

Behind the Numbers: A Look Into New York's Division of Tax Appeals

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In this article, the authors examine the makeup of the New York State Division of Tax Appeals and Tax Appeals Tribunal (DTA) and the most recent DTA annual report. The authors also provide some commentary about what might be behind some of the numbers presented therein.

On January 20, 2015, the annual report of the New York State Division of Tax Appeals and Tax Appeals Tribunal (collectively DTA) for fiscal 2014 was submitted to Gov. Andrew Cuomo (D), Sen. Dean Skelos (R), and former Speaker Sheldon Silver by Tax Appeals Tribunal President Roberta Moseley Nero.¹ For practitioners who litigate cases in New York's DTA, this report is an important window into the goings-on within the agency. Its annual "scorecard," which summarizes the statistics from all cases over the previous year, helps illustrate the tough task facing those litigating at the DTA.

Indeed, though we believe that the New York appeals system is probably one of the best in the nation — especially in terms of allowing taxpayers a full and fair airing of their disputes² — the report makes one thing clear: It's still hard to win! Maybe that's because taxpayers usually

¹New York State Tax Appeals Tribunal, Annual Report Fiscal Year 2013-2014.

²New York's tax appeals system received an "A" in a Council On State Taxation survey. See COST, "The Best and Worst of State Tax Administration" (Dec. 2013).

bear the burden of proof in these proceedings. Or maybe it's because a lot of cases end up reaching the decision stage that really shouldn't, as sometimes is the case with taxpayers moving cases on a pro se basis. But practitioners should take note either way. In this article, we'll examine the most recent DTA report and also provide some commentary from the cheap seats about what might be behind some of these numbers.

I. Background

The annual report is the product of a statutory mandate, one that requires the DTA to:

collect, compile and prepare for publication statistics and other data with respect to the operations of the division of tax appeals, and to submit annually to the governor, the temporary president of the senate and the speaker of the assembly a report on such operations including but not limited to, the number of proceedings initiated, the types of dispositions made and the number of proceedings pending.³

The annual reports usually follow the same format and open with general information about the agency and the DTA's adjudicatory processes. This year's report notes that Moseley Nero rose from commissioner to president in October 2013, at which time then-President James Tully again became a commissioner. The reports also typically contain a section on recent developments. This year's report says the DTA has commenced an "agency-wide functional assessment of operations, and a comprehensive review of policies, in an effort to refine and improve practices and procedures." The assessment will continue through fiscal 2015 and will be discussed below.

Noteworthy changes not mentioned in the report include the appointment of Judge Timothy Alston (previously an administrative law judge) as counsel to the tribunal and the appointment of two new ALJs, Judge Barbara Russo (previously the presiding officer of small claims proceedings) and Judge Kevin Law (former director of the Bureau of Conciliation and Mediation Services). While new to these positions, both new ALJs have a wealth of

³N.Y. Tax Law section 2006(13).

experience and not only from their immediately preceding positions — Russo and Law were also attorneys in the tax department's Office of Counsel for several years (and arguably got the best of one of the authors here, from time to time). Alexander Chu-Fong, former assistant counsel to the tribunal, has filled the presiding officer vacancy created by Russo's appointment. He previously served as assistant counsel to the tribunal and as a clerk with the DTA.

Additional personnel changes at the tribunal are inevitable in the coming year or so because Tully's term will expire on December 31, 2016, and Commissioner Charles Nesbitt's term expired on December 31, 2013.⁴ Though their replacements, if any, must be appointed by the governor and confirmed by the Senate, ostensibly Moseley Nero would be involved in the selection.⁵ Interestingly, some questions arose a few years ago when only two members made up the tribunal. While that is certainly contemplated by the statute, the law also requires that at least two of the tribunal members be licensed attorneys; for at least a year or so, only one of the two members met that qualification.⁶ Presumably that won't be an issue this time around.

II. Some Numbers

As noted above, the DTA is statutorily mandated to annually report "the number of proceedings initiated, the types of dispositions made and the number of proceedings pending."⁷ The statistics in the report are broken down by formal hearings before ALJs and by cases before the tribunal. For comparison's sake, let's compare some of the statistics from this year's report against those from fiscal 2013.

