Litigating in NYS Administrative Tax Tribunals – Practice and Procedure

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1. Introduction. New York State income, franchise, sales and use tax, and other tax disputes are litigated in the *Division of Tax Appeals* (DTA) and the *Tax Appeals Tribunal* (TAT).[1] These administrative tribunals also have jurisdiction over the denial of licenses, and refund claims. They do not hear estate tax and real property tax disputes.[2] Until 1986, the Commissioner of the Department of Taxation and Finance sat on a commission that heard tax disputes. In 1986, addressing conflict of interest concerns, the present administrative tax tribunals were constituted as independent administrative judicial bodies. Under the current system, the Commissioner of the Department of Taxation is not a member of the Tax Appeals Tribunal, and the members of the Tax Appeals Tribunal and the Division of Tax Appeals are independent from the litigating arm of the Department of Taxation and Finance.[3]

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1 In New York City, tax disputes for residents are generally handled by the New York City Department of Finance (DOF), not the New York State Department of Taxation and Finance. DOF is responsible for administering and collecting various NYC taxes, including property tax, business taxes, and certain excise taxes. Disputes arising from these city-administered taxes would be heard in the NYC Tax Appeals Tribunal. The NYS Department of Taxation handles state taxes, such as personal income tax and sales tax, but not the taxes specifically administered by New York City, such as the NYC personal income tax and the corporate franchise tax.

2 Tax Law §§ 171, 198, 2000; Real Property Tax Law § 425(15).

3 The Tax Appeals Tribunal is composed of three Commissioners appointed by the Governor. These should not be confused with the Commissioner of the Department of Taxation and Finance.

The Chief Judge of Court of Appeals, in a recent dissent, criticized the administrative tax tribunals for not considering constitutional issues, employing comprehensive statutory interpretation, or looking to legislative intent when deciding cases.[4] This criticism may be somewhat unfair, since the administrative tax tribunals are not courts of law. They are quasi-judicial bodies that are the exclusive venue for adjudicating most tax disputes. As such, they are ill-equipped to pass on Constitutional issues or to engage in extensive legislative interpretation. However, the criticism of Justice Wilson is fair in the sense that neither should administrative tribunals ignore the intent of the legislature when interpreting a statute.

2. **Division of Tax Appeals. The** Division of Tax Appeals is a separate and independent division in the Department responsible for processing and reviewing petitions, providing the hearing for which the petition was filed, rendering determinations and decisions and all other matters relating to the administration of the administrative hearing process. The Division of Tax Appeals is staffed by experienced Administrative Law Judges[5] who preside over hearings between taxpayers and the Department of Taxation. The Department has a clear advantage when litigating in the Division of Tax Appeals since tax laws are construed narrowly and in favor of the government; and the taxpayer bears the burden of proof in most instances. Hearings are held in New York City, Albany, and Rochester as well as virtually. Decisions of the Tax Appeals Tribunal, the Appellate Divisions, the Court of Appeals, or United States District Courts in the Second Circuit

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4 See Wilson, J., dissent, *Wegmans Food Markets v. Tax Appeals Tribunal*, 107 N.Y.S.3d 769 (Ct of Appeals, 2019):

> The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the Legislature. . . .The legislature's meaning is not opaque if one uses the conventional tools of statutory interpretation entrusted to us. . . . Accordingly, I dissent.

5 The administrative law judge unit is responsible for the scheduling and conducting of all hearings on petitions submitted to it, the reviewing of all motions made pursuant to this Part when designated to do so by the tribunal and the issuing of determinations after hearings and on motions .

may all be cited as authority in legal briefs. However, the doctrine of staré decisis[6] has no application with respect to cases decided at the Division of Tax Appeals. This means that theoretically two disputes involving the same issue could be decided differently in Division of Tax Appeals – even if the two cases were decided by the same ALJ. Accordingly, determinations rendered by an ALJ cannot be cited as authority in any brief.[7] Despite the relegated status of decisions emanating in the Division of Tax Appeals, if the determination is affirmed by the Tax Appeals Tribunal, their legal status is elevated, and they become legal authority in any administrative or court proceeding in New York.

a. Exclusive Forum Whose Only Access Is By "Invitation." Although the administrative tax tribunals are the "exclusive" venues for disputing income, sales, and corporate franchise tax disputes, they are exclusive an another sense as well: Only taxpayers who are "invited" to dispute certain income tax "deficiencies" or sales tax "determinations," or those who are seeking a refund of taxes paid, may litigate in the administrative tax tribunals.[8] Once receiving an invitation in the form of a statutory notice, the taxpayer must RSVP within 90 days, or forever forfeit the right to a hearing. (If a conciliation conference is requested, the 90-day period is tolled until a conciliation "order" is issued.) The 90-day period is jurisdictional; it cannot be extended for any reason. There

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6 The legal principal of determining litigation according to precedent.

7 Interestingly, despite this proscription, cases decided by the Division of Tax Appeals were cited by Justice **[insert]** in a concurring opinion in the Wegmans case at the Court of Appeals decision.

8 The term "statutory notice" means any written notice of the commissioner of taxation and finance which advises a person of a tax deficiency, determination of tax due, assessment, or denial of a refund, credit or reimbursement application, or of cancellation, revocation, suspension or denial of an application for a license, permit or registration, or of the denial or revocation of an exempt status, or any other notice which gives the person a right to a hearing in the division of tax appeals. Income tax deficiencies result in Notices of Deficiency; sales tax deficiencies result in Notices of Determination.

is one exception: The taxpayer must be in "actual receipt" of the statutory notice.[9] If not, due process has not been met. One further note: When responding to the statutory notice and requesting a hearing, the risk of the post office losing the mail, or affixing an illegible or untimely postmark, or any other unusual event not the fault of the taxpayer, will result at best in the necessity of taxpayer proving the circumstances of timely mailing, and at worst, the deemed failure to meet the statutory requirement of responding within the 90-day period. Therefore, the taxpayer should never file a petition other than by certified or registered mail or other secure means.

b. **Exhaustion of Administrative Remedies.** Subject to a Constitutional exception, the administrative tax tribunals are the exclusive venue for challenging an asserted income tax deficiency or sales tax determination. Recourse to Appellate Division review can only be had on appeal from the Tax Appeals Tribunal. However, exhaustion of administrative remedies is not required if constitutional issues are presented. A taxpayer may seek relief in state court without exhausting administrative remedies if the tax is alleged to be unconstitutional, the statute is inapplicable, or the Department of Taxation exceeded its jurisdiction. To avoid the lapse of the 90-day period in which to request a hearing at the Division of Tax Appeals, it might be necessary to bring two actions simultaneously, since the 90-day period will not be tolled unless an administrative review is requested.

i. **Advantage of Litigating in State Court.** Forcing the Department of Taxation to litigate in state court has its advantages. First, the case is no longer handled by counsel for the Department. By law, the Department can litigate only in the administrative tax tribunals. All tax litigation in state courts is handled by the Office of the Attorney General. Experience suggests that in-house counsel for the Attorney General has less fealty to the Department than the latter's own in-house counsel, and appears to exhibit greater latitude in settling cases. The Attorney General may wish to avoid the negative precedent of a statute being

[9] See *Matter of Ruggerite, Inc. v. State Tax Commission*, 468 NYS2d 945 (3rd Dept. 1983).

declared unconstitutional; or it may seek to avoid judicial disapprobation if the matter is not summarily resolved. The taxpayer may also seek injunctive relief and prevent collection activities while the dispute is pending in state court. Administrative tribunals as well as appellate courts are without jurisdiction to provide such injunctive relief. The Appellate Division on exception from the Tax Appeals Tribunal may only review the record before it and affirm, reverse, or remand the case to the Administrative Tribunal. Finally, courts may be more inclined to consider equitable aspects of a tax dispute. Administrative tax tribunals have no equitable jurisdiction.

3. **Disadvantages to Litigating in Administrative Tax Tribunals.** While the administrative tax tribunals are fair and Administrative Law Judges possess a high degree of tax expertise, several factors tilt the scales of justice decidedly to the advantage of the Department of Taxation in tax disputes:

a. Statutory notices of deficiency/determination can only be litigated in the tax tribunals unless a constitutional issues is present;
b. Failure to request an administrative hearing within 90 days forever forfeits the right to an administrative hearing;
c. The taxpayer bears the burden of proof;
d. Tax laws are construed in favor of the government;
e. Exemptions and exclusions are narrowly construed;
f. The Department may assess interest and penalties during the pendency of the dispute;
g. The taxpayer must post bond when appealing sales tax determinations; and
h. The Department may now seek appellate review where a decision is "premised on interpretation of the state or federal constitution. . . or constitute "legal matters that are beyond the purview of the state legislature." Until 2023, only the taxpayer could seek appellate review. Note that the change does not apply to decisions made by the NYC Tax Appeals Tribunal;
i. Article 78 review by the Appellate Division is governed by a short four-month statute of limitations, and appellate review is limited to whether the determination was "arbitrary and capricious" or lacked a "rational basis." Deference to the expertise of the tax tribunals in administering the tax law is accorded.

