



CONTESTING NYS TAX ASSESSMENTS

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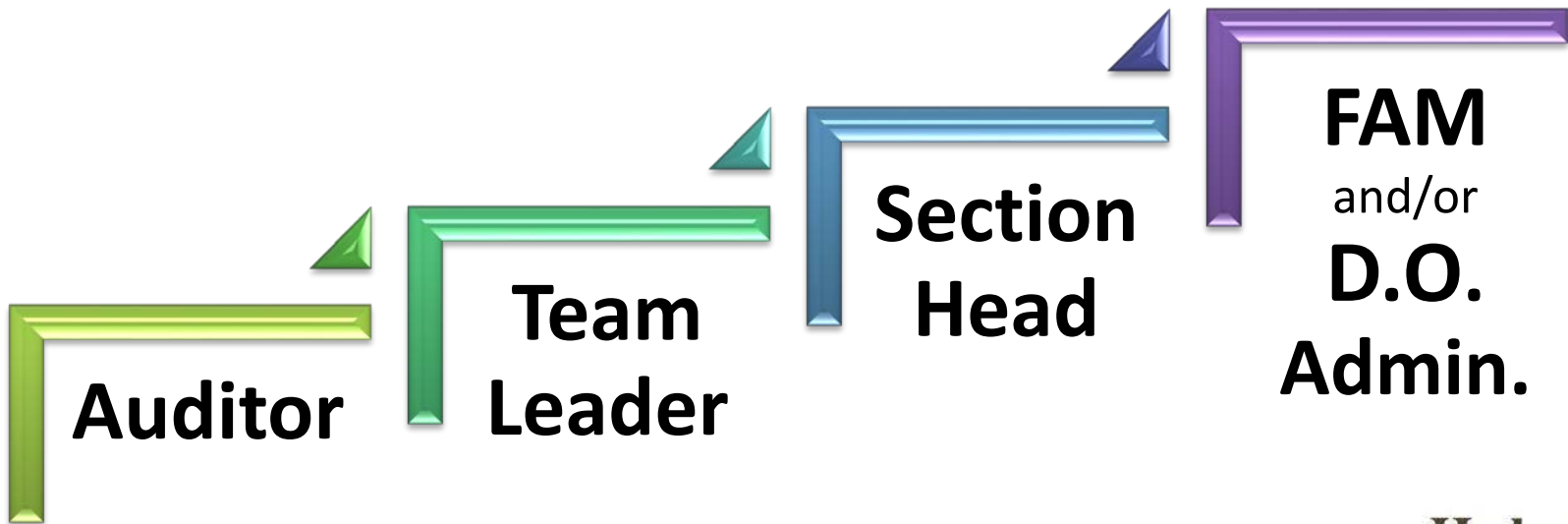


TODAY'S TOPICS

- 1. The Audit Process**
- 2. Conciliation Conferences**
- 3. Taking a Case to the Division of Tax Appeals**
 - *Motion Practice*
 - *Working with the Tax Department's Office of Counsel*
 - *Hearings Before an ALJ*
- 4. Judicial Review of a State Tax Decision**
- 5. Bypassing the Administrative Process**

THE AUDIT PROCESS

- **The Audit Division**
 - Field Audits
 - Desk Audits
- **Audit Selection** – *information matching, CISS*
- **Chain of Command**



THE AUDIT PROCESS

REPRESENTATION

➤ Right to Counsel in Administrative Proceedings

“Any person compelled to appear in person or who voluntarily appears before any agency or representative thereof shall be accorded **the right to be accompanied, represented and advised by counsel**. In a proceeding before an agency, every party or person shall be accorded **the right to appear in person or by or with counsel . . .**” (SAPA § 501)

➤ Representatives for Audits

- ✓ **Attorneys** (NYS)
- ✓ **Accountants** (NYS)
- ✓ **Others** – Enrolled Agents (NYS residents), general partner, officer, employee, others with special permission

