

TAX SECTION

New York State Bar Association

Administrative Adjudication of
Disputes Involving New York City Taxes:
Tax Tribunal Proposals

By The
Committee on New York City
Tax Matters

October 18, 1988

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October 31, 1988

Tax Appeals Tribunal

Dear Commissioner Grayson:

Enclosed is a report on proposals for a New York City tax appeals tribunal. The report was prepared by The Committee on New York City Tax Matters and was principally drafted by Carolyn Ichel and Robert Plautz.

The report describes both the Charter Revision Commission proposal that will appear on the ballot in the forthcoming election, and the bill (Senate Bill No. 9241-A) introduced last July in the New York State Legislature by Senator Marchi.

The Tax Section has long been an active proponent of establishing independent administrative review of tax disputes. The Tax Section believes that the Charter revision proposal, while imperfect, is a very important start towards providing taxpayers with an independent forum for the resolution of disputes involving New York City taxes. The Tax Section therefore recommends a YES vote on the Charter revision proposal.

The report also sets forth various procedural changes that we believe the Legislature should make in implementing the Charter proposal. Specifically, the report recommends that:

1. The dispute resolution process should be more in line with the existing State Division of Tax Appeals process, so that taxpayers would first engage in a conciliation conference with the

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Department of Finance, then proceed to a full evidentiary hearing before an administrative law judge who is expert in City tax matters and is independent of the Department of Finance, and then proceed to a review of legal issues by the Tribunal commissioners;

2. Taxpayers should not be required to pay the disputed tax or post a bond before they can present their case to the City Tribunal;

3. The City Tribunal should be required to follow as precedent prior unreversed decisions of the State Tribunal; and

4. To minimize confusion, the procedures and rules of the City Tribunal should, to the greatest extent possible, be the same as those of the State Division of Tax Appeals.

Very truly yours,

Herbert L. Camp

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Enclosure

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NEW YORK STATE
BAR ASSOCIATION
TAX SECTION

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REPORT OF THE
NEW YORK STATE BAR ASSOCIATION
TAX SECTION

Administrative Adjudication of New York City Tax Disputes:
Tax Tribunal Proposals

October 18, 1988

The Tax Section has for many years advocated the establishment of an independent tax tribunal to resolve tax disputes between taxpayers and New York State and City tax agencies. Such a tribunal was established at the State level by 1986 legislation. Disputes involving certain non-property taxes administered by New York City are the subject of recent, differing proposals, one introduced in the New York State Legislature and one approved by the New York City Charter Revision Commission. The Tax Section believes that the resolution of tax disputes by an independent administrative body would be an important advance in the administration of City tax law and supports the goals of both the bill in the Legislature and the proposal of the Charter Revision Commission. There are, however, significant differences between the two proposals; and there are aspects of each proposal that require further development. Inasmuch as the Charter Revision Commission plan will appear on the 1988 general election ballot, albeit subject to enabling legislation, the Tax Section is taking this opportunity to comment on both proposals.¹

¹ This report was prepared by Robert Plautz and Carolyn Ichel with comments from Robert J. Levinsohn, Arthur Rosen, Kenneth Moore, Paul Frankel, Ellen Gursky, Anshel David, Gordon Henderson, Donald Schapiro, Paul Comeau, and others.

Summary of Recommendations.

The Tax Section strongly supports the establishment of an independent dispute resolution process, and believes that the adoption of the Charter Revision Commission proposal by popular vote would be a very important start toward providing an independent forum for the resolution of disputes involving New York City taxes. The Tax Section further believes, however, that the procedures outlined in the Charter proposal do not meet all of the goals of an independent dispute resolution process. Therefore, when the State Legislature considers the enabling legislation necessary to implement the Charter proposal, the Tax Section recommends that the Legislature revise the Charter proposal procedures. Specifically:

1. The dispute resolution process should be more in line with the existing State Division of Tax Appeals process, so that taxpayers would first engage in a conciliation conference with the Department of Finance, then proceed to a full evidentiary hearing before an administrative law judge who is expert in City tax matters and is independent of the Department of Finance, and then proceed to a review of legal issues by the Tribunal commissioners;

2. Taxpayers should not be required to pay the disputed tax or post a bond before they can present their case to the City Tribunal;

3. The City Tribunal should be required to follow as precedent prior unreversed decisions of the State Tribunal; and

4. To minimize confusion, the procedures and rules of the City Tribunal should, to the greatest extent possible, be the same as those of the State Division of Tax Appeals.

