

Navigating Pennsylvania's Tax Appeals Process

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Pennsylvania's tax appeal system has long been criticized as very complicated, expensive and lacking impartiality. Several years ago, the PA Chamber, the PA Bar Association and other interested groups were able to work with the General Assembly to eliminate some of the most antiquated procedures – some tracing their history to the early 1800's! In April 2014, the Board of Finance and Revenue was restructured to provide a more independent and transparent second-level venue for state tax appeals. This article focuses on understanding Pennsylvania's tax appeals system and how to obtain results from the process in the most cost effective way.

Board of Appeals

The Department of Revenue's Board of Appeals (BOA) provides the first level appeal from assessments of Sales & Use Tax, Personal Income Tax, Corporate Net Income Tax, Capital Stock and Franchise Tax, and other taxes administered by the Department. BOA also handles petitions for refund of most taxes (excepting certain liquid fuels tax claims) and considers appeals from determinations made under Pennsylvania's Property Tax and Rent Rebate program.

Cases are reviewed by BOA hearing officers, and their draft decisions are then subject to review and approval by one or more "board members." The board members almost never hear cases directly. Effectively, one could view BOA as an "appeals office" rather than a "board" in the formal sense.

With nominal exceptions, petitions for reassessment must be filed with BOA within 90 days from the assessment mailing date. Petitions for refund generally must be filed within three years from the payment date. For a period subject to audit, the refund petition must be filed within the later of three years from the date of payment or six months from the mailing date of the assessment covering the refund period. Petitions for refund of amounts paid as the result of an assessment may be filed within six months from the date of payment. Most departmental notices provide an explanation of the appeal periods and the Board of Appeals has posted charts of the appeal periods on its website (www.boardofappeals.state.pa.us).

BOA hearings are informal and do not follow strict rules of evidence, although direct testimony is taken under oath. Representation by a certified public accountant or an attorney is not required, although the regulations provide that only an unrepresented petitioner or an attorney may raise or argue a legal question in a BOA hearing.

Aside from the basic nuts and bolts for filing a petition, the two most important points to remember when dealing with BOA are: (1) BOA is part of the Department of Revenue; and (2) BOA handles a very large volume of appeals with a relatively small staff. Since BOA's hearing officers and board members are employees of the department, it is not realistic to expect BOA to render a decision counter to department policy. Furthermore, most of the hearing officers and board members are not attorneys, so one should understand that, although they are knowledgeable and will apply the law to the facts of the case, they are not likely to go against the position taken by an auditor on an issue in a legal "gray area." Finally, there are some legal issues (e.g., "multiformity" or "unrelated assets") where BOA just does not overrule department auditors or taxing officers to grant relief except in very rare instances.

BOA annually handles 25,000 appeals of various types with a staff of just over forty people. Only rarely can a hearing officer devote many days or weeks to a single case – they have large caseloads and deadlines to meet. Since the taxpayer bears the burden of proof, the taxpayer or taxpayer's representative should do whatever can reasonably be done to make the hearing officer's job easier. If a case is factually complex or there are stacks of documents to be presented, the information should be organized logically. Clear schedules and summaries should be provided so that the hearing officer will have more time to consider the issues as opposed to grinding through documents or organizing data.

A taxpayer is not mandated to appear in person for a hearing at BOA. If a case is relatively straightforward and can be explained adequately in writing, the hearing may be waived and BOA will render a decision based on the written submissions. If the issue is one that is virtually certain to be denied by BOA, but may receive consideration at a higher level of appeal, the BOA hearing can be waived in order to minimize expense and to expedite the case to

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the next level of appeal.

The taxpayer may submit an offer in compromise after petitions are filed with BOA. If accepted by the Department, BOA enters an order based on the compromise. If the offer in compromise is rejected, BOA proceeds with issuance of a decision on the merits. Generally, the Department will not respond to an offer in compromise until documentation has been submitted to BOA and a hearing has been held (if necessary in the eyes of BOA or requested by the taxpayer).

Board of Finance and Revenue

The Board of Finance and Revenue (BF&R) hears appeals from decisions of BOA (petitions due 90 days from BOA decision), handles liquid fuels tax refund claims from farmers, schools and other exempt entities, and performs some other limited governmental functions not related to the tax appeals process.

Effective in April 2014, BF&R was reconstituted to a three-member board. Two members are appointed by the Governor and confirmed by the PA Senate for six-year terms. The State Treasurer designates the third member of the Board. Members of the Board serve full-time, must be attorneys or certified public accountants, and must have at least ten years of experience dealing with Pennsylvania taxes. Currently, all three members are attorneys, two of whom have substantial private practice experience and two of whom have substantial government experience.