➤ Power of Attorney Required (Form POA-1)

THE AUDIT PROCESS

AUDIT TECHNIQUES

➤ Sales & Use Tax Audits

- *Four Main Areas:*
 - ✓ Tax Reconciliation
 - ✓ Sales
 - ✓ Recurring Expenses
 - ✓ Fixed Assets
- *Responsible Person Questionnaire*

➤ Personal Income Tax Audits

- *Residency*
- *Nonresident Allocation*

➤ Corporate Franchise Audits

- *Apportionment*
- *Sourcing (services)*



THE AUDIT PROCESS

CONCLUDING THE AUDIT

➤ Audit Resolution

- Statement of Proposed Audit Adjustment/Changes
- Two Options:
 1. *Consent* → prompt assessment
 2. *Submit written objections* (request a meeting)

➤ Formalizing the Audit Results

- Statutory notice issued
- Decide how to protest

THE AUDIT PROCESS

➤ The Consent

- ✓ Whether to sign
- ✓ How to respond

➤ The Statutory Notice

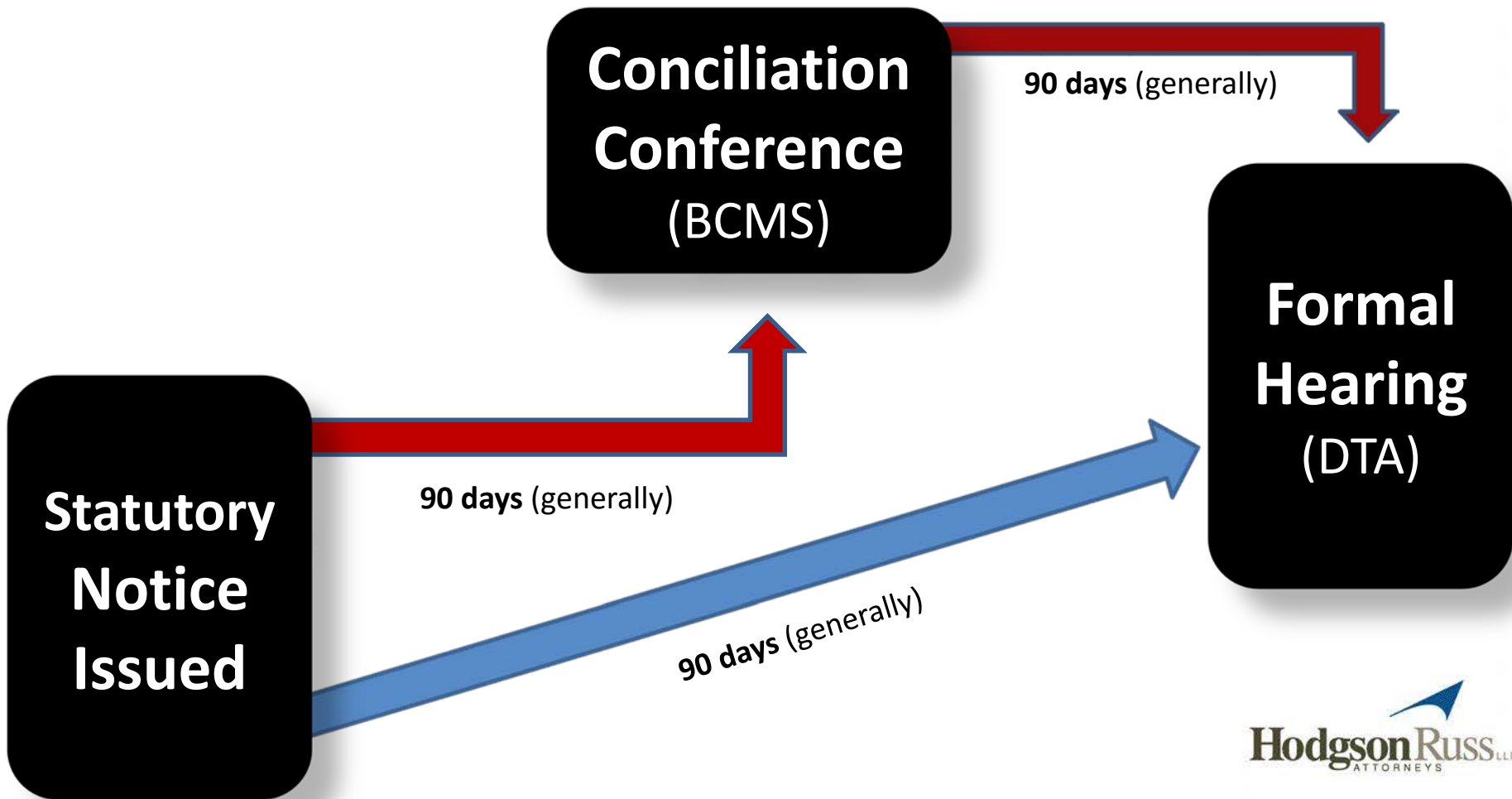
- ✓ Types of Notices:
 - *Notice of Deficiency*
 - *Notice of Determination*
 - *Others*
- ✓ Protest Period – generally 90 days