Background.

At the present time, with the exception of certain City taxes administered by the New York State Department of Taxation and Finance², disputes are adjudicated within the City Department of Finance; the adjudications culminate with a determination by the Commissioner of Finance. After the Commissioner's determination becomes final, the taxpayer may seek judicial review by way of an Article 78 proceeding in the Supreme Court. The matter is usually transferred to the Appellate Division, First Department, where de novo factual review is precluded. Consequently, the same agency responsible for auditing, assessing and collecting a tax sits as the exclusive trier of fact and almost always the exclusive trier of law regarding the tax. The situation is at odds with at least the appearance of fairness. It is similar to the situation that existed in the administration of State taxes prior to the establishment of the State Division of Tax Appeals in 1987.

Disputes involving all State taxes and the City taxes that are administered by the State are adjudicated, following informal conciliation conference within the State Division of Taxation, through proceedings in the State Division of Tax Appeals. The resolution of disputes involving such taxes, after the conciliation conference, involves first an evidentiary

² NYC personal income tax, sales tax, nonresident earnings tax, mortgage recording tax, leaded motor fuel tax, and the beer and liquor tax.

hearing before an administrative law judge, followed by a right to a review of the administrative law judge decision by the full Tax Appeals Tribunal. Subsequent judicial review is in the Appellate Division, Third Department.

Overview of the Tribunal Proposals.

There are currently two formal proposals for establishing a tax tribunal to adjudicate New York City tax disputes. The New York City Charter Revision Commission Proposal (the "Charter proposal") is to be embodied in sections 168, et seq. of the proposed New York City Charter. Senator Marchi, chair of the Senate Finance Committee, has introduced Senate Bill No. 9241-A (the "Legislative proposal").

The basic difference between these two tax tribunal proposals is that the Legislative proposal seeks to expand the jurisdiction of the State Division of Tax Appeals to include certain additional City taxes, while the Charter proposal creates a new City Tribunal that would be added to the existing City procedures as an additional step in the resolution of tax disputes. Appendix A of this report contains a chart reflecting the differences between the two proposals and shows the current procedures applicable at the State and City levels.

Taxes Covered by Each Proposal.

The Legislative proposal would include within the jurisdiction of the State Division of Tax Appeals the following NYC taxes: cigarette tax, banking corporation tax, foreign and alien insurers tax, general corporation tax, horse racing

admissions tax, hotel room occupancy tax, real property transfer tax, transportation corporation tax and unincorporated business tax. These taxes are referred to as "conforming" taxes.

The substantive provisions of the conforming City taxes that the Legislative proposal includes within the jurisdiction of the State Division of Tax Appeals generally conform to State taxes already administered by the State. In a memorandum accompanying the Legislative proposal it is stated that the conforming taxes are "...similar to taxes administered by the State's Department of Taxation and Finance and with which the Division of Tax Appeals would have familiarity." Therefore, the administrative law judges and the State Tax Tribunal are presumed equipped to resolve disputes involving these City taxes inasmuch as the State has, or once had, a tax similar to each conforming tax. Further the consolidation in one tribunal of the adjudicatory process involving the conforming State and City taxes will presumably lead to conforming interpretations.

It should be noted, however, that there are differences between the State taxes and the conforming City taxes, and in some cases these differences may be significant. For example, under the City general corporation tax the allocation of income outside the City requires the use of a regular place of business outside the City; by contrast, the State's comparable corporate franchise tax eliminated the regular place of business requirement in 1978. Another example is that the City real property transfer tax may be applied to acquisitions or dispositions of controlling interests in entities whereas the

State gains tax applies only to acquisitions of controlling interests, and the State transfer tax does not apply to controlling interests at all. Furthermore, the State no longer has a unincorporated business tax, the State's version having been repealed since 1982. To adjudicate City tax disputes with the same degree of expertise applied to State tax disputes, therefore, it will be necessary for the State administrative law judges and Tribunal members to become knowledgeable about these City taxes.

Under the Legislative proposal the remaining "nonconforming" City taxes would continue to be resolved under the existing system (i.e. City Finance Department hearing/Article 78 proceedings).

The Charter proposal on the other hand keeps all existing administrative hearing procedures in place, and adds a new City tribunal in the resolution procedure, placed between the Department of Finance and the courts. The taxpayer must exhaust the procedures existing in the Department of Finance before seeking relief in the City Tribunal. The Charter proposal does not draw the distinction between "conforming" or "nonconforming" taxes as does the Legislative proposal. All New York City excise and non-property taxes (with the exception of the City taxes now administered by the State as noted above) are to be included within the jurisdiction of the City tribunal.

