NYS TAX APPEALS TRIBUNAL

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Tribunal Practice and Procedure Update

- What issue’s are hot?
- IFAQs

Analysis of Substantive Issues Reviewed

- Timeliness/RFCC

- ***Matter of Papaye Restaurant, Inc.***, Tax Appeals Tribunal, May, 12, 2016
- ***Matter of Rubinos***, Tax Appeals Tribunal, April 3, 2017
- ***Matter of Abdullah***, Tax Appeals Tribunal, April 14, 2017
- ***Matter of Tsoumas***, Tax Appeals Tribunal, June 15, 2017
- ***Matter of Kayumi***, Tax Appeals Tribunal, July 14, 2017
- ***Matter of Napier***, Tax Appeals Tribunal, September 28, 2017
- ***Matter of Townley***, Tax Appeals Tribunal, January 25, 2018
- ***Matter of Reuben***, Tax Appeals Tribunal, February 8, 2018 (New issue-last known address changed on OLS account)

Timeliness/Petition

- ***Matter of Ankh-Ka-Ra Sma-Ntr f/k/a Andre Williams***, Tax Appeals Tribunal, April 14, 2016
- ***Matter of DiScenza***, Tax Appeals Tribunal, May 19, 2016
- ***Matter of McAleese***, Tax Appeals Tribunal, June 30, 2016
- ***Matter of Kennedy Deli Restaurant Corporation***, Tax Appeals Tribunal, June 30, 2016 (DTA No. 826901)
- ***Matter of Kennedy Deli Restaurant Corporation***, Tax Appeals Tribunal, June 30, 2016 (DTA No. 826902)
- ***Matter of Balan***, Tax Appeals Tribunal, October 27, 2016
- ***Matter of Nwankpa***, Tax Appeals Tribunal, October 27, 2016
- ***Matter of Santora***, Tax Appeals Tribunal, November 23, 2016
- ***Matter of Campos-Liz***, Tax Appeals Tribunal, January 12, 2017
- ***Matter of DiScenza***, Tax Appeals Tribunal, February 16, 2017
- ***Matter of Garitta***, Tax Appeals Tribunal, February 21, 2017
- ***Matter of Wiesen***, Tax Appeals Tribunal, April 10, 2017
- ***Matter of Kennedy Deli Restaurant Corporation (DTA No. 826901)***, Tax Appeals Tribunal, May 11, 2017
- ***Matter of Kennedy Deli Restaurant Corporation (DTA No. 826902)***, Tax Appeals Tribunal, May 11, 2017
- ***Matter of Manthas***, Tax Appeals Tribunal, June 1, 2017
- ***Matter of Ahmed***, Tax Appeals Tribunal, June 29, 2017
- ***Matter of Mostovoi***, Tax Appeals Tribunal, August 10, 2017
- ***Matter of Feliciano***, Tax Appeals Tribunal, August 24, 2017
- ***Matter of Gilani***, Tax Appeals Tribunal, October 12, 2017
- ***Matter of Tuohy***, Tax Appeals Tribunal, November 22, 2017
- ***Matter of Quinn***, Tax Appeals Tribunal, November 22, 2017
- ***Matter of Shamim***, Tax Appeals Tribunal, January 11, 2018
- ***Matter of Uddin***, Tax Appeals Tribunal, January 18, 2018 ***Matter of Ahmed***, Tax Appeals Tribunal, April 10, 2018

Timeliness/Exception

- **Matter of Jake Restaurant Corporation**, Tax Appeals Tribunal, April 14, 2016
- ***Matter of Yeamans***, Tax Appeals Tribunal, September 28, 2016
- ***Matter of Rhoden***, Tax Appeals Tribunal, October 5, 2017
- ***Matter of Marthone***, Tax Appeals Tribunal, March 23, 2018

Personal Income Tax

- Itemized Deductions and Credits
  - ***Matter of Fleischer***, Tax Appeals Tribunal, December 16, 2016 (Legal Expenses)
  - ***Matter of Li***, Tax Appeals Tribunal, May 8, 2017 (Solar Energy Equipment Expenses)
  - ***Matter of Grimm***, Tax Appeals Tribunal, January 11, 2018 (Solar Energy Equipment Expenses)
- Subchapter S Flow-Through Income
  - ***Matter of Devesta-Owrutzky***, Tax Appeals Tribunal, December 16, 2016
  - ***Matter of Rubinos***, Tax Appeals Tribunal, February 1, 2018
- Domicile and Statutory Residency
  - ***Matter of Campaniello***, Tax Appeals Tribunal, July 21, 2016
  - ***Matter of Ruderman***, Tax Appeals Tribunal, June 15, 2017
  - ***Matter of Mays***, Tax Appeals Tribunal, December 21, 2017

Personal Income tax

- Tax Protester
  - ***Matter of Van Rossem***, Tax Appeals Tribunal, October 24, 2017
  - ***Matter of Clifton***, Tax Appeals Tribunal, January 4, 2018
- Abusive Tax Avoidance Transactions
  - ***Matter of Sznajderman***, Tax Appeals Tribunal, July 11, 2016
  - ***Matter of Rao***, Tax Appeals Tribunal, July 21, 2016 Personal Income Tax/Losses
  - ***Matter of Geringer***, Tax Appeals Tribunal, June 2, 2016
- Hobby or Activities Engaged in for Profit
  - ***Matter of Horn***, Tax Appeals Tribunal, April 20, 2017
- Professional Gambler
  - ***Matter of Kayata***, Tax Appeals Tribunal, December 21, 2017
- Nonresident Allocation of Income
  - ***Matter of Murphy***, Tax Appeals Tribunal, December 16