4. **Tax Tribunal Procedure Modeled After CPLR.** The "mission" Tax Appeals is "to provide the procedural framework necessary to facilitate the rapid resolution of controversies, while at the same time avoiding undue formality and complexity."[10] The Rules of Practice and Procedure of the Tax Appeals Tribunal govern proceedings in the Division of Tax Appeals and the Tax Appeals Tribunal.[11] The procedures loosely correlate with the New York Civil Practice Law and Rules (CPLR), which govern practice and procedure in New York civil actions. The resemblance is closer in some areas than in others. For example, rules governing time limitation periods are often jurisdictional in the tax tribunals, as they are in the CPLR. Rules of evidence, on the other hand, are far more liberal in the administrative tax tribunals than in courts. For example, evidence may be admitted and considered without regard to the "hearsay" rule, provided the tribunal believes the evidence is relevant. Discovery in the administrative tax tribunals is not as robust as in courts. Motion practice is also generally confined to Motions to Dismiss and Motions for Summary Determination. For these two motions, The Rules of Practice and Procedure specifically refer to the governing rules for civil matters in the CPLR as authoritative.

   a. **Conciliation Conference.** Before proceeding to an administrative hearing, a taxpayer may request a mediation conference with the auditor under the auspices of the Bureau of Conciliation and Mediation Services (BCMS) after receiving a statutory notice. Although a conciliation conference can also be requested before receiving a statutory notice, only a hearing requested pursuant to a statutory notice will confer jurisdiction on the Division of Tax Appeals for purposes of scheduling a hearing. Despite the claim by the Division of Taxation on its website that the BCMS is "independent," this is not true. BCMS reports to the Department of Taxation and its "conferees" are employees of the Department. This does not mean that Conciliation Conferences are not useful; in some cases they are. The stated purpose of the conciliation conference is to resolve tax disputes without a formal hearing. Many disputes are in fact settled at BCMS. The conferee may discuss the

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10 2023 Annual Report p 1.

11 These were enacted pursuant to Tax Law Section 2006, 2012, 2014 and 2018.

proposed conciliation "order" with the auditor before issuing it. A "conciliation order" issued by the "conferee" following the conference is binding unless a hearing request is made to the Division of Tax Appeals within 90 days of the conciliation order.

TAX APPEALS TRIBUNAL RULES OF PRACTICE AND PROCEDURE

5. **Section 3000.2 Representation.** Attorneys and CPAs licensed in New York may represent taxpayers in proceedings. Petitioners may also act pro se.[12] Although administrative law judges accommodate pro se petitioners, proceedings at the Division of Tax Appeals are governed by the Tax Law and the CPLR. Pro se taxpayers with little or no knowledge of the rules are destined to fare poorly even if their case is meritorious. The Department is represented by skilled and experienced attorneys who are conversant with the tax law and the system.

6. **Section 3000.3. Commencement of Proceedings.**[13] All proceedings are commenced by the filing of a Petition, indicating the tax years involved, the nature of the tax, and errors alleged in "clear and concise terms." The Petition must also contain a statement of facts and the relief sought in separately numbered paragraphs, and must be signed under penalties of perjury. A copy of the conciliation order (if a conference was requested) must be attached, along with a power of attorney. If the petition is deemed procedurally correct, the supervising ALJ will forward it to the Department.[14] If the

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[12] Section 3000.2

[13] If the petitioner so elects, and the amount in controversy meets the criteria set forth in section 3000.9(b) of this Title, the hearing may be held in the Small Claims Unit. Following a hearing in the Small Claims Unit the presiding officer will issue a determination. A final determination issued by the presiding officer is conclusive on all parties to the controversy and is not subject to review by any other unit of the Division of Tax Appeals or the Tax Appeals Tribunal.

[14] If the petitioner so elects, and the amount in controversy meets the criteria set forth in section 3000.9(b) of this Title, the hearing may be held in the Small Claims Unit. Following a hearing in the Small Claims Unit the presiding officer will issue a determination. A final determination issued by the presiding officer is conclusive on all

the petition is defective, it will be returned for correction. The petitioner will have 30 days to file a corrected petition. Unless corrected within that time, the petition will be dismissed. Once a petition (or corrected petition) is accepted and filed, it will be forwarded to the office of counsel of the Department of Taxation for an answer.

7. **Section 3000.4 Pleadings, Amended Pleadings.** A pleading is a formal, written document filed with a court by a party in a lawsuit, outlining claims or defenses. It sets forth the basis for the case and the issues that the tribunal will address. Essentially, pleadings define the scope of the tax dispute.

   a. **Purpose.** The purpose of the pleadings is to "give the parties and the division of tax appeals fair notice of the matters in controversy and the basis for the parties' respective positions. All pleadings are liberally construed so as to do "substantial justice."

   b. **Answer.** The Department must serve an answer within 75 days, unless granted an extension. The answer must admit, deny, or state the Department is without knowledge or information sufficient to form a belief as to the truth of a statement. The answer must "completely advise" the petitioner of the defense. It shall contain (i) a specific admission or denial of each statement contained in the petition, or state if none is known; (ii) a statement of any additional facts to be proven by the Department either as a defense, or for affirmative relief,[15] or to sustain any issue upon which the Department has the burden of proof; and (iii) the relief sought by the Department.

   c. **Reply.** Petitioner may serve a reply within 20 days after service of the answer. After a reply has been filed, or if no reply is filed, after 20 days, the dispute is

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parties to the controversy and is not subject to review by any other unit of the Division of Tax Appeals or the Tax Appeals Tribunal.

[15] An affirmative defense is a legal argument admitting the facts as alleged, but providing a rationale for negating liability. An example of an affirmative defense is the statute of limitations. The burden of proof is generally imposed on the party claiming the affirmative defense.

deemed "at issue"[16] and a hearing will be scheduled.

d. **Amended Pleadings.** Either party may amend a pleading once without leave at any time before the period for responding to it expires. Thereafter, a pleading may be amended only by the written consent of the adverse party or by the consent of the supervising ALJ or the ALJ assigned to the matter. Leave shall be "freely granted."[17]

8. Section 3000.5 Motion Practice.

a. **General.** Motions[18] are permitted to "expeditiously resolve the controversy." Motions to dismiss and summary determination motions, the most common motions in the tax tribunals, are governed by the CPLR. In other cases, the ALJ is "guided but not bound" by the CPLR in resolving motions. Discovery motions are not permitted. Motions are filed with the ALJ and served on the adverse party, which has 30 days to respond and serve a copy on the moving party. In general, replies are not permitted.

b. **Contents.** A notice of motion must specify the supporting papers (e.g., affidavits, admissions) upon which the motion is based, the relief demanded, and the grounds for such relief. Any briefs must be filed with the motion. Any answering brief must be served with the response to the motion. Oral argument

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16 A dispute is "at issue," parties have filed their initial pleadings, i.e., petition and answer.

17 When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated as if they had been raised in the pleadings. If evidence is objected to at the hearing on the ground that it is not within issues raised by the pleadings, the evidence may be admitted and the pleadings amended to conform to the proof when justice so requires if the objecting party fails to show prejudice.

18 A motion is a formal request made to a judge for a specific ruling, order, or judgment in a case. The party making the motion is called the movant. Motions can be written or spoken, depending on the court rules, and can be made throughout a legal proceeding.

is generally not allowed, unless a request for oral argument is granted by the ALJ.

c. **Order Deciding Motion.** All motions are decided on the moving papers, and oral argument, if any. The ALJ will issue an order ninety days after a response has been served or 90 days from the time in which to serve a response has expired, if later. The time for issuing a summary determination order may be extended to six months.

d. **Postponement of hearing.** A hearing date may only be postponed by order of the ALJ. An order by an ALJ on a motion that does not finally determine all matters and issues in the petition is not final and binding until all remaining matters and issues have been decided. For purposes Article 78, an order of the Tax Appeals Tribunal is not final and conclusive until the Tribunal renders a decision on the remaining matters and issues.

9. Section 3000.6 Bills of Particulars; Admissions; Depositions.

a. **Bills of Particulars.**[19] After all initial pleadings, a party may demand further details of the allegations to prevent surprise at the hearing and to limit the scope of the proof. A bill of particulars may be served within 30 days from the date the last pleading was served. The bill states the particulars desired. If the party served is unwilling to provide such particulars, it may within 20 days make a motion requesting that the ALJ vacate or modify the demand. The request must articulate the grounds for objection. If no motion is made, the bill

[19] A bill of particulars might be requested by the petitioner demanding a more detailed explanation of the exact tax years, amounts, and grounds for the Department's claim. It might demand specifics concerning the nature of the case, the exact tax years, amounts involved, and grounds for the claim made against the petitioner. Bills of particular serve to limit the issues for the hearing. If the Department serves a 'defective" bill of particulars, upon request by the petitioner, the ALJ could issue an order of preclusion barring the Department from introducing evidence at hearing of items related to the bill of particulars that was not delivered to the petitioner.

of particulars must be served within 30 days. Failure to furnish a bill of particulars may preclude the party against whom the demand was made from giving evidence at hearing relating to the particulars not delivered.

b. **Admissions.** At any time after service of the answer but not within 20 days of the hearing, a party may serve a written request for admission concerning (i) the genuineness of any papers or documents; (ii) the correctness of any photographs served with the request; or (iii) the truth of any matters of fact set forth in the request. The request should relate to matters not in reasonable dispute. The party to whom the request to admit is made may respond by admitting the matters or by not responding, in which case the request is deemed admitted. Alternatively, the party may serve a verified statement (i) denying specifically the matters of which an admission is requested; (ii) stating why the matters cannot be truthfully admitted or denied; or (iii) setting forth a claim in detail.

i. **Proxy For Summary Judgment Motion.** Formal discovery in administrative tax proceedings is limited. Discovery motions are not allowed. A motion for summary determination will "lay bare" aspects of a defense that would otherwise be unattainable and may be a viable substitute for a discovery motion. However, any triable issue of fact will defeat a motion for summary determination. Moreover, a risk of making a motion for summary determination is that the Department can cross-move to dismiss the petition. A request for admission can be effective in forcing the Department to concede facts it would not otherwise admit or stipulate to without the risk of losing a motion for Summary Determination. Another advantage of using requests to admit is that they provide admissions that cannot be refuted at hearing.

c. **Depositions.** A party may request an order from the ALJ to take a deposition, but only where there is a substantial risk that the person or document or thing involved will not be available at hearing. The application must show (i) the reasons for deposing those persons rather than calling them as witnesses at the hearing; (ii) the nature of the testimony expected to be elicited; and (iii) other relevant factors. If the ALJ approves the application, an order will be issued stating the time and place of the deposition. The order may also allow videotaping. The parties may also stipulate to take a deposition instead of

seeking an order from the ALJ. A deposition may be taken on written questions when the parties so stipulate or when the ALJ so orders because the testimony is to be taken outside of New York.

