governor nominates Tribunal Commissioners, subject to the advice and consent of the New York State Senate.[6] In the City, the Tribunal Commissioners are mayoral appointees.[7] The City Charter further provides that the number of Tribunal Commissioners "may be increased by local law."[8]

Under both Tribunals, tax controversies are first heard by a single Administrative Law Judge ("ALJ").[9] These individuals are appointed by the three-member Tribunal.[10] The decisions they issue, referred to as "Determinations," set forth factual findings and legal conclusions. These Determinations then can be appealed, by the taxpayer or the taxing authority (or both), to the three-member Tribunal.[11] On appeal the Tribunals review the ALJ Determinations en banc,[12] and engage in de novo review of both the facts and the law.[13]

The State law establishing the State Tax Appeals Tribunal provides that "a majority of the tribunal shall constitute a quorum for the purposes of exercising such powers and performing such duties, including the issuing of decisions."[14] The City Charter provides that "when the tribunal reviews a matter en banc it must have a majority present and not less than two votes

[5] N.Y. Tax Law § 2004.

[6] Id.

[7] N.Y.C. Charter § 168(b).

[8] N.Y.C. Charter § 168(b).

[9] N.Y. Tax Law § 2010; N.Y.C. Charter § 168(d).

[10] N.Y. Tax Law § 2006.2; N.Y.C. Charter § 168(d).

[11] N.Y. Tax Law § 2010.4; N.Y.C. Charter § 168(d).

[12] N.Y. Tax Law § 2006.7; N.Y.C. Charter § 169(d).

[13] N.Y. Tax Law § 2006.7; N.Y.C. Charter § 169(d).

[14] N.Y. Tax Law § 2004.

shall be necessary to take any action."[15] The opinions issued by each Tribunal are referred to as "Decisions."

Reflecting a desire to achieve a prompt resolution of tax controversies, both Tribunals are subject to specific time constraints. The State law requires that a Tribunal Decision reviewing an ALJ Determination "shall be issued within six months from the date of notice to the tribunal that exception is being taken to an [ALJ's] determination, except that where oral argument is granted or written arguments are submitted such six month period will commence to run on the date that such oral argument was concluded or written argument received by the tribunal, whichever was later."[16] The City Charter provides that "[a] decision of the tribunal sitting en banc shall be issued within six months from the date of the request to the tribunal for en banc review of an administrative law judge's determination, except that where oral argument is granted or written arguments are submitted such six month period will commence to run on the date that such argument was concluded or written argument received by the tribunal, whichever was later."[17] Both Tribunals thus were specifically designed and intended to provide a prompt resolution of the merits of any tax controversy.

The Quorum Problem

There have been circumstances in which the Tribunals have been unable, within the four corners of their respective governing statutes, to provide the required prompt analysis of tax controversies, because the Tribunals did not have the requisite quorum prescribed under the statute to render a Decision. We refer to this situation generally as the "quorum problem."

For example, in the 1990's, two of the three State Tribunal Commissioners resigned or retired, leaving the State Tribunal with just one Commissioner. Some time after the prescribed

[15] N.Y.C. Charter § 168(d).

[16] N.Y. Tax Law § 2006.7.

[17] N.Y.C. Charter § 171(a)(3).

six-month time frame within which the Tribunal was required by statute to render its Decision in pending cases, two new Commissioners were appointed, and that three-member panel began to issue Decisions in the cases that had been deferred. Affected taxpayers challenged the late-rendered Tribunal Decisions as violating the statute's six-month period for issuing Tribunal Decisions.

