AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
August 7-8, 2006

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the Model State Administrative Tax Tribunal Act, dated August, 2006.

FURTHER RESOLVED, That the American Bar Association recommends to state and territorial legislatures the adoption of the Model State Administrative Tax Tribunal Act, dated August, 2006.

MODEL STATE ADMINISTRATIVE TAX TRIBUNAL ACT

(August 2006)

Section 1. Statement of Purpose

To increase public confidence in the fairness of the State tax system, the State shall provide an independent agency with tax expertise to resolve disputes between the [department of revenue] and taxpayers, prior to requiring the payment of the amounts in issue or the posting of a bond, but after the taxpayer has had a full opportunity to attempt settlement with the [department of revenue] based, among other things, on the hazards of litigation. By establishing an independent tax tribunal within the executive branch of government, this Act provides taxpayers with a means of resolving controversies that insures both the appearance and the reality of due process and fundamental fairness.

The tax tribunal shall provide hearings in all tax matters except those specified by statute, and render decisions and orders relating thereto. A tax tribunal hearing shall be commenced by the filing of a petition protesting a tax determination made by the [department of revenue], including any determination that cancels, revokes, suspends or denies an application for a license, permit or registration. A final decision of the tax tribunal shall have the same force and effect as, and shall be subject to appeal (except in the case of small claims) in the same manner as, a final decision of a State trial court.

It is the intent of the [General Assembly] that this Act foster the settlement or other resolution of tax disputes to the extent possible and, in cases in which litigation is necessary, to provide the people of this State with a fair, independent, pre-payment procedure to determine a dispute with the [department of revenue]. The Act shall be interpreted and construed to further this intent.

Section 2. Tax Tribunal: Establishment

(a) A tax tribunal is hereby established in the executive branch of government. The tribunal is referred to in this Act as the "Tax Tribunal."

(b) The Tax Tribunal shall be separate from and independent of the authority of the [commissioner of revenue] and the [department of revenue].

(c) The Tax Tribunal shall have a seal.

(d) The Tax Tribunal shall be created and exist on and after January 1, 200_, but the judge[s] thereof may be appointed prior thereto and may then take any action that is necessary to enable the judge[s] properly to exercise after that date the duties, functions and powers given the Tax Tribunal under this Act.

Section 3. Judges: Number; Appointment; Term of Office; Removal

(a) The Tax Tribunal shall consist of at least one full-time judge. If there is more than one judge, each shall exercise the powers of the Tax Tribunal.

(b) The judge[s] of the Tax Tribunal shall be appointed by the Governor, with the advice and consent of the Senate, for a term of ten years. If the Tribunal has more than one judge, the judges initially appointed should be given terms of different lengths not exceeding ten years, so that all judges' terms do not expire in the same year.

(c) The [Each] judge of the Tax Tribunal shall receive an annual salary no less than that provided for [general trial] court judges under [statute], which salary shall not be diminished during the judge's term of appointment.

(d) Once appointed and confirmed, the [each] judge shall continue in office until his or her term expires and until a successor has been appointed and confirmed.

(e) A vacancy in the Tax Tribunal occurring otherwise than by expiration of term shall be filled for the unexpired term in the same manner as an original appointment.

(f) If more than one judge is appointed, the Governor shall designate one of the members as chief judge, in this chapter referred to as the "Chief Judge." The Chief Judge shall be the executive of the Tax Tribunal, shall have sole charge of the administration of the Tax Tribunal and shall apportion among the judges all causes, matters and proceedings coming before the Tax Tribunal. The individual designated as Chief Judge shall serve in that capacity during the pleasure of the Governor.

(g) The Governor may remove a judge, after notice and an opportunity to be heard, for neglect of duty, inability to perform duties, malfeasance in office, or other good cause, with the advice and consent of the Senate.

(h) Whenever the Tax Tribunal trial docket or business becomes congested or the [any] judge of the Tax Tribunal is absent, is disqualified or for any other reason is unable to perform his or her duties as judge, and it appears to the Governor that it is advisable that the services of an additional judge or judges be provided, the Governor may appoint a judge, or judges, *pro tempore* of the Tax Tribunal. Any person appointed judge *pro tempore* of the Tax Tribunal shall have the qualifications set forth in subsections (a) and (b) of Section 4 of this Act and shall be entitled to serve for a period no longer than six months.

(i) A judge may disqualify himself or herself on his or her own motion in any matter, and may be disqualified for any of the causes specified in [judicial disqualification statute].

Section 4. Judges: Qualifications; Prohibition Against Other Gainful Employment

(a) The [Each] judge of the Tax Tribunal shall be a citizen of the United States and, during the period of his or her service, a resident of this State. No person shall be appointed as a judge unless at the time of appointment the individual has substantial knowledge of the tax law and substantial experience making the record in a tax case suitable for judicial review.

(b) Before entering upon the duties of office, the [each] judge shall take and subscribe to an oath or affirmation that he or she will faithfully discharge the duties of the office, and such oath shall be filed in the office of the Secretary of State.

(c) The [Each] judge shall devote his or her full time during business hours to the duties of his or her office. A judge shall not engage in any other gainful employment or business, nor hold another office or position of profit in a government of this State, any other State or the United States. Notwithstanding the foregoing provisions, a judge may own passive interests in business entities and earn income from incidental teaching or scholarly activities.

Section 5. Principal Office: Locations; Facilities

(a) The Tax Tribunal's principal office shall be located in [the State capital or other city].

(b) The Tax Tribunal shall conduct hearings at its principal office. The Tax Tribunal may also hold hearings at any place within the State, with a view toward securing to taxpayers a reasonable opportunity to appear before the Tax Tribunal with as little inconvenience and expense as practicable.

(c) The principal office of the Tax Tribunal shall be located in a building that is separate and apart from the building in which the [department of revenue] is located. When the Tax Tribunal holds hearings outside of its principal office, it shall do so in a location that is physically separated from facilities regularly occupied by the [department of revenue].

(d) The State shall provide hearing rooms, chambers and offices for the Tax Tribunal at its principal office and shall arrange for hearing rooms, chambers and offices or other appropriate facilities when hearings are held elsewhere.

Section 6. Appointment of Clerk and Reporter; Expenditures of the Tax Tribunal

(a) The Tax Tribunal shall appoint a clerk and a reporter, and may appoint such other employees and make such other expenditures, including expenditures for library, publications and equipment, as are necessary to permit it to efficiently execute its functions.

(b) The reporter shall be subject to the provisions of [court reporter statutes] as if appointed by a judge of the [general trial] court, except where such provisions are in conflict with this Act.

(c) No employee of the Tax Tribunal shall act as attorney, representative or accountant for others in a matter involving any tax imposed or levied by this State.

(d) An employee of the Tax Tribunal may be removed by the judge [Chief Judge], after notice and an opportunity to be heard, for neglect of duty, inability to perform duties, malfeasance in office, or for other good cause.

(e) In addition to the services of the official reporter, the Tax Tribunal may contract the reporting of its proceedings and, in the contract, fix the terms and conditions under which transcripts will be supplied by the contractor to the Tax Tribunal and to other persons and agencies.