10. **Section 3000.7 Subpoenas.** Witnesses sometimes fail to appear. Therefore issuing a subpoena to a person within the Department reduces the risk of nonappearance. A subpoena may be useful even if the witness is a person whom the Department would likely call at the hearing to testify. The ALJ may issue subpoenas to require the attendance of witnesses or to require the production of documentary evidence at a hearing. The subpoena may not be unreasonable or oppressive. A *subpoena duces tecum* is issued when the petitioner seeks written evidence. The person seeking the subpoena may be required to show the relevance and reasonable scope of the testimony or other evidence sought. The ALJ may refuse to issue the subpoena if its terms are unreasonable, or it may issue it upon appropriate terms. An attorney may issue a subpoena pursuant to CPLR §2302. A subpoena request must be made at least 20 days before the hearing. Pursuant to CPLR §2304, a motion to quash or modify a subpoena may be made in the supreme court.

11. **Section 3000.8. Recusal of ALJ.** Either party may request that the ALJ be recused on the basis of personal bias or other disqualifying factor. A motion to recuse must be accompanied by an affidavit setting forth the facts upon which recusal is based.

12. **Section 3000.9 Accelerated Determination.**

    a. **Motion to dismiss.** A motion to dismiss made by the Department would likely occur before the Department has put in an answer. A motion to dismiss would only be granted if the Petition is wholly without merit.

        i. **Grounds.** A party may move to dismiss a petition on the grounds that (i) a defense is founded on documentary evidence[20]; (ii) the division of tax appeals lacks subject matter jurisdiction; (iii) the petitioner lacks legal capacity to petition; (iv) there is an action pending between the same parties in another state or in federal court; (v) there has been a

[20] A defense based on documentary evidence means that the existence of certain evidence is a full defense.

discharge in bankruptcy, payment, release, or statute of limitations; (vi) the petition fails to state a cause for relief; (vii) the division of tax appeals lacks jurisdiction over the taxpayer; or (viii) the division of tax appeals should not proceed in the absence of a necessary person.

ii. **Procedure.** Either party may submit any evidence that could properly be considered on a motion for summary determination. Whether or not issue has been joined, the ALJ may treat the motion as a motion for summary determination. The ALJ may order an immediate hearing of the issues raised on the motion. Should it appear from affidavits submitted in opposition to a motion that facts essential to justify opposition may exist but cannot then be stated, the ALJ may deny the motion, allowing the moving party to assert the objection in his or her responsive pleading.

iii. **Review.** A determination of an ALJ denying the motion to dismiss is not subject to review by the Tax Appeals Tribunal.

iv. **Notice of intent to dismiss petition.** The supervising ALJ on his or her own motion may, upon notice to the parties, issue a determination dismissing the petition on the grounds that (i) the division of tax appeals lacks subject matter jurisdiction or (ii) the division of tax appeals lacks jurisdiction over the taxpayer. The notice of intent to dismiss shall inform the parties of the facts and the reasons providing the basis for the intended dismissal. The notice of intent to dismiss shall also provide the parties with thirty days to submit written comments on the proposed dismissal.

v. **Motion to dismiss exception.** Any party may move to dismiss an exception on the ground that the exception was not filed within 30 days of the issuance of the ALJ determination as provided for in Tax Law section 2006(7).

b. **Motion for summary determination. A** motion for summary determination is appropriate after issue has been joined if there are no triable issues of fact. Such motions are usually not granted since it deprives the movant of its "day in court." The motion must be supported by an affidavit, by a copy of the

pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion will be granted if there is no triable issue of fact and therefore as a matter of law, a determination in favor of either party may be granted. Where it appears that the non-moving party is entitled to a summary determination, the ALJ may grant such determination without the necessity of a cross-motion. A determination of an ALJ denying the motion for summary determination is not subject to review by the tribunal.

i. **Risk:** There are several risks in making a motion for summary determination. First, the department might cross-move for summary judgment; and second, forcing the ALJ to weigh the merits of a case before a hearing is probably inadvisable unless the motion has a reasonably strong chance of succeeding. However, as noted, a motion for summary determination may be an excellent means of achieving discovery not otherwise allowed in the Rules. One must weigh the risks versus the benefits in making such a motion.

c. **Application of CPLR.** Where not otherwise in conflict with the Rules, a motion to dismiss shall be subject to the same provisions as motions filed pursuant to CPLR §3211 and a motion for summary determination filed shall be subject to the same provisions as motions filed pursuant to CPLR §3212.

13. Section 3000.10 Ex Parte Communications

a. **Administrative law judges and presiding officers.** All litigants and representatives have access to ALJs and presiding officers on an equal basis. Parties may not communicate in writing with an ALJ or presiding officer unless a copy is promptly delivered to the opposing representative or, if none, to the opposing party. Nor shall any party directly or indirectly communicate orally with the ALJ or presiding officer without providing prior notice to the opposing representative or, if none, to the opposing party.

b. **Tax Appeals Tribunal.** All litigants and representatives have access to the tax appeals tribunal on an equal basis. No party shall communicate directly either in writing or orally with a member of the tribunal in connection with any case

before the tribunal. Access to the tribunal shall be through the office of the secretary to the tax appeals tribunal. No party shall communicate in writing with the office of the secretary to the tax appeals tribunal in connection with any aspect of a case unless a copy of such communication is promptly delivered to the opposing representative or, if none, to the opposing party.

14. Section 3000.11 Stipulations For Hearing.

a. General. Parties are required to stipulate to the fullest extent to which complete or qualified agreement can or should be reached all relevant facts that are not privileged. Where the truth or authenticity of facts or evidence is not disputed, an objection on the ground of relevance may be made but does not justify refusal to stipulate.

b. Form. Stipulations must be in writing signed by the parties or their representative, and must be filed with the supervising ALJ. Documents or other papers, which are the subject of stipulation in any respect and which the parties intend to place before the division of tax appeals, shall be annexed to or filed with the stipulation. The stipulation shall be clear and concise. Executed stipulations and related exhibits shall be filed by the parties with the supervising ALJ at or before the hearing. Once filed, a stipulation need not be offered formally to be considered in evidence.

c. Objections. While objections should be noted in the stipulation, the ALJ will nevertheless consider any objection to a stipulated matter made at the commencement of the hearing, or for good cause during the hearing.

d. Binding effect. A stipulation shall be treated as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the tribunal, ALJ, or agreement of the parties. A stipulation may not be changed or contradicted in whole or in part, except where justice requires.

e. Noncompliance by a party.

i. Motion to compel stipulation. If a party has refused to confer with his or her adversary with respect to entering into a stipulation in accordance with this section, the party proposing to stipulate may,

within 90 days of service of the proposed stipulation, make a motion to the tribunal, on notice to the other party, for an order directing that the matters covered in the motion be deemed admitted for the purposes of the hearing.

ii. **Procedure.** Within 20 days of service of the notice of the motion, that party shall file a response with the supervising ALJ with proof of service on the other party showing why the matter set forth in the motion papers should not be deemed admitted for purposes of the pending controversy.

15. **Section 3000.12 Submission without hearing.** The parties may consent to have the controversy determined on submission without need for appearance at a hearing. Following such consent, the ALJ will establish a schedule for submission of all documentary evidence, including any stipulation entered into by the parties. The office of counsel shall submit to the ALJ and to the opposing party all documentary evidence relevant to the issues in accordance with the schedule established. The petitioner may submit additional documents in support of the petition. The petitioner shall provide the office of counsel with copies of any such documentary evidence submitted. The parties may submit briefs within the period of time prescribed by the ALJ. The parties may also submit proposed findings of fact and conclusions of law within such time period.

16. **Section 3000.13 Small claims hearings.**

a. **General.** The petition may request a hearing in the small claims unit if the amount in controversy does not exceed $20,000 for any 12-month period in question. Small claims hearings are adversarial and are conducted by an impartial presiding officer.

b. **Pleadings; applicable sections; notice.** The only pleadings to be served by the parties are a petition by the petitioner and an answer by the office of counsel The parties may file briefs, additional documents or other material in support of their pleadings. After the petition and answer have been served or the time for serving an answer has expired, the controversy shall be deemed at issue and the small claims unit shall schedule the hearing.

c. **Conduct of Hearing.** The small claims hearing shall be conducted by a presiding officer with the same authority accorded an ALJ. The small claims hearing shall be conducted so as to do substantial justice between the parties according to the rules of substantive and administrative law. The hearing shall be conducted as informally. Any evidence which the presiding officer considers necessary or desirable for a just and equitable determination will be received, except that effect shall be given to the rules of privilege recognized by law. The burden of proof shall be upon the petitioner unless otherwise provided under the law.

d. **Transfer to Administrative Law Judge.** At any time before the conclusion of a small claims hearing, the petitioner may seek transfer of the proceeding to an ALJ. Such discontinuance will be without prejudice to any proceeding before the ALJ. After the small claims hearing, the presiding officer will render a determination containing findings of fact and conclusions of law. The determination will be rendered within three months after completion of the hearing, or the submission of briefs, if later.

17. **Section 3000.14 Hearing Memorandum.** Each party shall submit a hearing memorandum and all attachments to the supervising ALJ with copies to the opposing party at least 10 days before the hearing. The memorandum must contain (1) a list of all witnesses to be called to testify and a brief summary of their anticipated testimony; (2) a list of all exhibits to be introduced at hearing; (3) a brief statement of contested issues; and (4) a statement of the legal authorities relied on. Upon a finding that a party has failed to make a good faith effort to comply, the ALJ may preclude the testimony of witnesses or introduction of evidence not included in the hearing memorandum. Documents and testimony introduced only for purposes of rebuttal or to impeach a witness may be allowed without inclusion in the hearing memorandum.