The Charter proposal's new City Tribunal can "...confine its factual review to the record established below before the commissioner of finance,...." (Sec. 170(f) of the proposed Char-

ter). In addition, the taxpayer cannot "...raise any factual or legal issue or make any request for relief not raised or made earlier in the proceedings before the commissioner of finance without leave of the tribunal." (Sec. 170(c)).

Procedures under the Legislative Proposal.

1. The Bureau of Conciliation and Mediation.

Under the Legislative proposal, the current administrative hearing procedures within the City Department of Finance are eliminated with respect to the conforming taxes. The first step in the dispute resolution process would be a conference with a newly established Bureau of Conciliation and Mediation within the City Department of Finance. This Bureau is similar to the Bureau of Conciliation and Mediation that exists within the State Department of Taxation and Finance. The object of the conciliation conference is to give both the taxpayer and the City an opportunity to resolve tax disputes informally before going to the State Division of Tax Appeals. This conference is mandatory.

The taxpayer must exhaust the opportunity to seek resolution in the City bureau before going on to the State Division of Tax Appeals.³

The taxpayer has the usual 90-day period in which to file a petition for conciliation with the City Bureau of Conciliation and Mediation (150 days if outside the United States).

³ This conciliation procedure differs from the State procedure, which only provides for a conference with the State Bureau of Conciliation and Mediation "...at the option of any taxpayer..." Tax Law 170(3-a)(a).

Filing of a petition suspends the running of the statute of limitations for assessment. The City Bureau of Conciliation and Mediation can also be petitioned with respect to refund claims.

With the exception of certain language not relevant here, the powers of a City "conciliation conferee" are identical to that prescribed for State "conciliation conferees":

A conciliation conferee shall conduct the conciliation conference in an informal manner and shall hear or receive testimony and evidence deemed necessary or desirable for a just and equitable result. The commissioner of finance shall have the power to delegate authority to a conferee to waive or modify penalty, interest and additions to tax to the same extent as such commissioner is permitted under this title.

The taxpayer may be represented at such conciliation conference by either a spouse, partner, lawyer or accountant, or if a corporation, one of its officers. During such conference a representative of the Department of Finance familiar with the controversy must be present.

The conferee is to issue a "conciliation order" within 30 days of the conference and "in the absence of fraud, malfeasance or misrepresentation of a material fact" the order is binding on both the Department of Finance and the taxpayer unless the taxpayer petitions the State Division of Tax Appeals for a hearing within 90 days of the order. Only the taxpayer has the option to appeal a conciliation order. If the conferee has not issued an order within six months, the taxpayer may discontinue the proceedings by so notifying the Bureau and then may petition the State Division of Tax Appeals.

2. The State Tax Tribunal.

If the City tax dispute involving a conforming tax is not resolved at the conciliation conference to the taxpayer's satisfaction, the taxpayer may petition to the State Division of Tax Appeals for a de novo hearing.

If a timely petition is filed with the State Division of Tax Appeals, the rules of the Tax Appeals Division control. The dispute is assigned to an administrative law judge who is to hold an evidentiary hearing, Tax Law 2010(1). The rules provide for certain motion practice by either party including motions to dismiss and for summary judgment, Tax Law 2006(5) and (6). These pretrial motions are heard by an administrative law judge and are not subject to review by the full Tribunal.

Under existing State Tax Appeals Division procedures, the hearing before the administrative law judge is a full adversarial evidentiary hearing. Testimony is taken from witnesses who may be required to attend under subpoena and are subject to cross-examination, Tax Law 2006 (10) and (11).

An administrative law judge is to render a determination within six months, which may be extended for good cause for an additional three months. The taxpayer may commence an Article 78 proceeding to compel such determination if it is not made within the required time limitations, Tax Law 2010(3). The decisions of an administrative law judge are "...not to be cited,...considered as precedent nor be given any force or effect in any other [proceeding]", Tax Law 2010(5).

Either party may appeal a determination of an administrative law judge by filing an exception with the full Tax Appeals Tribunal if notice is given within 30 days of such determination. Factual review of the administrative law judge's determination is precluded and oral argument is only granted in the discretion of the Tribunal, Tax Law 2006(7). The Tribunal is to render a decision within six months from the date of notice of exception to an administrative law judge determination. Decisions of the Tribunal would continue to be made by majority vote.