Section 7. Jurisdiction of the Tax Tribunal

(a) Except as permitted by section 15 of this Act relating to judicial review and by [other State law, such as the State constitution, a statute or case law], the Tax Tribunal shall be the sole, exclusive and final authority for the hearing and determination of questions of law and fact

arising under the tax laws of this State. For purposes of this section, the following statutes are not tax laws of this State, except to the extent that they preclude the imposition of other taxes: [Any laws regulating the payment of taxes or assessments over which it is not intended the Tax Tribunal shall have jurisdiction, *e.g.*, Workman's Compensation Laws, Racing Taxes, Commodities Assessments, etc.].

(b) Except as permitted by section 15 of this Act relating to judicial review and by [other State law, such as the State constitution, a statute or case law], no person shall contest any matter within the jurisdiction of the Tax Tribunal in any action, suit or proceeding in the [general trial] court or any other court of the State. If a person attempts to do so, then such action, suit or proceeding shall be dismissed without prejudice. The improper commencement of any action, suit or proceeding will not extend the time period for commencing a proceeding in the Tax Tribunal.

(c) Except in cases involving the denial of a claim for refund and except as provided in [State statute regarding jeopardy assessments], the taxpayer shall have the right to have his case heard by the Tax Tribunal prior to the payment of any of the amounts asserted as due by the [department of revenue] and prior to the posting of any bond.

(d) If, with or after the filing of a timely petition, the taxpayer pays all or part of the tax or other amount in issue before the Tax Tribunal has rendered a decision, the Tax Tribunal shall treat the taxpayer's petition as a protest of a denial of a claim for refund of the amount so paid.

(e) The Tax Tribunal shall decide questions regarding the constitutionality of the application of statutes to the taxpayer and the constitutionality of regulations promulgated by the [department of revenue], but shall not have the power to declare a statute unconstitutional on its face. A taxpayer desiring to challenge the constitutionality of a statute on its face may, at the taxpayer's election, do so by one of the following methods:

(1) commence a declaratory action in the [general trial] courts of this State with respect to the constitutional challenge, and file a petition in the Tax Tribunal with respect to the remainder of the matter, which proceeding shall be stayed by the Tax Tribunal pending final resolution of the constitutional challenge;

(2) file a petition with the Tax Tribunal with respect to issues other than the constitutional challenge, in which the taxpayer preserves the constitutional challenge until the entire matter, including the constitutional challenge and the facts related to the constitutional challenge, is presented to the appellate court; or

(3) commence and simultaneously prosecute a declaratory action in the [general trial] court with respect to the constitutional challenge and a proceeding in the Tax Tribunal with respect to the remainder of the issues.

Section 8. Opportunity To Resolve Tax Disputes Informally Prior to Commencing a Proceeding in the Tax Tribunal

(a) Before the [department of revenue] finalizes a determination that triggers a taxpayer's right to commence a proceeding in the Tax Tribunal under Section 9 of this Act, the [department

of revenue] shall provide to the taxpayer, including for purposes of this section any person asserted by the [department of revenue] to be a taxpayer, the option to obtain review of the audit function's proposed determination by an independent administrative appeals function. An independent administrative appeals function means a program of holding conferences and negotiating settlements that is designed to resolve the vast majority of tax controversies without litigation on a basis that is fair and impartial to the State and the taxpayer and that enhances voluntary compliance and public confidence in the integrity and efficiency of the [department of revenue].

(b) The independent administrative appeals function shall have all of the following characteristics:

(1) Appeals personnel shall exercise independent judgment with the objective of settling as many disputed issues as possible without litigation;

(2) Appeals personnel shall have expertise in, and extensive experience with, the State's tax laws;

(3) Appeals personnel shall concede or settle individual issues based on the facts and the law, including the hazards of litigation, and an issue specifically conceded or settled by appeals personnel shall not thereafter be contested by the taxpayer or the [department of revenue];

(4) Appeals conferences shall be conducted in an informal manner;

(5) Appeals conferences shall be conducted, at the taxpayer's option, by correspondence, by telephone or in person;

(6) Appeals personnel shall consider argument as to the applicability of the tax laws; settlement proposals and counterproposals; and new evidence in support of the taxpayer's position, provided that, if the new evidence is substantial and should have been presented at the time of audit, appeals personnel may request the audit function to examine the evidence and to make a recommendation as to the effect of the evidence on the related issue;

(7) The taxpayer shall have the right to bring witnesses to an in-person conference;

(8) The taxpayer may participate in appeals conferences without representation; may be represented by an officer, employee, partner or member of the taxpayer; or may be represented by a third party of the taxpayer's choice, including a person specified in section 16(a);

(9) Appeals personnel shall not engage in *ex parte* communications with [department of revenue] employees to the extent that such communications appear to compromise the independence of the appeals function. Consistent with this rule, appeals personnel may on an *ex parte* basis (a) ask questions that involve ministerial, administrative, or procedural matters and that do not address the substance of the issues or positions taken in the case, and (b) seek legal advice on an issue from a [department of revenue] attorney

who was not involved in providing advice on that issue to the employees who made the determination being reviewed. In all other cases, appeals personnel shall allow the taxpayer to participate in any communications with [department of revenue] employees;

(10) Appeals decisions and agreements shall not be considered as precedent;

(11) A taxpayer's decision to forego appeals consideration shall not constitute a failure to exhaust administrative remedies, nor shall a taxpayer's decision to request appeals consideration with respect to a determination preclude the taxpayer from commencing a proceeding in the Tax Tribunal with respect to any issue not resolved by settlement or concession; and

(12) The [department of revenue] may promulgate emergency and other rules governing the operation of the independent administrative appeals function, including, without limitation, a rule allowing the [department of revenue] to finalize its determination if the taxpayer fails to timely request or pursue appeals consideration or a rule allowing the [department of revenue] to publicly designate specific issues that appeals personnel may not compromise.

Section 9. Pleadings

(a) A taxpayer may commence a proceeding in the Tax Tribunal by filing a petition protesting the [department of revenue]'s determination imposing a liability for tax, penalty or interest; denying a refund or credit application; canceling, revoking, suspending or denying an application for a license, permit or registration; or taking any other action that gives a person the right to a hearing under the law. The petition shall be filed in the Tax Tribunal no later than 90 days after receipt of the [department of revenue]'s written notice of such determination. For purposes of this Act, the term "taxpayer" includes a person (1) who is challenging the State's jurisdiction over the person, and (2) who has standing to challenge the validity or applicability of the tax.

(b) The [department of revenue] shall file its answer in the Tax Tribunal no later than 75 days after its receipt of the Tax Tribunal's notification that the taxpayer has filed a petition in proper form. Upon written request, the Tax Tribunal may grant up to 15 additional days to file an answer. The [department of revenue] shall serve a copy on the taxpayer's representative or, if the taxpayer is not represented, on the taxpayer, and shall file proof of such service with the answer. Material facts alleged in the petition, if not expressly admitted or denied in the answer, shall be deemed admitted. If the [department of revenue] fails to answer within the prescribed time, all material facts alleged in the petition shall be deemed admitted.