Personal Income Tax

- NYS Pension Income
  - ***Matter of Kane***, Tax Appeals Tribunal, December 21, 2016
- Requirement of Conducting an Audit
  - ***Matter of Mayo***, Tax Appeals Tribunal, March 9, 2017
- ERISA preemption
  - ***Matter of Murphy***, Tax Appeals Tribunal, March 6, 2018
- Withholding Tax/Responsible Person
  - ***Matter of Hopwood, Jr.***, Tax Appeals Tribunal, February 9, 2017
  - ***Matter of Cho***, Tax Appeals Tribunal, February 9, 2017

Sales Tax

- Estimated Audits
  - ***Matter of Laham***, Tax Appeals Tribunal, October 27, 2016
  - ***Matter of Edelweiss Catering, Inc.***, Tax Appeals Tribunal, December 16, 2016
  - ***Matter of Henry Street Deli Corporation***, Tax Appeals Tribunal, February 21, 2017
  - ***Matter of Majestic Deli Grocery, Inc. and Alamrani***, Tax Appeals Tribunal, April 14, 2017
- Responsible Person and Duty to Act
  - ***Matter of Johnson***, Tax Appeals Tribunal, October 12, 2017
  - ***Matter of Henrie***, Tax Appeals Tribunal, November 22, 2017
  - ***Matter of Silverstein***, Tax Appeals Tribunal, December 7, 2017
- Capital Improvements
  - ***Matter of Costabile, Costabile and Delponte***, Tax Appeals Tribunal, April 14, 2017
  - ***Matter of NW Sign Industries, Inc.***, Tax Appeals Tribunal, May 12, 2016

Sales Tax

- Adult Entertainment Venues, Admissions and Sales of Script
  - ***Matter of 677 New Loudon Corporation d/b/a Nite Moves***, Tax Appeals Tribunal, August 25, 2016
  - ***Matter of The Executive Club LLC***, Tax Appeals Tribunal, April 12, 2017
- Exemption for Utilities Used in the Production of TPP for Sale
  - ***Matter of Costco Wholesale Corporation***, Tax Appeals Tribunal, March 6, 2017
- Exemption for Medical Equipment or Prosthetic Devices
  - ***Matter of Titan Elevator & Lift LLC***, Tax Appeals Tribunal, September 11, 2017
- Sales Tax/Breakfasts Provided with Hotel Room
  - ***Matter of Washington Square Hotel LLC***, Tax Appeals Tribunal, July 19, 2006

Sales Tax

- Refund Requirement to Return Tax to Customers
  - ***Matter of Stamford Subaru LLC***, Tax Appeals Tribunal, November 23, 2016
- Accounting for Prior Volume Discount
  - ***Matter of Prima Asphalt Concrete, Inc.***, Tax Appeals Tribunal, February 9, 2017
- Failure to Prove Liability Less Than Signed Consent
  - ***Matter of RJB Slick's, Inc.***, Tax Appeals Tribunal, February 8, 2018
- Transfers of Title to Motor Vehicles Between Related Entities
  - ***Matter of CLM Associates***, Tax Appeals Tribunal, February 12, 2018

Franchise Taxes

- Taxation of Insurance Corporations/Violation of International Tax Treaty
  - ***Matter of Bayerische Beamtenkrankenkasse AG***, Tax Appeals Tribunal, September 11, 2017
  - ***Matter of Landschaftliche Brandkasee Hannover***, Tax Appeals Tribunal, September 11, 2017
- Premiums Paid to Captive Insurance Company
  - ***Matter of Stewart's Shops Corporation***, July 27, 2017
- Corporation Franchise/Requirement to File Combined Report
  - ***Matter of Whole Foods Market Group, Inc.***, September 11, 2017
- Franchise Tax on Banking Corporations/NOLs
  - ***Matter of TD Holdings II, Inc.***, Tax Appeals Tribunal, April 7, 2016

Penalties

- Fraud Assessment Without Proposed Assessment of Tax
  - ***Matter of Bautista***, Tax Appeals Tribunal, March 13, 2017
- Fraud Penalties
  - ***Matter of March***, Tax Appeals Tribunal, May 10, 2017
- Tax Preparer Penalties
  - ***Matter of Garcia***, Tax Appeals Tribunal, December 1, 2017

Miscellaneous

- Mortgage Recording Tax
  - ***Matter of Katz***, Tax Appeals Tribunal, September 29, 2016
- Empire Zones
  - ***Matter of Led Duke, et al.***, Tax Appeals Tribunal, May 12, 2016
  - ***Matter of Spiezio***, Tax Appeals Tribunal, July 19, 2016
  - ***Matter of Balbo***, Tax Appeals Tribunal, August 18, 2016
  - ***Matter of Cipolla***, Tax Appeals Tribunal, September 29, 2016
  - ***Matter of Purcell***, Tax Appeals Tribunal, November 14, 2016
  - ***Matter of Jones, Petrella and Swift***, Tax Appeals Tribunal, December 16, 2016