➤ Notice and Demands (if no protest)



THE AUDIT PROCESS

PROTESTING STATUTORY NOTICES



CONCILIATION CONFERENCES

- **Bureau of Conciliation and Mediation Service (“BCMS”) – Tax Law § 170(3-a)**
 - Within Tax Dept.’s Division of Taxation
 - Reports directly to Commissioner
 - Forum for information resolution
- **Requesting a Conciliation Conference**
 - Simple form (Form CMS-1)
 - Include short statement of disagreement

CONCILIATION CONFERENCES

- **Preparing for the Conference**
 - Consider opening dialogue with auditor (especially if new to the case)
 - Adjournments - 10 days' notice required
- **Appearing at the Conference**
 - Conducted by BCMS conferee
 - Tax Dept. represented by Audit Division
 - Parties explain their position and present evidence in support of their position
 - Consider whether to bring taxpayer

CONCILIATION CONFERENCES

- **Post-Conference Submissions**
 - Conferee may request further evidence or explanation
 - *Ex parte* communications OK!
- **Conferee's Proposed Resolution**
 - *Ex parte* report to Audit Division
 - Presented to taxpayer → the Consent
- **The Conciliation Order** – 90 days to protest

TAKING A CASE TO THE DIVISION OF TAX APPEALS

OVERVIEW OF DTA

- **Independent Division of Tax Dept.** (Tax Law, Article 40)
 - Separate from other Tax Dept. divisions
 - Administered by Tax Appeals Tribunal - *Tax Dept.'s Commissioner has no power/authority over DTA*
 - 9 ALJs, 1 Presiding Officer

- **Forum for Formal Hearings**
 - Hearings held before ALJs (except small claims cases)
 - No jury
 - ALJ determinations are published but not precedential

TAKING A CASE TO THE DIVISION OF TAX APPEALS

PLEADINGS

- **Petition** - Taxpayer commences DTA proceeding by filing petition (Form TA-10 – *available at dta.ny.gov*) Separately numbered paragraphs alleging (i) errors made by Tax Department and (ii) facts establishing the errors
 - Attach statutory notice, include Power of Attorney
 - File original and 2 copies with DTA → DTA will forward to Tax Dept.'s Office of Counsel

- **Answer** – Tax Dept.'s response to Petition
 - Due 75 days from date DTA forwards to Office of Counsel (may be extended)
 - Must expressly admit or deny each material allegation in Petition
 - Must contain additional facts (as affirmative statements) that Division of Taxation plans to prove in defense

- **Reply** - Taxpayer is entitled to file/serve Reply to Answer (not required)
 - Due 20 days from date served with Answer
 - Controversy deemed “at issue” (joined) either (i) when Reply served or (ii) when 20-day period to reply expires

