Navigating State Income Tax Administrative Processes

DONALD M. GRISWOLD AND ALEXANDRA E. SAMPSON*

I. Introduction

A friend in our little world of state tax once said, "The administrative processes for state tax matters are a bit like snowflakes: no two are exactly the same," and there is considerable truth in her statement.[1] Among different states' income tax administrative processes taxpayers will find variations in limitations periods, protest guidelines, refund claim procedures, conference and hearing formalities, available appeal alternatives, and more.[2] Those unfamiliar with navigating the administrative process in a particular state can easily find themselves in an administrative "blizzard" if that jurisdiction's rules are not carefully examined and followed. This can be true regardless of the practitioner's level of tax experience. Even tax practitioners with years of federal tax practice and procedure experience will find, to their chagrin, that they cannot simply apply their knowledge of the federal process to the states. Whether we like it or not, the state tax administrative process requires strict attention to state-specific details.

A comprehensive treatment of the details of each state's income tax administrative process is, however, beyond the scope of this short Article. Instead, this Article will address selected major themes and considerations in identifying and comparing administrative processes in the context of state income tax appeals.[3] Although this Article will not comprehensively cover every procedural consideration a taxpayer should evaluate, it will provide an overview of the various stages of the state tax appeal process, technical considerations for each stage of the administrative process, and examples of state-specific

---

*Donald M. Griswold is a Partner in the Washington, D.C., office of Crowell & Moring. Alexandra E. Sampson is an Associate in the Washington, D.C., office of Reed Smith LLP, State Tax practice. The authors gratefully acknowledge the following individuals for their contributions of state-specific examples of administrative "traps for the unwary": Marty Dakessian, Esq.; Frank J. Gallo, Esq.; Michael A. Jacobs, Esq.; Alan Levine, Esq.; Janette M. Lohman, Esq.; Kaitlin McKenzie-Fiumara, Esq.; Michael J. Wynne, Esq.; and Aaron M. Young, Esq.

[1] Marianne Evans, Senior Manager, KPMG, Washington, D.C.

[2] *See infra* text accompanying notes 4–155.

[3] This Article focuses exclusively on state administrative processes as they relate to income tax appeals. The administrative appeal process for other tax types, such as sales and use tax and real property tax, often differ from the process used in the context of income taxes and are not addressed in this Article. Further, taxpayers should be aware of administrative procedures at the local level that are also not addressed in this Article. Differences between state-level and local-level procedural rules are just as important—and can vary just as widely—as distinctions among the rules of the various states.

"traps for the unwary." Further, this Article will mention certain strategic considerations at the audit and judicial appeal levels that often impact the administrative appeal process.[4]

Part II of this Article addresses audit-level considerations that may impact an administrative protest or appeal. Part III focuses on the various stages of an administrative appeal. That Part, which is the central focus of this Article, evaluates important concepts to be considered at the administrative level and compares and contrasts various state distinctions. Part IV examines certain items taxpayers should consider at the administrative appeal level in preparation for judicial review.

II. Audit Level Considerations

Strictly speaking, a state's administrative appeals process begins at the conclusion of the audit process.[5] However, taxpayers who wait until the end of a state tax audit to consider how to handle the administrative appeal of an audit assessment may find themselves behind the curve. In many instances, planning ahead may allow taxpayers to develop an audit strategy that helps to minimize, or perhaps even to avoid completely an audit assessment.

While state tax audit procedures are outside the scope of this Article, we will focus on a few items taxpayers should consider at the audit level that may impact their administrative appeals.

A. *Know Who Is Conducting the Audit*

Taxpayers should not assume that a specific state tax audit will be conducted by the tax or revenue agency of that particular state. With strained budgets and budget deficits, cash-strapped states are looking to increase their audit activity and to bring in additional state revenue.[6] However, these states often have understaffed audit departments that are unable to take on the increased demand for state tax audits. As a result, states are increasingly augmenting their audit efforts with the use of nontraditional methods to audit taxpayers. This often includes the use of outside auditors—such as the Multistate Tax Commission and contract auditors (sometimes pejoratively referred to as "bounty hunters")—to assist with auditing taxpayers.[7]

---

[4] A further resource to supplement this Article is the "State Tax Appeals System" flow charts prepared by the Bureau of National Affairs (BNA), published in BNA's *Tax Management Multistate Tax Portfolios®* series. *See* 1700-2nd State Tax Portfolios: Procedure and Administration (BNA).

[5] *See, e.g.*, Ala. Code § 40-2A-7(b)(5) (2011); Del. Code Ann. tit. 30, §§ 522–23 (2011); D.C. Code § 47-4312(a) (2005); Va. Code Ann. § 58.1-1825(A) (2009).

[6] *See, e.g.*, Raymond J. Freda & Kenneth T. Zemsky, *New York's Proposed Combined Reporting Regs: The Same Old Story?*, 66 St. Tax Notes (TA) 209 (Oct. 15, 2012); Aaishah Hashmi, *An Analysis of D.C.'s Proposed Combined Reporting Regs*, 63 St. Tax Notes (TA) 547 (Feb. 3, 2012).

[7] *See* John Buhl, *NCLS Task Force Warned About 'Bounty Hunter' Auditors,* 60 St. Tax Notes (TA) 458 (May 16, 2011) (quoting Stephen Kranz, a partner at McDermott Will & Emery in Washington, D.C.).

It is important to know who is conducting a taxpayer's audit as it may alert the taxpayer to potential audits in other states. Although taxpayer information is confidential[8] and should not be shared, when a third-party auditor conducts an audit for one state but also provides similar services to other states, there is some risk that the taxpayer's information may be "shopped around."[9] This risk is also present in audits conducted directly by the state tax agency, as states often share information with each other.[10]

1. *Multistate Tax Commission Joint Audit Program*

The Multistate Tax Commission (MTC) is an intergovernmental state tax agency established with the stated goal of improving the efficiency and effectiveness of state tax systems.[11] The MTC has operated a longstanding audit program under which the Commission's audit staff performs corporate income and sales and use tax audits for a number of states concurrently.[12]

Under the MTC audit program, the MTC Audit Director first assigns an MTC auditor to conduct the audit of a particular taxpayer from the MTC "audit inventory."[13] The MTC audit inventory is a database comprised of taxpayers that have been selected through a state voting process, taxpayers that have been referred by the MTC National Nexus Program, and taxpayers who voluntarily request an MTC Joint Audit.[14] Once an MTC auditor is assigned an audit, each state participating in the MTC must affirmatively decide whether to participate in the audit of the assigned taxpayer.[15] During the audit process, the MTC auditors act as agents for the states. However,

---

[8] See, e.g., N.Y. Tax Law § 211(8)(a) (McKinney 2012); Va. Code Ann. § 58.1-3(A).