Miscellaneous

- Notice of Proposed Driver's License Suspension Referral
  - ***Matter of Jacobi***, Tax Appeals Tribunal, May, 12, 2016
  - ***Matter of DeMartino***, Tax Appeals Tribunal, December 16, 2016
  - **Matter of Jacobi**, Tax Appeals Tribunal, March 8, 2018
- Entitlement to a Hearing on a Notice and Demand
  - ***Matter of River Barrel, Inc.***, Tax Appeals Tribunal, August 18, 2016
  - ***Matter of Taveras Sister***, Tax Appeals Tribunal, March 20, 2018
  - ***Matter of Meltzer***, Tax Appeals Tribunal, March 29, 2018 (also timeliness issue)
- Retroactive Application of Tax Statute
  - ***Matter of NRG Energy***, Tax Appeals Tribunal, March 14, 2018

Miscellaneous

- Collateral Estoppel/Effect of Plea Bargain
  - ***Matter of Yerry***, Tax Appeals Tribunal, August 10, 2017
- Entitlement to a Conciliation Conference
  - ***Matter of Rattner***, Tax Appeals Tribunal, March 6, 2017
- Entitlement to a Hearing on a Notice of Additional Tax Due
  - ***Matter of Rodriguez***, Tax Appeals Tribunal, March 20, 2017
- Sufficiency of Division's Answer/Effect of Late Filed Answer
  - ***Matter of Forest City Enterprises, Inc.***, Tax Appeals Tribunal, May 19, 2016
  - ***Matter of Emerald International Holdings***, Tax Appeals Tribunal, April 5, 2018 (also procedural refund issue regarding signed consent)

Noteworthy* Tribunal Decisions Over the Last Year

Matter of Kennedy Deli Restaurant Corp.; **Division's Rep: Frank Nuara; Taxpayer's Rep: Mohd Abdalla; Articles 20, 28 & 29 (May 11, 2017).** These two decisions reflect a tortured procedural history. In April 2015, Petititoner filed its petitions. They seemed late. In July 2015, the Supervising ALJ (SALJ) issued a Notice of intent to dismiss. In November 2015, the SALJ issued a determination dismissing the petition, but made no findings of fact or conclusions of law. The Taxpayer filed an exception. In June, 2016, the Tribunal sent the case back to the SALJ with instructions to give them something more to work with. In the supplemental determination, the SALJ reviewed Nagengast/Peltier affidavits that were produced by the Division to prove mailing procedures and that they were followed. The SALJ dotted his "i"s and crossed this "t"s. Ultimately, in September 2016, the SALJ determined (again) that the petitions were untimely. And in this Decision, the Tribunal agreed.

* Chris Doyle, who is responsible for this and the following slides, decided what is noteworthy. Also, the case summaries appearing here are distillations of case summaries originally appearing in the TiNY Report, which is a ridiculous little blog authored by Chris Doyle and Nara Tjitradjaja. Any inaccuracies are theirs. Any opinions are also theirs. Readers are encouraged to form their own opinions by consulting the decisions, which are published in full on the Division of Tax Appeal's website (www.dta.ny.gov).

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of March***; **Division's Rep: Charles Fishbaum; Taxpayer's Rep: Roger Gromet; Article 22 (May 11, 2017).** Taxpayer involuntarily paid some penalties she did not think were owed. And she got some of them back. Here is the up-beat-ish summary to what is a tale a true woe. Taxpayer was a real estate professional. The evidence indicated her husband was a dominating and abusive functioning alcoholic. Taxpayer knew taxes were being filed late or not at all, but was unwilling to confront or escalate confrontations with her husband on the issue. Criminal tax fraud charges ensued. Ultimately both husband and wife pled to a lesser crime. There is some evidence that the criminal court judge intended that the fraud penalty should be paid by the husband. But he died. When taxpayer sold her house, the Division claimed $15,000 or so of the proceeds to pay down what was left of the couple's penalties. Petitoner filed a claim for a refund of the amounts applied to penalties. In partially reversing the ALJ's determination sustaining the refund denial, the Tribunal found that the Division had not proven fraud, and that it alleged lesser penalties for certain years too late. But for the years lesser penalties had been timely asserted by the Division, petitioner owed them. So she'll at least get some of her money back.

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of Ruderman*; Division's Rep: Peter Ostwald; Taxpayer's Rep: Alan Blecher; Article 22 (June 15, 2017).** The Tribunal affirmed the ALJ's determination that Petititoner was a statutory resident of New York State and City even though he was a domiciliary of Florida. Key quote from the case: "We agree with the Administrative Law Judge that the testimony provided by petitioner and the affiants speaks mainly in general terms and lacks specificity with regard to dates and events." In short, even though Petitioner's testimony was found to be credible, it was simply not detailed enough to satisfy the "clear and convincing" evidence standard applied in such matters.

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of Yerry*; Division's Rep: Michele Milavec and Ellen Roach; Taxpayer's Rep: Frank Yerry; Article 22 August 10, 2017).** Christina pled guilty to one count of attempted grand larceny. During the Q&A between Christina and the criminal court Judge, Christina admitted to having forged checks or otherwise stolen up to $208,602.70 from a neighbor. The amount found to have been stolen was later reduced to $195,744.65. The Division issued a Notice of Deficiency against Christina and her joint-filing spouse for New York income tax on the $195,744.65 that Christina admitted to have stolen, along with fraud penalties. The ALJ sustained the Notice as did the Tribunal. The Tribunal found that Christina was estopped from arguing that she did not steal $195,744.65 because of her testimony in the plea hearing. The Tribunal said it did not matter that she had plead guilty to *attempted* grand larceny since the Q&A showed that she had actually taken the money. With respect to the fraud penalty, the Tribunal said: "Here, petitioner's guilty plea to attempted grand larceny in full satisfaction of all charges against her and the restitution order requiring her to repay the victim the fruits of her crime establish fraudulent intention and action on her part throughout the period at issue and thereby justify the imposition of a fraud penalty." While we are confident that the Tribunal is correct that the Division showed fraudulent conduct, we are not convinced that the proven fraud resulted "in deliberate nonpayment or underpayment of taxes due and owing". Based on the facts found by the Tribunal, it is pretty clear to us that Christina intended to defraud her neighbor. It is possible, however, that Christina had no idea that stolen funds were "income" required to be reported on the appropriate federal and state income tax returns. The Tribunal took itself to task for its failure to render a decision within the expedited time limits required by Tax Law § 2008(2)(b) for fraud cases.