(c) The taxpayer may file a reply in the Tax Tribunal within 30 days after receipt of the answer. The taxpayer shall serve a copy on the authorized representative of the [department of revenue] and shall file proof of such service with the reply. If the taxpayer fails to reply within the prescribed time, all material facts alleged in the answer shall be deemed denied. When a reply has been filed, or, if no reply has been filed, then 30 days after the filing of the answer, the controversy shall be deemed at issue and will be scheduled for hearing.

(d) Either party may amend a pleading once without leave at any time before the period for responding to it expires. After such time, a pleading may be amended only with the written consent of the adverse party or with the permission of the Tax Tribunal. The Tax Tribunal shall freely grant consent to amend upon such terms as may be just. Except as otherwise ordered by the Tax Tribunal, there shall be an answer or reply to an amended pleading if an answer or reply is required to the pleading being amended. Filing of the answer, or, if the answer has already been filed, the amended answer, shall be made no later than 75 days after filing of the amended petition. Filing of the reply or, if the reply has already been filed, the amended reply, shall be made within 30 days after filing of the amended answer. The taxpayer may not amend a petition after expiration of the time for filing a petition, if such amendment would have the effect of conferring jurisdiction on the Tax Tribunal over a matter that would otherwise not come within its jurisdiction. An amendment of a pleading shall relate back to the time of filing of the original pleading, unless the Tax Tribunal shall order otherwise either on motion of a party or on the Tax Tribunal's own initiative.

Section 10. Fees

(a) Upon filing a petition, the taxpayer shall pay to the clerk a fee in the amount of $_____, except that, in case of a petition filed in the Small Claims Division as provided in section 14 of this Act, the fee shall be $_____. A similar fee shall be paid by other parties making an appearance in the proceeding, except that no fee shall be charged to a government body or government official appearing in a representative capacity.

(b) The Tax Tribunal may fix a fee, not in excess of the fees charged and collected by the clerks of the [general trial] courts, for comparing, or for preparing and comparing, a transcript of the record, or for copying any record, entry or other paper and the comparison and certification thereof.

Section 11. Discovery and Stipulation

(a) The parties to a proceeding shall make every effort to achieve discovery by informal consultation or communication, before invoking the discovery mechanisms authorized by this section.

(b) The parties to a proceeding shall stipulate all relevant and non-privileged matters to the fullest extent to which complete or qualified agreement can or fairly should be reached. Neither the existence nor the use of the discovery mechanisms authorized by this section shall excuse failure to comply with this provision.

(c) Subject to reasonable limitations prescribed by the Tax Tribunal, a party may obtain discovery by written interrogatories; requests for the production of returns, books, papers, documents, correspondence or other evidence; depositions of parties, non-party witnesses and experts; and requests for admissions. The Tax Tribunal may provide for other forms of discovery.

(d) The [A] judge or the clerk of the Tax Tribunal, on the request of any party to the proceeding, shall issue subpoenas requiring the attendance of witnesses and giving of testimony and subpoenas *duces tecum* requiring the production of evidence or things.

(e) Any employee of the Tax Tribunal designated in writing for the purpose by the judge [Chief Judge] may administer oaths.

(f) Any witness subpoenaed or whose deposition is taken shall receive the same fees and mileage as a witness in a [general trial] court of this State.

(g) The Tax Tribunal may enforce its orders on discovery and other procedural issues, among other means, by deciding issues wholly or partly against the offending party.

Section 12. Hearings

(a) Proceedings before the Tax Tribunal shall be tried *de novo* and, to the extent permissible under the constitution, without a jury.

(b) Except as set forth in this Act or otherwise precluded by law, the Tax Tribunal shall take evidence, conduct hearings and issue final and interlocutory decisions.

(c) Hearings shall be open to the public and shall be conducted in accordance with such rules of practice and procedure as the Tax Tribunal may promulgate. Notwithstanding the foregoing, on motion of either party the Tax Tribunal shall issue a protective order or an order closing part or all of the hearing to the public, if the party shows good cause to protect certain information from being disclosed to the public.

(d) The Tax Tribunal shall not be bound by the rules of evidence applicable to civil cases in the [general trial] courts of this State. The Tax Tribunal shall admit relevant evidence, including hearsay, if it is probative of a material fact in controversy. The Tax Tribunal shall exclude irrelevant and unduly repetitious evidence. Notwithstanding the foregoing, the rules of privilege recognized by law shall apply.

(e) Testimony may be given only on oath or affirmation.

(f) The petition and other pleadings in the proceeding shall be deemed to conform to the proof presented at the hearing, unless a party satisfies the Tax Tribunal that presentation of the evidence would unfairly prejudice the party in maintaining its position on the merits or unless deeming the taxpayer's petition to conform to the proof would confer jurisdiction on the Tax Tribunal over a matter that would not otherwise come within its jurisdiction.

(g) In the case of an issue of fact, the taxpayer shall have the burden of persuasion by a preponderance of the evidence in the record, except that the [department of revenue] shall have the burden of persuasion in the case of an assertion of fraud and in other cases provided by law.

(h) Proceedings before the Tax Tribunal, except those before the Small Claims Division as provided in section 14 of this Act, shall be officially reported. The State shall pay the expense of reporting from the appropriation for the Tax Tribunal.

Section 13. Decisions

(a) The Tax Tribunal shall render its decision in writing, including therein a concise statement of the facts found and the conclusions of law reached. The Tax Tribunal's decision shall, subject to law, grant such relief, invoke such remedies and issue such orders as it deems appropriate to carry out its decision.

(b) The Tax Tribunal shall render its decision no later than six months after submission of the last brief filed subsequent to completion of the hearing or, if briefs are not submitted, then no later than six months after completion of the hearing. The Tax Tribunal may extend the six-month period, for good cause, up to three additional months.

(c) If the Tax Tribunal fails to render a decision within the prescribed period, either party may institute a proceeding in the [general trial] court to compel the issuance of such decision.

(d) The Tax Tribunal's decision shall finally decide the matters in controversy, unless any party to the matter timely appeals the decision as provided in section 15 of this Act.

(e) The Tax Tribunal's decision shall have the same effect, and shall be enforced in the same manner, as a judgment of a [general trial] court of the State.

(f) The Tax Tribunal's interpretation of a taxing statute subject to contest in one case shall be followed by the Tax Tribunal in subsequent cases involving the same statute, and its application of a statute to the facts of one case shall be followed by the Tax Tribunal in subsequent cases involving similar facts, unless the Tax Tribunal's interpretation or application conflicts with that of an appellate court or the Tax Tribunal provides satisfactory reasons for reversing prior precedent.

Section 14. Small Claims Division: Establishment; Jurisdiction

(a) There is hereby established a Small Claims Division of the Tax Tribunal.

(b) The Judge[s] of the Tax Tribunal shall sit as the judge[s] of the Small Claims Division.

(c) If the taxpayer timely elects, the Small Claims Division shall have jurisdiction over any proceeding with respect to any calendar year for which the net amount of the tax deficiencies and claimed refunds in controversy does not exceed $25,000, exclusive of interest and penalties.