[9] *See* Billy Hamilton, *This Gun for Hire: The Emerging Fight Over Contingent-Fee Auditing*, 62 St. Tax Notes (TA) 533 (Nov. 21, 2011).

[10] *See* 20 Ill. Comp. Stat. 2505/2505-65(a) (2008) (authorizing the Illinois Department of Revenue to exchange information that is necessary for efficient tax administration with any other state); N.Y. Tax Law §211(8)(c) (authorizing the Commissioner to furnish information, on a reciprocal basis, to tax officials of other states); Va. Code Ann. § 58.1-3(C) (authorizing the Commissioner to enter into information-sharing agreements with tax officials of other states).

[11] *See* Multistate Tax Commission, About the Multistate Tax Commission, http://www.mtc.gov/About.aspx?id=40 (last visited Oct 20, 2012).

[12] *See* Multistate Tax Commission, About the MTC Audit Program, http://www.mtc.gov/Audit.aspx?id=578 (last visited Oct 20, 2012); Multistate Tax Commission, About the MTC: Joint Income Tax Audit Process, http://www.mtc.gov/Audit.aspx?id=1914 (last visited Oct 20, 2012); Multistate Tax Commission, About the MTC: Joint Sales Tax Audit Process, http://www.mtc.gov/Audit.aspx?id=1916 (last visited Oct 20, 2012).

[13] *See* Multistate Tax Commission, About the MTC Audit Process, Audit Selection, http://www.mtc.gov/Audit.aspx?id=1912 (last visited Oct 20, 2012); Multistate Tax Commission, About The MTC Audit Program: Income Tax Joint Audit Process, http://www.mtc.gov/Audit.aspx?id=1914 (last visited Oct 20, 2012).

[14] *See* About The MTC Audit Program: Income Tax Joint Audit Process, *supra* note 12; Multistate Tax Commission, Taxpayer-Initiated Joint Audits: Taxpayer's Request for a Joint MTC Audit, http://www.mtc.gov/Audit.aspx?id=586 (last visited Oct 20, 2012).

[15] *See* Multistate Tax Commission, About the MTC Audit Process: Income Tax Joint Audit Process, *supra* note 13.

MTC auditors do not have assessment authority, and at the conclusion of an audit, they may only issue their nonbinding recommendations to each participating state.[16] Each state must then independently determine whether to make an assessment.[17]

Currently, there are 22 states that participate in the MTC's income tax joint audit process.[18]

Table 1. MTC Audit Program – Income Tax Participating States

Alabama	Minnesota
Alaska	Missouri
Arkansas	Montana
Colorado	Nebraska
District of Columbia	New Jersey
Hawaii	New Mexico
Idaho	North Dakota
Illinois	Oregon
Kansas	Utah
Kentucky	West Virginia
Michigan	Wisconsin

2. *Private Auditing Firms*

A number of states—in lieu of or in conjunction with the MTC Audit Program—contract with private firms to conduct state tax audits.[19] Depending on the state, these firms provide taxpayer auditing services in exchange for a fixed fee, fixed percentage, or contingent fee payment.[20]

For example, the District of Columbia (the District) has contracted with ACS State & Local Solutions (ACS)—an organization that audits taxpayers based on publicly-available information—to conduct certain audits of parent–subsidiary and brother–sister corporations.[21] Specifically, the District has contracted with ACS to conduct research and analysis about transactions between related companies with particular regard to the allocation of income and expenses so as to minimize federal and local taxes.[22] In addition, the

---

[16] *Id.*

[17] *Id.*

[18] *See* Multistate Tax Commission, Report on the MTC Joint Audit Program, http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Audit_Program/About_Audit/Joint%20Audit%20Program%20Presentation.pdf (last visited Oct 20, 2012).

[19] *See* Hamilton, *supra* note 9.

[20] *See id.*

[21] *See* Microsoft Corp. v. Office of Tax and Revenue, No. 2010-OTR-00012 (D.C. Office of Admin. Hearings May 1, 2012).

[22] *See id.*

District is one of the 22 states that participate in the MTC Audit Program.[23] Therefore, a District taxpayer could be audited by the Office of Tax & Revenue, the Multistate Tax Commission, or ACS.

B. *Know the Limitations Period*

1. *General Considerations*

It is important for taxpayers to keep track of the time within which a state revenue department must make an assessment. If the state fails to assess the taxpayer within the limitations period, the taxpayer generally cannot be held liable for the additional tax.[24] However, in many states, the statute of limitations varies based on certain factors, such as the date the return was filed, the amount of tax understatement, the transaction type, or taxpayer intent.[25] This fluidity complicates the task of keeping track of the limitations period that may apply to a taxpayer's situation.

For example, in New Hampshire, assessments generally must be made within three years of the date the return was filed or the date the tax was paid, whichever was later.[26] However, if the Department of Revenue deems a transaction to be a "sham" transaction, the statute of limitations for assessment will be extended.[27]

In Georgia, the limitations period generally expires three years after the return was filed.[28] However, if a taxpayer understated its gross income less expenses by more than 25%, a deficiency assessment may be made at any time within six years of the date the return was filed.[29] Similarly, the general four-year limitations period in Texas becomes unlimited in cases where a taxpayer understated its tax liability by more than 25%.[30]

Further, in many states, there is an unlimited period for assessment if the taxpayer fails to file a return or files a false or fraudulent return.[31] In Idaho and Maryland, the period to file is unlimited in those instances where a taxpayer willfully attempted to evade taxation.[32]

---

[23] *See* Report on the MTC Joint Audit Program, *supra* note 18.

[24] However, special circumstances, such as federal adjustments made by the Service, may allow assessments to be made after the general time limit. Perhaps most notoriously, a net operating loss appearing in an open-year return generally allows the state effectively to audit the otherwise closed year in which the loss was incurred.

[25] *See infra* text accompanying notes 26-32.

[26] *See* N.H. Rev. Stat. Ann. §21–J:29(I)(a) (2008). The statute also provides that the assessment must occur within three years after the last day prescribed by law for filing such return or within three years from the date on which the tax was paid. *Id.*

[27] *See id.* §21-J:38-a(III).

[28] Ga. Code Ann. §48-2-49(b) (2010).

[29] *Id.* § 48-7-82(b)(2).

[30] Tex. Tax Code Ann. §§ 111.201, 111.205 (West 2008).

[31] *See*, *e.g.*, D.C. Code § 47-4301(d) (2005); VA Code Ann. § 58.1-111 (1984).

[32] *See* Idaho Code Ann. § 63-3068(c) (2007); Md. Code Ann., Tax-Gen. § 13-1101(b) (West 2010).