Noteworthy Tribunal Decisions Over The Last Year

- ***Matters of Bayerische Beamtenkrankenkasse AG* and *Landschaftliche Brandkasse Hannover;* Division's Rep: Clifford Peterson and Ellen Roach; Taxpayer's Rep: Arthur Rosen and Alysse Grossman; Article 33 (September 14, 2017)**.

This decision interprets the nigh-on impenetrable (and infrequently interpreted) details of the Article 33 franchise tax on insurance corporations, and the Tribunal's decision peels the onion layer by layer, and then throws in some international law razzle-dazzle at the end of the decision.

Petitioner was a foreign non-life insurer not authorized to be in the insurance business in New York. The Tribunal found that the clear and unambiguous language of the statute meant that neither the premiums tax nor the "cap" on the Article 33 tax would apply to unauthorized non-life insurers like Petitioner for years beginning after 2002. There are suggestions in the decision (footnote 7 if you want to fact-check me) that, prior to a 2012 TSB-M, the Division's policy was to apply the cap even to unauthorized non-life insurers. But it appears that Petitioner did not argue that the Division could not change this policy retroactively. As the premiums tax did not apply, the Tribunal found that the tax under Tax Law § 1501 would apply. More specifically, the Tribunal found that the entire net income (ENI) base would pertain to Petitioner. According to the Tribunal, for a non-US insurer, ENI starts with federal effectively connected income (ECI). Petitioner's ECI resulted from its ownership of interests in US partnerships investing in real estate, primarily in New York. The Tribunal noted that unlike pre-2015 Article 9-A, Article 33 does not have a modification that pivots to worldwide income for non-US corporations, so that Petitioner's non-US items of income, gain, loss and deduction were properly excluded from ENI. Under Article 33, ENI is allocated to New York by adding 90% of an insurer's premiums factor to 10% of its wage factor. The Tribunal found that Petitioner had no premiums factor in the US, and ultimately it was determined that the Division had proven that use of the Article 33 apportionment regime resulted in an allocation "out of all appropriate proportion to the business transacted" in New York. In addition, the Tribunal confirmed that the use by the Division of the Article 9-A apportionment regime (tweaked to take into account only those factors contributing to the production of ECI) was designed to obtain a fair and proper allocation. **HOWEVER, the Tribunal also found that it had jurisdiction to consider Petitioner's argument (made for the first time at the Tribunal) that the Division's interpretation of Article 33 resulted in discrimination in violation of the US-Germany Tax Treaty. And the Tribunal eventually found that the Division's approach "as applied" to Petitioner violated the Treaty's non-discrimination provisions and canceled the Notice.**

Noteworthy Tribunal Decisions Over The Last Year

- ***Titan Elevator & Lift, LLC;*** **Division's Rep: Lori Antolick; Taxpayer's Rep: Ken Novick; Articles 28 & 29 (September 14, 2017)**. Petitioner sold lifts, dumbwaiters and elevators, some of which were probably used to assist the infirm. Petitioner argued that its purchases were not subject to tax because they were re-sold and because those sold to assist persons with infirmities should be treated as exempt prosthetic devices. The Petitioner did not provide much detail with respect to the different products sold at the hearing, and during the audit Petitioner did not provide enough records (so the Tribunal and ALJ found) for the Division to complete a proper audit. The Tribunal applied the narrow standard used for exemptions to determine that Petitioner had not proven its entitlement to the prosthetic device exemption. In addition the Tribunal found that Petitioner failed to prove that any of its purchases were otherwise exempt or that penalties should be abated.

Noteworthy Tribunal Decisions Over The Last Year

- ***Whole Foods Market Group, Inc.;*** **Division's Rep: Jennifer Baldwin; Taxpayer's Rep: Michael Zargari; Article 9-A (September 14, 2017).** The issue was whether Petitioner was required to include its intangible holding company (IHC) affiliate in its New York combined return. The years at issue were post-2006, so the mandatory combination rule for corporations engaging in substantial intercorporate transactions was in play. Petitioner argued that the royalty addback statutory scheme also in place at the time meant that the deductions for the intercompany transactions at issue had been modified out of Petitioner's ENI and therefore shouldn't have been counted for purposes of determining whether substantial intercorporate transactions existed. But the Tribunal found that substantial intercorporate transactions were present nonetheless based on the clear and unambiguous language of the statute. The Tribunal abated penalties, however, finding that some sloppy language in a TSB-M (i.e. that the receipts to be considered in determining the existence of substantial intercorporate transactions were those entering into ENI) made Petitioner's filing position reasonable.