(d) A taxpayer may elect to proceed in the Small Claims Division of the Tax Tribunal by filing a petition in the form prescribed by the Tax Tribunal no later than 90 days after the taxpayer's receipt of written notice of the determination that is the subject of the petition. A taxpayer may not revoke an election to proceed in the Small Claims Division.

(e) No later than 30 days after receipt of notice that the taxpayer has filed a petition in proper form, or at such other time as the Tax Tribunal may order, the [department of revenue] shall file with the Tax Tribunal an answer similar to that required by section 9 of this Act.

(f) At any time prior to entry of judgment, a taxpayer may dismiss a proceeding in the Small Claims Division by notifying the clerk of the Tax Tribunal in writing. Such dismissal shall be with prejudice, and shall not have the effect of revoking the election made in accordance with subsection (d) of this section.

(g) Hearings in the Small Claims Division shall be informal, and the judge may receive such evidence as the judge deems appropriate for determination of the case. Testimony shall be given under oath or affirmation.

(h) A judgment of the Small Claims Division shall be conclusive upon all parties and may not be appealed. A judgment of the Small Claims Division shall not be considered as precedent in any other case, hearing or proceeding.

(i) Sections 1 to 13 and sections 15 to 20 of this Act shall apply to proceedings in the Small Claims Division unless expressly inapplicable thereto or inconsistent with the provisions of this section.

Section 15. Appeals

(a) The taxpayer or the [department of revenue] shall be entitled to judicial review of a final decision of the Tax Tribunal, except a final decision of the Small Claims Division, in accordance with the procedure for appeal from a decision of a [general trial] court, but without regard to the sum involved. The taxpayer or the [department of revenue] may obtain judicial review of an interlocutory decision of the Tax Tribunal under the same conditions and in the same manner as an interlocutory decision of the [general trial] court.

(b) The record on judicial review shall include the decision of the Tax Tribunal, the stenographic transcript of the hearing before the Tax Tribunal, the pleadings and all exhibits and documents admitted into evidence.

Section 16. Representation

(a) Appearances in proceedings conducted by the Tax Tribunal may be by the taxpayer, by an attorney admitted to practice in this State (including an attorney who is a partner or member of, or is employed by, an accounting or other professional services firm), by an accountant licensed in this State, or by an enrolled agent authorized to practice before the Internal Revenue Service. The Tax Tribunal may allow any attorney or accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a taxpayer in proceedings before the Tax Tribunal for a particular matter. In addition, the Tax Tribunal may promulgate rules and regulations permitting a taxpayer to be represented by an officer, employee, partner or member.

(b) The [department of revenue] shall be represented by an authorized representative in all proceedings before the Tax Tribunal.

Section 17. Publication of Decisions

Except for decisions issued by the Small Claims Division, the Tax Tribunal shall index and publish its final decisions in such print or electronic form as it deems best adapted for public convenience. Such publications shall be made permanently available and constitute the official reports of the Tax Tribunal.

Section 18. Service of Process, etc.

(a) Mailing by first class or certified or registered mail, postage prepaid, to the address of the taxpayer given on the taxpayer's petition, or to the address of the taxpayer's representative of record, if any, or to the usual place of business of the [department of revenue], shall constitute personal service on the other party. The Tax Tribunal may by rule prescribe that notice by other means shall constitute personal service and may in a particular case order that notice be given to additional persons or by other means.

(b) Mailing by registered or certified mail and delivery by a private delivery service approved by the Internal Revenue Service in accordance with Section 7502(f) of the Internal Revenue Code of 1986, as amended, shall be deemed to have occurred, respectively, on the date of mailing and the date of submission to the private delivery service.

Section 19. Rules and Forms

The Tax Tribunal is authorized to promulgate and adopt all reasonable rules and forms as may be necessary or appropriate to carry out the intent and purposes of this Act.

Section 20. Effective Dates

This Act shall take effect January 1, 200_, except that the provision in section 2 of this Act for the appointment of [a] judge[s] to the Tax Tribunal shall take effect on _____, 200_. This Act shall apply to (a) all proceedings commenced in the Tax Tribunal on or after such date, and (b) all administrative proceedings commenced prior to such date that have not been the subject of a final and irrevocable administrative action as of such effective date, to the extent this Act can be made applicable thereto. Any administrative proceeding in which a hearing has commenced prior to the effective date of this Act shall be transferred to the Tax Tribunal, which shall render the decision in such proceeding unless there is a prior settlement. This Act shall not affect any proceeding, prosecution, action, suit or appeal commenced in the judicial branch before its effective date.

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REPORT

In many states, a taxpayer who desires to contest the state tax authority's determination of a tax liability, or denial of a refund claim, faces several obstacles that seriously undermine the public's perception of the fairness of tax decisions made by the State.

In a number of states, a taxpayer who disagrees with a state tax determination must present his legal challenge and make his factual record to a hearing officer who is employed by the same tax agency that made the determination in issue. In such states, such an internal hearing is the taxpayer's first and last opportunity to present his case to a person who is knowledgeable about taxes. Moreover, the standard for judicial review of the internal hearing officer's factual determinations is often extremely onerous, *e.g.*, the hearing officer's findings must be upheld by a reviewing court unless "arbitrary and capricious," "without rational basis," "clearly erroneous," or "against the manifest weight of the evidence in the record." No matter how conscientious and fair the particular hearing officer, the hearing officer's status as an employee and agent of the tax collector creates an unavoidable perception of bias.

In some states the taxpayer must pay part or all of the asserted liability for tax, interest and penalty before the taxpayer can challenge the state's tax determination before a court or administrative tribunal that is independent from the state taxing agency that made the determination ("pay-to-play"). In other states, the taxpayer must post a bond—which can be very expensive—as a condition to challenging the assessment ("bond-to-play"). By imposing a substantial cost upon the exercise of the taxpayer's right to an initial hearing before an independent body, pay-to-play and bond-to-play provisions discourage taxpayers—particularly smaller taxpayers—from challenging decisions that are not clearly supported by controlling law or by the taxpayer's facts.

Comprehensive surveys of the tax appeal regimes in the various states and their salient characteristics may be found in Ocasal and Federation of Tax Administrators, "State Tax Appeal Systems," 1700 *Tax Management Portfolio (BNA)*, and Publication RR-144, "State Tax Appeal Systems," Federation of Tax Administrators (1994). An analysis of the characteristics and advantages of the various types of independent judicial and administrative state tax courts and tribunals now in existence is set forth in Coffin, "The Case for a State Tax Court," 8 *State and Local Tax Lawyer* 68ff. (2003). The existing dispute resolution systems in the various states are critiqued from the point of view of larger, multistate business taxpayers in Lindholm and Kranz, "Best and Worst of State Tax Administration: COST Scorecard on Appeals, Procedural Requirements," *Tax Management Multistate Tax Report*, Vol. 11, No. 3, pp. 137-152 (BNA, 3/26/04).

Basic fairness demands that a taxpayer be allowed to make his case against an assertion of tax liability before an independent adjudicatory body with tax expertise. And, except in unusual situations, a taxpayer challenging a tax determination should not be required to pay the amount in dispute, or post a bond, as a condition to receiving an initial hearing before an unbiased, adjudicatory body.