18. **Section 3000.15 Hearings Before Administrative Law Judges.**

a. **Notice.** After issue is joined,[21] the ALJ shall schedule a hearing. The parties shall be given at least 30 days' notice of the first hearing date, and at least 10

[21] Issue is joined when the initial pleadings have been made.

days' notice of any adjourned or continued hearing date. A request by any party for a preference in scheduling will be honored to the extent possible. At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted for good cause.

b. Administrative law judge. The hearing shall be conducted by an impartial ALJ who is authorized to (1) administer oaths and affirmations; (2) sign and issue subpoenas; (3) regulate the course of the hearings and fix the time for filing legal memoranda and other documents; (4) rule on questions of evidence; and (5) render determinations after hearings.

c. Conduct of hearing.

i. Witnesses and Testimony. At the hearing, the parties may call and examine witnesses, introduce exhibits, cross examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in direct examination, impeach any witness regardless of which party first called the witness to testify, and rebut the evidence against them. The office of counsel shall introduce a copy of each statutory notice at issue or satisfactory evidence of its issuance. Affidavits as to relevant facts may be received for whatever value they may have, in lieu of the oral testimony of the persons making such affidavits. Technical rules of evidence will be disregarded provided the evidence offered appears to be relevant and material to the issues. However, effect shall be given to the rules of privilege recognized by law.

ii. Subpoenas. If a party refuses or fails without reasonable cause to obey any subpoena or subpoena duces tecum issued, the ALJ shall have the power to preclude the noncomplying party from introducing any proofs concerning such witnesses, documents or things, or from introducing them in evidence and may draw the inference that the precluded evidence is unfavorable to the noncomplying party's position. The burden of proof shall be upon the petitioner except as otherwise provided by law.

iii. **Submission of Briefs.** After the parties have completed the submission of the evidence, they may orally argue the applicability of the law to the facts. If the parties also wish to submit briefs,[22] they may do so within the time restrictions fixed by the ALJ. Each party shall serve a copy on the other party. The parties may also submit proposed findings of fact and conclusions of law.[23]The proposed findings of fact shall refer, wherever possible, to the relevant pages of the transcript of hearing and exhibits. The hearing will be stenographically reported. A transcript thereof will be made available for examination at the offices of the division of tax appeals in Albany, or may be purchased. Corrections shall be made a part of the record.

d. Determination. The ALJ shall review the evidence and render a determination containing findings of fact and conclusions of law within six months after completion of the hearing or the submission of briefs, whichever is later. The ALJ may extend such six month period for good cause shown, to no more than an additional three months.[24] The division of tax appeals will serve a copy of the determination on the petitioner, the petitioner's representative, and the office of counsel.

i. After hearing, the ALJ will render a decision in the form of a determination that either sustains the deficiency or cancels it. Either party may take an "exception" to the Tax Appeals Tribunal within 30 days. Three Commissioners sit at the Tax Appeals Tribunal.[25] Like an appellate court, the Tax Appeals Tribunal reviews the record but takes no evidence. Unlike an appellate court, the Tribunal need not defer to the judgment of the ALJ; it may substitute its own judgment if it

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22 Wegman, Division of Tax Appeals, Determination, page 1

23 *Wegman*, Division of Tax Appeals, Determination, pages 12-16

24 See *Wegman*, Division of Tax Appeals, Determination, page 1.

25 The review of a decision of the Tax Appeals Tribunal the exclusive remedy available for the judicial determination of a tax liability under article 28 of the Tax Law and local laws administered by the Department of Taxation and Finance pursuant to article 29 of the Tax Law.

believes that the ALJ decided the matter incorrectly. Until recently, only the taxpayer could appeal a determination by the Tax Appeals Tribunal to the Appellate Division. In 2023, the statute was amended to permit the Commissioner to appeal an adverse decision of the Tax Appeals Tribunal in some cases involving constitutional issues.

ii. **Effect of determination.** The determination of the ALJ shall finally decide the controversy unless a party takes exception by timely requesting review by the tax appeals tribunal. Determinations of ALJ are not considered precedent, nor are they given any force or effect in other proceedings in the division of tax appeals.

19. Section 3000.16 Motions to Reopen Record or For Reargument

a. **Determinations.** An ALJ may, upon motion of a party, issue an order vacating a determination rendered by such ALJ upon the grounds of (1) newly discovered evidence which, if introduced into the record, would probably have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding, or (2) fraud, misrepresentation, or other misconduct of an opposing party.

b. **Procedure.** A motion to reopen the record or for reargument, with or without a new hearing, shall be made to the ALJ who rendered the determination within thirty days after the determination has been served. A timely motion to reopen or reargue shall not extend the time limit for taking an exception to such determination; however, upon application for an extension of time to file an exception, "good cause" shall be deemed to include the timely filing of a motion to reopen the record or reargue. An ALJ shall have no power to grant a motion made pursuant to this section after the filing of an exception with the tax appeals tribunal.

c. **Decisions.** A motion for reargument shall be made to the tribunal and served upon the office of the secretary to the tribunal within four months after the decision has been served. The tribunal shall have no power to grant a motion made pursuant to this section after a petition for judicial review has been commenced as provided by section 2016 of the Tax Law.

20. Section 3000.17. Review by Tax Appeals Tribunal

a. **Filing of Exception.** Within 30 days of notice of the determination of the ALJ, any party may take exception by filing such exception to the tax appeals tribunal. A copy of the exception shall be served on the other party at the same time. When the division of taxation is the other party, service shall be made on the office of counsel. The tribunal may extend the 30-day period for filing an exception, provided an application for extension is filed within such period, served on the other party, and is made for good cause. "Good cause" depends on the circumstances of each case but would include any cause which appears to an ordinarily prudent person as a reasonable ground for failure to file within the prescribed period.

b. **Form of Exception; Briefs.** The exception shall contain: (i) the particular findings of fact and conclusions of law with which the party disagrees; (ii) the grounds of the exception with references, wherever possible, to the relevant pages of the transcript of hearing and exhibits; and (iii) alternative findings of fact and conclusions of law. A brief in support of the exception may be submitted at the time the exception is filed or within 30 days thereafter. The party taking exception shall serve a copy of the brief in support on the other party. Within 30 days after service of the brief in support, the other party may submit a brief in opposition and shall serve a copy on the party taking exception.

c. **Transmittal of record.** Whenever an exception to an ALJ determination is filed, the supervising ALJ shall transmit to the secretary of the tax appeals tribunal the record of the hearing before the ALJ.

d. **Oral argument.** A party taking exception may request oral argument. Within the time allowed for submitting a brief in opposition, the other party may request, in writing, an opportunity for oral argument. Failure to make such a request in writing within the prescribed time period shall be deemed a waiver of oral argument. The tribunal may grant, deny or limit any request for oral argument. The secretary will advise the parties of the time and place at which oral argument will be heard. A request for postponement of the argument must

be made in writing at least 15 days in advance of the date fixed for argument.

e. **Decision.** After reviewing the record of the hearing and any arguments, oral or by brief, the Tribunal issues a written decision affirming, reversing or modifying the determination of the ALJ, or remanding the case for additional proceedings. Each decision of the Tribunal sets forth the issues in the case, the relevant facts established by the parties at hearing and the Tribunal's opinion, which applies applicable law to such facts. Each decision must be rendered within six months from the date of notice to the Tribunal that exception is being taken to the determination of the ALJ. This period is extended if oral or written argument is made before the Tribunal. In cases where oral arguments are requested and granted, they are typically held in Albany and New York City. Additionally, post-COVID, parties are also given the option of having their oral arguments conducted via teleconference. The tribunal shall review the record and shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the determination. Taxpayers may appeal the Tribunal's decision by commencing an Article 78 proceeding in the Appellate Division, Third Department within four months of the determination.

f. **Appeal by Division of Taxation.** *Effective May 3, 2023, Tax Law § 2016 was amended to allow the Division of Taxation, in consultation with the Attorney General, to appeal Tribunal decisions that are premised on interpretation of the state or federal constitution, international law, federal law, the law of other states, or other legal matters that are beyond the purview of the state legislature.*

21. Section 3000.18 Expedited hearings

a. **Hearing preference.** Whenever a petition is filed protesting a statutory notice which advises a person of the denial of such person's application for a license, permit, registration or certificate of authority or which advises a person of an increase in the amount of a bond or other security required to be filed, an expedited hearing shall be granted. Within 10 business days of the receipt of the petition for an expedited hearing (determined with regard to any postponement of any scheduled hearing or other delay made at the request of the petitioner), a hearing will be scheduled at an office of the division of tax

appeals in Albany or New York City, or at a convenient office of the division of taxation as determined by the supervising administrative law judge.

b. **Determinations and decisions.** The administrative law judge or presiding officer shall render a determination within 30 days from the date of the petition for the expedited hearing. Where exception is taken to an administrative law judge's determination, the tribunal shall issue its decision within 3 months from the date of the petition for the expedited hearing.

22. **Section 3019. Record of Hearing.** Within a reasonable period of time after a determination of an ALJ, or where exception is taken after a decision of the tribunal, a petitioner may obtain a copy of the record consisting of (1) all notices, pleadings, motions and intermediate rulings; (2) a transcript of the hearing, if any; (3) copies of all exhibits or, where the parties consented to have the controversy determined on submission without hearing, the documents submitted to the administrative law judge pursuant to section 3000.8(b) of this Part; (4) a transcript of oral argument before the tribunal, if any; (5) the determination of the administrative law judge and exceptions thereto, if any; and (6) the decision of the tribunal where exception was taken to the determination of the administrative law judge.