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of Gilani*; Division's Rep: Frank Nuara; Taxpayer's Rep: *pro se*; Articles 28 and 29 (October 12, 2017).** This is a taxpayer loss in a responsible officer case. This loss was, however, on timeliness grounds. A few interesting facts here: The Petitioner was automatically included at the BCMS conference when the underlying business (a restaurant) filed its timely BCMS request. Petitioner never filed his own BCMS request and did not appear at the conference. The BCMS issued an Order to Petitioner, and the Petitioner filed an ALJ Petition challenging the Order about 100 days after the BCMS order had been issued (i.e. about ten days too late). The ALJ rescinded the initial Notice of Intent to Dismiss which was based on the Petition being filed more than 90 days after the BCMS order. It seems that the ALJ felt the Petition could be timely if it was filed within 90 days of either the initial Notice of Determination or the BCMS order and therefore the Division was required to prove the mailing of both. The timeliness issue was revisited after the Division offered evidence of the mailing of the original Notice of Determination and a new Notice of Intent to Dismiss was issued. The second time around the ALJ dismissed the case since the Petition had been filed more than 90 days after both the issuance of the BCMS Order and the issuance of the Notice of Determination. In affirming the ALJ's dismissal of the case, the Tribunal noted that the Division adequately proved the mailing of both the Notice and the BCMS Order by demonstrating its standard mailing practices and that they had been followed in both instances. OK, but the situation raises a few questions: (1) When a taxpayer is automatically included in the BCMS process as a responsible officer (RO) of a timely-filing underlying business, is the statute of limitations for the RO tolled? i.e. Once an RO's case gets to the ALJ level (if the RO files a petition within 90 days of the BCMS order), does the Division have a meritorious argument that DTA has no jurisdiction because the RO never filed a timely BCMS request? (2) In every case in which there is a timeliness issue with respect to an ALJ petition following a BCMS Order (assuming the Petitioner denies receipt of the original notice), is it now incumbent on the Division to prove the mailing of both the BCMS Order and the original Notice? I expect that the latter circumstance won't arise very frequently since a copy of the Notice is usually included with the BCMS request. But what if the copy of the Notice attached to the BCMS request is from the Notice sent to the taxpayer's representative?

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of van Rossem*; Division's Rep: Christopher O'Brien ; Taxpayer's Rep: *pro se*; Article 22 (October 26, 2017).**

This *pro se* petitioner lived in Pennsylvania and worked at SUNY Binghamton in 2011. According to the IRS and the NYS Comptroller's Office, Petitioner was paid $52,133.26 by NYS for his work, but did not file a New York tax return for 2011. After applying the standard deduction and reducing the tax liability by the amount of the tax withheld by his employer, the Division issued a Notice of Deficiency for $568 of additional tax and interest and penalties. Petitioner filed a timely challenge arguing that: (1) his salary from NYS was not "wages" includable in gross income; and (2) he is entitled to deduct the value of his labor from his salary under IRC § 83(a). The ALJ found against Petitioner (citing numerous federal "tax protestor" decisions) and imposed a $500 frivolous petition penalty.

Petitioner excepted to the ALJ's determination arguing that the Tribunal should address the propriety of collection activities of the Department with respect to years other than 2011, and that his labor was "property" and thus his salary should have been reduced by the value of his labor in determining his gross income. The Tribunal held that: (1) It had no jurisdiction for years other than 2011; (2) Petitioner's SUNY salary was includable in gross income (even though Petitioner had dropped this argument); (3) his labor was not property the value of which should be deducted in calculating gross income; and (4) since the Division's counsel provided no fact testimony at the hearing, it was not improper for the ALJ to have failed to swear-in the Division's counsel. Since Petitioner did not take exception to the ALJ's sustaining the audit penalties and assertion of the frivolous petition penalty, the Tribunal neither addressed nor disturbed those decisions.

And what may we conclude from the above? Not much, really. The only meritorious take-away I have is that the Legislature needs to increase the cap on the frivolous petition penalty.

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of Clifton*; Division's Rep: Charles Fishbaum; Taxpayer's Rep: *pro se*; Article 22 (January 4, 2018).** The Division issued to Petitioner a Notice of Deficiency because it received information from the IRS indicating Petitioner was a NY resident with federal taxable income in the 2006 tax year. The Tribunal noted such information provided a rational basis to conclude the Petitioner was required to file a NY income tax return for that year, and Petitioner failed to do. So, the Division estimated Petitioner's NY tax liability using the information it received from the IRS. The Tribunal agreed with the ALJ's determination concluding the Division's use of the IRS's information as the basis for the Notice was rational. Where a Notice of Deficiency has been properly issued, the Notice is presumed correct, and the taxpayer then has the burden to prove the deficiency is erroneous. The Tribunal disagreed with Petitioner that the Division was required to first prove the information it got from the IRS was accurate. Moreover, Petitioner failed to provide any evidence that the IRS information was incorrect. The Tribunal also agreed with the ALJ's rejection of Petitioner's "tax protestor" argument that he was not a federal employee or officer and thus his payments weren't wages subject to income tax. The Tribunal affirmed the ALJ's determination and sustained the Notice against the Petitioner.