A. Formal Hearings Before ALJs

The number of ALJ cases closed in fiscal 2014 (462) was considerably larger than fiscal 2013 (338). That makes sense, as in early 2012 the tribunal implemented several policy changes at the division of tax appeals to reduce the backlog of cases including "tightening up timeframes in the prehearing processes, expediting the scheduling of hearings and limiting adjournments of scheduled hearings."⁸ These changes appear to have been effective.

ALJ Inventory		
	Fiscal 2014	Fiscal 2013
Beginning Inventory	525	495
Cases Received	441	426
Total Cases for Hearing	966	921
Petitions Withdrawn	54 (12%)	58 (17%)
Closing Orders Issued	284 (61%)	234 (69%)
Defaults	11 (2%)	8 (2%)
Determinations Issued	57 (12%)	50 (15%)
Petitions Dismissed	25 (5%)	15 (4%)
Referred to BCMS ^a	25 (5%)	28 (8%)
Bankruptcy	6 (1%)	3 (1%)
Subtotal	462 (100%)	338 (100%)
Ending Inventory	504	583

^aBureau of Conciliation and Mediation Services

In terms of results, the ALJs issued 57 determinations in fiscal 2014, up from 50 determinations in fiscal 2013. But of those 57 determinations, only three (5 percent) canceled the protested statutory notice, which is a drop from fiscal 2013 when seven out of 50 determinations (14 percent) resulted in cancellations. Nine determinations (16 percent) modified the notice, which is also down from fiscal 2013 when 11 determinations (22 percent) modified the notice. On the other hand, 45 determinations (79 percent) sustained the notice, which is a considerably higher rate than that of fiscal 2013, when 32 determinations (64 percent) modified the statutory notice.

Analysis of ALJ Determinations		
	Fiscal 2014	Fiscal 2013
Sustained	45 (79%)	32 (64%)
Canceled	3 (5%)	7 (14%)
Modified	9 (16%)	11 (22%)
Total	57 (100%)	50 (100%)

Yikes. Is it getting harder to win? Or is the old saying about statistics true?⁹ The bottom line, as noted above, is that it's hard to win. But so many of these decisions are no-brainers. Taxpayers file their petitions for a conciliation conference or the DTA late more often than you'd expect, and sometimes it seems like half of the issued cases involved timeliness issues alone. We suspect that in more traditional disputes involving difficult legal issues with well-represented parties, taxpayers' winning percentages go up.

B. Cases Before the Tribunal

The Tax Appeals Tribunal issued 24 decisions in fiscal 2014, a slight drop from the 27 decisions issued in fiscal

⁴See N.Y. State Division of Tax Appeals and Tax Appeals Tribunal website, "About the Division of Tax Appeals," available at <http://www.dta.ny.gov/about/>.

⁵See N.Y. Tax Law section 2004.

⁶*Id.*

⁷*Supra* note 3.

⁸*Supra* note 1, at 4.

⁹"There are lies, damn lies, and statistics."

2013. Of the 24 decisions, 15 (63 percent) sustained the protested statutory notice, seven (29 percent) modified the notice, and two (8 percent) remanded the case to the ALJ. But there were no outright victories for taxpayers at the tribunal; the tribunal did not issue a single decision canceling a statutory notice in fiscal 2014.

Tribunal Inventory		
	Fiscal 2014	Fiscal 2013
Beginning Inventory	53	50
Cases Received	40	30
Total Cases for Hearing	93	80
Decisions Issued	24	27
Settled	0	0
Withdrawn	1	0
Subtotal	25	27
Ending Inventory	68	53

Of the 24 decisions issued in fiscal 2014, only one (4 percent) reversed the ALJ determination, while two decisions (8 percent) modified and two decisions (8 percent) remanded the case. Thus, 19 decisions (79.2 percent) affirmed the ALJ determination, which is a slightly lower affirmance rate than the year before, when 22 ALJ determinations (81 percent) were affirmed. And for whatever reason, the tribunal granted a significantly lower percentage of oral argument requests (67 percent) in fiscal 2014, as compared with 81 percent granted in fiscal 2013. Of the 24 decisions issued, seven decisions (nearly 30 percent) were subject to judicial review.