23. **Section 3000.20 Judicial review.** A decision of the tribunal shall irrevocably decide all the issues which were raised in the proceeding, unless within four months after the issuance of such decision by the tribunal and the giving of notice of such decision to the parties, the petitioner applies for judicial review in the manner provided by article seventy-eight of the civil practice law and rules. The tribunal may, in its discretion, certify to such appellate division questions of law involved in its decision.

24. **Section 3000.21 Frivolous petitions.** If a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the tribunal may, on its own motion or on the motion of the office of counsel, impose a penalty against such petitioner of not more than $500.

25. **Section 3000.22 Service and filing of documents.**

a. **Date of filing.** If any document required within a prescribed period or on or before a prescribed date under the Tax Law is, after such period or date, delivered by United States mail to the New York State Division of Tax

Appeals or Tax Appeals Tribunal, Agency Building1, Empire State Plaza, Albany, NY 12223, the date of the United States postmark stamped on the envelope or other appropriate wrapper in which such document is contained will be deemed to be the date of filing. Where delivery is made by courier, delivery, messenger or similar services, the date of delivery will be deemed to be the date of filing.

b. **Mailing requirements.** Any document required to be filed under this Part will not be considered to be timely mailed or timely filed unless the document is (i) contained in an envelope or other appropriate wrapper and properly addressed to: State of New York, Division of Tax Appeals or Tax Appeals Tribunal, Agency Building1, Empire State Plaza, Albany, NY 12223; (ii) the envelope containing the document must be deposited in the mail of the United States within the prescribed period or on or before the prescribed date with sufficient postage prepaid.

c. **Assumption of Risk.** The sender assumes the risk that the envelope containing the document will bear a postmark date stamped by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (but see subdivision (c) with respect to the use of registered mail or certified mail to avoid this risk). Furthermore, if the postmark made by the United States Postal Service on the envelope or wrapper containing the document is not legible, the person who is required to file the document has the burden of proving when the postmark was made.

d. **Postmarks not made by the United States Postal Service.** If the postmark on the envelope or wrapper containing the document is made by other than the United States Postal Service (i.e. office metered mail):(i) the postmark so made must bear a date which falls within the prescribed period or on or before the prescribed date for filing the document (including any extension of time granted for filing the document); and (ii) the document must be received by the New York State Division of Tax Appeals or Tax Appeals Tribunal, Agency Building1, Empire State Plaza, Albany, NY 12223, not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for

filing (including any extension of time granted for filing the document).

e. **Registered and certified mailing.** If an envelope or wrapper containing a document is sent by United States registered mail, the date of such registration is treated as the postmark date and the date of filing. If an envelope or wrapper containing a document is sent by United States certified mail and the sender's receipt is postmarked by the postal employee to whom such envelope is presented, the date of the postmark on such receipt is treated as the postmark date of the document and the date of filing.

f. **Document defined.** The term "document" means any Exception to Administrative Law Judge's Determination, Petition or other document required to be filed under the authority of any provision of the Tax Law.

g. **Filing.** Filing of all pleadings, motions, exceptions and other papers with the division of tax appeals or the tribunal pursuant to this Part shall be made by either delivery during business hours to its Albany offices or by mail properly addressed to New York State Division of Tax Appeals or Tax Appeals Tribunal, Agency Building1, Empire State Plaza, Albany, NY 12223.

h. **Service.** Service of all motions, exceptions and other papers on the office of counsel of the division of taxation pursuant to this Part shall be made by either delivery during business hours to its Albany offices or by mail properly addressed to the appropriate person at the Office of Counsel, Division of Taxation, Building 9, W.A. Harriman Campus, Albany, NY 12227.

26. Miscellaneous provisions.

a. **Service by Administrative Tribunals.** Service of decisions, determinations and orders of the tribunal, administrative law judges and presiding officers shall be made by registered and certified mail, and service shall be complete upon the deposit of the appropriate document, enclosed in a post-paid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States postal service.

b. **Extension of time.** The tribunal, administrative law judges or presiding officers may, on its or their own motion, or on the motion of any party, order

a continuance, extension of time or adjournment for good cause, provided no statutory prohibition exists. Notice of any such order shall be given to all parties. Where the dates for filing briefs are fixed, an extension of time for filing a brief shall correspondingly extend the time for filing any other brief due at the same time and for filing succeeding briefs, unless the tribunal, administrative law judge or presiding officer shall order otherwise.

c. **Resolution of controversies.** The provisions of Part 4000 are not to be construed as the sole opportunity for resolution of a controversy other than by decision of the tribunal or determination of an administrative law judge or presiding officer. The petitioner and the petitioner's representative, if any, and the office of counsel are encouraged to confer at all times prior to the decision or determination in an effort to resolve the controversy.

d. **Availability of decisions and determinations.** All decisions of the tribunal and determinations of the administrative law judge shall be available for public inspection pursuant to the provisions of Part 800 of this Title. A request for a copy of a decision or determination shall be made to:

Records Access Officer
Department of Taxation and Finance
Building 9, Room 211,
W. A. Harriman Campus
Albany, New York 12227

A copy will be furnished at a cost of 25 cents a page.

e. **Availability of rules.** This Part shall be generally available to the public and copies shall be obtainable at all offices of the division of tax appeals and all district offices of the department.

27. **Publication of Tribunal Decisions and ALJ Determinations.** Tax Law § 2006 (9) requires the Tribunal to publish and make available to the public all determinations rendered by Administrative Law Judges and all decisions rendered by the Tribunal. The Tribunal may charge a reasonable fee for a copy of such determinations or decisions. Accordingly, all decisions and determinations are available at no cost on

the agency's website at www.dta.ny.gov. The Tribunal also provides copies of individual decisions and determinations upon request. The Tribunal posts on its website a monthly docket, which indicates ALJ determinations and Tribunal decisions issued for the month, as well as exceptions filed to Administrative Law Judge determinations and Article 78 proceedings instituted by taxpayers to review Tribunal decisions.

CPLR ARTICLE 78 PROCEEDINGS

28. Article 78 Proceedings. A decision of the Tax Appeals Tribunal finally decides the matter in dispute unless the taxpayer initiates an Article 78 proceeding to review the determination of a "state body" (i.e., Commission of Taxation and Finance), pursuant to Tax Law §2016 and CPLR §7804. Article 78 review must be commenced within four months of an adverse determination[26] by the Tax Appeals Tribunal. The proceeding brings the tax dispute out of administrative tribunals and into the court system. Although Article 78 is a "reward" to the taxpayer for having exhausted administrative remedies, from both a procedural and substantive standpoint, Article 78 is far from ideal. It possesses a treacherous statute of limitations – 120 days – and it is inherently incapable of providing relief unless the determination is "arbitrary and capricious" or lacks a "rational basis." Onerous bonding requirements apply in sales tax disputes. Moreover, the Department may continue assessment and collection efforts during the pendency of an Article 78 proceeding. Another new development affects only those taxpayers whose claim was meritorious enough to prevail in the administrative tax tribunals: In 2023, the Commissioner was accorded jurisdiction to appeal some adverse determinations rendered by the Tax Appeals Tribunal in matters involving federal or state constitutional issues, or issues involving the laws of other

[26] What exactly constitutes a "determination" for purposes of Article 78 purposes has spawned a voluminous amount of litigation in other areas of the law. For purposes of Tax Law §2016 and CPLR §7804, the date of the determination is embedded in the statute. Controversies do arise however where the dispute involves whether the petitioner has timely filed the petition. Since the date of the determination is not when the taxpayer receives notice thereof, but rather the date when the Tax Appeals Tribunal served the papers. Strict filing and service of process requirements imposed by the statute have also been ripe areas for dispute, and to the taxpayer's occasional chagrin, dismissal of the petition.

states.

Still, despite these shortcomings, Article 78 offers a ray of hope to those taxpayers who, despite being defeated in the administrative tribunals, are intrepid enough to seek appellate review, where they may endeavor to show the Tax Appeals Tribunal committed reversible error in lending its imprimatur to actions taken by the department of taxation that were arbitrary and capricious.

a. Article 78 Petition. An Article 78 petition is returnable to the Appellate Division, 3rd Department, in Albany. The scope of review in an Article 78 proceeding is limited to determining the following questions:

   i. Whether the agency *failed to perform a duty required by law* or
   ii. Whether the agency *exceeded its jurisdiction*; or
   iii. Whether the determination was made in *violation of lawful procedure* or was affected by an error; ***or was arbitrary and capricious or an abuse of discretion***; or
   iv. Whether the determination was *supported by substantial evidence.*

b. Undertaking in Sales and Use Tax Matters. In sales or use tax determinations, a taxpayer must deposit the disputed tax, penalty and interest to ensure that the state will be compensated if the taxpayer loses the Article 78 proceeding. Alternatively, the taxpayer may obtain and file with the Department an undertaking issued by a surety company authorized to transact business in New York in such amount as a justice of the Supreme Court approves to the effect that if the proceeding is dismissed or the tax confirmed the petitioner will pay all costs and changes that may accrue in the prosecution of the proceeding. The taxpayer must deposit the disputed tax, penalty, and interest, or post an undertaking.[27]

c. Income Tax May Be Assessed During Proceeding. Although a bond is not

[27] No undertaking is required to seek review of personal income and corporate franchise tax determinations, including responsible person determinations; however, assessment and collection of these taxes may proceed during the pendency of an Article 78 proceeding.

required in order to initiate an Article 78 proceeding based upon deficiency relating to income tax, the Department may nevertheless assess and collect a deficiency during the pendency of such a proceeding. If the Department decides to assess tax during the proceeding, the taxpayer must either pay the deficiency or file a bond (a letter of credit may also be acceptable to the Department) pending ultimate disposition of the case.

d. **Four Month Period to Commence Article 78 Proceeding**. CPLR §217 provides that an Article 78 proceeding must be commenced within four months after notice of the final determination "is served by the tax appeals tribunal." Service by the taxpayer upon every party to the proceeding must be made by certified mail or personal service. Tax Law §2016 provides that "service by certified mail shall be complete upon deposit of such notice . . . in a post office." Therefore, the four month period commences before the taxpayer receives the notice. The Department keeps meticulous records. The Article 78 petition will be subject to a motion to dismiss if commenced even a day late.

e. **Tax Appeals Tribunal Must Be Served With Petition.** One might presume that only the Department of Taxation need be served with an Article 78 petition. This presumption would be incorrect: Tax Law § 2016 provides that "[t]he petitioner shall designate the tax appeals tribunal and the commissioner of taxation and finance as respondents in the proceeding for judicial review."[28] Section 2016 continues, providing that "[i]n all other respects the provisions and standards of article seventy-eight of the [CPLR] shall apply." After such service is complete, proof of such service must be filed with the Appellate Division "not later than 15 days after the date on which the [four-month] statute of limitations expires."[29] CPLR § 306(b).

f. **Service on Attorney General Also Required.** CPLR §7804(c) provides that "notice of petition must be served upon the attorney general by delivery of

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[28] The Tax Appeals Tribunal does not, however, participate in the proceeding.