It is equally important for taxpayers to know the statute of limitations for filing a tax refund claim. In some states, the statute of limitations for a state to assess taxes differs from the amount of time a taxpayer has to claim a refund.[33] For example, in Michigan, the general statute of limitations for a refund claim is four years from the due date of the original tax return.[34] However, taxpayers only have 90 days from the date set for filing their tax return to file for the refund of an unconstitutional tax.[35] Refund claims are addressed in greater detail in Part III.C, below.

2. *Waiving the Limitations Period*

Taxpayers should also be mindful of the effect of any state or federal waivers of the statute of limitations. Particularly, taxpayers should consider the effects of federal waivers and partial state waivers. For instance, in some states, a federal waiver granting the Commissioner an extension of the statute of limitations also extends the state's statute of limitations for assessment.[36] In California, if a taxpayer agrees to a federal waiver, the state limitations period for mailing a notice of proposed deficiency will either be the normal statute of limitations—generally four years—or six months after the expiration of the federal waiver, whichever is later.[37] Similarly, in Colorado, the general statute of limitations for C corporations is three years and 11 months.[38] However, a federal waiver extends the Colorado statute of limitations by the same amount of time as the federal waiver.[39]

Partial state waivers may also impact a taxpayer's administrative appeal. A partial waiver is granted when a taxpayer agrees to extend the statute of limitations on some, but not all, of the audit issues or audit years.[40] Partial waivers may affect a taxpayer's ability to offset an audit assessment with other issues.[41]

C. *Pre-Assessment Appeals*

Some state tax jurisdictions provide an opportunity for taxpayers to appeal an assessment resulting from a state tax audit before the assessment is formally issued as a proposed or final assessment.[42] For example, in the District of Columbia, before assessing a potential deficiency, the Office of Tax and

---

[33] *See infra* text accompanying notes 34–35.

[34] Mich. Comp. Laws § 205.27a(2) (2007).

[35] *Id.* § 205.27a(6). The questionable validity of such shortened limitations periods for constitutional claims is, sadly, beyond the scope of this Article.

[36] *See* N.Y. Tax Law § 211 (2012).

[37] *See* Cal. Rev. & Tax. Code § 19065 (McKinney 2002).

[38] *See* Colo. Rev. Stat. Ann. § 39-21-108(1)(a) (West 2011); *see also* Colo. Dep't of Revenue, FYI General 18, Statute of Limitations (2012), *available at* http://www.colorado.gov/cs/Satellite/Revenue/REVX/1193047057911.

[39] *See* Colo. Rev. Stat. Ann. § 39-21-108(1)(a) (West 2004).

[40] *See id.* § 39-21-107(2).

[41] *See id.*

[42] *See infra* text accompanying note 43.

Revenue issues a Notice of Proposed Audit Changes.[43] This notice precedes a Notice of Proposed Assessment of Tax Deficiency and a Notice of Final Assessment.[44] Upon receiving the Notice of Proposed Audit Changes, the taxpayer "may contest the changes within 30 calendar days of the date of the notice by requesting an informal conference with a conferee in the Review and Conference Section of the Audit Division."[45] If the matter is not resolved at the informal conference, "a Notice of Proposed Assessment of Tax Deficiency will be mailed to the taxpayer."[46] Similarly, in California, during the course of an audit or at the end of an audit, the auditor will send the taxpayer Audit Issue Presentation Sheets (AIPS).[47] The AIPS set forth the auditor's analysis of the specific audit issue—including the relevant facts and law and the auditor's recommendation on the issue.[48] If a taxpayer disagrees with the AIPS, it may contact the audit supervisor to try to resolve the issue.[49]

Taxpayers will want to consider whether a pre-assessment appeal is appropriate in light of the specific facts and circumstances.

D. *Settlement Authority*

Taxpayers will find—perhaps to their frustration—that the ability to settle a matter at the audit level varies by jurisdiction. Generally, auditors have very limited or no statutory settlement authority.[50] Thus, a taxpayer's best bet is to get the auditor to agree to the taxpayer's position. This is typically done by providing the auditor with additional information to help the auditor better understand the facts and how those facts support the taxpayer's position. However, in some instances, auditors informally settle issues—even without statutory authority.[51] When this occurs, it is often accomplished by the auditor agreeing to concede certain issues fully in exchange for the taxpayer's concession on others.

In a number of states, if a taxpayer disagrees with an auditor's findings, the taxpayer may request an exit conference with audit staff.[52] This provides the taxpayer with an opportunity to discuss the audit issues and to seek resolution before a proposed or final assessment is issued. However, taxpayers will want

---

[43] *See* Office of Tax and Revenue, Gov't of D.C., OTR Tax Notice No. 2008-02, at 4 (2008), *available at* http://otr.cfo.dc.gov/otr/lib/otr/otrtaxnotice2008-02.pdf.

[44] *See id.* at 5–7.

[45] *Id.* at 4 (emphasis omitted).

[46] *Id.* at 5 (internal quotation marks omitted).

[47] *See* Cal. Franchise Tax Bd., Manual of Audit Procedures § 6.10.6 (2008), *available at* https://www.ftb.ca.gov/aboutFTB/manuals/audit/860_001_MAP.pdf.

[48] *See id.*

[49] *See id.*

[50] *See e.g.*, Ma. Admin. P. 628, 635.

[51] *See, e.g.*, Fla. Stat. § 213.21 (2010); Fla. Admin. Code Ann. r. 12-6.003(3)(a)1 (1998); Fla. Admin. Code Ann. r. 12-6.0033(3) Ga. Code Ann. §48-2-46 (2010); Ill. Admin. Code §§ 215.100, -.105, -.110, -.120, -.125, -.130 (2007).

[52] *See, e.g.*, R.I. Gen. Laws Ann. § 22-13-4 (West 2012); Utah Code Jud. Admin.§ 3-415 (West 2012).

to consider the state-specific process for settling and then determine whether it makes sense to engage in settlement discussions at the audit level.

Understanding an auditor's ability to settle audit issues is important, as it allows taxpayers to make a decision whether it makes sense to spend time working with an auditor to resolve an issue or instead to allow the issue to progress to the next level of the administrative process.

E. *Privilege*

The work product privilege, attorney-client privilege, and accountant-client privilege are the three doctrines taxpayers generally cite in claiming that certain documents are privileged and thus are protected from disclosure during an audit.[53]

Recently, the viability of the work product privilege—a doctrine that protects from disclosure information prepared in anticipation of litigation—has been called into question.[54] The work product privilege has been applied in the state tax context to protect certain tax documents and workpapers, such as tax accrual workpapers.[55] A First Circuit decision in *United States v. Textron*[56] concluded that documents are not protected by the work product doctrine unless they are prepared primarily "for use" in litigation.[57] *Textron* has created uncertainty regarding how to apply the work product privilege in the federal tax context.[58] This federal tax decision has potential implications in the state tax arena, as many states follow the federal standards regarding privilege and would certainly find the First Circuit opinion favorable.[59]

Protecting privilege during an audit is an important audit-level consideration that can have a major impact on any current state-level audit. Furthermore, the result in one state may also affect future audits or the ability to assert privilege in those other states. Therefore, in responding to audit requests for documents and taxpayer information, taxpayers should carefully consider the multistate, multi-tax, multi-year, and multi-issue implications of a failure to protect privileged documents in the current controversy. In some states, an auditor will request that the taxpayer provide a privilege log for any documents withheld due to a claim of privilege.[60]

---

[53] *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 386 (1981); United States v. Deloitte LLP, 610 F.3d 129, 133 (D.C. Cir. 2010); United States v. Eaton Corp., 2012 U.S. Dist. LEXIS 115003 (N.D. Ohio 2012).

