

Comments on the Tax Dispute Process

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Preface

The most desirable environment for handling tax disputes, from a taxpayer's viewpoint, is one that provides procedural and substantive clarity, reasonable consistency, timeliness and fundamental equity. The following comments are intended to identify areas where steps could be taken to further these objectives and improve the current tax dispute process in Indiana.

Department of Revenue Proceedings

Consistency at this level is particularly important. Taxpayers need to be able to rely on the Department applying the same position as has been set forth in previous Letters of Findings to subsequent like factual circumstances. Taxpayers should be confident that the law will be interpreted the same and applied the same regardless of the staff persons involved, the passage of time or how it impacts an assessment. The Department has endeavored to realize this objective and those efforts are recognized. But ensuring consistency of position is an ongoing challenge. And reiterating the need for the Department to follow the holdings of previously issued Letters of Findings to the greatest extent possible remains warranted. Cataloging and indexing all important positions within each Letter of Finding would likely enhance consistency and improve the efficiency of the entire process.

Tax Court

Some attention is currently focused on this level in the dispute process. One aspect is the number of pending cases – the length of time cases remain pending and the number of decisions being rendered on an annual basis. Questions are being raised regarding how to deal with the Tax Court's caseload. In the past, some have suggested adding additional judges to hear and decide cases. However, the issue is not in the number of cases being held or in the timeliness of those hearings. The issue relates more to the time period between the hearing and the final disposition of the case. This matter would not be resolved by adding judges. In fact, that would probably only exacerbate the situation. We need not pretend that the bulk of preparing a written decision/opinion is done by the judge. The bulk of the task is associated with the research and drafting that is typically performed, to a large degree, by law clerks. The productivity of an appellate level court in terms of issuing decisions correlates directly to the number of clerks and other staff available to assist the judge. Additionally, the research tools and other resources available to the court are critical. Adding staff and resources to the Tax Court offer the best remedy to the backlog and time lag. Input from the Tax Court should be sought utilizing the Tax Court Liaison Committee of the Taxation Section of the Indiana State Bar Association, whose members include the judge, a representative from the Attorney General, and representative tax practitioners, and which has historically addressed any concerns regarding the Tax Court.

Attorney General Representation

Another issue associated with the Tax Court arises as a consequence of the role of Office of the Attorney General serving as the attorney for the State in Tax Court proceedings. The question presented is to what degree the Deputy Attorney General (DAG) assigned to represent the Department of Revenue should accede to the tax policy positions of the Department in the course of litigating the dispute. There have been instances where the DAG forwards arguments that are contrary to the policies and practices of the Department. The most prominent example occurred in 2012 when the DAG challenged the propriety of the standard of review applicable to Tax Court proceedings, arguing that proceeding before the Tax Court should not be conducted as “de novo” hearings. Changing this standard would not only have fundamentally altered the protest procedures and required drastic changes to the internal operations of the of the Department, it would be contrary to statute, would destroy the purpose and function of the Tax Court and wipe away the basis due process afforded to taxpayers. The tax administration policy positions taken and argued in Tax Court proceedings should be guided by the determinations of Department of Revenue, not their counsel.

Additional Specific Recommendations

1. Interest on Refunds [IC 6-8.1-9-2(c)]

Change the statute to provide that a taxpayer who succeeds in an appeal receives interest from the date of the overpayment.

Current law only allows for interest to accrue from the date a taxpayer files a claim for refund. The state is unjustly enriched by being allowed to keep the interest earned on the un-owed taxes from the date of the overpayment to the date of the filing for a refund. This stands in contrast to the taxpayers’ obligation to pay interest on delinquencies back to the date the taxes were first due. Simple fairness and equity calls for interest to be paid for as long as the money was in the hands of the state and earning interest.

NOTE: This issue is raised in the COST Best and Worst State Tax Administration Scorecard and contributed to the downgrading of Indiana in that evaluation.

2. Burden of Proof in Alternative Apportionment Cases [IC 6-3-2-2]

Provide that the party seeking to deviate from the standard apportionment method has the burden of proof.

Indiana promotes itself as a non-unitary state, but the audit process often forces companies to file unitary returns. The Department departs from the statutory allocation and apportionment formulas by claiming that the non-unitary filing method used by the taxpayer is “distortive.” The Department then makes an assessment based on a unitary filing method, and relies on the statute that states that the Department’s assessment is presumed correct. In these cases, or any other where the Department alleges distortion, the Department should have the burden of proof in these circumstances.

NOTE: This issue is raised in the COST Best and Worst State Tax Administration Scorecard and contributed to the downgrading of Indiana in that evaluation.

3. Authority to Settle Tax Court Cases [IC 4-6-2-11 and 6-8.1-3-17]

Streamline settlement approval process by giving the Commissioner of Department of Revenue sole authority to settle Tax Court cases as is the case for settlement of administrative appeals.

The Commissioner has the authority to settle any tax case before it gets to Tax Court and any Tax Court cases under \$25,000. However, Tax Court cases over \$25,000 require taxpayers to obtain three approvals, from the Commissioner, the Attorney General and the Governor's Office. This tripartite approval process is inefficient and unnecessary. First, it takes too long to obtain all three approvals. After being approved by the Commissioner, it takes many months to obtain approvals from the Attorney General and Governor's Office. The total time involved can be 6-9 months. This delay is unwarranted and causes harm to those taxpayers who are trying to book settlement payments before quarter or year-end for GAAP or SEC reporting purposes. Second, the approval of the Governor's Office is unnecessary because, as chief executive, the Governor already exercises his authority through his agent – the Commissioner. Approvals by two executive branch authorities is redundant. Third, the approval of the Attorney General is problematic. Having the Department's own lawyer approve settlements is illogical and counterproductive in that it enables the Attorney General to disprove settlements desired by its own client, which creates potential conflict between agencies. Also, the requirement that the Attorney General and Governor's Office approve settlements is a historical anachronism in that it is based on an 1889 statute (IC 4-6-2-11) requiring such approvals for settlement of any claims against the state. In 1889, there was no Department of Revenue so it made sense to require approval of settlements by other executive agencies. But that is no longer the case. The Commissioner is perfectly capable of settling tax disputes both prior to and after such disputes go to Tax Court.

4. Tax Court Jurisdiction [IC 6-8.1-9-1]

Expressly state that Tax Court jurisdiction includes disputes over settlement agreements (entered into with the Department of Revenue), penalties, interest and any other fees associated with a tax liability.

The current definition of jurisdiction is very specific and is unclear in whether it extends to post-settlement matters. It is both inefficient and contrary to the concept of the Tax Court having exclusive jurisdiction and being there to apply expertise in resolving all tax related disputes. The Tax Court was formed so that it could develop complete familiarity with the complexities of tax law and consistently apply of the law in all tax matters. It was intended for the Tax Court to relieve other state courts of the burden of dealing with tax issues. The Tax Court jurisdiction should encompass all tax controversies (regardless how it arises) in a "one-stop" court. Making taxpayers pursue or defend actions stemming from a tax liability that has, will or could be, in other respects, litigated in Tax Court is inappropriate. These disputes involve primarily the same underlying facts, statutes and case law. To bisect the dispute is not just inefficient but costly and inconsistent with the purpose and function of the Tax Court.