The Third Department held, however, that "the six-month time limit outlined in Tax Law § 2006(7) and 20 NYCRR 3000.17(e)(2) is directory only. . . . Only upon a showing of substantial prejudice, wholly absent on this record, would noncompliance with this discretionary limitation have any consequence . . . . Equally meritless is petitioner's claim that it was prejudiced by the replacement -- attributable to resignation and retirement -- of two of the three Tribunal commissioners who heard oral argument in this matter as the two duly appointed replacement commissioners, although not present at oral argument, were otherwise 'authorized to participate in a decision' (20 NYCRR 3000.17(d)(3)), the decision itself reciting that it is based upon the Tribunal's review of the record."[18]

The State legislature had signaled a clear intent, in the State Tribunal legislation, that appeals to the Tribunal must result in a prompt decision on the merits. Nevertheless, in the face of the State Tribunal's inability to act due to the quorum problem, the Third Department ruled that the taxpayer was obliged to wait out the Tribunal's inability to act, and then to accept the later decision of a new panel as binding.

On the City front, a different problem has recently hamstrung the resolution of a tax controversy. The Matter of Samuel D. Friedman,[19] involves a situation in which one City Tribunal Commissioner, in his former private-sector practice, represented the taxpayer, while

[18] Bray Terminals Inc. v. N.Y.S. Tax Apps. Tribunal, 248 A.D.2d 832 (3d Dept. 1998).

[19] Samuel D. Friedman, N.Y.C. Tax Apps. Trib. Order Nos. TAT(E)03-21(UB); TAT(E)03-22(UB); and TAT(E)03-23(UB).

another City Tribunal Commissioner, in his former role as a litigator for Corporation Counsel, represented the City in the same case, now pending before the City Tribunal. The City Tribunal requested briefing on the question of whether the so-called "rule of necessity" required the Tribunal to decide the case notwithstanding its Commissioners' obvious conflicts. After considering the parties' responses, the City Tribunal concluded that "notwithstanding our opinion that as a matter of law, the Tribunal could and should proceed to exercise its statutory obligation to review the ALJ Determination under the Rule of Necessity, we are prevented from doing so under our equal but conflicting responsibilities under the [Code of Professional Responsibility] and ALJ Rules. As a consequence, out of an excess of caution and concern for the integrity of the Tribunal, we place this matter on hold sine die until such time as a court of competent jurisdiction issues an order compelling us to proceed or providing for an alternative solution, or until such time as circumstances otherwise permit the Tribunal to proceed."[20] Two years have passed since that decision, and the case remains in limbo.

It is obvious that a Tribunal's inability to decide a case due to a lack of the statutory quorum disadvantages everyone. It reflects poorly on the institution as well. It is therefore clear that some solution to the current potential for stalemate is both needed and desirable.

Exactly which solution to adopt is perhaps a more complex question, involving considerations of legislative protocol and efficiency, of administrative and civil service law, of statutory interpretation, and ultimately of practicality. At bottom, however, the quorum problem is something that should not continue to interfere with efficient tax administration. Moreover, it is something that is eminently capable of resolution, without any material expenditure of governmental funds.

[20] Id., at 15.

We have identified several possible solutions to the quorum problem. These options, and some of the issues each raises, are discussed below. In considering which solution is best, it should be borne in mind that (i) the quorum problem is not necessarily a frequent or repetitive problem, yet, (ii) when the problem does occur it basically renders the Tribunal inoperative, to the detriment of all concerned. Given those realities, it may be preferable to adopt a solution that can most easily be implemented and most efficiently applied, even if that is not the most theoretically perfect solution.

Furthermore, while members of the State and Local Tax Committee practice before the Tribunals and are well acquainted with their operations, certain possible solutions to the quorum problem raise issues of law that are not within our expertise. We have therefore suggested solutions that, from our perspective as tax practitioners, would serve as reasonable means to solve the quorum problem. We cannot, however, offer conclusions as to issues that might arise under other areas of law (e.g., administrative, civil service, home rule, Charter interpretation, the CPLR, etc.) that could be implicated under different approaches.

Finally, the suggested solutions in themselves may lead to other questions. These include, for example, whether there should be one state-wide Tribunal that addresses all tax disputes, municipal and state. Or whether the law should be amended to allow the State and City to appeal adverse Tribunal Decisions, which taxpayers currently are entitled to do. These are reasonable questions, and different constituencies have differing views as to their best resolution.