[54] *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 509–11 (1947) (recognizing the work product privilege).

[55] *See* United States v. Textron Inc., 577 F.3d 21, 27 (1st Cir. 2009).

[56] *Id.*

[57] *Id.* at 29.

[58] *See, e.g.*, *Deloitte*, 610 F.3d at 138.

[59] *See, e.g.*, Precision Airmotive Corp. v. Ryan Ins. Servs., 2011 U.S. Dist. LEXIS 4738 (D. Me. 2011).

[60] *See, e.g.*, Cal. Franchise Tax Bd., Frequently Asked Questions About Your Tax Audit, FTB 1015B (2011), *available at* www.ftb.ca.gov/forms/misc/1015B.pdf.

Further, taxpayers should ascertain the rules governing when privilege is waived in each state because, once privilege is deemed waived in one state, it may be "blown" everywhere.[61] Thus, as a practical matter, the taxpayer should work hardest to ensure privilege is maintained in the state with the weakest law concerning waiver of privilege.

III. Administrative Review and Appeals Process

If a taxpayer is unable to reach a favorable resolution of an audit at the audit level, the taxpayer will receive an audit assessment.[62] This audit assessment marks the beginning of the administrative appeals process. At the administrative level, taxpayers generally have a number of options for how to handle petitioning the audit assessment. These options commonly include (A) filing a written protest and seeking administrative review within the Department, (B) waiting for a final assessment and appealing the assessment at the administrative or judicial appeal level, or (C) paying the tax and filing a tax refund claim.[63] The following Subparts will discuss common elements under each option and state-specific distinctions.

A. *Audit Protest and Departmental Review*

Shortly after an auditor concludes that an assessment is warranted, the taxpayer will receive a notice of proposed assessment.[64] Generally, the first option for challenging an audit assessment is to file a protest.[65] The protest is not only the taxpayer's opportunity to advocate how the relevant facts and law support the taxpayer's position, but is also often the key to access the other levels of the administrative process.[66] If the audit was conducted by the MTC or a private auditing firm, the taxpayer will protest the audit results directly with the state and not with the third-party auditor.[67]

1. *Filing the Protest*

a. Protest Deadline. One of the first things a taxpayer should do upon receiving a notice of proposed assessment is to determine exactly how long it has to file a protest. The deadline to file a protest is set by each state

---

[61] *But c.f.* Laguna Beach Cnty. Water Dist. v. Superior Court, 124 Cal. App. 4th 1453, 1457 (Cal. Ct. App. 2004).

[62] *See, e.g.*, La. Rev. Stat. Ann. §§ 47:1562(B), 1564, 1565 (2012).

[63] *See, e.g.*, *Id.* § 47:1565.

[64] In some states a "notice of proposed assessment" is also referred to as a "notice of deficiency," "notice of intent to assess," "notice of proposed audit changes," "notice of determination," or "notice of tax due."

[65] In some states a "protest" is also referred to as a "petition," "petition for review," "petition for reconsideration," "petition for redetermination," or "petition for reassessment."

[66] *See, e.g.*, La. Rev. Stat. Ann. §§ 47:1576.

[67] *See* Ala. Code § 40-2A-7(b)(5) (2011).

legislature and ranges from 20 to 90 days.[68] In addition, each state individually determines when the deadline for a taxpayer to file a protest starts to run. For example, in Connecticut, the Department of Revenue issues a Formal Billing Notice to alert a taxpayer of a proposed assessment.[69] Upon issuance of the Billing Notice, the taxpayer has 60 days to protest the assessment.[70] Although the 60-day deadline is noted on the Billing Notice, it is displayed in very small print, making it easy to miss.[71] For an unwary taxpayer, it may be too late to file a protest by the time the taxpayer realizes the notice was not a run-of-the-mill tax bill. Protest and appeal deadlines are discussed further in Part III.D.2 below.

b. Protest Issues. In challenging an audit assessment, taxpayers should give serious consideration to whether they limit themselves to the issues they disagree with in the auditor's report. Instead, taxpayers should consider including all audit assessments in the protest. Taxpayers may also consider raising additional issues that are not listed in the audit report. In many instances, these additional issues may serve as bargaining chips in the administrative process. Further, if the taxpayer does not challenge the issue at the administrative level, the ability to challenge the issue later is likely lost.[72]

However, it is also important to know what issues may be protested. In Pennsylvania, the Department of Revenue has taken the position that the only issues that can be addressed by the appeal boards in a corporate net income or franchise tax assessment appeal are those directly related to the adjustments made by the Department in its assessment.[73] Thus, if the Department makes an adjustment to the taxpayer's income, in the Department's view, the taxpayer would be limited to disputing the income adjustment and would be barred from raising other unrelated issues such as, for example, challenging the apportionment originally reported.[74]

2. *Informal Conference or Hearing*

Once a taxpayer files a protest, many jurisdictions give the taxpayer the option to request an informal conference or hearing at which the Department will hear the taxpayer's facts and try to resolve the outstanding issues.[75]

---

[68] *See, e.g.*, Ark. Code Ann. § 26-18-405 (1997) (20-day limit to request revision of hearing officer's decision); Ariz. Rev. Stat. Ann. §§ 42-1251, -1254 (2006); N.J. Rev. Stat. § 54:49-18 (2002) (90-day limit to protect finding of assessment of director).

[69] *See* Conn. Gen. Stat. §§ 12-236, 12-729 (2003); *see also* Filing an Appeal, Dep't of Revenue Services, State of Conn., http://www.ct.gov/appeal (last visited Oct. 20, 2012)

[70] *See* Conn. Gen. Stat. Ann. §§ 12-236, 12-729.

[71] For an example of a Connecticut Department of Revenue Service Billing Notice, see http://www.pact-act.com/picture_library/Connecticut/53 CONNECTICUT BILLING NOTICE $99.43 DUE 17MAY2012.pdf (last visited Oct. 20, 2012).

[72] *See, e.g.*, Union Pac. Res. Co. v. State, 839 P.2d 356, 360-61 (Wyo. 1992).

