

Litigating a New York Tax Case, Volume 2

by Timothy P. Noonan and Ariele R. Doolittle



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This is part two of a four-part series discussing all phases of New York tax litigation. In this second installment, Noonan and Doolittle cover the conciliation conference process, usually the first level of the appeals process. They write that participating in the process, which is optional, is usually a good idea because it can facilitate the ongoing discussion typically helpful in resolving tax disputes.

After going through what is often a long and difficult audit process — the ins and outs of which we covered in the first installment of this series¹ — most taxpayers expect that their case will get resolved and they will be able move on. When cases don't get resolved, taxpayers (and sometimes tax auditors) can become frustrated and discouraged. The good news for New York taxpayers, however, is that there is a well-oiled (if sometimes slow) process in which they have a full and fair opportunity to find justice and reach the right result. And the usual first step in that appeals process is found in the New York State Department of Taxation and Finance's Bureau of Conciliation and Mediation Services (BCMS). That process provides taxpayers with an opportunity to resolve the controversy through what's called a "conciliation conference" without having a formal hearing or further litigation in the division of tax appeals.

In this article, we'll discuss how the conciliation process works, outline some best practices, and discuss circumstances in which skipping BCMS altogether might make sense.

¹Noonan and Doolittle, "Litigating a New York Tax Case, Volume 1: The Audit Process," *State Tax Notes*, Feb. 29, 2016, p. 637.

I. Background

BCMS was established in 1987 to provide an informal forum for resolving tax controversies. It was created to provide pre-hearing conferences in order to afford taxpayers the opportunity to resolve tax disputes in an informal and expeditious manner before, or in lieu of, formal hearings.² BCMS is not involved in administering or collecting taxes or any other activities conducted before the conference. Instead, it is responsible for providing conciliation conferences and issuing conciliation orders. The head of BCMS is the director, who reports directly to the tax department's commissioner.³

II. Conciliation Conference Nuts and Bolts

A. The Request

At the close of a disputed audit, the taxpayer is issued either a notice of deficiency (in income tax cases) or a notice of determination (in sales tax cases). Or if a refund claim is denied, a notice of disallowance will be issued. If a taxpayer wishes to appeal any of those notices, the first step is to pay careful attention to deadlines. Under normal circumstances, a request for a conciliation conference must be filed within 90 days to challenge any of those notices. But there are some variances. A shorter deadline applies to notices that (i) propose canceling, revoking, or suspending a license, permit, registration, or similar credential; (ii) deny an application for a license, permit, registration, or similar credential; or (iii) impose a fraud penalty.⁴ And because of what is probably a statutory quirk, a taxpayer has two full years to file an appeal to a notice of disallowance in an income tax matter (but not for sales tax).⁵

Whatever the required time frame, the BCMS process is initiated by filing a request for conciliation conference (Form CMS-1). Aside from including such things as the taxpayer's name, address, tax type, and notice number, the form allows the taxpayer to include a short statement of the

²See Tax Law section 170(3-a); Letter from Commissioner of Taxation and Finance, July 9, 1986, at 1-2, Bill Jacket, L. 1986, ch. 282.

³See 20 NYCRR section 4000.1(c).

⁴Tax Law sections 2008(2), 170(h).

⁵Tax Law sections 689(c), 1089(c).

disagreement. Nothing too detailed or formal is required here, though we generally find it helpful to include a substantive summary of the case, since that will give the conciliation conferee a good grasp of the issue before sitting down for the conference. Without something like that, the conferees come into the conferences cold, since they do not review the audit file or talk to the auditors before the conference.

Taxpayers may choose the location for the conference from a variety of options, including Buffalo, Rochester, Syracuse, Albany, Brooklyn, Westchester, and Long Island. If no location is selected, usually the conference will be scheduled in the location closest to the taxpayer.

The request for conciliation conference is acknowledged on receipt, and thereafter a conference is scheduled, on at least 30 days' notice. Usually that scheduling notice will come out a couple of months after the appeal has been filed. Adjournments are routinely allowed, provided they are made in writing at least 10 days before the conference.⁶ Normally, however, multiple adjournments are frowned on and often prohibited.

The general form letter from BCMS acknowledging receipt of the appeal does indicate that the auditors may contact the taxpayer before the conference to explain the department's position or to request additional information to resolve the case. In practice, that rarely happens. Still, we think it is often a good idea to contact the auditor before the conference to see if there is a possibility of resolving the case or, at the very least, narrowing the issues. That is especially true if the practitioner is new to the case. Often a fresh set of eyes and a new perspective allow for a pre-conference resolution.