However, while these broader questions may well be legitimate topics for debate, analysis and possible legislative changes, those questions should not delay or derail the adoption of a practical -- even if interim -- solution to the quorum problem. The point of establishing the Tribunal systems was to establish a just and efficient system for resolving tax disputes. The

quorum problem can be resolved within that framework, even while other fundamental issues remain for further consideration.

Possible Solutions to the Quorum Problem

1. Elimination of the Quorum Requirement

One solution to the quorum problem would be to repeal the statutory provisions that prescribe a quorum and require "a majority," or "two," Commissioners to issue a decision.[21] This would permit the Tribunals to function in circumstances in which there is only one Tribunal Commissioner eligible to hear and decide the case.

This approach would, however, eliminate one of the essential components of the basic Tribunal review process – having the determination of a single ALJ reviewed by a panel of Commissioners expert in tax matters. This model is similar to the usual appellate-level review, in both state and federal courts. Deleting the quorum requirement in circumstances where none was available would, therefore, be inferior, in terms of the type of review afforded, to an approach that ensured that more than one reviewer would examine the ALJ's factual findings and legal conclusions de novo.

Moreover, such an approach would not solve the quorum problem in circumstances in which there are two eligible Commissioners, but they are split in their views as to whether to affirm or reverse the ALJ Determination under review. Such circumstances would still require a rule for resolution of the impasse, perhaps the fairly common judicial rule that if a quorum exists to hear the case but the panel is evenly divided, the decision below is deemed affirmed.[22]

[21] N.Y. Tax Law § 2004; N.Y.C. Charter § 168(d).

[22] See, e.g., Warner-Lambert Co., LLC et al. v. Kimberly Kent et al., 552 U.S. ___ (Mar. 3, 2008), (Per curiam decision in Case No. 06-1498 that "the judgment is affirmed by an equally divided Court.")

2. Mandamus

In Friedman, the City Tribunal noted that, notwithstanding its inability to act, "either of the Parties has the right to bring [the question of the application of the Rule of Necessity] before a court in an Article 78 proceeding in the nature of mandamus or prohibition."[23] Presumably such an action would entail a request by the taxpayer or the taxing authority that the relevant court direct the proceedings to go forward and either order the sitting Commissioners to consider the case, or devise some other solution to the quorum problem.

While a mandamus procedure might be used to compel otherwise ineligible Commissioners to proceed with their review of the case, it is not clear such a proceeding would be of any utility where the quorum problem stemmed from vacancies on the Tribunal. Nor is it clear a court would in fact apply the Rule of Necessity in a case such as Friedman, where the sitting Commissioners had clear conflicts stemming from their prior roles as advocates for the parties.

Ordering Commissioners to proceed to review an ALJ determination notwithstanding circumstances that otherwise validly compel their recusal also presents an obvious fairness issue. The reason for requiring recusal is a concern that the litigants be provided an impartial forum in which their disputes will be heard. By overriding the fundamental precept that conflicted individuals should not serve as judges, the mandamus approach would undercut the perception, if not the reality, that the Tribunals function as impartial arbiters. Given the importance of that basic principle to the establishment of each of the Tribunals, that would present a serious problem.

Finally, resorting to a mandamus proceeding to solve the quorum problem shifts the burden and expense of solving this fundamental institutional issue to a single taxpayer, a policy

[23] Friedman, supra, at footnote 12, citing N.Y. CPLR § 7803(1), (2).

choice that seems questionable. Finally, any solution devised by the court would by nature be ad hoc, addressed solely to the facts at hand, and of no broader import in resolving the quorum problem generally.

3. Cross-Appointment of Sitting Commissioners.

Between the State and City Tribunals, it is contemplated that a full complement of six Commissioners serve contemporaneously. The current quorum rules in the Tax Law and City Charter contemplate that two Commissioners render a decision that upholds, reverses, modifies or remands an ALJ Determination. Given the number of Commissioners usually available, it seems likely that at any given time a panel of three duly-appointed and unconflicted Commissioners could be designated to hear an appeal of an ALJ Determination in a circumstance where the usual three-Commissioner panel was unable to serve. With three qualified Commissioners hearing the appeal, a two-Commissioner majority could resolve the case.