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of Grimm*; Division's Rep: Ellen Roach; Taxpayer's Rep: *pro se*; Article 22 (January 11, 2018).** The Tribunal affirmed the ALJ's decision that Petitioner's payments for the installation of a geothermal heat pump system did not qualify for solar energy system credits. Both the Tribunal and the ALJ applied the "only reasonable construction" ("ORC") standard in making their determinations. The use of the ORC standard by a court in reviewing an agency determination presupposes that the agency analyzed the statute using its specialized knowledge and experience to determine and then apply the most reasonable construction of the statute. In short, when a reviewing court gives deference to Department of Taxation and Finance interpretation, it implicitly assumes that the DTA (which is a division within the Department of Taxation and Finance) determined and applied the best construction of the statute. Accordingly, one might think that the Tribunal should apply an MRC (most reasonable construction) standard when construing statutes permitting credits. Petitioner's case may well have failed even if the ALJ and the Tribunal applied the most reasonable construction of the statute.

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of Rubinos*; Division's Rep: Christopher O'Brien; Taxpayer's Rep: *pro se*; Article 22 (February 1, 2018)**.

On her 2010 and 2011 personal income tax returns Petitioner claimed losses related to her ownership of two businesses: a proprietorship and an S corporation. The Tribunal sustained the ALJ's disallowance of most of the expenses claimed by the businesses. The Tribunal found that Petitioner had not proven the amount of the disallowed expenses or their deductibility as ordinary and necessary business expenses.

The Tribunal questioned the credibility of Petitioner's evidence after the Tribunal determined that (among other incidences of non-standard accounting) Petitioner had claimed full depreciation on the same vehicles in both her proprietorship and her S corporation. The Tribunal also sustained penalties.

Noteworthy Tribunal Decisions Over The Last Year

- **Matter of CLM Associates; Division's Rep: Osborne Jack; Taxpayer's Rep: Julius Rousseau III and Russell McRory; Articles 28 & 29 (February 15, 2018)**.

The Tribunal sustained the ALJ's determination sustaining the imposition of sales tax on the intercompany transfers of titles to loaner cars from the dealership entities to their central management entity (i.e., the Petitioner). Those transactions were found to be transfers of title and thus taxable if there was consideration. The Tribunal identified consideration in the managing entity's tacit acceptance of joint and several liability for claims asserted concerning the use of the vehicles by the dealerships. Note, that tax may have been significantly reduced if there had been expert testimony regarding the value of the joint liability assumed by the Petitioner.

The Petitioner also argued it should be entitled to trade–in credits for certain transactions in which it received title to a new car upon the release of title to an older loaner back to the dealership to allow the dealer to sell the older loaner. The Tribunal ruled that the Petitioner failed to sustain its burden of proof on that issue because the Petitioner had consented to the Division's use of an indirect audit method and there was a lack of contemporaneous documents confirming the trade-in transactions.

However, the Tribunal reversed the ALJ's determination that the Petitioner was not entitled to a credit for the use tax paid by the dealerships on their use of the loaners, finding that the Division was bound by its concession at the hearing that payment of sales tax by the dealerships on behalf of the Petitioner was acceptable. Given that the Division was willing to blur the distinction between the parties for certain sales tax payment purposes, it was consistent to blur the distinction between the parties for all sales and use tax payment (and refund) purposes.

This case presents quite a puzzle. Whenever one is dealing with moving hard assets between related companies, one should consider the sales tax consequences. And taxpayers under audit should almost never sign a consent allowing the Division to use an indirect audit method.

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of Jacobi*; Division's Rep: Linda Farrington; Taxpayer's Rep: Randall Andreozzi and Tiffany Bell; Proposed Driver License Suspension Referral under Tax Law § 171-v (March 8, 2018)**. Petitioner made an offer in compromise to the Division in an attempt to set up a payment plan to pay off the underlying tax liabilities. Petitioner made a number of monthly payments while the offer was pending. The Division ultimately rejected Petitioner's offer. Petitioner argued the Division unreasonably rejected the offer in compromise without considering Petitioner's ability to pay. The Tribunal agreed with the ALJ that a rejected offer in compromise does not satisfy the statutory requirement of making payment arrangements satisfactory to the Commissioner to avoid a driver's license suspension referral. The Tribunal noted that there is no process under Tax Law § 171-v that allows a taxpayer to challenge the Commissioner's decision to reject an offer in compromise or a proposed payment arrangement. A suspension notice can only be challenged by six specific statutory defenses, none of which Petitioner alleged. The Tribunal noted that Petitioner challenged the Division's denial of his offer in compromise proposal rather than request relief provided for under § 171-v . An offer in compromise of a fixed an final liability is a collection activity of the Division, and DTA lacks statutory authority to review collection activities. Petitioner also alleged a denial of due process as a result of the suspension referral and argued he must be given a meaningful opportunity to be heard on the Division's rejection. The Tribunal also rejected that argument. The Tribunal affirmed the ALJ's determination to sustain the Notice suspending Petitioner's driver's license.