B. The Conference

The actual conference is not nearly as formal as many practitioners or taxpayers think. It's basically just a meeting between the taxpayer, the auditors, and the conferee. Those taxpayers who had hoped to not run into the auditors again during the appeals process will be disappointed! The auditors are heavily involved in the BCMS process.

The auditors present their side first at the conference and explain the basis for the notice, which usually involves them reading the audit report they prepared at the end of the audit. Then it's the taxpayer's turn to present its side of the story, rebutting the points made by the auditor, presenting relevant evidence, and explaining why the assessment was wrong.

Most conferees ask questions of both sides, and typically practitioners and auditors will discuss and argue points throughout the conference. Again, the process is informal and designed to be an airing of all the issues, so usually the conference evolves into a discussion of all points by all sides.

Sometimes all of that results in a resolution at the conference. But in more complex or difficult cases, in which an agreement is not reached, that usually does not happen. The conferee may ask the auditors or taxpayer to get back to him with responses to specific questions, there may be follow-up issues that need exploring, or the conferee may just ask for some time to review all the materials and respond.

C. Post-Conference Process

When the parties are unable to reach an agreement, the conciliation process continues after the conference. Sometimes, in fact, the conciliation process is just the beginning. Discussions continue between the auditor and the conferee, the conferee and the taxpayer, and sometimes between the taxpayer and the auditor. There's no formal process for those discussions, and we've found that this kind of flexibility in post-conference discussions is helpful to the process. Ultimately the goal is to get the case resolved, and often the continued discussions, emails, and calls are the keys to getting a deal done.

That's the good side to the post-conference process. There is, however, another side, one that has caused many practitioners to question the utility of going through the process at all. That problem first arises with what is usually a good thing: The conferee decides in favor of the taxpayer. But in the normal circumstance, that is not immediately communicated to the taxpayer. Instead, the conferee will internally report the proposed resolution of the matter back to the audit division, and the conferee and the audit division's representative will discuss those findings *ex parte*. If the audit division's representative agrees with the conferee's proposed resolution, all is well, and the case will be closed on that basis.⁷

If, however, the audit division's representative disagrees with the conferee's proposed resolution, the conferee will be required to defend his proposal before an internal review process involving BCMS and audit division supervisors. As with the discussion with the audit division's representative, that takes place *ex parte*, and the taxpayer has no involvement. There is no published guidance as to what happens during that internal review process, and there are no statistics about how often the conferee is overruled — but it happens. And it can be incredibly frustrating to taxpayers, practitioners, and the conferees themselves when it does, particularly because it means the final decision on a matter is made by parties who were not even present at the conference. Moreover, because the process happens behind the scenes, the taxpayers are often not even aware it is happening and, in any case, have no opportunity to present their side of the story.

Needless to say, that is one unfortunate aspect of an otherwise excellent and well-managed process. It is probably the primary reason that some practitioners persist with the

⁶20 NYCRR section 4000.5(b).

⁷See 20 NYCRR section 4000.5(c).

belief that the process is a waste of time and resources. And though we don't feel that way, it is sometimes a factor in our decision whether to skip the process altogether. More on that below.

A word, though, in mild defense of the process. Yes, it would be much better (and fairer) if the taxpayer and practitioner were allowed to participate in the internal review process. But the idea that a decision in the taxpayer's favor gets closely scrutinized is understandable. Indeed, if the conferee finds in favor of the taxpayer, that's it. Case closed. If, however, the conferee sustains the assessment, the taxpayer has further options for appeal. So a decision is final and binding on the department, but not on the taxpayer. On one hand, of course, that's sensible. The BCMS unit is housed within the tax department, so why would we allow the department to appeal itself? A decision by the department should be binding on the department. Still, we understand the need to get things right. The process, though, would be much better if it was more transparent and if taxpayers or practitioners could participate.

III. BCMS Best Practices

So what's the best way to handle a conference? How do you maximize chances for success? What should you look out for?

Here are some tips derived both from our own experience and from suggestions of the former director of the BCMS unit, Kevin R. Law.⁸

- Know the basis for the notice being protested. If you are a new representative or unsure or unaware of the basis of the notice, then ask. Call the auditor or technician and get clarification. There should be no surprises from the auditor or technician at a conference. The best way for a practitioner to do that is to file a Freedom of Information Law request for the audit file at the same time that the BCMS request is filed. Usually the tax department's Records Access Office is able to provide the requested documents before the conference is scheduled. And that should provide the practitioner with everything she needs to know about the audit.
- If the taxpayer's documents were not given during audit, sometimes it makes sense to call the auditor to explain the situation, ask them what the issues are, and ask what they need. Start a dialogue with the auditors and give them needed documents. Get information that you do not have. Just because you have filed a request for conciliation conference does not mean you cannot resolve the dispute before the conference.