[73] *See* Penn. Dep't of Revenue, Miscellaneous Tax Bulletin 2008-01 § (1)(e) (2008).

[74] *See id.*

[75] *See, e.g.*, N.C. Gen. Stat. § 105-241.11 (2011).

In a number of jurisdictions, the informal hearing is a mandatory part of the department review process.[76]

Taxpayers should not be misled by the term "informal." In some jurisdictions an informal hearing is not informal at all! In Illinois, for example, there is an informal conference board. However, procedural motions and evidentiary rules are no different than in state judicial court, and discovery goes beyond what a judicial court might allow.[77] Taxpayers that choose to represent themselves or to have a Certified Public Accountant prepare the protest suddenly find themselves in a pre-trial scramble, trying to ask for time to get counsel involved.

B. *Administrative Appeals*

In many jurisdictions, once a taxpayer has filed a protest and participated in an informal conference, the Department will issue a final assessment.[78] The final assessment marks the finality of the assessment from the Department's standpoint and signals that the taxpayer will need to proceed further in the administrative process to seek relief.[79] In these jurisdictions, taxpayers typically have the opportunity to appeal the Department's decision to an administrative tribunal or to a district or circuit court.[80] For example, in Idaho, once the Commission reviews a taxpayer's protest and issues a final decision, the taxpayer may appeal to the Board of Tax Appeals or directly to district court.[81]

Alternatively, in some states, taxpayers have the option to sit on a notice of assessment and to wait for a final assessment before engaging in the administrative appeals process.[82] This is the case in Georgia, where a proposed assessment automatically becomes a final assessment if the taxpayer does not file a protest within 30 days of the date of the proposed assessment.[83] However, taxpayers should not presume that this option—to ignore a proposed assessment and wait for the final assessment—is available in every jurisdiction, as it is the opposite case in most. In fact, in many jurisdictions, the failure to file a timely protest bars the taxpayer from seeking further relief.[84] For example, in West Virginia, at the conclusion of an audit, the West Virginia Department of Revenue issues a Notice of Assessment.[85] Once the Notice of Assessment has been issued, the taxpayer must file a petition for reassessment with the Office of Tax Appeals within 60 days of issuance of the Notice or the assess-

---

[76] *See, e.g.*, *id.* § 105-241.12.
[77] *See* Ill. Admin. Code tit. 86, §§ 215.100–30 (2007).
[78] *See, e.g.*, *id.*
[79] *See, e.g.*, 735 Ill. Comp. Stat. Ann. 5/3-113 (West 2008).
[80] *See id.*
[81] *See* Idaho Code Ann. § 63-3049(a) (2007).
[82] *See* Ga. Code Ann. § 48-2-45(a)(1) (2010).
[83] *See id.*
[84] *See, e.g.*, Stone v. Errecart, 675 A.2d 1322, 1325–26; (Vt. 1996).
[85] *See* W. Va. Code § 11-10-8(a) (2008).

ment will otherwise become final and the taxpayer will be foreclosed from contesting the assessment—directly or indirectly.[86]

C. *Refund Claims*

There are generally two ways a claim for refund is used in the context of a state income tax administrative process. The first instance occurs where the taxpayer has paid tax—typically on an original return—that has not been assessed and files a refund for amounts the taxpayer overpaid. This may occur wholly separate and apart from an audit assessment or may be done as an offsetting refund claim—one that offsets any assessments made as the result of an audit.

The second context in which a refund claim generally arises is after the taxpayer has been assessed additional tax. In some jurisdictions, a taxpayer may pay an audit assessment and file suit in circuit court for refund. In a number of jurisdictions, this option can be asserted in lieu of protesting the assessment via the administrative appeals process.

Taxpayers should be sure to understand the requirements for filing a refund claim in a particular jurisdiction. One important consideration is whether the refund claim must specifically state all grounds for relief. For example, in Missouri, a taxpayer must specifically state all grounds for recovery in the refund claim, or, if the claim is denied, the taxpayer will be precluded from bringing up any new grounds for recovery in the complaint that it files with the Missouri Administrative Hearing Commission.[87] Taxpayers should also be aware of whether protective refund claims—that is, a refund claim filed to protect a taxpayer's right to a potential refund based on a contingent event such as pending litigation or an audit in another state—are permitted. California, the District of Columbia, and North Carolina are examples of jurisdictions that permit protective refund claims.[88]

Taxpayers should also watch out for "deemed denials" in the refund context. In a number of jurisdictions, a taxpayer's refund claim is deemed denied if the department of revenue fails to issue a determination on the claim within a specified time period.[89] For example, in Alabama, the Department of Revenue "shall either grant or deny a petition for refund within six months from the date the petition is filed."[90] If the Department of Revenue does not make a determination with respect to the taxpayer's refund claim by the end of the six-month period, the taxpayer's claim is deemed denied.[91] Similarly, Tennes-

---

[86] *See id.* § 11-10A-18.

[87] *See* Kansas City Royals Baseball Corp. v. Dir. of Revenue, 32 S.W.3d 560, 563 (Mo. 2000) (en banc).

[88] *See* Office of Tax and Revenue, *supra* note 43; *see also* N.C. Dept. of Rev., 2008 Technical Bulletins Supp., Corporate, Excise, and Insurance Tax Technical Bulletin (Feb. 2008), *available at* http://www.dor.state.nc.us/practitioner/corporate/bulletins/.

[89] *See, e.g.*, Ala. Code § 40-2A-7(c)(3) (2011).

[90] *Id.*

[91] *See id.*

see has a six-month deemed denial rule for refund claims.[92] This is important as the statute of limitations for appealing the Department's denial begins to run as of the denial date.[93] Thus, the Department's silence may trigger the running of the appeal clock.

D. *Other Strategic Considerations*

Taxpayers should independently review the administrative process in any particular state where they are undergoing audit to determine whether additional considerations may be warranted. This Part lists, as a starting point, a few other items a taxpayer will want to consider during the administrative appeals process.