[29] CPLR § 306(b).

such order or notice to an assistant attorney general." *Therefore, the Department of Taxation, the Tax Appeals Tribunal and the Attorney General must all be served in an Article 78 proceeding.*

i. **Personal Service Required on Attorney General.** One might also presume that since the Tax Appeals Tribunal was only required to serve the taxpayer with its determination by certified mail, the taxpayer could similarly commence an Article 78 proceeding by serving the three required recipients by certified mail. This is not the case: Although CPLR §307(2) does provide that personal service may be effected upon a state agency (i.e., Department of Taxation and Tax Appeals Tribunal) by certified mail, §307(1) appears to require personal delivery by a process server upon the Attorney General.

ii. **Requirements For Envelope Containing Petition.** Additionally, one more trap awaits the unwary regarding service of process by certified mail: CPLR §307(2) provides that such service is not effective unless "the front of the envelope bears the legend "URGENT LEGAL MAIL." The purpose of this legend may relate to the short time period in which the respondents must answer the petition. Given the tangle of statutory provisions governing service, it would appear far preferable to serve all parties personally by process server, rather than to serve by certified mail and hope that all statutory requirements have been met.

g. **Commencement of Proceeding.** An Article 78 proceeding is commenced by service of a Notice of Petition and Petition upon the parties described above made returnable to the Appellate Division, 3rd Department, on at least 20 days' notice. At least five days before the return date of the Petition, the Commissioner must appear by serving an answer, or otherwise moving to dismiss.[30] Proof of service of a hard copy of the notice of petition and petition on each respondent must be filed not later than 15 days after the applicable statute of limitations has expired.[31]

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30 CPLR §7804(c).

31 N.Y. Comp. Codes R. & Regs. Title 22 § 1250.13(b).

h. **Electronic Filing.** As of January 1, 2023, Article 78 petitions in the Third Department are subject to mandatory electronic filing (e-filing), with some exceptions. Specifically, the NYS Unified Court System's website states that all matters in the Third Judicial Department, including Article 78 petitions, are subject to mandatory e-filing, except for specific situations outlined in the rules.

i. **Items Included With Petition.** Pursuant to Tax Law § 2016, the taxpayer must include as part of the petition (1) the determination of the Administrative Law Judge (ALJ), (2) the decision of the Tax Appeals Tribunal, (3) the transcript of the hearing (if any) before the ALJ, and (4) any exhibit or document submitted into evidence at any stage in the proceeding. Judicial review of the agency determination is limited to a review of the record.

j. **Dismissal on Procedural Grounds.** Although it may seem unjust for a petition to be dismissed on procedural grounds, a body of case law has evolved which makes it virtually impossible for a court to entertain a petition that suffers from jurisdictional defects. The petition must be verified (CPLR §7804) and must comply with all provisions of the CPLR that govern pleadings. Thus, it must make factual allegations in separately numbered paragraphs and must state a legally cognizable cause of action. The Court of Appeals held in *Spodek v. New York State Com'r. of Taxation and Finance*, 628 N.Y.S.2d 256 (1995), that the commencement-by-filing provisions in CPLR §304 apply to proceedings originating in the Appellate Division. Thus, before service of the Article 78 petition on the required recipients, the Petition must be filed (and an index number purchased) from the Clerk of the Appellate Division.

k. **Standard of Review.** CPLR §7803 provides that the determination will be upheld if it is supported by "substantial evidence." In addition, the burden of proof is generally on the taxpayer to show that the agency determination was

arbitrary or capricious, or not supported by the evidence.[32] After submission of the record and brief, oral argument is scheduled. Taxpayer's counsel is generally allowed 15 minutes for oral argument. Approximately six weeks later, the Court will render a full opinion or memorandum decision. The prevailing party will then draft a proposed order for execution by the Appellate Division Clerk. After service of this order with Notice of Entry, the adverse party will then have 30 days in which to seek leave (permission) to appeal to the Court of Appeals. The Court of Appeals seldom grants leave to appeal in tax cases.

[32] This includes responsible person determinations made under the income and sales tax laws for corporate officers and employees.

THE WEGMANS DECISIONS

Matter of Wegmans, Division of Tax Appeals (2015) Sales Tax [Petition Denied]

Matter of Wegmans, Tax Appeals Tribunal (2016) [Exception Denied]

Wegmans v. Tax Appeals Tribunal, Appellate Division, (3rd Dept. (2017) [Determination Annulled; Petition Granted]

Wegmans v. Tax Appeals Tribunal, Court of Appeals (2019) [Appellate Division Reversed, Determination Confirmed, Petition Dismissed]

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29. *Matter of Wegmans Food Markets Inc., Division of Tax Appeals (2015)*

In the *Matter of the Petition of Wegmans Food Markets, Inc.*, for Revision of a Determination or Refund of Sales and Use Taxes.

a. Division of Tax Appeals Determination DTA No. 825347

b. Issue: Whether petitioner's purchases of pricing information were personal or individual in nature making them eligible for the exclusion from tax under Tax Law §1105(c(1).

c. Petitioner's Proposed Findings of Fact (paragraphs 1-44).

i. Paragraphs 1-26: Wegmans was a grocery store chain operating in several states with 50 locations in New York. During the audit period, Wegmans purchased "competitive price audits" from RetailData Services (Retail Data) to reveal how its competitors priced items. Wegmans provided a "pricing strategy" to Retail Data, based on Wegmans' goals and values. Petitioner submitted a list of 552 items specifically identifying items to be checked by Retail Data. RetailData conducted audits based on competitors' store locations provided by petitioner. Petitioner's request schedule was created, formatted and customized entirely by petitioner's pricing team according to its pricing

strategy. Confidentially was expected by both parties to the agreement. Although there was a remote possibility that the data collected by RetailData could be used in preparing CPA reports to other customers, given the tremendous variations in customer's orders, the number of permutations made it a practical impossibility for two reports to gather the same item information.

ii. **Paragraphs 27- 41:** Each customer's request was packaged into a "work component," and prices were gathered separately for each. Prices could be gathered either by permission of the store and scanning, or without permission, by taking a picture with a phone. RetailData only gathered information at the request of petitioner. Once RetailData collected the pricing information, it ran the information through a verification process, which utilized its own proprietary software. Once validated, petitioner could view the data in petitioner's "competitive pricing system for pricing analysts (COPSPA). COPSPA was a proprietary computer software program created by petitioner to examine pricing information in a way that allowed its pricing team to analyze the data and set store pricing.

iii. **Paragraphs 42-44:** The Division of Taxation conducted a field audit of petitioner's sales and use tax liability. A Statement of Proposed Audit Change, dated August 4, 2011, asserted tax due of $2.005 million. Subsequently, the Division issued a Notice of Determination indicating credits and payments made by petitioner left a balance of $0. Following a conciliation conference, the additional tax due was modified to $1.7 million, plus interest. The amount of tax determined on the purchases of information services was $227,270.

d. Summary of Parties' Positions:

i. **Position of Petitioner.** The purchases are excluded under Tax Law § 1105(c)(1) since the information is "personal and individual" in nature and could not be incorporated into reports to others. The information provided to RetailData was dictated by a schedule created by petitioner; and formatted based on unique and proprietary pricing strategies. The

information was not incorporated into reports furnished to others, nor was it collected from a common database. Rather, it was collected by physically traveling to a specific store. Finally, if there is any doubt whether petitioner qualifies for the exclusion under §1105(c)(1), the statute must be strictly construed in favor of the taxpayer.

ii. **Position of Division.** The exclusion in §1105(c)(1) is inapplicable. The purchase of information services was neither personal nor individual in nature and the information may have been substantially incorporated into reports furnished to others. The source of the information determines whether the information is personal or individual in nature, and the source of prices taken from store shelves was not personal in nature. The substantial incorporation requirement is a test of potentiality, where the critical examination focuses on whether the vendor may sell the same information to another customer.

e. Conclusions of Law.

i. Tax Law §1105(c)(1) provides that receipt from the sale of services of collecting, compiling or analyzing information of any kind is subject to tax, but not the furnishing of information that is personal or individual in nature and which is or may not be substantially incorporated into reports furnished to other persons. Regs 20 NYCRR 527.3 essentially restates the statute in similar terms.

ii. The issue is whether the pricing reports are within the exclusion provided for furnishing information that was personal or individual in nature and which was not or may not have been substantially incorporated in reports furnished to others. For the reasons stated below, the exclusion is inapplicable, even though the exclusion generally must be construed in favor of the taxpayer.

iii. Cases interpreting the two elements needed for the exclusion, i.e., that the services were personal in nature and not substantially incorporated into reports furnished to others have consistently scrutinized the provision of information generated from common databases. In *Matter*

of Town-Oller, even though the reports generated from a common database were customized, the services were not of a personal and individual character. In *Matter of Rich Products* held that even though the reports were customized, they derived from a single data repository. Data was culled from competitor's stores, and the reports contained general information. Petitioner's instructions did not transform the general information to something personal or individual in nature. In *Matter of Westwood Pharmaceuticals*, there was no common database, and the reports did not provide the same information to several subscribers.