The Legislative proposal also increases the membership of the State Tax Tribunal from the present three members to five members, three of whom must be attorneys.

Certain existing procedural provisions of the "conforming" taxes proposed to be included in the expanded jurisdiction of the State Division of Tax Appeals are included in the legislation for purposes of clarity. These matters include such things as restrictions on further notices of deficiency after the filing of a petition with the State Division of Tax Appeals and burdens of proof.

3. Judicial Review.

As with existing law, a modified Article 78 proceeding is the exclusive method of judicial review of a decision of the State Tax Tribunal. Since the "conforming taxes" are adjudicated in the same manner as State taxes, venue would be placed in the Appellate Division, Third Department.

The Legislative proposal follows the current practice concerning the tax agency's right to appeal a decision of the

Tribunal. Thus, unless the general rules pertaining to the State Tribunal are changed to permit appeals by the taxing authority, the City could not appeal an adverse determination by the State Tribunal.

Procedures under the Charter Revision Commission Proposal.

1. State Constitutional Issues.

As a preliminary matter, the State Constitution, Art. 9, Sec. 2(c)(8), and Municipal Home Rule Law Sec. 10(1)(a)(8), restrict the powers of local governments in matters of taxation. Accordingly, any proposal by the Charter Revision Commission concerning City taxes would have to trace its source to State enabling legislation in order to be valid. The City Tax Tribunal proposed by the Charter Revision Commission therefore could not apply to all City taxes solely on the basis of voter approval in the November 1988 general election. Section 1152(c)(1) of the proposed Charter provides that the Tribunal shall begin functioning on January 1, 1990, except that with respect to the corporate business taxes and unincorporated business tax authorized by enabling legislation set forth in sections 1 and 2 of Chapter 772 the Laws of 1966, it shall begin accepting appeals on the later of such date or the date such enabling legislation is amended to allow the City Tribunal to adjudicate such taxes. Thus, subsequent State enabling legislation with respect to these business taxes will be required to cure any jurisdictional defect resulting from the creation of a City Tax Tribunal solely on the basis of popular vote. Furthermore, the State Legislature could modify the dispute resolution process described in the Charter

proposal, in whole or in part, as it deems appropriate.

2. Structure.

Under the Charter proposal a City Tax Tribunal is to be composed of three full-time commissioners appointed by the Mayor. All three are to be lawyers, appointed for six year terms, staggered every two years. The Mayor also designates one commissioner as president of the Tribunal; he or she is to be in charge of administration and operation of the Tribunal. The proposal states that the President shall serve as president during his or her term as commissioner. The salary of each commissioner is to be the same as a civil court judge.

The Tribunal is to have the "... same power and authority as the commissioner of finance to impose, modify or waive any taxes with its jurisdiction, interest thereon, and any applicable civil penalties."

The Tribunal is given broad powers to promulgate rules regarding such things as who may appear before it, the form of petitions and establishing filing fees.

3. The City Tribunal.

Three points should be made clear concerning the Charter proposal. First, it does not change any existing procedure within the Department of Finance. All procedures for administrative review remain in place. The Charter proposal only begins after the taxpayer has exhausted the existing procedures, including the hearing procedures within the Department of Finance.

Second, the taxpayer may not bypass the City Tribunal but must seek relief before the City Tribunal before seeking further review in the courts. (Proposed Charter section 170(e).)

Third, the City Tribunal may, in its discretion, conduct a *de novo* review; however it need not hold an evidentiary hearing and can instead "...confine its factual review to the record established below before the commissioner of finance." (Section 170(a)). Therefore the Charter proposal does not guarantee a hearing.

4. Procedure for Review.

The City Tribunal as a general rule is not intended to sit *en banc*. Each appeal is to be assigned to an individual commissioner "...who shall be responsible for hearing all aspects of that appeal...." The President can, however, order that an appeal be "heard or re-heard" en banc "...when consideration by the full Tribunal is necessary to secure or maintain uniformity of its decisions." The Tribunal may also remand the matter back to the Commissioner of Finance for further findings of fact.

The City Tribunal has jurisdiction in any case where the matter in controversy exceeds \$10,000.00, exclusive of interest and penalties, or where the matter is in the determination of the tribunal of "sufficiently substantial significance to warrant a hearing." Although the proposal provides for the opportunity to request a hearing if the taxpayer does not meet the \$10,000.00 threshold, the comments by the Charter Revision Commission make clear that:

If either or both parties request a hearing, however, it should be stressed that [the provision] unequivocally provides that the tribunal itself shall be the sole arbiter on whether a particular appeal should proceed pursuant to either the tribunal's formal hearing procedure or its small claims procedure." CRC comments, p. 9.