1. *Who May Represent the Taxpayer?*

It is important to know who may represent the taxpayer, as this will vary by state and at various stages in the administrative process. In some states, taxpayers are permitted to be represented only by those persons specifically authorized by the state's laws.[94] In other states, a taxpayer may only be represented by an attorney, a Certified Public Accountant (CPA), or any person authorized to practice before the Service.[95] Still, in other states, a taxpayer may be represented by any person the taxpayer authorizes.[96] For example, in Arizona, a taxpayer may be represented by a CPA, a federally authorized tax practitioner, or, in matters where the dispute including interest and penalties values less than $5,000, any duly appointed representative.[97] In Louisiana, a taxpayer may generally only be represented before the Board of Tax Appeals by an attorney or a CPA licensed to practice in Louisiana, a public accountant, or a federally authorized tax practitioner.[98] However, at the Board's discretion, out-of-state attorneys and accountants may be permitted to represent the taxpayer.[99]

What constitutes proper representation may change at different stages in the administrative process. For instance, in Pennsylvania, a taxpayer may be represented by an attorney, an accountant, or any other representative at an interview with the Department.[100] However, only an attorney or the taxpayer acting without representation may raise or argue a legal question before the Board of Appeals or the Board of Finance and Revenue.[101] Thus, as a practical matter, only an attorney may represent the taxpayer before these Boards. In

---

[92] *See* Tenn. Code Ann. § 67-1-1802(b) (2011).
[93] *See id.* § 67-1-1802(c).
[94] *See, e.g.*, Ariz. Sup. Ct. R. 31 (13) (2003).
[95] *See* N.Y. Tax Law § 2014 (McKinney 2012).
[96] *See* Mont. Code Ann. § 15-1-222(2) (2009).
[97] *See* Ariz. Rev. Stat. Ann. § 42-1253 (2006); Ariz. Sup. Ct. R. 31 (13).
[98] *See* La. Rev. Stat. Ann. § 47:1414 (2006).
[99] *See id.*
[100] *See* 61 Pa. Code § 7.5(b)(1) (2006).
[101] *See id.* § 7.5(b)(2).

Illinois, a taxpayer may be represented by any person of his choice, including an accountant, as a part of the informal review process at the Department.[102] However, at hearings and pre-trial conferences, only the taxpayer or a licensed attorney may represent the taxpayer.[103]

Generally, the taxpayer must execute and file a Power of Attorney or similar Department-issued form in order to authorize the Department to provide confidential tax information to the taxpayer's representative.[104]

As a strategic consideration, taxpayers should evaluate early on the nature of the dispute and whether the matter is something that will likely reach the judicial review level. If it is, it may make sense to get an attorney involved at the administrative level, as only a licensed attorney may represent the taxpayer at even the lowest level of state court.

2. *Protest and Appeal Deadlines*

One of the most common state tax procedural foot faults is the failure to file timely a protest or appeal. While moving through the administrative process, taxpayers should be sure to keep track of the deadlines for advancing to the next step in the process. It is especially important to do so during the administrative review and appeal process, as there are a number of deadlines to keep track of, such as filing the protest, requesting and setting hearings, appealing an administrative determination, seeking judicial review, and other events.[105]

Taxpayers should note that continued correspondence with the department, in many instances, does not toll the period for filing a protest or appeal.[106] It is not uncommon or improper for taxpayers to discuss potential audit adjustments with an auditor after a notice of proposed assessment is issued. But such conversations do not stop the clock on the taxpayer's deadline to file a protest from running. Therefore, taxpayers should be sure to file any documents by their filing deadline in spite of any promising correspondence with the agency.

a. Mailbox Rule. In many states, simply knowing the deadline to file a protest or appeal may not be enough. Taxpayers must also be aware of any specific rules regarding when the protest or appeal is deemed filed. In some states a document is deemed file based upon the postmark date, whereas in other states the document is deemed file when received by the state tax agency.[107] Further, if a taxpayer is considering sending a document via an express private delivery company such as Airborne Express, DHL Worldwide Express, Federal Express, or United Parcel Service, the taxpayer will want to ensure that delivery via such methods are sufficient for purposes of proving

---

[102] *See* Ill. Admin. Code tit. 86, § 200.135(b) (2007).
[103] *See id.* § 200.110(a).
[104] *See supra* note 100.
[105] *See supra* notes 68–71.
[106] *See supra* notes 70–73.
[107] *See infra* text accompanying notes 109, 111; Ariz. Rev. Stat. Ann. § 12-167 (2006).

that the document was timely filed.[108] For example, New Jersey permits the delivery of protests by express delivery services but has a specific rule for the filing of documents via such methods.[109] Similarly, Ohio permits a taxpayer to file a notice of appeal in person, by certified mail, by express mail, or by any other authorized delivery service.[110] In addition to confirming if express delivery services are acceptable, taxpayers will want to check the applicable rules for each state regarding whether the documents are stamped by a postage meter rather than postmarked by the United States Postal Service.

In general, the burden of proving that a protest or appeal document was timely filed falls on the taxpayer.[111] Thus, taxpayers should do whatever is necessary to ensure that a proper record of the mailing is maintained. One of the simplest ways to do this is to send documents via certified mail rather than first class mail. Knowing a particular state's rule can be critical in ensuring that a protest or appeal is timely filed.

3. *Alternative Tracks*

In many jurisdictions, taxpayers have the option of selecting among alternative methods for protesting an audit assessment.[112] Sometimes these tracks are mutually exclusive. In some jurisdictions, a taxpayer can go straight to court, but in other jurisdictions the taxpayer must first exhaust all administrative appeal options before judicial review is available.[113] In the District of Columbia, after receiving a Notice of Proposed Assessment of Tax Deficiency, a taxpayer has the option of appealing this determination either to the Office of Administrative Hearings or to the Superior Court.[114] These two tracks are mutually exclusive, and therefore the taxpayer cannot appeal to both forums.

Taxpayers should closely consider the pros and cons of selecting one appeal track over another. For instance, many taxpayers find a non-"pay-to-play" administrative appeal option attractive and often select such an option in lieu of skipping ahead to a judicial appeal. However, if most of the cases that go to hearing at the administrative level are decided against the taxpayer in a particular jurisdiction, a limited litigation budget can be wasted by selecting a non-"pay-to-play" option when a "pay and protest" option to bypass the department may have improved the probability of a favorable result.

---

[108] *See infra* note 109.

[109] *See* N.J. Admin. Code § 18:2-4.13 (2004) (indicating that New Jersey deems documents delivered by express delivery to be filed one day prior to the date upon which the protests are received—date-stamped—by the Division).

[110] *See* Ohio Rev. Code Ann. § 5717.02(B) (West 2007).

[111] For example, in Ohio, if a taxpayer files a notice of appeal by certified mail, express mail, or authorized delivery service as defined by the Ohio Code, the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. *See id.*

[112] D.C. Code § 47-4312(d) (2005); Office of Tax And Revenue, *supra* note 43.

[113] *See, e.g.*, D.C. Code § 47-4312(d).

[114] *See id*.

Taxpayers will also want to consider whether the appeal forum is independent of the department of revenue. In some jurisdictions, the administrative appeal tribunal includes representatives from the state's department of revenue.[115] For example, in Alabama, the Administrative Law Judge dedicated to handling tax disputes is appointed by and is an employee of the Department.[116] Similarly, in Arkansas, the Hearing Officer at the administrative level is appointed by the Director of Finance and Administration.[117]

Another important consideration is whether the forum has the ability to issue a final determination or whether the determination may be overruled by the Commissioner. For example, in North Carolina, a determination by the Department can be overridden by the Office of Administrative Hearings.[118] By contrast, in Arizona, the determination of the Arizona Board of Tax Appeals cannot be overridden by the Department.[119] Taxpayers may also want to determine whether there are any prepayment requirements at the administrative level.