RetailData's software may customize the report, but did nothing to make the pricing information any less general, less accessible or more confidential. The focus of the matter is that information transmitted in reports was general in nature, not confidential, and thus not personal or confidential in nature. Although petitioner argues that the information received from RetailData was personal and individual in nature, it began and ended with the prices of products on store shelves. Neither the marketing strategies nor the steps taken to protect them change the nature of the information in the reports. It is insufficient that the likelihood of a pricing report produced for another client would be de minimis or even mathmatically impossible is insufficient to demonstrate eligibility for the exclusion.

iv. **The petition of Wegmans Food Markets, Inc., is denied.**

v. **Dated:** Albany, New York, February 19, 2015
(1) /s/ Joseph W. Pinto, Jr. ALJ

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30. ***Matter of Wegmans Food Markets, Inc., Tax Appeals Tribunal* (2016)**

In the *Matter of the Petition of Wegmans Food Markets, Inc.*, for Revision of a Determination or Fund of Sales and Use Taxes.

a. Tax Appeals Tribunal; DTA No. 825347

b. Issue. Whether petitioner's purchases of pricing information were personal or individual in nature, making them eligible for an exclusion from tax on information services provided for in Tax Law § 1105(c)(1).

c. Findings of Fact. Restates Findings of Fact in Decision rendered by the Division of Tax Appeals with two minor clarifications.

d. The Determination of the Administrative Law Judge. The ALJ determined that the information services were not personal or individual in nature and were therefore subject to tax under §1105(c)(1). The information used by RetailData was culled from one general source that was widely available and not confidential. Customization by petitioner did not transform the general pricing information to information that was personal or individual in nature. The extreme unlikelihood that the information could be used by another client of RetailData was insufficient to affect eligibility for the exclusion.

e. Summary of Arguments on Exception.

i. Petitioner. The information gathered may have been general in nature, it was transformed when customized at petitioner's request. The reports were not substantially incorporated into reports furnished by RetailData to other customers. The process of compiling, interpreting, analyzing and verifying the collected data converts the data into new data that is personal and individual to petitioner. The pricing data that appears on supermarket shelves has little value because it has not been processed.

ii. Division. The information sold by RetailData was not personal or individual because it comes from a widely accessible public source. Customization of pricing information does not transform it into

something that is personal or individual.

f. **Opinion.** In another recent case involving *Matter of RetailData, LLC* the Tribunal determined that the information services that is the subject of the present matter was taxable under Tax Law §1105(c).(1). *Resolution requires that exclusions from taxation be strictly interpreted in the taxpayer's favor. Nevertheless, the burden of proof remains with petitioner as to entitlement of the exclusion.* The personal or individual component refers to uniquely personal information. *Matter of Allstate Ins. Co.* In contrast, confidential character reports based on personal interviews with applicants for life insurance are uniquely personal. There is nothing uniquely personal about the price of an item in a supermarket.

We reject petitioner's contention that customized requests for pricing data transformed the generalized pricing information on supermarket shelves into personal or individual information. The fact that reports are customized in some respects is not dispositive of entitlement to the exclusion. *Rich Prods. Corp.* The correct question to determine eligibility for the exclusion is whether the information is uniquely personal, not whether each report is the same. The process of customizing a report is insufficient to meet the personal or individual requirement. The process of formatting the report data so as to be readable by petitioner's computer software did nothing to make the pricing information any less general, less accessible or more confidential. The case is distinguishable from *Westwood Pharms*, where the information service provider converted raw data into new data using confidential analytic and statistical procedures.

Here, RetailData did not create any new information. The information provided by RetailData began and ended as the prices of products taken from store shelves. In this matter, the relevant information sits on supermarket shelves until compiled by RetailData. It does not differ significantly from *Matter of Allstate*, where data resided in the electronic records of the Department of Motor Vehicles until removed at the information service provider's request.

Our conclusion that the information provided was not personal or individual

in nature within the meaning of Tax Law §1105(c)(1) is sufficient to establish that the service at issue is taxable.

g. Ordered, Adjudged and Decreed that:

i. the exception of Wegmans Food Markets is denied;
ii. the determination of the Administrative Law Judge is affirmed;
iii. the petition of Wegmans Food Markets is denied; and
iv. the Notice of Determination dated August 25, 2011, is sustained.

(1) Dated: Albany, New York March 10, 2016

/s/ Roberta Moseley Nero, President
/s/ Charles H. Nesbitt, Commissioner
/s/s James H. Tully, Jr., Commissioner

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31. *Wegmans v. Tax Appeals Tribunal*, Appellate Division, 3rd Dept. 2017

65 N.Y.S.3d 296

In the Matter of WEGMANS FOOD MARKETS, INC.,

Petitioner,

v.

TAX APPEALS TRIBUNAL OF the STATE of New York et al.,

Respondents.

Supreme Court, Appellate Division, Third Department, New York.

Nov. 22, 2017.[*297]

Ward Greenberg Heller & Reidy LLP, Rochester (Jeffrey J. Harradine of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, Albany (Frederick A. Brodie of counsel), [*298] for Commissioner of Taxation and Finance, respondent.

Before: EGAN JR., J.P. DEVINE, CLARK, MULVEY and RUMSEY, JJ

EGAN JR., J.P.

a. CPLR Article 78 Jurisdiction. This proceeding is pursuant to CPLR Article 78 to review a determination of the Tax Appeals Tribunal denying petitioner's request for certain refunds of sales and use tax imposed under Tax Law Articles 28 and 29.

b. Introduction. Petitioner is a regional supermarket chain headquartered in Rochester, New York. As part of its business operations, petitioner monitors retail prices charged by competitors to competitively price its products. Since

1995, it has contracted with RetailData for the provision of competitive price audits (CPAs). Retail Data collects this raw data and compiles it into a report, according to specifications of petitioner.

c. **Procedural Posture of Case.** In 2011, the Department of Taxation and Finance audited petitioner's sales and use tax liability, and determined that petitioner owed $227,270.01 for the relevant time period. The petitioner sought a redetermination of its tax liability in a hearing before an ALJ. The ALJ determined that the CPAs produced by RetailData did not qualify under the statutory exemption, and sustained the Determination. Petitioner then filed an exception with the Tax Appeals Tribunal. Following a hearing, the Tax Appeals Tribunal sustained the determination of the ALJ. Petitioner then commenced this proceeding seeking to annul the Tribunal's determination.

i. **Appellate Court Review Limited.** As long as the tribunal's decision is rationally based, and supported by substantial evidence, it must be confirmed. Where statutory interpretation involves knowledge of underlying practices, courts are generally deferential to the governmental agency administering the statute. However, if the task is one of pure statutory interpretation, and discerning legislative intent, the expertise of the administrative agency is accorded much less weight. The burden is on the taxpayer to establish entitlement to the applicable exclusion. Where an exclusion, rather an exemption, is involved, the statute must be strictly construed in favor of the taxpayer.

ii. **Petitioner's Objections.** Petition contends that the Tribunal erred as a matter of law by determining that the purchase of pricing information from RetailData was not personal and individual in nature and therefore not subject to the exclusion.

iii. **Analysis.** The CPAs provided by RetailData qualify as an information service. The issue presented is whether the information is personal or individual in nature and is not or may not be substantially incorporated in reports furnished to other persons. Respondent Commissioner of Taxation and Finance argues that the raw data for the written reports consisted of pricing information obtained from shelves of

supermarkets, and that since the data was derived from a common source, it was not individual or personal in nature.

iv. **Information Not From a Common Data Source.** While the pricing information is available to the public, petitioner is correct that the information does not derive from a singular, widely accessible common source as that test has been applied. Based on its own unique and confidential pricing strategy, petitioner provided RetailData with the pricing information desired. Each individual location required auditing. Since prices were constantly in flux, there was no single common data repository from which RetailData could timely access the pricing information.

v. **Data Was Not Contained in a General Database.** Raw data collected was maintained in a separate work component for use in preparing a written report to petitioner. The information was not maintained in a general database that could be viewed or used by another customer. RetailData analyzed the information through its own proprietary software according to petitioner's specifications, and a written report was generated in a customized format pursuant to petitioner's specifications that was only compatible with petitioner's proprietary price management system. Therefore, the information was uniquely tailored was related exclusively to petitioner's confidential pricing strategy.

vi. **Record Supports Petitioner's Claim.** Based on the record, the information services purchased from RetailData were personal or individual in nature and were not substantially incorporated into reports of others. Therefore, the purchase of these information services should have been excluded from taxation. To expand the interpretation of Tax Law 1105(c)(1) so as to deny the exclusion simply because the information ultimately furnished derived from a common source, would defeat the purpose of the exclusion. Therefore, it is adjudged that the determination is annulled, and the petition granted.

vii. Devine, Clark, Mulvey and Rumsey, concur.

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32. *Wegmans v. Tax Appeals Tribunal*, Court of Appeals, 2019

33 N.Y.3d 587

In the Matter of WEGMANS FOOD MARKETS, INC.,

Respondent,

v.

TAX APPEALS TRIBUNAL OF the STATE of New York,
Respondent,Commissioner of Taxation and Finance of the State of New York,

Appellant.

Court of Appeals of New York.