To address these instances of unfairness, and to make available to taxpayers in all states the best practices of the independent state tax courts and tribunals that now exist, the Model State

Administrative Tax Tribunal Act ("the Model Act") was drafted for consideration by the states. The Model Act would establish within the executive branch of government a tax tribunal with virtually the same powers as a state trial court of general jurisdiction, but with its subject matter jurisdiction limited to taxes.

The new tax tribunal would assume jurisdiction over most or all of the taxes collected by the state's revenue department, and would do away with the need for the state to maintain a formal hearing system within the department. In recognition of the fact that only a small percentage of tax disputes should be litigated, the Act would require the state to afford every taxpayer a realistic opportunity to resolve a dispute with the revenue department on an informal basis, without the obligation to hire professional tax representatives, before the taxpayer is given the option to commence a proceeding in the new tribunal.

The taxpayer would invoke the tax tribunal's jurisdiction after receiving an adverse determination from the department of revenue. The tribunal's proceedings would be *de novo* and without a jury. The tribunal would include both a regular and a small claims division. The taxpayer or the department could appeal a tax tribunal decision, except a decision of the tribunal's small claims division, in the same manner as an appeal from a decision of the state's trial court of general jurisdiction.

How the Model Act Relates to Prior State Tax Court Proposals

In 1957, the American Bar Association sponsored a study of state tax courts. The ABA study prompted the National Conference of Commissioners on Uniform State Laws to promulgate a Model State Tax Court Act, which was designed to provide a model for state legislatures to use in establishing such a court.

Subsequently, the American Bar Association approved a revised model act (Revised Model State Tax Court Act 1971-12), which clarified some of the ambiguities of the 1957 Model Act and placed the proposed court in the state's judicial system.

After studying the Revised Model State Tax Court Act 1971-12; the independent tax court and tribunal statutes enacted by various states, including Maryland, Massachusetts, New Jersey, New York and West Virginia; the literature reflecting modern thinking on the operation of state tax tribunals; and the practical knowledge of attorneys with extensive state tax litigation experience, the Model State Administrative Tax Tribunal Act was prepared, which would establish a tax tribunal within the executive branch of government with plenary jurisdiction over tax matters.

The Model Act uses the terms "[general trial]" and "[statute]" to indicate to the draftsman that reference to local usage and statutes must be inserted at this point. Other insertions are suggested by the use of material in brackets.

Section-by-section explanation of the Model State Administrative Tax Tribunal Act.

Section 1. This section declares the legislature's purposes in creating an independent administrative tax tribunal. Portions of this section were taken from the legislation that established the West Virginia Office of Tax Appeals, the statement of purpose from the

legislation establishing the New York State Division of Tax Appeals, and provisions of the South Carolina Revenue Procedures Act.

Section 2. The Model Act places the tax tribunal in the executive branch, while simultaneously insuring that the tribunal is separate from and independent of the commissioner of revenue and the department of revenue.

The Model Act establishes a tax tribunal in the executive branch, rather than the judicial branch, for several reasons. First, a number of state constitutions either do not permit the legislature to establish a specialized court within the judicial branch without an amendment to the state constitution or require judicial branch judges to be elected in a manner that makes it difficult or impossible to insure that the court has tax expertise.

Second, experience over the last twenty years demonstrates that executive-branch state tax tribunals can efficiently achieve the Model Act's principal goals of providing every taxpayer faced with a tax dispute a pre-payment opportunity to make his factual record before an independent forum of tax experts. Executive-branch tribunals in states such as Maryland, Massachusetts, Michigan and New York have operated successfully for a number of years and have earned a reputation for fairness and tax expertise.

A specialized judicial branch court would have advantages over the executive branch tribunal contemplated by the Model Act, *i.e.*, a judicial court would have greater institutional independence and the power to invalidate facially unconstitutional tax statutes. Accordingly, a state considering reform of its tax appeals system should explore the alternative of accomplishing the Model Act's goals by establishing a specialized tax court in the judicial branch. If that alternative is chosen, sections 7-19 contain important and useful provisions that should be considered for enactment by the legislature or adoption by the new court as rules.

Subsection (d) permits the first judge (or judges) to establish the tax tribunal before the tribunal actually has jurisdiction to hear cases.

Section 3. The number of judges needed by a state necessarily depends upon the volume of cases in the state. To provide flexibility, the Act provides that there will be at least one judge. If there is more than one judge, the number should be uneven, to avoid tied *en banc* decisions. This and succeeding sections are written to apply in states having only one judge. In brackets are the changes necessary to accommodate states having more than a single judge. If the tribunal will have more than one judge, the statute should provide for staggered terms for the judges that are first appointed.

Consistent with the practice in many states, the Act provides that judge(s) shall be appointed by the Governor with the consent of the Senate.

Subsections (b) and (c)'s requirements that each judge serve a 10-year term and receive at least the same annual salary as a state [general trial] court judge are intended to insure that the position of Tax Tribunal judge will have sufficient prestige, freedom from political pressure and job security to attract and retain experienced and knowledgeable tax experts.

Subsection (f) provides for a chief judge when more than one judge is serving.

Subsection (h) allows the appointment of *pro tempore* judges to deal with temporary circumstances affecting the tribunal's ability to efficiently process its docket.

Section 4. A judge of the tribunal should have substantial knowledge of the tax laws of the State and substantial experience making a tax case record suitable for review through the court system. In states with a tax certification program, such as Louisiana and its Board Certified Tax Specialist program, consideration should be given to adding such a requirement to the qualifications of a tax tribunal judge. Consideration should also be given to including a provision authorizing the Governor to request a list of qualified, potential judges from the governing boards of appropriate professional organizations.

Subsection (c) prohibits a judge from engaging in other employment during the time the person is serving as a judge, except for passive ownership of business interests and incidental teaching or scholarly pursuits.

In jurisdictions in which the number of tax cases does not justify the employment of a full-time tax tribunal judge, consideration should be given to providing for a part-time judge and allowing the individual to engage in other employment so long as such other employment does not conflict with his or her employment as a tax tribunal judge. In such a situation, subsection (a) of section 3 should be amended to delete the "full-time" requirement and subsection (c) of section 4 should be replaced with a conflict-avoidance provision similar to subsection (c) of section 6.

Section 5. This section provides that hearings will take place at the principal office of the tribunal as well as at other locations throughout the state.

Inasmuch as the appearance of independence is extremely important, Section 5 also provides that the principal office of the tribunal will be located in a building that is separate and apart from the building in which the department of revenue is located.

Similarly, when the tribunal is holding hearings away from its principal office, it should do so in a location that is physically separate from any location regularly occupied by the department of revenue. When the New York State legislature created the Division of Tax Appeals, it located the Division of Tax Appeals in Troy, New York while the Department of Taxation and Finance was (and is) located in Albany, New York. This furthered the separation of the two bodies.

Section 6. Subsection (c) prohibits an employee of the tribunal from acting as an attorney, representative or accountant for others in a matter involving any tax imposed or levied by the state. This prohibition would not prohibit the employee from performing such activities on his or her own behalf. Consideration should be given to allowing the employee to perform such activities on behalf of family members and/or on behalf of others so long as the employee is not paid for such services (for example, on a *pro bono* basis).