4. *Settlement Authority*

Generally, the opportunity to settle a dispute is considerably higher at the administrative appeals level than at the audit level.[120] Taxpayers will find that the department representatives at this stage of the process have statutory authority to settle matters on a hazards-of-litigation or other cost–benefit basis.[121]

However, taxpayers will want to consider the state-specific process for settling and to determine the stage of the administrative appeal process at which it makes sense to engage in settlement discussions. For example, in Massachusetts, taxpayers may choose to appeal pre-assessment to the Massachusetts Department of Revenue or to await the formal assessment and afterward file an application for abatement.[122] Both avenues of appeal end up at the Massachusetts Office of Appeals before the same personnel.[123] As a practical matter, it may make sense for a taxpayer that desires to settle an issue to appeal the formal assessment rather than appeal pre-assessment. If the taxpayer appeals pre-assessment, it may end up "bidding against itself" regarding settlement because the Office of Appeals has no incentive to settle the pre-assessment

---

[115] *See infra* notes 116–17.

[116] *See* ALA. CODE § 40-2A-7 (2011). In our experience, however, this employment relationship has not resulted in any compromise of judicial independence. This suggests, of course, that awareness of the black letter law ought to be supplemented with an understanding of practical reality "on the ground" before appropriate conclusions can be reached.

[117] ARK. CODE ANN. § 26-18-405 (1997).

[118] *See* N.C. GEN. STAT. § 105-241.15 (2011).

[119] *See* ARIZ. REV. STAT. ANN. §§ 42-1252, -1253 (2006).

[120] *See, e.g., id.*; N.C. GEN. STAT. ANN. § 105-241.13.

[121] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 42-1252, -1253; N.C. GEN. STAT. ANN. § 105-241.13.

[122] *See* MASS. GEN. LAWS ch.62C § 37 (2009).

[123] *See id.* § 39.

appeal, as the taxpayer will end up before the Office of Appeals again—before the same person—when it files its abatement application.

a. Alternative Dispute Resolution. Taxpayers will find that more and more state tax agencies are offering alternative dispute resolution (ADR) mechanisms, such as mediation, as a means for discussing and resolving a tax disputes without going to trial.[124] Traditionally, ADR methods have been used to try to resolve matters that are already in the process of being litigated, but many states now offer mediation, conciliation, arbitration, and other ADR methods at the administrative appeals level as an alternative to courtroom litigation or agency adjudication.[125] For instance, in West Virginia, instead of appealing a tax assessment, a taxpayer may request alternative dispute resolution.[126] If ADR is unsuccessful for the taxpayer, it may subsequently appeal to the Office of Tax Appeals.[127] Even in those states where formal ADR procedures have not been adopted, taxpayers may still have an opportunity to participate in ADR through the Multistate Tax Commission's Alternative Dispute Resolution Program.[128]

However, even in jurisdictions where dispute resolution is an option at the administrative level, taxpayers will want to weigh whether participation in the dispute resolution process is worthwhile. For example, if a taxpayer is contesting a legal issue in New York state, it will almost never make sense to appeal to the Bureau of Conciliation because the auditor remains centrally involved in that forum.[129] The taxpayer may find that a direct appeal to the Division of Tax Appeals makes more sense. By contrast, if a taxpayer is contesting an issue in New York City, it will almost always make more sense to go to the New York City Conciliation Bureau on appeal because the auditor is not directly involved in that process and the appeal issues will receive a fresh look at that level.[130]

b. Quasi-Settlement Programs. In addition to the traditional settlement methods, a number of states offer quasi-settlement programs where the settlement terms are generally predetermined.[131] Such programs include state amnesty programs and state voluntary disclosure programs.[132] These programs typically offer taxpayers a predetermined settlement, such as the waiver of penalties and all or some portion of interest, in exchange for the

---

[124] *See, e.g.*, La. Rev. Stat. Ann. § 47:1522 (2006).

[125] *See infra* notes 126–28.

[126] W. Va. Code § 11-10-23 (2008); W. Va. Code R. § 110-10G-3 (2012).

[127] *See id.*

[128] *See generally* Multistate Tax Commission, Bylaw 14. Voluntary Alternative Dispute Resolution, *available at* http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Services/Alternative/Bylaw.pdf.

[129] *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 3000.11(e)(1) (2012); N.Y. Tax Law § 2006 (McKinney 2012).

[130] *See* New York City Charter §170 (2011); N.Y.C. Admin. Code §§ 11-672, -680 (2011).

[131] *See* Parker Sinclair, *The Case Against Tax Amnesties*, 56 St. Tax Notes (TA) 953, 953–62 (June 21, 2010).

[132] *See id.*

taxpayer coming forward and disclosing a past liability.[133] These programs, however, are not without taxpayer consequence. States often require taxpayers who participate in an amnesty program to give up their right to protest or to seek judicial review of liabilities settled through the program.[134] However, an increasing number of states are imposing post-amnesty penalties on taxpayers who fail to participate in an amnesty program.[135] In addition, some states have closed or changed the terms of any voluntary disclosure programs that existed pre-amnesty. For example, following the implementation of its 2009 amnesty program, New Jersey changed its voluntary disclosure program—which was previously a taxpayer anonymous program with a four year lookback period—to a program with a seven year lookback period and in which the taxpayer must identify itself if it seeks to negotiate special terms on certain tax issues.[136]

5. *Establishing the Record*

It is important to understand when the record is established at the administrative level, as it often serves as the basis for judicial review.[137] Many lower courts limit the facts and legal issues raised in a judicial forum to those that were raised at the administrative appeals level.[138] Therefore, taxpayers should be sure to include and to develop fully any and all facts or issues that may be central to proving their cases. Part IV.A.3 below provides a brief discussion of the standard of review in judicial appeals. Taxpayers will find that the importance of establishing the record is closely tied to the type of review a lower level court will conduct in evaluating the taxpayer's appeal.

IV. Judicial Review Considerations

Taxpayers should consider a variety of issues while going through the administrative appeals process in order to ensure that they are adequately prepared to bring a judicial appeal, should the need or desire to do so arise. A few of these issues are touched upon below.

---

[133] *See id.*

[134] *See, e.g.*, Kan. Stat. Ann. § 79-2977(d) (West 2012).

[135] *See, e.g.*, Va. Code Ann. § 58.1-1840.1(F)(1) (2009).