⁸Law now serves as an administrative law judge in the division of tax appeals. Some of Law's suggestions are from a presentation he gave at the offices of Hodgson Russ LLP in November 2013, which is on file with the authors.

- The mere testimony of the representative at the conference will generally be given little weight. It is better to bring the client or documents to get out the facts that you have alleged. If you don't have black-and-white documents, consider bringing the taxpayer to tell his side of the story. Proceedings before BCMS are not relevant or precedential in any subsequent proceeding, so it does not hurt to bring the taxpayer. We have found that is especially true in residency cases. Often those cases involve questions about intent and credibility. Numerous conferees have told us how helpful it is (usually for the taxpayer) when the taxpayer shows up to tell his story — so don't miss the chance to do that.
- Be cordial and polite at the conference. Be firm when you have to. We'll usually let the auditor get through her entire explanation without interruption, not only because we're polite people, but also because it encourages her to do the same when we are presenting!
- Summarize your argument in written form to give the conferee a roadmap. As noted above, that should start with a well-written and descriptive BCMS petition.
- Be prepared to settle the case on the day of the conference, when the audit division may be more eager to settle. That means being prepared to make a reasonable settlement offer at the conference.
- As noted above, continue to work the case after the conference. Calls, emails, even meetings can be helpful to get a case resolved. Don't just walk out of the conference, slap a high-five with your client, and wait for an answer!

IV. Should BCMS Be Skipped?

The answer to that question is, usually, no. Historically, our understanding is that close to 90 percent of cases are resolved at BCMS without further contest. That number includes situations in which taxpayers default, fail to appeal, or just give up. But the process is still usually worthwhile, with 75 percent of the cases resulting in an agreed consent.

Nonetheless, because BCMS is a voluntary procedure, practitioners have varying views on its utility in the tax appeals process. Some practitioners believe that since the conciliation conferees are employed by the tax department and are often former auditors themselves, the process is biased and generally a waste of time. A bad experience with the internal review process can further that view. Other practitioners see it as a mandatory step in the appeals process and something that should always be requested no matter what facts or issues arise.

The right answer, however, is somewhere in the middle. The opportunity always exists for a conferee to simply rule in the taxpayer's favor. Moreover, the discussion of issues and the presentation of additional facts at a conciliation conference can lead the audit division to reconsider its position or, in the alternative, lead to a favorable resolution that all parties can accept. A conciliation conferee can often

be quite helpful in facilitating those settlement discussions. And finally, at the very least, the conciliation conference allows further development of the arguments, further understanding of the tax department's arguments, and further preparation for the next phase: a formal hearing before an administrative law judge. Thus, in most cases, taxpayers are well-advised to use the conciliation conference process.

But that's not to say that is an all-or-nothing rule. Sometimes going to a conciliation conference might be unnecessary, either because of the nature of the issue or because of the basis for the tax department's position. If the tax department has stated its position in a technical services bureau memorandum or in an opinion of counsel, generally conciliation conferees are bound by that.⁹ In some cases in which advisory opinions are issued in similar factual situations, conferees will feel constrained to take a different position, even though advisory opinions are only supposed to be binding on the taxpayer to whom it was issued.¹⁰ And in some cases, it is really more of a gut feeling that we get from having handled so many of these cases. If a case is really difficult — with lots of money at issue and intransigent auditors — the BCMS process simply might not be a fit. Again, often that happens when we get the sense that even if we “knock it out of the park” at the conference, we'll strike out during the internal review process. In cases like that, we often make the call to go straight to the division of tax appeals.

Thus, before making the decision to proceed to BCMS, make sure you understand the basis for the tax department's position and evaluate whether that position could be modified or overruled by a conferee. Also keep in mind that even if the taxpayer originally skips BCMS, there is a limited right to return. When a petition for an ALJ hearing is filed without a conciliation conference having been conducted, the division of tax appeals may suspend action on the petition and refer the matter to BCMS if the taxpayer and the office of counsel agree to that referral.¹¹

V. Next Up

Are we there yet? If the case can't be resolved at BCMS, or if BCMS is skipped altogether, it's on to the division of tax appeals — the next installment of this series. ☆

⁹20 NYCRR section 2375.6.

¹⁰20 NYCRR section 2375.5.

¹¹See 20 NYCRR 3000.3(e).

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