TAKING A CASE TO THE DIVISION OF TAX APPEALS

➤ Procedural Tools

- ✓ Stipulations
- ✓ Bills of Particulars
- ✓ Admissions
- ✓ Subpoenas

➤ No Formal Discovery

➤ No Depositions (generally)



TAKING A CASE TO THE DIVISION OF TAX APPEALS

MOTION PRACTICE

➤ **Common Types of Motions:**

- Motion to Dismiss
- Motion for Summary Determination

➤ **Prohibited Motions:**

- Motions for costs or disbursements
- Discovery motions

➤ **Generally no Oral Argument on Motions** – can be requested

TAKING A CASE TO THE DIVISION OF TAX APPEALS

WORKING WITH THE TAX DEPARTMENT'S OFFICE OF COUNSEL

- About half of all DTA cases are settled
- Point of contact → Tax Dept. attorney who filed Answer
- Settlements reached via phone calls, face-to-face meetings, e-mail



TAKING A CASE TO THE DIVISION OF TAX APPEALS

PREPARING FOR HEARINGS BEFORE AN ALJ

- **Who are the ALJs?**
- **Conference calls**
- **Notice of Hearing**
 - ✓ Adjournments
 - ✓ Defaults
- **Hearing Memo** – due at least 10 days before the hearing



TAKING A CASE TO THE DIVISION OF TAX APPEALS

THE ALJ HEARING

- **Evidentiary Considerations**
- **Presenting Arguments and Evidence**
 - ✓ Jurisdictional Documents
 - ✓ Opening Statements
 - ✓ Presentation of the Division's Case
 - ✓ Presentation of Petitioner's Case
 - ✓ Closing Statements



TAKING A CASE TO THE DIVISION OF TAX APPEALS

AFTER THE ALJ HEARING

- **Request a Copy of the Transcript**
- **Post-Hearing Submissions (Briefs)**
- **The ALJ Determination**
 - Findings of Fact
 - Conclusions of Law
 - Possible Outcomes: grant the petition (wholly or partly) or deny the petition

TAKING A CASE TO THE DIVISION OF TAX APPEALS

APPEALS TO TAX APPEALS TRIBUNAL

- ALJ determinations are appealed to the Tax Appeals Tribunal
- 3 Commissioners (1 is also President)



- Original jurisdiction in tax controversies (not estate or property tax)
- *De Novo* Review of ALJ determinations

TAKING A CASE TO THE DIVISION OF TAX APPEALS

APPEALS TO TAX APPEALS TRIBUNAL

➤ *Who can appeal?*

- ✓ Either party can take exception

➤ *When is the appeal due?*

- ✓ The exception must be filed within 30 days of the date the ALJ determination is issued

➤ *Is there a form I should use?*

- ✓ Form TA-10 (*Notice of Exception to Administrative Law Judge's Determination*) available at www.dta.ny.gov

TAKING A CASE TO THE DIVISION OF TAX APPEALS

APPEALS TO TAX APPEALS TRIBUNAL

Procedure for Taking Exception

➤ **Exception Must Contain:**

1. Disagreed findings of fact and conclusions of law;
2. Grounds for the exception; and
3. Alternative findings of fact and conclusions of law

➤ **Filing and Serving the Exception:**

- ✓ **File** original exception papers plus 2 conforming copies with the Secretary of the Tribunal
- ✓ **Serve** 1 copy of exception papers on opposing counsel

TAKING A CASE TO THE DIVISION OF TAX APPEALS

APPEALS TO TAX APPEALS TRIBUNAL

Perfecting the Appeal

- Party taking exception must file a brief either (i) when filing Notice of Exception or (ii) within 30 days thereafter



- Opposing party then has 30 days to file a brief in opposition

TAKING A CASE TO THE DIVISION OF TAX APPEALS

APPEALS TO TAX APPEALS TRIBUNAL

Oral Argument

- Must be requested on Form TA-14
- Held before Tribunal's 3 Commissioners in Albany or NYC
 - Usually 15 minutes per party
 - Stenographically reported
- Transcript is part of record on review



"Your suit is without merit."