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of New Cingular Wireless PCS LLC*; Division's Rep: Robert Maslyn; Taxpayer's Rep: Margaret Wilson; Articles 28 & 29 (March 8, 2018)**. This Tribunal decision was an **Order** on Remand as a result of the NYS Appellate Division, Third Department's decision (153 AD3d 976, 59 NYS3d 846)modifying the Tribunal's original decision. On remand, the Tribunal: 1) reversed the ALJ's Order denying Petitioner's motion to reopen the record, 2) granted Petitioner's motion to reopen the record, and 3) admitted into evidence an affidavit regarding the funding of an escrow by Petitioner. On the issue of whether Petitioner's funding of a pre-refund escrow account in compliance with certain agreements would constitute repayment to Petitioner's customers of improperly collected taxes, the Tribunal remanded the question to the ALJ because the ALJ never addressed that question. The ALJ's determination dismissed the case by granting the Division's motion for summary determination, i.e. determined there were no triable issues of fact based on the legal conclusion that Petitioner had not made any repayment to its customers of the tax erroneously collected. However, the admission into evidence of the affidavit regarding the escrow funding (which was formed and funded after the original ALJ Determiantion had been issued) raised material and triable issues of fact. There remained at issue the exact refund amount. The Tribunal thus nullified the ALJ's Determination, denied the Division's motion for summary determination, and ordered the matter be scheduled for a hearing.
- Quoteworthy from the Third Department: "As the ALJ aptly noted, however, the procedural landscape changed in August 2014 when petitioner funded a pre-refund escrow account in an amount exceeding $106 million. **Although the ALJ refused to grant petitioner's subsequent motion to reopen the record upon this ground and respondents have effectively viewed petitioner's funding of the pre-refund escrow account as too little, too late, we are not prepared to ignore the fact that the funds in question, which amount to over $106 million and are undeniably due and owing to petitioner's customers, are now available and are awaiting distribution — if only petitioner and the Division could get out of each other's way long enough to make that happen.** Based upon the particular facts of this case, and in the absence of a viable alternative, [footnote omitted] we find that it was an abuse of discretion to deny petitioner's motion to reopen the record. Accordingly, petitioner's motion to reopen is granted, and this matter is remitted for further proceedings."

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of Murphy*; Division's Rep: Jennifer Hink-Brennan; Taxpayer's Rep: *pro se*; Article 22 (March 8, 2018)**.

JJF Associates LLC ("JJF Associates") sold real property in NYC for $5,500,000 to an unrelated entity. JJF Associates was an LLC treated as a partnership for tax purposes. JJF Associates realized a gain of $2,268,774 on the sale of the property and reported that gain on its 2006 NYS partnership return. Mr. Murphy signed the partnership return as a general partner. At the time of the sale, JJF Associates was owned 99% by JJF Realty Employees Stock Ownership and Plan Trust ("JJF ESOP") and 1% by Triune Foundation, Inc. ("Triune"). Mr. Murphy was the trustee of JJF ESOP, and Petitioners were the sole participants and beneficiaries of JJF ESOP. Mr. Murphy was the president of Triune. According to Petitioners, JJF ESOP was a tax-exempt pension trust established for the benefit of the employees of JJF Realty Management, Inc. ("JJF Realty"). Petitioners claimed they were employees of JJF Realty. Petitioners were the president and secretary and the only members of the board of directors of JJF Realty, and there were no other officers or employees as of 2006. JJF Realty's purpose was to own and operate the property that was sold. And JJF Realty was wholly-owned by JJF ESOP. In 2009, JJF Associates was audited. The audit was closed with no additional tax due from JJF Associates. In 2010, JJF ESOP was audited. The Division closed that audit concluding that JJF Realty did not have any employees, JJF ESOP was not eligible for tax-exempt status, and that the income derived by JJF ESOP from its interest in JJF Associates was taxable to Petitioners as the participants and beneficiaries of JJF ESOP. As a result of those audits, the Division audited Petitioners' 2006 and 2007 personal income tax returns.

The Tribunal first determined there were no statute of limitations issues because Petitioners signed a waiver to extend the statute of limitations. Though Mr. Murphy attempted to revoke the agreement, the Tribunal noted the revocation was of no consequence. Petitioners' argued the Notice of Deficiency lacked a rational basis. The Tribunal noted the basis for the Notice was the previous audit determination that Petitioners were not employees of JJF Realty and thus ineligible participants of JJF ESOP. The Tribunal found the Notice had a rational basis because Petitioners argued the Notice was based on erroneous audit findings, not that it was irrational.

Matter of Murphy (continued)

The Tribunal then addressed Petitioners' preemption claim. The gain from the sale of the property resulted in long term capital gain under IRC § 1231 and was reported as such on JJF Associates' partnership return. The full amount of the gain was reported on its 99%-member JJF ESOP's K-1 and as a result was passed through to JJF ESOP. Generally, liability for income tax also passes through to an LLC member. However, an ESOP trust qualified under IRC § 401(a) is exempt from tax under IRC § 501(a). Responsibility for tax on qualified ESOP trust income falls to the trust's beneficiaries because distributions from the trust are taxable to the distributee in the year of distribution. An ESOP trust qualified under IRC § 401(a) is an employee benefit plan as defined under ERISA law (Employee Retirement Income Security Act of 1974). That entity would fall within the scope of the ERISA preemption clause, which states that ERISA's provisions trump any other State laws to the extent they "relate to" any employee benefit plan. The Tribunal discussed the meaning of ERISA's preemption provision, and held that it is not unlimited, so there's no preemption unless the state law in issue affects an ERISA plan "in more than a tenuous, remote or peripheral way." The Tribunal relied on ***Ingersoll-Rand Co. v. McClendon*** in its analysis, a case where the Court held preemption was appropriate. In ***Ingersoll-Rand***, a former employee claimed wrongful discharge under Texas state law against his former employer. The employee claimed he was fired because the employer was avoiding contributing to or paying benefits under a plan covered by ERISA. The Court held that an ERISA plan must exist and the employer must have had a pension-defeating motive in terminating the employment, and the existence of a pension plan was a critical factor in establishing liability. Thus, there would be no cause of action if there was no plan. The Court held that because the cause of action related not just to pension benefits but to the essence of the pension plan itself, i.e. an ERISA plan, preemption of the employee's state law cause of action was appropriate.