It is contemplated that the hearings held by the City Tribunal would be conducted pursuant to the proposed City "Administrative Procedure Act", being concurrently proposed for voter approval at the November election by the Charter Revision Commission. The proposed Administrative Procedure Act states, in relevant part, that at any adjudication hearing:

...the parties shall be afforded due process of law, including the opportunity to be represented by counsel, to issue subpoenas or request that a subpoena be issued, to call witnesses, to cross-examine opposing witnesses and to present oral and written arguments of the law and facts. Adherence to formal rules of evidence is not required. ...

Findings of fact shall be based exclusively on the record of the proceeding as a whole. Except as otherwise provided for by state or local law, the party commencing the adjudication shall have the burden of proof. (Emphasis added.) Chapter 45 of the proposed Charter.

If a case under \$10,000.00 in controversy is not determined to merit Tribunal review, a small claims procedure is to be established by Tribunal rules.

5. The Decision.

The Charter proposal provides that the filing of a petition with the Tribunal does not stay "the collection of any taxes or annual vault charges...unless (1) otherwise provided by law or (2) the tribunal issues a stay..." (Section 170(d).) However, a later section states that "[a]ny determination by the

commissioner of finance shall not become final and irrevocable until the taxpayer has exhausted all available hearings, appeals and other remedies provided by the tribunal." (Section 171(b).)

When these two sections are read together, they raise the question of whether the Section 170(d) reference to "otherwise provided by law" includes the Section 171(b) provision that a "determination by the commissioner shall not be final until the taxpayer has exhausted all [proceedings before the tribunal]." The drafters of the Charter proposal have indicated that the intent of the proposal is that assessment and collection of disputed taxes would not be stayed while a petition is pending before the Tribunal (unless stayed at the discretion of the Tribunal). In their view, the later clause requiring exhaustion of proceedings before the Tribunal is intended only to make clear that proceedings before the Tribunal are mandatory before seeking judicial review. We do not believe this interpretation is required. Moreover, it would be unusual if City administrative review required prepayment of the disputed tax; that is not generally the case with respect to administrative review at the federal or state level.

The Charter Revision Commission proposal does not provide for any time limit within which the City Tribunal must render a decision.

In reaching a decision on a dispute involving City taxes the City Tribunal is directed to "take into consideration as precedent" the prior precedential decisions of the City tribunal, the New York State Tax Appeals Tribunal or of any federal or New

York State court. The meaning of this provision may not be entirely clear, but the comments accompanying the proposal state that "[t]he tribunal should be looking not only to render decisions consistent with its own precedent, but also to issue decisions conforming with those issued by other tribunals and courts dealing with similar legal issues."

6. Judicial Review.

An Article 78 proceeding is presumably the method for seeking judicial review of a decision of the City Tribunal. The proposal merely provides that review must be sought in "compliance with the time limitations and other applicable provisions of the Administrative Code and any other applicable law relating to judicial review of determinations by the commissioner of finance." (Section 171(b)). Both the taxpayer and the Commissioner of Finance have the right to commence an Article 78 proceeding. Presumably the Supreme Court for New York County (and thus the Appellate Division, First Department) will be the appropriate venue for such a proceeding.

Comments and Recommendations.

The Tax Section strongly supports the adoption of changes in the process for resolving disputes involving the non-property taxes that are administered by the City Department of Finance. The Tax Section believes that a tax dispute resolution process should be independent from the tax collecting agency, should be staffed by tax experts, should be economical and

efficient, and should ensure uniform interpretation of similar statutes.

A. General Recommendation.

The Tax Section believes that the goals of an independent dispute resolution process could be well served by the establishment of a joint State and City tax appeals division comprised of tax practitioners, at least a majority of whom are lawyers, who are experienced and knowledgeable in State and City tax laws. Under this system, for example, tribunal members would be appointed by the Governor and the Mayor (each would appoint a specified number of tribunal members), and administrative law judges would be selected for their expertise in and would specialize in City and/or State taxes. The independent tribunal would hear tax disputes on a cost-efficient de novo basis and render decisions which would be appealable by either party. Disputes relating to all taxes administered by the State and all taxes administered by the City therefore would follow the same procedures.

