

# Best Practices for Managing Your Audit and Litigation Portfolio

TEI Denver Chapter

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Open Weaver Banks  
*Counsel*

Ted Friedman  
*Counsel*

# Learning Objectives

- COVID-19 Impact on Tax Proceedings
  - Understanding guidance regarding procedural issues critical to tax matters
- Audit Considerations
  - Documentation and issue identification
- Administrative Appeal Considerations
  - Timing, tribunals, and multistate considerations
- Judicial Appeal Considerations
  - Forums, judges, discovery, and confidentiality
- Settlement Considerations
  - When and how to present

# COVID-19 Impact on Tax Proceedings

- Deadline extensions
- Remote online notarizations
- E-signatures
- POA issues
- Remote depositions
- Video/telephonic proceedings
- E-filing

# Audit Considerations

# Audit Considerations

- Planning ahead matters
  - Contemporaneous documentation to support a tax position
- Balance compliance with taxpayer rights
  - Failure to produce documentation could preclude reliance at a later point
- Keep track of documentation provided to auditors
- Put response in writing!
- Be consistent in audit responses to states
- Issue identification
  - Does issue exist in other states?
  - Recurring issue?
  - Does issue impact your positions on other tax types?
  - Amount at issue?
  - Legal or factual issue?

**You received an assessment – so what's next?**

# Administrative Appeal Considerations

# Key Considerations for Administrative Appeals

- State tax appeal systems vary dramatically.
- Most states have an administrative appeal **option** or **requirement** before a dispute has to be taken to court:
  - Illinois Informal Conference Board
  - New Jersey Conferences & Appeals Branch (“CAB”)
  - New York Bureau of Conciliation and Mediation
  - Pennsylvania Board of Appeals
  - Wisconsin Resolution Unit
- Multistate Considerations
  - Choosing the right forum

# Key Considerations for Administrative Appeals

## — What is the Timing?

- NJ
  - CAB protest deadline is 90 days from date of the notice of assessment.
  - At CAB it may take a year for a protest to be assigned to a “conferee.”
  - For corporate tax issues it can take 2 years to resolve an issue at CAB.
- WI
  - Petition for Redetermination must be filed with the Resolution Unit within 60 days
  - File is generally assigned to a Resolution Officer within a few weeks
- Consider all deadlines in protest/appeals process
  - PA – Offer in compromise

## — Who will decide your appeal?

- CAB has conferees that specialize in either CBT, Sales Tax or GIT.
  - Often conferees are former auditors.
  - CAB is within the Division of Taxation and conferees apply the Division’s legal interpretations.
  - Conferees often have follow up questions that the auditor might not have asked.
  - Conferees can settle disputes; can also increase an assessment at CAB.
- PA – BOA Hearing Officer, BF&R
- WI – Resolution Officer

# Key Considerations for Administrative Appeals

- Is it “pay-to-play?”
- Would it make sense to pay even if it isn’t required?
- Are you setting the record?
- Confidentiality?
  - Taxpayer submissions and CAB decisions (“Final Determinations”) remain confidential.
  - WI submissions are confidential.

# Key Considerations for Administrative Appeals

## — Is there a “hearing?”

- CO – Initial informal conference(s); / Formal hearing
- NJ CAB conferences can be conducted telephonically
- WI Resolution Office – Yes (but what does that mean?)
- We recommend an in-person meeting with the conferee

## — Right to appeal

- CO final determination must be appealed to District Court within 30 days
- CAB Final Determinations may be appealed by the Taxpayer to the Tax Court of New Jersey within 90 days
- WI Resolution Office Notice of Action can be appealed within 60 days to the Wisconsin Tax Appeals Commission

# Key Considerations for Administrative Appeals

- If you don't like the answers to the above questions, can you skip the administrative appeal?
  - NJ taxpayers can skip CAB and go straight to Tax Court.
  - When should NJ taxpayers consider skipping CAB:
    - The dispute is purely a legal issue and the Division will not budge from its interpretation without a court order.
    - The dispute requires discretionary relief and CAB is not likely to give adequate relief.
  - WI – No
- Multistate considerations

# Judicial Appeal Considerations

# Key Considerations for Judicial Appeals

- What kind of “court” are we talking about?
  - Illinois Independent Tax Tribunal
  - Illinois Circuit Court of Cook County
  - Tax Court of New Jersey
  - New York Division of Tax Appeals
  - Oregon Tax Court
  - Commonwealth Court of Pennsylvania
  - Texas District Court
  - Wisconsin Tax Appeals Commission
- Who will hear your appeal?

# Key Considerations for Judicial Appeals

- Multistate Considerations
- SALT Scoreboard



# Key Considerations for Judicial Appeals

- Many of the same considerations apply.
  - Timing
    - NJ Tax Court has plenty of available judges but litigation is protracted because of dwindling attorneys to represent the Division.
    - NY Division of Tax Appeals has the opposite problem, with it taking over a year for an ALJ to be assigned to a case.
    - WI example (2013 Petition; 2016 trial; 2017 TAC decision).
  - Pay-to-play states (Illinois and Texas are examples).
  - Discovery
  - Setting the Record
  - Confidentiality/Availability of Protective Orders
    - NJ Tax Court is an open court and public access to filed documents is available online.
    - OR and WI TAC - confidential materials can be protected if steps taken.
  - Appeals – how many levels?
    - NJ taxpayers can appeal a losing decision to the Appellate Division of the Superior Court.
    - Any party may appeal a WI TAC decision to the Circuit Court.

# Key Considerations for Judicial Appeals

- Major differences between an administrative appeal and judicial appeal
  - Opposing Counsel
  - Discovery
    - New Jersey is known for fairly extensive discovery requests in Tax Court (written and depositions).
  - Stipulations of Fact
  - Briefing
    - Some disputes can be resolved by a judge with briefing on the parties' legal positions.
  - Trials/Summary Judgment Motions
    - Some disputes require a trial for a judge to hear the testimony of the taxpayer's witnesses.
  - Settlement

# Settlement Considerations

# Settlement Considerations

## Overview

- When can you settle?
  - In NJ, settlement can happen at CAB, at the NJ Tax Court, and while appeals are pending at higher courts.
  - In WI, settlement can happen at Resolution Office, at the WI TAC, and while appeals are pending at higher courts.
- How does the NJ Division settle?
  - The Division prefers a settlement based on a methodology and not hazards of litigation.
    - Compare to NYS and NYC which regularly negotiate based on the hazards of litigation.
- How long does settlement take?
  - At CAB settlement might only take a couple of months once the parties have presented their positions.
  - At NJ Tax Court settlement can take over a year to finalize after the parties have agreed to “settlement in principle.”

# Questions?



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*Contact us*

**Open Weaver Banks**

*Counsel*

Eversheds Sutherland (US) LLP

212.389.5081

openweaverbanks@eversheds-  
sutherland.com

**Ted Friedman**

*Counsel*

Eversheds Sutherland (US) LLP

212.389.5008

tedfriedman@eversheds-  
sutherland.com

**stateandlocaltax.com**

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