JUDICIAL REVIEW OF A STATE TAX DECISION

- **Article 78 Review of Tribunal decisions**
- **Standing** - Only taxpayers can appeal
- **Venue** - Appellate Division, Third Department
- **Deposit and Undertaking** – sometimes required



JUDICIAL REVIEW OF A STATE TAX DECISION

- **Statute of Limitations** – 4 months from Tribunal’s Decision
- **Scope of Review** (CPLR 7803) - whether the Tribunal:
 1. **Failed to perform a duty enjoined upon it by law;**
 2. **Is proceeding or is about to proceed without or in excess of jurisdiction;**
 3. Decision was made **in violation of lawful procedure**, was **affected by an error of law** or was **arbitrary and capricious** or an **abuse of discretion**, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
 4. Decision is **supported by substantial evidence**

JUDICIAL REVIEW OF A STATE TAX DECISION

PROCEDURE FOR APPEAL

- **Step One – Petition for Judicial Review**
 - **Pay \$350 filing fee** – Get index number
 - **File Pleadings** - Notice of Petition and Verified Petition (w/ verification)
 - **Serve Pleadings** on AG, Tax Appeals Tribunal and Tax Dept.
 - **File Proof of Service** with the Court
- **Step Two – Perfect the Appeal** (*after* gov't serves Answer)
 - **File and Serve Brief**
 - **File Record**

JUDICIAL REVIEW OF A STATE TAX DECISION

PROCEDURE FOR APPEAL - *CONTINUED*

- **Answer** – must be filed/served at least 5 days before return date
- **Brief & Record** – must be filed/served within 60 days of date served with government's Answer (but actually have up to 9 months!)
- **Respondents' Brief** – Must be filed/served within 60 days from date brief and record are filed/served

JUDICIAL REVIEW OF A STATE TAX DECISION

ARGUING AND DECIDING THE APPEAL

- **Oral argument** (if requested when appeal was perfected) is held in the Justice Building
 - Court clerk notifies party of date approx. 1 month in advance
 - Can be up to 30 minutes
 - Expect a “hot bench?”
- **Opinion or Memorandum and Decision and Order** – typically issued 4-6 weeks after argument
 - Taxation of costs (if taxpayer wins)
 - Appeals are made to the Court of Appeals

BYPASSING THE ADMINISTRATIVE PROCESS

DECLARATORY JUDGMENT ACTIONS

➤ **Grounds:**

- Unconstitutionality of Statute
- Inapplicability of Statute
- Scope of Jurisdiction Exceeded
- Other grounds (e.g., taxing statute or regulation has been applied to a taxpayer in an unconstitutional manner)

➤ **Venue – Supreme Court**

- Often Albany County – CPLR 505
- Can be county where taxpayer lives/located – CPLR 506(b)

➤ **Prepare an “Exhaustion-Not-Required” Defense**

➤ **Concurrent Administrative Petitioning**

BYPASSING THE ADMINISTRATIVE PROCESS

HYBRID PROCEEDINGS

- Courts have allowed hybrid actions/proceedings to proceed where the mixture of relief requested straddles the less-than-clear boundaries that exist between Article 30 and Article 78
- *Hodgson Russ v. Minnesota Department of Revenue* (Erie County Supreme Court, Index No. 2014/000097)
 - A law firm challenged MN's assertion of nexus under both Article 30 and Article 78

BYPASSING THE ADMINISTRATIVE PROCESS

OTHER COURT ACTIONS

- Actions Commenced by Taxpayers
 - Actions for civil damages for failure to release a lien
 - Actions for civil damages for certain unauthorized collection actions
 - Actions for unauthorized disclosures of tax returns and/or tax return information
- Actions by Non-Taxpayers for Wrongful Levies

THANK YOU



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