BF&R usually sits two days each month to hear tax appeals. Hearings before the board are limited to five minutes per case. This may seem quite restrictive, but it is sufficient time to provide a brief summary of the case and to determine if the board members have any questions. When the case is complex, the board will sometimes grant a request for extra time, or simply allow more time if there are numerous questions. A representative of the Department of Revenue also may present argument to BF&R and the board members may engage in a discussion with both parties.

All pre-hearing and post-hearing taxpayer communications with the board or its staff must be provided to the Department of Revenue as well. No ex parte contacts are permitted. Service on the Department may be made electronically. The Board has posted interim operating rules on its website.

The opportunity to appear in person before the board, while certainly important, is only part of the story in dealing with BF&R. The real nitty-gritty work on the cases is performed by the board's "briefers." Many of the briefers are attorneys – some

with considerable experience in dealing with state tax appeals. After petitions for review are filed with BF&R, they are assigned to a briever, who is responsible for analyzing the case and for preparing a summary of the facts and law, and a recommended disposition – this document is referred to as the "Board Brief." The Board Briefs are provided to each member of the board prior to hearing; taxpayers do not have access to Board Briefs.

The taxpayer or their representative may request a meeting with the briever to discuss their case before the Board Brief is prepared. Sometimes the briever will initiate a request for a meeting, or request additional documentation. Meetings with the briever may also be attended by a representative of the Department of Revenue. Since the members of the Board rely on the Board Brief for the "bones" of the case, it is absolutely essential for the taxpayer or the taxpayer's representative to make sure the briever receives all appropriate information before the Board Brief is prepared.

As with the Board of Appeals, representation before BF&R is flexible but only a petitioner who is self-represented or an attorney may raise or argue a legal issue before the board. Also, as with BOA, hearings before BF&R may be waived and the board will then decide the case based on written submissions. Waiver of a hearing before BF&R is not at all uncommon.

Effective April 2014, taxpayers are permitted to negotiate compromises with the Department of Revenue while an appeal is pending before BF&R. Notice that a compromise is being sought must be provided to BF&R within thirty days after an appeal is filed with the board. Negotiations are carried out directly with the Department of Revenue's Office of Chief Counsel. If a settlement is reached, BF&R will issue an order implementing the terms of settlement. If the parties do not settle, BF&R will proceed to schedule a hearing and decide the case on its merits.

Commonwealth Court

Appeals from decisions of the Board of Finance and Revenue may be taken to Pennsylvania's Commonwealth Court. Only issues raised and preserved before BF&R may be raised in court. Petitions for review must be filed with the court within 30 days from the mailing date of the BF&R decision. There is a small filing fee. While individuals, technically, may file the appeal on their own, most utilize the services of an attorney; corporations must be represented by counsel.

While taxpayers sometimes cringe at the thought of paying for a court hearing, the fact of the matter is that most tax

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appeals to Commonwealth Court are resolved through settlement negotiations with the Office of Attorney General (with participation by the Revenue Department's Office of Chief Counsel). According to court statistics, an average of 876 state tax appeals were filed annually from 2007 through 2009; however, an average of only five cases were actually tried before the court each year. A small number of cases were either dismissed or withdrawn, but the vast majority of the cases were resolved through negotiated settlement.

The petition for review to the Commonwealth Court need not be a very detailed document. Following the filing of the petition, counsel is asked to provide the assigned Deputy Attorney General with a summary of the facts and issues in the case. This provides the parties with a basis to discuss possible settlement. If the parties have not resolved a case within eleven months from the filing date, the court will require counsel to file status reports with the court, and further status reports will be required periodically until the parties either settle the case, or the court schedules a status conference with a judge. At a status conference, the court determines whether additional time should be allowed for settlement discussions, or the case should be scheduled for briefing and argument. While paying counsel to pursue settlement negotiations may not be inexpensive, the real expense is incurred when a case cannot be settled, and counsel must develop stipulations of fact, draft briefs and otherwise prepare for argument of the case to the court.

One ancillary expense of filing a tax appeal may be the fee for an appeal bond or letter of credit. If an assessment is appealed and has not been paid, court rules require the taxpayer to post an appeal bond or other security (usually a letter of credit) if they want to preclude the Department of Revenue from pursuing

collection while the appeal is before the court. The Department, however, will waive the filing of an appeal bond or other security if the taxpayer presents satisfactory financial statements. If the department does not find the financials acceptable, and if security is not filed, the department will file a lien and its collections personnel will call periodically. The court appeal may continue whether or not security is filed.

Readers should consult counsel for information on Commonwealth Court procedures for hearing the handful of cases actually argued each year, or the process for exercise of the right to file a further appeal of a tax case to the Pennsylvania Supreme Court.

Conclusion

Successfully navigating Pennsylvania's tax appeals process involves much more than meeting appeal deadlines and showing up for hearings. Hopefully this article has provided a better understanding of how the process really works, and how to deal effectively with it.



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