

Navigating Pennsylvania's Tax Appeals Process

By: James L. Fritz

Pennsylvania's tax appeal system has long been criticized as very complicated, expensive and lacking impartiality. A few years ago, the PA Chamber 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 1800s! The PA Chamber and others continue to work for further improvements. In the meantime, however, it is important for Pennsylvania businesses to understand how best to navigate through the existing process. This article focuses on understanding the current system and how to obtain results from the existing 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 or, for a period subject to audit, within six months from the mailing date of the assessment covering the refund period. 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), where petitions also may be filed online or forms may be downloaded.

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 receives 23,000 to 25,000 appeals of various types. 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 financial 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 the next level of appeal.

continued

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.

Although established by the Fiscal Code as an independent board, the members of BF&R include the Secretary of Revenue, the Secretary of the Commonwealth and the Governor's General Counsel, as well as the independently-elected Attorney General, Auditor General and State Treasurer (who serves as Chairman of the Board). For purposes of hearing tax appeals, the statutory members of the board appoint "designees" to sit in their place—the designees are usually legal counsel or other senior personnel from within their departments. A taxpayer must obtain a majority of the six-member board to prevail—a task perhaps complicated by the presence on the board of the designees of the Secretary of Revenue and other gubernatorial appointees. However, in the writer's experience, BF&R does at times overrule BOA decisions and grant substantial relief.

BF&R usually sits two days each month to hear tax appeals. Petition forms and other information may be accessed on the BF&R webpage (www.patreasury.org/board-finance-rev.html). 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.

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. 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.

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 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.

continued

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. Recently, the department announced that it 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 persons 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.



James L. Fritz is the chair of the State and Local Tax Group at McNees Wallace and Nurick LLC in Harrisburg, where he has practiced in the state and local tax field for more than twenty years. He previously served for several years as Secretary of the Department of Revenue's Board of Appeals, is a past Chair of the Pennsylvania Bar Association Tax Section and is a long-time member of the PA Chamber's Tax Committee/Work Group.

This article was originally published in the Summer 2011 edition of "Catalyst," the Pennsylvania Chamber of Business and Industry magazine, and is posted with the Chamber's permission.