Subsection (d) may have to be conformed to meet an individual state's civil service laws.

Section 7. Subsections (a) and (b) grant to the tribunal jurisdiction in all cases involving "questions of law and fact arising under the tax laws of this State," except tax laws specifically

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excluded. Under this language, the tribunal has jurisdiction in all tax cases, unless the legislature affirmatively removes that jurisdiction. While some states may include, for example, property taxes within the jurisdiction of the tribunal, it is likely that many states will exclude such taxes from the tribunal's jurisdiction.

Subsection (a) does not grant jurisdiction over tax collection actions initiated by the state, which must be brought in the regular courts. Since the tax liability in such cases has been finalized and cannot be contested by the taxpayer, there are generally no "questions of law and fact arising under the tax laws of this State" to be determined. If collection action authority is treated in the state's tax laws, such provisions may need to be amended to make clear that they are not affected by enactment of the Model Act.

Serious consideration should be given to including within the jurisdiction of the tribunal disputes involving taxes imposed by local jurisdictions. Inclusion of local tax disputes before the tribunal will help insure consistency in interpretations of similarly worded statutes.

Consideration should also be given to allowing the tribunal to hear cases involving other state statutes for which the tribunal judges have an appropriate background. This would allow full utilization of the tribunal in states in which there are not many tax cases in a particular year.

The subsection (b) exceptions to exclusive jurisdiction refer primarily to situations in which the State constitution or statutes give jurisdiction over specific matters to the State supreme court or other courts. The subsection also makes clear that an action within the jurisdiction of the tax tribunal that is improperly commenced in another forum shall be dismissed, but without prejudice to re-file in the tax tribunal; however, the time period for commencing an action in the tax tribunal shall not be extended.

Some states currently allow refund actions or suits to recover taxes paid under protest to be brought in the regular courts. Unless existing law is changed, subsections (a) and (b) will cause the regular courts and the tax tribunal to have simultaneous jurisdiction over such matters.

Subsection (c) makes clear that a taxpayer need not pay, nor post a bond for, any amount asserted to be due by the department of revenue prior to being allowed to challenge the assertion before the new tribunal, *i.e.,* no "pay-to-play" or "bond-to-play" as a condition to having the case heard by the tribunal. The Model Act does not preclude the state from conditioning appeal from a decision of the tribunal upon prepayment or a bond, assuming that is the rule with respect to appeals from state trial courts of general jurisdiction.

If the tribunal's jurisdiction extends to property taxes, relaxation of subsection (c)'s no-prepayment rule may be appropriate, since a single taxpayer's tax liability may constitute a substantial part of a local jurisdiction's annual revenue. For example, the state could condition the taxpayer's petition with respect to a property tax dispute upon prepayment of the portion of the tax or other liability not genuinely in dispute. In the case of non-property taxes, the tax or other liability disputed by a single taxpayer is rarely material to the state's finances, the amount in dispute is often difficult to determine, and deficiency interest provisions are usually adequate to protect the taxing authority's interest.

Subsection (d) allows the taxpayer to pay all or a portion of the asserted deficiency prior to the tax tribunal's rendering of a decision, without thereby mooting the case and requiring the taxpayer to commence a new proceeding by filing a claim for refund of the amount paid. This provision is modeled on Section 19335 of the California Revenue and Taxation Code.

Subsection (e) acknowledges that the tribunal will not have the power to rule on the constitutionality of a statute on its face, as this power is thought to be the sole province of the judicial branch of government. The Model Act does, however, authorize the tax tribunal to decide the constitutionality of a statute as applied to a particular taxpayer, as well as the constitutionality of a regulation, both on its face and as applied to a particular taxpayer.

In the case of a challenge to the constitutionality of a statute on its face, subsection (e) provides that the taxpayer may proceed, at its election, in one of three ways. First, the taxpayer may commence a declaratory action in the state trial court with respect to the constitutional challenge and have the remaining issues in the tax tribunal stayed pending final resolution of the constitutional challenge. This would be the approach likely taken if the other issues are contingent upon the constitutionality of the statute.

As a second option, the taxpayer could file a petition in the new administrative tribunal, which would adjudicate all issues other than the constitutional challenge. The tribunal's decision could then be appealed to the appropriate appellate court, at which time the taxpayer would also present the constitutional issue to the appellate court. This option would likely be taken when the other issues are unrelated to the constitutional challenge and their prompt resolution is more significant to the taxpayer.

The final option would be for the taxpayer to bifurcate the case, with the constitutional challenge proceeding directly through the judicial system and the remaining issues proceeding through the tax tribunal and, if necessary, to the appellate courts. This option would likely be used if the constitutional issue were separate and distinct from the remaining issues. Also, this option would allow the facial challenge to be handled by the judicial branch, while avoiding any prejudice to the taxpayer that might be occasioned by delaying presentation of the taxpayer's case to the administrative tax tribunal, *e.g.*, loss of witnesses or other evidence.

In some jurisdictions the legislature acts on regulations in addition to enacting statutes. In such a jurisdiction, subsection (e) may need to be modified to provide that the tribunal can only rule on the constitutionality of a regulation as applied to a particular taxpayer. In those situations, similar conforming changes will need to be made to the remainder of subsection (e).

Section 8. This section is designed to insure that a taxpayer faced with a tax determination will have a realistic opportunity to resolve the dispute, without litigation, through informal conferences with experienced state tax officials charged with the duty of exercising independent judgment, *i.e.*, independent of the judgment of the auditor and other tax enforcement personnel who made the determination. No litigation forum, however independent—including the new tax tribunal—can or should be the vehicle for resolving most legitimate tax disputes: litigation is simply too legalistic, too time-consuming, and too expensive.

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The independent administrative appeals function contemplated by this section is consciously modeled on the Appeals function within the Internal Revenue Service, and reflects the best practices of conference/appeals/settlement functions already operating in states such as California, Illinois and New York.

Virtually every state currently provides one or more opportunities for the taxpayer to meet with senior revenue department personnel to discuss and resolve a proposed audit determination before litigation, *i.e.*, before the taxpayer is required to make the record that may ultimately be reviewed by the state's courts. As contemplated by this section, in some states the administrative appeals function is formally separated from the audit function. In New York State, for example, before commencing litigation before the Division of Tax Appeals, the taxpayer may, at his option, obtain review of the proposed determination in the department's Bureau of Conciliation and Mediation Services. In California, the taxpayer can propose settlement of a proposed audit determination to the revenue department's Settlement Bureau. In Illinois, the taxpayer may discuss proposed audit determinations and settle cases, on a hazards-of-litigation basis, within the revenue department's Informal Conference Board. In other states, there is no separate administrative appeals function, but taxpayers are nonetheless routinely given the opportunity to meet with senior department officials and to persuade them that the proposed audit determination should be modified or conceded.