Analysis of Tribunal Decisions		
	Fiscal 2014	Fiscal 2013
Sustained	15 (63%)	17 (63%)
Modified	7 (29%)	5 (19%)
Remanded	2 (8%)	3 (11%)
Canceled	0 (0%)	2 (7%)
Total	24 (100%)	27 (100%)

It's harder to glean much from these numbers, because we're dealing with a smaller sample. Overall, 2014 looks similar to the previous fiscal year. One statistic that might be interesting to see here is whether or to what extent tribunal decisions from previous years were overturned or affirmed on appeal. Of course, one of our favorite cases from 2014 reversed a 2011 decision of the tribunal,¹⁰ and that came on the heels of a few other cases that overturned tribunal

¹⁰*Gaied v. New York State Tax Appeals Tribunal*, 22 N.Y.3d 592 (2014).

decisions in 2012.¹¹ But usually, tribunal decisions are affirmed, in part because the system works well and of course in part because the standard for reversal is usually extremely high. Nonetheless, more data like those in these annual reports would be interesting.

Other Noteworthy Items

As mentioned above, this year's report announced the commencement of an "agency-wide functional assessment of operations, and a comprehensive review of policies, in an effort to refine and improve practices and procedures." When Nesbitt was appointed president of the tribunal in 2005, he, too, undertook a "functional assessment of the agency's procedural operations" that culminated in the DTA implementing new procedures for proceedings before ALJs geared toward more active and efficient handling of cases.¹² One of the most welcome changes involved the assignment and participation of ALJs earlier on in the appeals process. It used to be that the assignment of the particular ALJ was a safely guarded secret (or simply not known) right up until the week before the hearing. But for the past several years, the ALJs have been involved from the start, and regular conference calls with the ALJs have become standard operating procedure in all cases. From our practical experience, this has helped a lot.

Presumably Moseley Nero's assessment and review will also yield helpful changes like this. We understand some work has already been done to improve the DTA's website and improve the search engine functionality for practitioners searching for cases. Another area of focus might address some of the timing issues that have arisen in the system. For instance, while cases move fairly swiftly once ALJs are assigned, often it can take up to six months or longer for that to happen. Of course, nothing prohibits the sides from talking to each other during this interim period. But nothing gets two sides talking like some pressure from the judge!

Also, it would be nice to see an effort to revamp or revise the DTA regulations. The last significant amendments to the DTA's regulations were made in 1995,¹³ and there have been numerous procedural and practical changes over the past 20 years. Having those promulgated might clarify some of these procedures and reduce some confusion. Some practices (such as the assignment of ALJs, scheduling of hearings, etc.) might not need to be set forth in official regulations. But other important procedural changes might be

¹¹*See Matter of United Parcel Serv. Inc. v. Tax Appeals Trib.*, 98 AD3d 796 (3d Dept. 2012), *leave denied* 20 NY3d 860 (2013); *Matter of Meredith Corp. v. Tax Appeals Trib.*, 102 AD3d 156 (3d Dept. 2012); *Matter of Elmer W. Davis Inc. v. Commissioner of Tax. & Fin.*, 104 AD3d 50 (3d Dept. 2012); *Matter of American Rock Salt Co. LLC v. Commissioner of Tax. & Fin. of the State of N.Y.*, 104 AD3d 12 (3d Dept. 2012).

¹²New York State Tax Appeals Tribunal, Annual Report Fiscal Year 2006-2007, at 3.

¹³The DTA's regulations were amended in March 2012 to reflect the address of the DTA's new offices.

helped by further review and study. For instance, since about the time that the ALJs started getting involved earlier in the process, the parties have been directed to provide copies of all potential exhibits, sometimes as long as two weeks before the hearing. But such practice is not called for in the regulations — the regs contemplate the sharing of hearing memos only 10 days in advance. Similar policies or procedures ought to be promulgated in regulations. Doing so allows taxpayers and practitioners to have input into the rulemaking process, as is encouraged under the State Administrative Procedure Act.¹⁴

¹⁴See State Administrative Procedure Act, section 202(1).

Conclusions

Overall, though, as the old adage goes: If it ain't broke, don't fix it. Clearly there's room for improvement. There always is. And of course we'd like to see more taxpayer wins in the DTA, which might happen if we can get some more cases! That's a joke, of course. Well, sort of.

But practitioners who have handled cases in other jurisdictions know how hard it can be. In many states, the independence of the appeals process is questionable on a good day. But here in New York, despite what you see in the numbers, our experience has been that taxpayers get a full and fair shot. The judges are independent, and the decisions are generally thorough and well reasoned . . . especially when the decisions agree with our clients' positions. ☆