The political and administrative feasibility of a blended tribunal will require further consideration. The Tax Section believes, however, that this structure could achieve the greatest degree of independence, expertise and efficiency in resolving tax disputes.

B. Comments and Recommendations on the Legislative Proposal and the Charter Proposal.

As set forth below, the Charter proposal and the Legislative proposal would achieve some of the aforementioned goals, but each proposal also has deficiencies.

1. Status of the Tribunal as a State or a City body.

Under the Legislative proposal the City Administration would no longer have the opportunity formally to interpret its taxes (other than through audit policy and regulations) and apply such interpretation to the adjudication of tax disputes at the City level. By contrast, under the Charter proposal the City would retain the authority to adjudicate City tax disputes, inasmuch as the City Tribunal would be a body appointed by the Mayor and serving as an arm of the City government.

By vesting the adjudication of both State and City taxes in a single body, the Legislative proposal would increase the likelihood that the interpretation of City taxes will be similar to the interpretation of similar State taxes, thereby ensuring conformity in the interpretation of tax laws. The Legislative proposal also may be more personnel-efficient, at least insofar as State and City taxes are identical, by concentrating dispute resolution in a single body. The Legislative proposal also achieves total independence of the adjudication process from the relevant tax collecting agency, the City Department of Finance.⁴

There are, on the other hand, policy arguments why the City should retain the ability to resolve disputes involving its own taxes, particularly where those taxes are not identical to State taxes. In authorizing New York City to impose taxes that differ from State taxes, the State legislature in effect

⁴ The Tax Section believes that the Division of Tax Appeals, which currently is an isolated and independent Division of the Department of Taxation and Finance, should be removed structurally from the Department of Taxation and Finance.

recognizes the status of the City as a separate taxing authority, and grants the City some latitude to design its taxing regime. Having given the City the responsibility to collect tax revenue and administer governmental programs, it can be argued that the Legislature should permit the City to interpret and determine the application of its taxes as well, and not have the City tax statutes adjudicated by the State administration. Implicit in the proposal to transfer the adjudication of City taxes to the State is a suggestion that, where the State's administrative interpretation differs from the City's administrative interpretation, the State's interpretation is necessarily the more correct one.

The Tax Section does not support the transfer of the responsibility for administrative adjudication of New York City tax disputes to the State at this time.

2. Independence of the Tribunal -- Fact-Finding.

The Legislative proposal will require one evidentiary hearing before a State Administrative Law Judge, and thus this proposal ensures that taxpayers will have the right to a *de novo* hearing before a body that is independent from the Department of Finance.

By contrast, the Charter proposal fails to guarantee taxpayers a full evidentiary hearing before an individual or agency independent from the tax collecting agency, inasmuch as it gives the City Tribunal apparently unfettered discretion to decide whether or not a de novo hearing will be offered to taxpayers. In addition, the Mayor's appointment of tribunal members does not require confirmation by any elected body such as the City Council; therefore, although the City Tribunal would be

independent of the Department of Finance, it is less independent of City Administration than the State Tribunal is.

The Tax Section believes that the right to an independent evidentiary hearing is one of the most important aspects of an independent dispute resolution process. The Tax Section supports the requirement of the Legislative proposal that taxpayers be guaranteed a full evidentiary hearing before an independent body, and believes that the lack of a guaranteed independent hearing is a serious flaw in the Charter proposal.

If the Charter proposal is adopted by popular vote the Tax Section strongly recommends that, in connection, with enacting the necessary enabling legislation, the State Legislature should revise the hearings procedures applicable to all City taxes by changing the City dispute resolution process to require that taxpayers be guaranteed an independent de novo hearing. These legislative changes, which we believe are imperative to achieve an independent dispute resolution process, are discussed more fully in paragraph 3, below. Furthermore, if the Charter proposal Tribunal begins hearing nonbusiness tax cases before such legislative changes are effective, the Tax Section recommends that the rules and practice of the City Tribunal should be liberal in granting taxpayers the right to a de novo factual hearing. This will advance the service of the Tribunal as an independent source of dispute resolution and will enhance the public perception of the fairness of the new Tribunal procedures.

3. Economical and Efficient Procedures.

a. The Legislative proposal provides for an informal conciliation conference within the City Department of Finance, followed by one evidentiary hearing by an Administrative Law Judge, which in turn may be followed by an appeal on the record to the full State Tribunal. Taxpayers and their representatives have found this procedure, as it applies to State taxes, to be economical and efficient. It should be noted, however, that the Legislative proposal only deals with certain City taxes; the remaining taxes will still need to be dealt with under the existing City procedures.