The Tribunal determined that ***Ingersoll-Rand*** strongly supported a finding in favor of preemption here. Because Petitioners sought to prove JJF ESOP was qualified under IRC § 401(a), the DTA proceeding related to the "essence" of JJF ESOP, the questionable ERISA plan, and therefore related to ERISA. The Tribunal noted that from a policy perspective, it was inconsistent with the preemption clause's "goal of uniformity" for DTA to determine whether a trust is qualified under IRC § 401(a)**.** The Tribunal noted it agreed with the ALJ that a taxpayer's mere claim that an ERISA plan exists should not give rise to preemption. However, the Tribunal held that the record contained sufficient evidence of the existence of JJF ESOP. As a result, such a level of proof was sufficient to prevent abuse. At the same time, the Tribunal held that DTA would not develop its own rules regarding the qualification of a trust under IRC § 401(a). Ultimately, the Tribunal was preempted from addressing the issue of whether JJF ESOP was a qualified trust under IRC § 401(a), and because Petitioners presented prima facie evidence of JJF ESOP's existence, it canceled the Notice of Deficiency.

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of NRG Energy, Inc.*; Division's Rep: David Markey; Taxpayer's Rep: Daniel Hurteau and Jena Rotheim; Article 9-A (March 15, 2018)**. Petitioner argued it should be permitted to claim QEZE credits for the 2009 year based on the Court of Appeals decision in ***James Square***, which held that de-certifications resulting from new tests added to the law in April 2009 constituted an improper retroactive law change. At the ALJ level, the Judge determined that the changes, as applied to the 2009 tax year, were not applied retroactively. So the ALJ denied Petitioner its 2009 credits. On Exception, the Tribunal reversed that decision, finding that "the application of the 2009 amendments in the present case attached 'new legal consequences' to actions of petitioner that occurred prior to the enactment of the 2009 amendments", and was thus retroactive. The Tribunal opined that retroactive application of a law change may be permissible if it passes the balancing test contained in ***Replan Development***. Under that test, a court determines constitutionality of a retroactive application of a statutory change by balancing three factors: the length of the retroactivity, the public purpose for the statutory change, and the reasonableness and depth of the petitioner's reliance on the prior law. The Tribunal remanded the case back to the ALJ for application of the ***Replan*** test.

Noteworthy Tribunal Decisions Over The Last Year

- ***Matter of Emerald International Holdings, Ltd.*; Division's Rep: M. Greg Jones; Taxpayer's Rep: Otu Obot; Articles 28 & 29 (April 5, 2018)**.

Petitioner is a liquor store. The Desk Audit Casual Sales Unit(!) performed an audit that essentially determined Petitioner's purchases and then divided that CoGS by an industry-survey cost of operations factor to determine audited sales. The Division then sent a Consent form that said, in effect 'sign and pay and you can always file a refund claim later.' Petitioner signed and paid and then filed a refund claim. Petitioner claimed the refund claim was mailed to the Casual Sales Unit (and not the Refund Unit) on March 4, 2013, but the Division alleged it did not receive that refund claim. The Division confirmed it did receive a refund claim from Petitioner on July 14, 2014, which it denied on September 5, 2014. Petitioner filed a timely petition that included 45 paragraphs of allegations. The Answer filed by the Division contained 10 affirmative allegations and the following general denial: '2. DENIES any and all of the other allegations contained in the petition, inclusive of paragraphs 1 through 45.' Judge Galliher found that: (1) By using regular mail to file the March 4 refund claim Petitioner bore the burden of proving delivery and the risk of non-delivery. Since Petitioner could not prove delivery, the six-month time limit for acting on the refund claim did not begin until the July 14, 2014 refund claim had been posted; (2) Even if the refund claim had been filed on March 14, 2014, the Division's failure to have acted on it within six months as required by Tax Law § 1139(b) did not mean it was deemed granted, rather, it should mean that it was deemed denied; (3) The Division's general denial of the 45 paragraphs of allegations in the Petition satisfied the DTA's requirement that the Answer contain 'a specific admission or denial of each statement contained in the petition' (20 NYCRR 3000.4(b)(2)); (3) The execution of the Consent by Petitioner took the Division's methodology off of the table (*i.e*. Petitioner was prohibited from arguing that the Division's methodology was wrong and was instead required to prove the accuracy of its original returns); and (4) Petitioner did not prove that its originally-filed returns were correct.

The Tribunal affirmed the ALJ's determination and sustained the Division's refund denial. The Tribunal agreed with the ALJ that the Division's general denial of Petitioner's allegations was sufficient to comply with the Tribunal's rules, where it specified all of the allegations in the petition by reference to the paragraph numbers. The Tribunal agreed with the ALJ that the record did not support a finding Petitioner filed a refund claim on March 4, 2013. The Tribunal also agreed with the ALJ that Petitioner had not met its burden to prove entitlement to the refund. The Tribunal also found it could not address whether the Division had an obligation to respond to a refund claim within 6 months since it could not identify when, exactly, the refund claim was filed. Lastly, the Tribunal agreed with the ALJ that the assessment became fixed and final when Petitioner signed the consent to proposed audit changes. Petitioner could not prove the additional tax it consented to was erroneous because 1) by signing the consent, the Division's audit methodology was no longer an issue and 2) Petitioner submitted no evidence supporting the accuracy of its original sales tax returns.