This solution obviously requires that each of the State and the City cede to the other, and to the appointees of the other's Executive, some control over the resolution of its tax controversies. The taxpayer (and taxpayer representative) constituencies must also acquiesce in the notion that, for example, a state tax controversy affecting a Buffalo taxpayer might ultimately be decided by one or more Tribunal Commissioners appointed by New York City's Mayor.

There also will likely be issues of staffing, budgets, reimbursements, statutory authority, etc. that would require resolution, either administratively or through legislation.

Notwithstanding these details, the cross-pollination of one Tribunal by another, when necessary to meet the objective of obtaining a timely resolution of a controversy that is made by at least two individuals who have the background and experience that merit appointment as Tribunal Commissioners, probably best achieves the overall intent of the State and City Tribunal legislation. Given that Tribunal appointees are to be "knowledgeable on the subject of taxation

and . . . skillful in matters pertaining thereto,"[24] or a person who "possesses substantial knowledge and competence in the area of taxation,"[25] the reassignment on a temporary basis of one or more City Commissioners to the State, or vice versa, ensures the knowledgeable forum, and by comparison the administrative issues that might arise in those rare cases should be of relatively minor significance.

4. Designation of a Sitting ALJ to Serve as a Tribunal Commissioner.

The federal and New York State court systems incorporate procedures whereby a lower-level judge can be designated to sit on the appeals panel.[26] An analogous procedure could be employed by the Tribunals to address the quorum problem. Specifically, a sitting ALJ could be designated as a Tribunal Commissioner to serve in those circumstances when a quorum of Commissioners is otherwise unavailable. This approach has the advantage of concentrating the resolution of each Tribunal's quorum problem in the State or City agency that is experiencing the problem. That means, for example, that the ALJ designated to sit as a Commissioner would be familiar with the agency's procedures and practices, which preserves a certain institutional consistency.

It would however be important to avoid designating as an interim Commissioner any ALJ who had been involved in the case below. For that reason, simply stating that an ALJ occupying a specific position would serve as designee -- for example the State's Chief or Assistant Chief ALJ or the City's Chief or Deputy Chief ALJ -- may not be appropriate. That position-specific approach also would not be adequate if the inability to serve involved more than one Commissioner.

[24] N.Y. Tax Law § 2004.

[25] N.Y.C. Charter § 168(c).

[26] See U.S.C. §§ 292 et seq. See also, N.Y. Const. Art. 6, § 2 ("In case of the temporary absence or inability to act of any judge of the court of appeals, the court may designate any justice of the supreme court to serve as associate judge of the court during such absence or inability to act.")

There also may be complications under administrative and/or civil service law in designating an individual who had been appointed an ALJ by a Tribunal Commissioner to serve on an interim basis in the place of an absent or conflicted Commissioner. Again, however, while these issues should be identified and resolved, they should not swamp the need to find a simple, workable solution that provides a prompt, efficient and professional solution to the quorum problem.

5. Special Appointments to the Tribunal.

Instead of drawing from the available pool of sitting Commissioners or of appointed ALJs, one might decide that the quorum problem is most efficiently addressed by changing the existing State and City statutes to allow the temporary designation of an entirely new individual to serve as a Commissioner, in the event of vacancies, or, alternatively, in the event that a sitting Commissioner suffered some disability that precluded him or her from deciding a case on appeal.

Overall, this seems the most complex solution to the quorum problem, inasmuch as a designee presumably would not be identified until a quorum problem surfaced; and the process of vetting a designee could easily take more time than would otherwise be consumed by waiting for the quorum solution to resolve itself.