The Charter proposal grafts a City Tribunal onto the existing Department of Finance procedures. Taxpayers will therefore continue to be required to appear before the City Hearings Bureau, where a review of the relevant facts will be conducted. The City Tribunal may then (1) accept the facts as found by the commissioner, (2) conduct a de novo factual hearing, or (3) remand for further findings. In addition, if the decision of one City Tribunal commissioner is reviewed en banc, the en banc proceeding presumably will present the same three possibilities. The Tax Section finds the procedural structure of the Charter proposal unduly burdensome. It presents a possibility that there may be repeated factual reviews, burdening both the taxpayer and the City. Moreover, as noted above, this procedure fails to guarantee an independent evidentiary hearing.

The Tax Section believes that, as generally provided in the Legislative proposal, the dispute resolution process applic-

able to all City taxes should be similar to the State Division of Tax Appeals procedures.

If the Charter proposal is passed the Tax Section strongly recommends that, in enacting the enabling legislation that is necessary to extend the Charter Tribunal's authority to the city Corporate Business and Unincorporated Business Taxes, the State Legislature should entirely restructure the City Tribunal procedures such that for all City taxes the dispute resolution procedure will begin with a conciliation conference within the Department of Finance, followed by one evidentiary hearing before a fact-finder who is independent of the Department of Finance, followed by a review of the legal issues determined at the previous level by a panel of tribunal members independent of the Department of Finance. Furthermore, taxpayers should be entitled to proceed through the tribunal review process without having to pay the tax in dispute or post a bond.⁵

In addition, if the procedures requiring initial review by one Tribunal commissioner followed by the possibility of en banc review are retained, the Tax Section urges the legislature and the City Tribunal to adopt procedures that would minimize the risks of duplicative proceedings. For example, the City Tribunal rules could specify that, after reviewing the record, the Tribunal Commissioner must decide whether a factual hearing will be held en banc or by the Commissioner alone. This would eliminate the possibility of two tribunal-level evidentiary hearings, while providing the taxpayer an opportunity for review

⁵ The structure of the City Tribunal should generally follow that of the State Division of Tax Appeals.

of the record by at least one independent Tribunal Commissioner.

b. Both the Legislative and the Charter proposals continue the practice of having different State and City procedures. Taxpayers would be benefited if just one set of procedures applied to all State and all City taxes. If the Charter proposal is passed the Tax Section urges the City Tribunal to adopt, to the greatest extent possible, the same procedural rules as currently apply at the State Tribunal level.

4. Conformity in Interpretation.

The Tax Section believes it is important to the efficiency and fairness of tax administration that identical State and City taxes be interpreted consistently. We recognize that the objective of conformity may be difficult to achieve solely through the dispute resolution process, because many instances of nonconformity arise as a result of differences between State and City statutes, or differences between State and City regulations that are authorized by the underlying statutory provisions. Even where the State and City laws are identical, taxpayers may encounter burdensome duplicate procedures and differing audit policies as a result of the separate State and City examination procedures. Nevertheless, the Tax Section believes that the establishment of a new dispute resolution process for City taxes should have as one of its goals the achievement of conformity in interpretation of State and City taxes.

By removing "conforming taxes" from the City's resolution procedures and placing them with the State tribunal, the Legislative proposal makes it quite likely that conformity

will be achieved in the interpretation of similar taxes.

The Charter proposal addresses conformity by leaving the interpretation of City taxes to a City Tribunal, but providing that the City Tribunal should consider as precedent relevant State Tribunal decisions. If an issue of law is resolved first at the State level and then arises at the City level, this approach should work in those cases where the City tribunal members agree with the State precedent. Where an issue is resolved first at the City level and subsequently the same issue is decided differently at the State level, there will be a conflict among the precedents the City Tribunal is mandated to consider. Where the City tribunal does not agree with prior State tribunal decisions, there will be a lack of conformity in administrative precedents. Moreover, disputes that involve arguably different facts will always have the potential for different results, whether under the Charter Revision Commission proposal or in the State Tribunal.