[136] *See* David J. Gutowski and Kyle O. Sollie, *Appellate Court Upholds Penalties on IHC; Non-Filers Should Consider VDA -- New Policy Reduces Cost of Coming Forward*, http://www.reedsmith.com/Appellate-Court-Upholds-Penalties-on-IHC-Non-Filers-Should-Consider-VDANew-Policy-Reduces-Cost-of-Coming-Forward-09-03-2010/ (last visited April 24, 2013). Note New Jersey has since revised its voluntary disclosure program to return to a four year lookback period and to allow non-filers to approach the Division of Taxation on an anonymous basis. *See* N.J. Division of Taxation, Voluntary Disclosure Program Notice (Aug. 20, 2010), *available at* http://www.state.nj.us/treasury/taxation/voldisc.shtml.

[137] *See, e.g.*, W. Va. Code § 11-10A-14(c) (2008).

[138] *See, e.g.*, III. Adm. Code tit. 86, § 200. 175 (2007). ("In any circumstance in which a rehearing may be granted after the original has taken place, no new or additional discovery may be initiated by any party to the proceeding.").

A. *Strategic Considerations in Advancing a Judicial Appeal*

Taxpayers will want to be sure that they are fully aware of the technical aspects of filing a judicial appeal. Taxpayers who consider and plan for the possibility of a judicial appeal will find themselves in a far better position than those who put off considering judicial review until a tax dispute goes unresolved through the administrative process. Some of the most important items to consider in preparing for judicial review are the time limit for filing a judicial appeal, state prepayment requirements, and the standard of review.

1. *Time Limit for Judicial Appeals*

One of the first items a taxpayer should determine is the time period during which the taxpayer must file a judicial appeal or else lose its right further to appeal the tax matter. Oftentimes, the number of days in which a taxpayer must seek judicial review differs from the numbers of days the taxpayer was given to file the protest at the administrative level.[139] For instance, in Connecticut, a taxpayer has 60 days to file a written protest against a proposed assessment, while the taxpayer only has one month to seek judicial review of the Commissioner's final determination.[140] In Idaho, a taxpayer has 63 days to file a written protest challenging an assessment and 91 days to appeal the Tax Commission's final determination on an assessment appeal to either the district court or the Board of Tax Appeals.[141] If the taxpayer decides to appeal to the Board, once the Board issues its final determination, the taxpayer has only 28 days to appeal the determination to the district court.[142] Although this step in the judicial appeal process may seem ministerial, a procedural foot fault regarding the untimely filing of a judicial appeal could cause a taxpayer to forfeit its ability to pursue the desired relief any further.[143]

As previously mentioned, taxpayers should be especially careful that they not allow continued correspondence with representatives from the Department after an administrative protest has reached its end to deceive the taxpayer into believing that the Department is still "working to resolve" the issue with the taxpayer. Once an administrative appeal has resulted in a final determination and the judicial appeal clock begins to run, the taxpayer must file a timely judicial appeal.[144] In most instances, continued correspondence with the Department's representatives does not toll the appeal clock.[145]

---

[139] *See infra* note 140.

[140] Conn. Gen. Stat. § 12-729 (2003). The time period for seeking judicial review begins to run on the date the Commissioner's Final Determination Letter is received by the taxpayer, not from the date it is mailed. *See* Millward Brown Inc. v. Conn. Commissioner of Revenue Serv., 811 A.2d 717, 764–65 (Conn. App. Ct. 2002).

[141] Idaho Code Ann. §§ 63-3045(1)(a), 63-3049 (2007).

[142] *Id.* § 63-3045(1)(b).

[143] *Id.* § 63-3045(5).

[144] *See, e.g.*, La. Rev. Stat. Ann. §47:1434 (2012); N.Y. Tax Law § 2016 (McKinney 2012).

[145] *See supra* notes 70–73.

2. *State Prepayment Requirements*

Many states require taxpayers to pay the tax liability or post a bond before a court will have jurisdiction to hear an appeal.[146] These prepayment requirements can range from partial prepayment to full prepayment.[147] For instance, in Arkansas, a taxpayer seeking to appeal a final determination of a notice of proposed assessment may pay the tax under protest within 30 days of the final determination and then file suit in circuit court within one year from that payment.[148] Alternatively, the taxpayer may post bond within 30 days and then file suit in circuit court within 30 days of posting bond.[149]

Even in states where there is not a prepayment requirement, taxpayers should be sure to determine that there are no other adverse consequences to not paying the tax before filing a judicial appeal. For example, in the District of Columbia, taxpayers who appeal the denial of a real property tax exemption application may do so without first paying the real property tax.[150] However, the Office of Tax and Revenue (OTR) has informally taken the position that even though the taxpayer need not "pay to play," the taxpayer must pay to prevent OTR from taking action to collect a tax deficiency, which includes selling the property at a real property tax sale. Although this example is within the real property tax context, taxpayers should be sure to examine whether there are any disadvantages to not paying a tax before appealing.

3. *Standard of Review*

It is important to know what standard a court will apply in reviewing a taxpayer's case at the judicial level. In some jurisdictions, the judicial forum reviewing the Department's final determination will conduct a de novo review of the determination.[151] For instance, in states like the District of Columbia (D.C. Superior Court), Florida (Circuit Court), and Tennessee (Chancery Court), the court will conduct a de novo trial of the taxpayer's appeal and issue a final determination.[152] A court conducting a de novo review of the determination will permit either party to introduce new evidence and review the determination as if no record had been established at the administrative level.[153] However, in other jurisdictions, the judicial forum may conduct an on-the-record review, which limits the court's review to the record established during the administrative process. Taxpayers will want to examine the standard of review for a given jurisdiction well in advance of initiating a judicial

---

[146] *See, e.g.*, Alaska Stat. § 43.05.480 (2010); Ariz. Rev. Stat. Ann. §12-170 (2006); Idaho Code Ann. § 63-3049(b); La. Rev. Stat. Ann. §47:1576.

[147] *See infra* notes 148–49.

[148] *See* Ark. Code Ann. § 26-18-406(a)(1)(A) (1997).

[149] *See id.* § 26-18-406(a)(2)(A).

[150] D.C. Code § 47-1009(a)(1) (2005).

[151] *See infra* note 152.

[152] *See* D.C. Code § 47-3303; Fla. Stat. § 120.68 (2010); Tenn. R. of App. P. 4.

[153] *See, e.g.*, D.C. Code § 47-3303 (allowing the court to hear all questions and make separate findings of fact).

appeal so that, if necessary, they can develop the record adequately at the administrative appeals level.

V. Conclusion

The state administrative review and appeals process can be filled with "traps for the unwary." However, with careful consideration of the applicable law in a given state, taxpayers may find that they are able to turn administrative procedural traps into opportunities for strategically navigating the administrative process. The taxpayers who will be successful in creating opportunities will be those who explore the potential traps at each level of the state tax procedural process—from audit through judicial review.