The new tax tribunal is not intended to replace or downgrade existing pre-litigation review and settlement mechanisms, but rather to provide a forum for the hearing of record in the minority of cases that cannot be resolved informally within the department. Even if, for budgetary or other reasons, a state adopting the Model Act decides not to create an administrative appeals function within the department of revenue that is separate from the audit/tax enforcement function, as contemplated by this section, the department should strengthen existing mechanisms by modifying them to incorporate, to the extent possible, the characteristics of an independent administrative appeals function enumerated in this section.

Section 9. This section provides that a proceeding is commenced by the filing of a petition by the taxpayer. Even though the term "taxpayer" does not accurately describe a person contesting jurisdiction over his person, the Model Act uses the term "taxpayer" for administrative convenience.

Subsection (a) provides that the taxpayer commences an action in the tribunal by filing a petition within 90 days from the date of receipt of notice of the determination being protested. This 90-day period is sufficient for a person to review the [department of revenue]'s position and prepare a proper petition. If the state's current deadline for protesting a determination is different, either the current provision will need to be amended or the time period in subsection (a) conformed to the current provision.

Subsection (b) requires the department of revenue to file an answer within 75 days (which can be extended to a total of 90 days) after the petition is acknowledged by the tribunal to be in proper form. Since the tribunal receives the petition, reviews it for facial adequacy, and delivers a copy

to the department, the taxpayer need not serve the petition on the department. If the department fails to answer within the prescribed time, then all material facts alleged in the petition are deemed admitted. This procedure is similar to that followed in the New York State Division of Tax Appeals.

Subsection (c) provides that the taxpayer may, but is not required to, file a reply within 30 days after service of the answer. If the taxpayer fails to reply within the prescribed time, then all material facts alleged in the answer are deemed denied.

The distinction between the consequence of the department's failure to timely answer and the taxpayer's failure to timely reply is intentional. Since the department issued the determination in issue and the taxpayer has the burden of proof, the taxpayer is entitled to learn the department's position on the taxpayer's factual assertions and it is reasonable to hold the department accountable for failing to respond to the taxpayer. Thus, the Act in effect requires the department to answer the petition in a timely manner. On the other hand, it is often unclear whether a reply from the taxpayer is necessary and in many cases the taxpayer is not represented. To avoid unintended dismissals of the petition based on procedural foot faults, the Act does not require a reply be filed and deems all material allegations of facts set forth in the answer to be denied.

Section 10. This section provides that a fee will be charged to the taxpayer for filing a petition. Although the Act provides that one fixed fee will be charged for filing a petition with the tribunal and another for filing a petition with the Small Claims Division, a state could instead base the fee on the amount in dispute. The Massachusetts Appellate Tax Board, for example, currently bases its fee on the amount of tax in dispute, subject to a maximum fee.

Section 11. Subsection (a) of this section, which is based on Rule 70(a)(1) of the U.S. Tax Court's Rules of Practice and Procedure, requires the parties to use informal means of discovery before resorting to the formal discovery mechanisms authorized by this section.

Subsection (b) requires the parties to stipulate the facts to the fullest extent possible. Modeled on U.S. Tax Court Rule 91, this provision is intended to insure the fair and expeditious resolution of disputed issues. Under this rule, no party, including the revenue department, shall refuse to stipulate to a fact, document or piece of evidence that is not fairly the subject of a genuine dispute. The tribunal may wish to adopt further rules to insure compliance with this provision.

Subsection (c) specifically allows written interrogatories, requests for production of evidence, depositions and requests for admission to be used by either party to accomplish discovery, based on U.S. Tax Court Rules 70-76, 81-84 and 90. Subsection (c) also allows the tribunal to provide reasonable limitations on the use of these discovery mechanisms, either by rule or by order in a particular proceeding, as well as to permit other forms of discovery.

Section 11 allows both the taxpayer and the revenue department to conduct discovery. A taxpayer should not be required to prepare for a trial challenging an assessment of tax without an opportunity to learn the department's position before the trial begins.

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Some may argue that the department should not be allowed discovery at trial, since the department has already conducted an audit, *i.e.*, that the department should not be able to force the taxpayer to undergo a second "audit" as the price of contesting the resulting assessment. Although this argument was considered, it was ultimately decided that discovery by the department should be permitted.

Allowing discovery by the department is justified by fairness, current practice in many states, and practical considerations. Discovery by the department is appropriate in cases in which facts with key legal importance to the taxpayer's liability have not been developed by the audit staff. While auditors can interview employees and officers or the individual taxpayer, such interviews are quite different from trial depositions. Moreover, when expert witnesses are used by a party, the other party (be it the department or the taxpayer) should be able to discover information concerning such testimony and to receive a copy of any report prior to the time the individual is called as a witness.

Many states' administrative hearing regimes already permit discovery by the department, so that allowing it does not expand the department's powers in those states.

The practical effect of not allowing such discovery would be to intensify the scrutiny given by the audit staff to all taxpayers—since the audit staff and the department's representatives cannot be sure which matters will eventually go to trial. By contrast, experience demonstrates that departments that are permitted to conduct discovery at trial rarely abuse the discovery process. If this were to occur, the tribunal should step in to prevent abuse.

Section 12. This section addresses the hearing before the tribunal.

Subsection 12(a) provides that hearings shall be without a jury and de novo.

Subsection 12(c) provides that the hearing is open to the public. While some jurisdictions currently provide that the hearing is open to the public, *e.g.*, Maryland and Massachusetts, others do not allow the public to attend, *e.g.*, New York State and New York City. Recognizing that occasionally there will be the need for a protective order or for an order closing part or all of the hearing to the public, the Model Act provides for such orders upon a showing of good cause.

Inasmuch as the hearing is public, the state's statutes concerning the confidentiality of taxpayer information may need to be amended to permit the department of revenue to present taxpayer documents and testimony in the tribunal.

Subsection 12(d) provides that the tribunal is not bound by the rules of evidence and that all relevant evidence, including hearsay, is admissible. At the same time, the Act provides that the rules of privilege shall apply to proceedings before the tribunal.

The Model Act thus reflects the conclusion that, on balance, the value of reaching a correct conclusion outweighs the risks associated with admitting evidence that violates the traditional rule against hearsay. While sometimes unreliable, hearsay evidence is often credible and in some cases is the only evidence available to prove a material fact. A number of state tax courts and tribunals, *e.g.*, the New York State Division of Tax Appeals, routinely admit and rely upon

such evidence. In the absence of a jury, the tribunal should be able to evaluate such evidence and to discount it where appropriate.

Subsection 12(f) is taken from Rule 41 of United States Tax Court's Rules of Practice and Procedure. That rule insures that a party's failure to plead facts as to which evidence is subsequently presented at the hearing will not be grounds for excluding the evidence, unless the objecting party demonstrates that its ability to defend its position is unfairly compromised thereby or unless allowing the pleadings to conform to the proof would confer jurisdiction on the tribunal over a new matter.

Section 13. Following the example of the New York State Division of Tax Appeals, subsections (a) and (b) require that the tribunal issue a written decision within six months after the submission of briefs subsequent to completion of the hearing (which time can be extended for an additional three months) or, if briefs are not submitted, within six months after completion of the hearing.