The Tax Section believes, as stated above, that City tax disputes should be resolved by a City Tax Tribunal that is appointed by the Mayor and that serves as an official body of New York City. The Tax Section recommends, however, that if the Charter proposal passes the City Tax Tribunal should be clearly required to adopt unreversed decisions of the State Tribunal as precedent, and should be required to accede to any subsequent unreversed State Tribunal decisions as being controlling precedent, even where such decisions are inconsistent with prior City Tribunal decisions. The Tax Section recognizes that this proposal reflects a bias in favor of the State Tribunal, and in

some cases this bias may prove to be inappropriate. Nevertheless, the Tax Section believes that adopting this rule would be a reasonable compromise to achieve conformity in interpretation where the State and the City Tribunals are separately considering the same legal issue. If the City believes that a State Tribunal decision followed by the City Tribunal is wrong, its rights are preserved by its right to appeal the City Tribunal decision to the Appellate Division.

5. Other Matters.

a. The Tax Section believes that all New York City taxes should be subject to the same dispute resolution procedure. The maintenance of existing procedures for certain taxes while new procedures apply to others, as under the Legislative proposal, would be confusing and unnecessarily complicated.

b. The Tax Section believes that the interpretation of tax law is, over the long run, likely to be more balanced and consistent if those charged with the interpretation are experienced tax practitioners, at least a majority of whom are lawyers. The Charter proposal requirement that the persons who are appointed as members of the City Tribunal be experienced lawyers therefore is preferable to the current State Tribunal provisions.

c. The Tax Section believes that both the taxpayer and the taxing authority should have the right to appeal tribunal decisions by initiating proceedings under a modified Article 78. This is provided for under the Charter proposal, but would not be

provided for under the Legislative proposal unless the law relating to the existing State Tribunal were amended.

d. The Tax Section has not studied the matter sufficiently to express any opinion as to whether it is better to continue the current judicial appellate procedure, whereby City tax disputes are decided by the First Department, or to shift all judicial decision making on tax cases to the Third Department.

6. Vote on the Charter Proposal.

The Charter revisions will be voted on by the New York City electorate shortly. If the Charter revisions are passed the Charter proposal will become law automatically as to New York City excise taxes effective January 1, 1990, and will become law as to New York City business taxes if the State Legislature passes appropriate enabling legislation. The passage of the Charter proposal therefore will lead very swiftly to the establishment of a quasi-independent dispute resolution procedure.

The Tax Section believes that it is important to establish a procedure that, while imperfect, is at least a start towards providing taxpayers with an independent forum for the resolution of disputes involving New York City taxes. Further, the Tax Section believes that the passage of the Charter proposal would serve as an important expression of the voters' interest in an independent dispute resolution process.

For these reasons, the Tax Section favors a YES vote on the Charter proposal, and if the Charter proposal is passed by popular vote, the Tax Section further recommends that the State Legislature not enact the necessary enabling legislation unless

it also amends the dispute resolution procedures applicable to all City taxes along the lines set forth above. Most importantly, the dispute resolution process should be revised so that it involves (1) a conciliation conference within the Department of Finance, followed by (2) a single evidentiary hearing before a fact-finder who has an expertise in City taxes and who is independent of the Department of Finance, followed by (3) a review of the legal issues determined at the previous level by a panel of Tribunal members who are both expert in City taxes and independent of the Department of Finance. Furthermore, it should be made clear that the taxpayer is not required to pay the tax or to post a bond in order to use the Tribunal procedures. These changes are, we believe, imperative to achieve the proper functioning of the City Tribunal as a source of independent dispute resolution.

On the ballot the Charter proposal is grouped in one question with other proposals that have not been reviewed by the Tax Section. The Tax Section's opinion as to the Charter proposal is not and should not be interpreted as an expression of any conclusion on such other questions.

APPENDIX A

Current State Procedure Examination Dispute Informal Conciliation Conference in NYSDTF (Optional)	Current City Procedure Examination Dispute Hearing before Hearing Officer in NYCDF	Charter Revision Procedure Examination Dispute Hearing before Hearing Officer in NYCDF	Legislative Procedure Examination Dispute Mandatory Conciliation Conference with NYCDF
	no factual review Article 78	factual review discretionary	Hearing
Hearing before ALJ in NY S DTA	Proceeding in First Department	Review before NYC Tax Tribunal Commissioner	before ALJ in NYSDTA
no factual review		factual review discretionary	no factual review
Review by Tax Tribunal in NYSDTA		Potential <u>en banc</u> review before NYC Tax Tribunal	Review by Tax Tribunal in NYSDTA
Article 78 proceeding in Third Dept.		no factual review	Article 78 Proceeding in Third Dept.
		Article 78 Proceeding in First Dept.	