Decided June 27, 2019

OPINION OF THE COURT

FEINMAN, J.

a. Introduction. Tax Law §1105(c)(1) imposes a sales tax on certain information services, but excludes the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to others. We hold that the Tax Appeals Tribunal rationally determined that the information services in issue were not excluded from the tax.

b. Tribunal Decision Sustaining ALJ Determination Reversed on Appeal. Following an evidentiary hearing, the ALJ denied the petition. The Tax Appeals Tribunal affirmed, concluding that the exclusion was inapplicable because the reports were culled from supermarket shelves, and although there was some customization of the information, that process did not render the

information personal or individual in nature. Given that determination, it was unnecessary for the Tribunal to consider the second requirement, i.e., whether the information may be substantially incorporated into reports furnished to other customers of RetailData. Wegmans then commenced this CPLR article 78 proceeding against the Tax Appeals Tribunal and the Commissioner of Taxation of the State of New York (the Commissioner) in the Appellate Division pursuant to Tax Law §2016, seeking a judgment annulling the Tribunal's determination.

The Appellate Division granted the petition and annulled the Tribunal's determination. Initially, the Court stated that any ambiguity where as here, an exclusion rather an exemption, is involved, the statute must be strictly construed in favor of the taxpayer. The Court found that although the information is available to the public, it does not derive from a common source or database as that test has been applied. The information furnished to Wegmans was uniquely tailored and was part of its confidential pricing strategy. Accordingly, the Court found that the information services were personal and individual in nature and were not substantially incorporated into the reports of others.

We granted leave to appeal from the Appellate Division judgment, and we now reverse.

c. **Ambiguities in Statutory Exclusions Not Interpreted Favor of Taxpayer.** The Appellate Division erroneously applied the law in differentiating exclusions from exemptions. No such differentiation exists. In general, a taxing statute is construed against the government and in favor of the citizen. *However, this principle is applicable only in determining whether a taxing statute applies. The rule is otherwise with respect to the taxpayer's right to exclude items from income.* Therefore, if it is determined that a taxing statute applies, the presumption is in favor of the government. In *Matter of Grace*, we concluded that the same rules apply to deductions and exemptions, because a deduction is functionally a particularized species of exemption. A statute providing for an exemption is construed against the taxpayer because an exemption is not a matter of right, but exists only as a matter of legislative grace. Still, the exemption should not be so narrow as to defeat its purpose.

d. A taxpayer has the burden to overcome tax assessments and to establish its entitlement to an exclusion from tax. *Matter of Grace; Matter of Colt.* In the sales context, in particular, it shall be presumed that the receipts of any time mentioned in Tax Law §1105© are subject to tax unless the contrary is established. If there are any reasonable facts or inferences to sustain it, the court must confirm the Tribunal's determination. Here, the determinative issue was whether the Tax Appeals Tribunal rationally determined that those information services were not excluded from sales tax. The Tribunal's determination that Wegmans failed to establish its entitlement to the statutory exclusion, because the information was not personal or individual in nature, was rational and should be confirmed.

The information RetailData compiled and the reports furnished to Wegmans derived from a non-confidential and widely-accessible source. Nothing about the information is personal or individual in nature. The Tribunal made that rational determination. It was reasonable for the Tribunal to determine that the customization by RealData of the publicly-available information collected from supermarket shelves into a report format did not render the information personal or individual in nature.

e. Accordingly, the Appellate Division judgment should be reversed, the Tribunal's determination confirmed, and the petition dismissed.

f. **STEIN, J. (Concurring).**

i. **Majority Rejects *Grace* With Respect to Exclusions.** The majority effectively overrules long-standing precedent set forth in *Grace*. The Tax Appeals Tribunal conceded that the resolution of this dispute is guided by a rule of construction that requires exclusions from taxation to be strictly interpreted in the taxpayer's favor. Nevertheless, the Commissioner rejects that rule of construction and argues that the *Court in Matter of Mobil Oil*, overruled *Grace* sub silentio and that the distinction between exclusions and exemptions has no force. However, the Commissioner's argument is contrary to both *Grace* and *Mobil Oil* that both the courts and the Tribunal have employed since the 1980's. While the argument advanced by the Commissioner is unsupported by law, the majority goes even farther, by denying that this distinction has ever existed. The majority's reading of *Grace* is untenable.

An erroneous statement appeared in *Mobil Oil* which deviated from long-standing precedent that advised where an exclusion rather than an exemption is involved, the statute must be strictly construed in favor of the taxpayer. A dissenting opinion in *Mobil* challenged the interpretation of an exclusion in favor of the government. That challenge was cited by the majority in *Fairland* which reiterated the long-standing rule providing for an exclusion in favor of the taxpayer. It thus appears that Wegmans' argument that the confounding language in *Mobil Oil* was a syntactical error, that was corrected in *Fairland.* Since the majority did not overrule *Mobil Oil* sub silentio, it clearly misread *Grace*, and the rule remains that in determining entitlement to a tax exclusion, tax statutes must be construed most strongly against the government and in favor of the citizen, but if a statute or regulation authorizing an exemption is found, it will be construed against the taxpayer.

ii. Reversal is nevertheless required since Wegmans bears the ultimate burden to show its entitlement to the exclusion. Moreover, the Tribunal's determination must be upheld unless it is shown to be irrational. Even if the ambiguity were correctly construed against the government, Wegmans failed to demonstrate that the Tribunal's interpretation was unreasonable. The information furnished cannot be considered personal or individual in nature. Since the statements by the majority concerning ambiguities in statutory exclusions was not necessary to decide the matter, the misguided attempt by the majority to resolve confusion that never existed, and the consequent deprivation to taxpayers of a protection they have long enjoyed, is of no legal force, being mere dicta.

g. **FAHEY, J. (dissenting).** The key question in this appeal involves the distinction between the interpretation of exemptions and exclusions from tax. For decades the Appellate Division has correctly held that an exclusion should be interpreted in favor of the taxpayer. I agree with the Appellate Division order in this case, and I adopt both its holding and its reasoning as my own.

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h. WILSON, J. (dissenting).

i. Must determine intention of legislature. Neither Tax Appeals Tribunal nor the appellate court has attempted to determine with the usual tools of statutory construction what the legislature meant by the words "personal or individual" in Tax Law § 1105(c)(1). Statute says nothing about the confidentiality or public availability of the information. The Appellate Division correctly held that to deny the exclusion solely because it was furnished from a public source would undermine the purpose of the exclusion. I agree, but the Appellate Division failed to conduct any real investigation into what the legislature meant by the words "personal or individual." The lower courts and Tax Appeals Tribunal relied on their own prior cases, cherry-picked to avoid others that are inconsistent. The majority fails to give effect to the intent of the legislature, pausing only to dispense pure obiter dicta denigrating a 40-year old principle of statutory interpretation distinguishing tax exemptions from tax exclusions.

Deference to the Tribunal is at its lowest where the question is one of pure statutory reading and analysis. To know whether deference is appropriate, we must know whether the Tax Appeal Tribunal's interpretation of the statute is rational or reasonable. Discusses "plain meaning" and cannons of construction. "Inquiry should be made into the spirit and purpose of the statute." We must use "all tools of the judicial trade to "accurately apprehend legislature intent." Courts should defer to an agency's statutory interpretation only after employing all of the tools of statutory interpretation. The majority skips past the legislature's intent. The majority concluded that the Tribunal acted rationally, but rationality is determined by reference to legislature's intent.

ii. Read alone, the text of the "personal and individual" exclusion is susceptible of several meanings. It could mean (i) the information must be personal or individual; or (ii) "the furnishing of information must be personal or individual." The phrase "and of a type that cannot be sold to a third party" can be construed in different ways. If "personal or

individual" refers *to the nature of the services provided*, the CPAs qualify for the exclusion." If the term refers to the source of the information provided, then the exclusion would not apply. The majority chooses the latter interpretation. It is the sale of the service of furnishing information by a business which is taxable under Tax Law §1105(c)(1). It would be "incongruous" to read the exclusion to concern the "personal or individual" character of the underlying information when the tax is imposed on the service provided to the client, not the underlying information.

iii. The legislative history makes the meaning of the personal or individual exclusion clear: it was meant to distinguish generic information services from customized ones. The New York City regulation, read in conjunction with the local law it was interpreting, makes clear that the "personal or individual" phrase was meant to broader the City's exclusion for "professional services." The understanding of the "personal or individual" exclusion from legislative history also comports with a commonsense interpretation of the statute, which is intended to exclude professional and consulting services.

iv. The Tax Tribunal's decision on whether the CPAs were subject to sales tax analyzed the facts using an approach "completely untethered" from the statutory language, when properly understood. The Tribunal examined the nature of the information (i.e., whether it was publicly available), rather than the nature of the information services (the i.e., delivery of a customized report). The Tribunal stated "there is nothing uniquely personal" about the price of an item in a supermarket and such information is obviously not confidential. However, what the Tribunal never considered was whether a service that collected those prices with specifications provided by a client, constituted the "furnishing of information" that was "personal and individual in nature and which is or may not be substantially incorporated into reports furnished to other persons." Each CPA was tailored to Wegman's precise requirements; the data generated was preserved solely for Wegman's use.

v. Since the Tribunal's determination was inconsistent with the governing statute, it requires no deference and must be annulled, even if, as the majority contends, one puts a thumb on the scale in favor of the

government when construing an exclusion. I agree with Judge Stein that the majority places undue emphasis on the exclusion/exemption distinction, although I disagree with her on the correct outcome of the case. The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the legislature. It is doubtful that the legislature intended to create a rule that taxpayers should lose whenever the language of a statute is unclear. That seems particularly true here, where the legislature sought to broaden an exclusion that had been previously intended to benefit only narrow classes of professional service providers. The legislature's meaning is not opaque if one uses the conventional tools of statutory interpretation. When such a procedure is followed, it becomes clear that the legislature was not concerned with the public nature of the information gathered by an information service provider or whether that information was transformed in some manner, but rather whether the report delivered was custom – personal or individual for the client – or generic -- sold or potentially sold to others.