Subsection (c) provides that, if the tribunal fails to render a timely decision, either party may institute a proceeding in the judicial branch to compel the issuance of a decision. Consideration should be given to penalizing the judge for failing to issue a decision in a timely manner unless the failure is for good cause. For example, Section 271.20 of the Minnesota Statutes provides that a judge of the Minnesota Tax Court must ordinarily file a decision within three months after submission and that no part of the judge's salary shall be paid unless the judge has certified full compliance with this requirement.

Pursuant to subsection (e), the tax tribunal's decision shall have the same legal effect as a judgment of the state's general trial court. Since the Model Act allows the losing party to obtain judicial branch review of an adverse tribunal decision, this provision should not create a separation of powers issue in an enacting state.

Subsection (f) provides that the tax tribunal's decisions are to be considered as precedent in other proceedings before the tribunal. The tribunal is to follow its decisions in all future proceedings unless the decision conflicts with the decision of an appellate court or the tax tribunal provides satisfactory reasons for reversing its decision.

It is not the intention of the Model Act that a decision by one tax tribunal judge should bind another tax tribunal judge in a proceeding involving a different taxpayer. If the tribunal has more than one judge, the tribunal should adopt rules providing for *en banc* decisions that would settle the rule to be applied to pending cases and in future cases that come before one of the tribunal's judges.

It has been suggested that, in order to lessen the judges' workload, the Model Act should not require the tribunal to issue a written decision in certain cases, *e.g.*, proceedings in the small claims division or cases involving no substantial question of law or fact. The Model Act reflects the conclusion that relaxing this requirement would not significantly impact the tribunal's workload, but would hinder the Model Act's goal of increasing the public's confidence in the fairness of the state's tax dispute resolution process. The Model Act requires only that the

tribunal's opinion include a concise statement of its legal conclusions and the principal facts (or failures of proof) underlying those conclusions.

If a written decision is not provided, it would be difficult for the losing party to determine whether to appeal a regular tribunal decision and for an appellate court to know whether the decision is correct under the applicable standard of review. Moreover, a taxpayer who has incurred the time and expense of litigation deserves a written statement of the reasons for the tax tribunal's determination.

Section 14. This section concerns proceedings in the small claims division of the tribunal. Some states may wish to change the jurisdictional limits.

The purpose of this section is to give the local drafter the recommended framework which can be adapted to the local situation. As with subsection (a) of section 9, if the state currently provides for different time frame within which to protest the department's actions, the times provided in the Model Act may have to be adjusted.

Section 15. This section requires that tax tribunal decisions be subject to appeal in the same manner as decisions of the state's courts of general civil trial jurisdiction, except that decisions of the tribunal's small claims division may not be appealed. In other words, decisions of the tax tribunal shall generally be entitled to the same right of nondiscretionary appellate court review as decisions of the state's [general trial] court. Given the tax tribunal's independence and tax expertise, it makes sense to eliminate any existing "review" or "appellate" role for the state's [general trial] courts in relation to tax matters within the tribunal's jurisdiction.

Section 16. This section specifies the persons who may represent the taxpayer in tax tribunal proceedings. As is the practice within the Internal Revenue Service, before the United States Tax Court, and in the formal hearing process in most state revenue departments, this section allows the taxpayer to represent himself or herself, or to select as a representative an attorney, accountant or enrolled agent.

The department of revenue may be represented by any authorized person. If the jurisdiction of the tax tribunal includes taxes administered by other state or local officials, such as assessors, subsection 16(b) would have to be modified to allow those officials to appoint persons to represent them before the tribunal.

Section 17. This section requires decisions of the tribunal be to be indexed and published in a manner that makes them "permanently available" to the public. This provision would authorize publication on a state-maintained website, as an alternative to publication in print.

Decisions rendered by the tribunal's small claims division are exempt from the publication requirement, since such decisions involve smaller tax amounts, are generally less developed cases, and cannot be appealed.

The drafters decided against an alternative rule under which some regular tribunal decisions would not be published, *e.g.*, cases involving no substantial question of law or fact. Other taxpayers have a legitimate interest in knowing how the tribunal handles issues, even issues that are relatively unimportant or uncontroversial in the eyes of tax experts. Since every tribunal

decision will necessarily be available to the revenue department, failure to publish certain regular tribunal decisions only insures that taxpayers and their representatives might remain unaware of prior tribunal decisions on issues of importance to them. Moreover, deciding which cases are not to be published involves the application of a necessarily vague standard, a process that itself would consume judicial effort.

Section 18. This section allows service by mail or private delivery service, as alternatives to personal service. The tribunal may, by rule, allow filings by facsimile or e-mail.

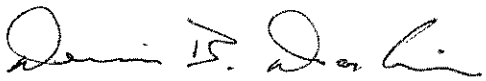
Section 19. This section authorizes the tribunal to adopt rules, regulations and forms to carry out the intent of the Model Act.

The tribunal should consider adopting motion practice and other rules similar to those in effect in the state's [general trial] courts. As to discovery, the tribunal should consider the Rules of Practice and Procedure of the United States Tax Court as an informed source.

Section 20. This section sets forth the effective date of the Model Act. Suits pending in the judicial branch at the time the Model Act becomes effective will not be affected. Proceedings pending in an administrative tax tribunal will generally be transferred to the new tribunal.

Coordination with Administrative Statutes. Legislation adopting the Model Act should also include amendments to tax and other statutes, including any statutory provisions governing the review of administrative tax determinations, to insure that all intended tax contests will be handled by the new tax tribunal.

Respectfully submitted,



Dennis B. Drapkin, Chair, Section of Taxation

August, 2006

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GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Section of Taxation

Submitted By: State and Local Tax Committee

1. Summary of Recommendation(s).

   It is recommended that state legislatures consider adoption of The Model State Administrative Tax Tribunal Act. The Model Act would guarantee that every taxpayer aggrieved by a state tax assessment gets a *de novo* hearing of record, before paying the tax, from a judge with tax expertise who is independent from the state's tax collecting agency. In addition to achieving these major fairness goals, the Model Act would require the adoption of best practices followed by the most successful independent state tax tribunals and courts.

2. Approval by Submitting Entity.

   Submitted to House of Delegates contingent on Section Membership approval at the May Meeting Plenary Session on May 5, 2006.

3. Has this or a similar recommendation been submitted to the House or Board previously?

   None.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

   Revised Model State Tax Court Act 1971-12 recommended the creation of a state tax court in the judicial branch. Today only 6 states have such a court, while 24 states have established administrative tribunals. Experience demonstrates that administrative tribunals can also secure the major fairness goals of Revised Model State Tax Court Act 1971-12. As a result, the current recommendation would create a tax tribunal in the executive, rather than the judicial, branch of state government. The commentary accompanying the Model Act acknowledges, however, that a judicial branch tax court

with judges possessing tax expertise would have advantages and that this alternative should be pursued in the unusual state in which constitutional, political and institutional factors do not effectively preclude the creation of such a court.

5. What urgency exists which requires action at this meeting of the House?

None.

6. Status of Legislation. (If applicable.)

Not applicable.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

To all Sections and Divisions. NCCUSL has reviewed this recommendation and their comments have been incorporated.

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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