6. Treating the Inability to Act as an Affirmance of the Determination Below.

The purpose of an appellate body such as the Tribunal is to review the Determination rendered below. Under ordinary circumstances, the three-member Tribunal would review the substantive conclusions of the ALJ below, and either affirm or reverse the ALJ's Determination. The Tribunal structure discussed herein thus assumes a system wherein the Determination issued by an ALJ is considered by the Tribunal, and affirmed, modified, reversed or remanded under a Decision rendered by a two-Commissioner quorum. At that point, a Tribunal Decision adverse

to the taxpayer can be appealed to the Appellate Division, while a Decision adverse to the State or City becomes final, and is precedential.

When a Tribunal lacks a quorum to review an ALJ Determination one relatively simple solution is to treat that Determination as affirmed, and proceed accordingly. This is exactly what obtains in the United States Supreme Court, and what the Court did last year, when the recusal of four justices on conflicts grounds rendered the Court unable to decide a case on appeal from the Second Circuit.

Specifically, federal law mandates that the Supreme Court comprise nine justices, six of whom constitute a quorum.[27] In a case[28] in which a quorum is absent, the U.S. Code provides that "if a majority of the qualified justices shall be of the opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."[29]

Pursuant to that statute, in 2008 the Supreme Court issued an order that had the effect of affirming a Second Circuit decision: "Because the Court lacks a quorum . . . and since a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next term of the Court, the judgment is affirmed under 28 U.S.C. § 2109. . . ."[30] Thus, where the appellate body was unable to act -- in that case due to the recusal of Justices Roberts, Kennedy, Breyer and Alito -- the decision below stood as affirmed.

Adopting a similar rule for the State and City Tribunals would provide an efficient solution to the quorum problem, without the need to address some of the more complex

[27] 28 U.S.C. § 1.

[28] Other than one brought to the Supreme Court by direct appeal from a district court.

[29] 28 U.S.C. § 2109.

[30] Am. Isuzu Motors, Inc., et al. v. Ntseheza, Lungisile, et al., 553 U.S. ___ (May 12, 2008), (Summary Disposition in Case # 07-919).

administrative details that could ensue under the alternatives that require the appointment of one or more substitute Commissioners.

Treating the ALJ Determination as affirmed would allow the taxpayer to appeal, where such Determination was adverse to the taxpayer. If the Determination had been adverse to the State or City the case could be treated as finally resolved, as is the case currently when the Tribunal issues a Decision adverse to the taxing authority. Alternatively, given that there would have been no actual review of the ALJ Determination by the Tribunal, one could level the playing field by allowing the State and City the right to appeal in such circumstances.[31]

On appeal to the Appellate Division, one could treat the factual findings of the ALJ as the final findings of fact. This would reflect the ALJ's role as the hearing officer present at the hearing (if one was held), and the Appellate Division's traditional role. Alternatively, if this approach is viewed as substituting review by the Appellate Division for the review the Tribunal was unable to provide, then the Appellate Division should review both the facts and the law de novo.

In any case, in the absence of actual review by the Tribunal, an ALJ Determination that is deemed affirmed under this approach should not be considered precedential.

Conclusion

Two years have passed since the City Tribunal's Decision in Friedman, with no decision on the merits. As that case makes obvious, finding a simple and efficient solution that enables the relatively rare quorum problem to be resolved is both necessary and important to the fair resolution of tax controversies.

[31] Amending the Tribunal statutes to grant the government a right of appeal has been advocated from time to time by the State and City, and may be worth further consideration and debate; that question need not and should not, however, stand in the way of a prompt and efficient resolution of the quorum problem.

We have offered herein an analysis of six different approaches to resolving the quorum problem. There may be other approaches, and, as noted, there may be further considerations to weigh in choosing a solution. In the end there may well be no solution that is a perfect fit. It is important, nonetheless, that action be taken so that the Tribunals can be ensured of delivering a prompt and fair review of the Determination below in those rare but real circumstances when the quorum problem otherwise interferes with their normal review function.

June 20, 2009