



## State & Local Tax Advisory ■

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### Litigating in the Georgia Tax Tribunal

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The Georgia Tax Tribunal was created by an act of the Georgia General Assembly during the 2012 legislative session in order to establish "an independent specialized agency separate and apart from the Department of Revenue to resolve disputes between the department and taxpayers in an efficient and cost-effective manner."<sup>1</sup> More specifically, the General Assembly stated in the act that it was creating the Tax Tribunal to:

1. improve the utilization of judicial resources by resolving tax cases in a more streamlined and efficient manner;
2. increase the uniformity of decision making in tax cases;
3. improve the equal access of all parties to court process; and
4. increase public confidence in the fairness of the state tax system.<sup>2</sup>

On January 1, 2013, the Georgia Tax Tribunal (the "Tribunal")—through its first appointed judge, the Hon. Charles Beaudrot—began accepting cases. Although it has been only one year, and although the Georgia tax community is still waiting for the Tribunal's first significant "substantive" opinion, so far it appears that the legislature's goals will be met in full. Taxpayers wishing to challenge assessments, denials of refund claims or other decisions of the Georgia Department of Revenue (the "Department") now can be much more confident that they will get a fair and efficient resolution of their Georgia tax disputes.

<sup>1</sup> H.B. 100, 2012 Ga. Laws p. 318, Act 609, § 15, 2011-2012 Reg. Sess., available at <http://www.legis.ga.gov/legislation/en-US/display/20112012/HB/100>. Much of the bill created Chapter 13A of Title 50 of the Georgia Code, which governs the Tax Tribunal.

<sup>2</sup> O.C.G.A. § 50-13A-2.

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It should be noted, however, that the Tribunal's first year has presented its fair share of challenges. In particular, the Tribunal has been inundated with petitions filed by individual taxpayers—often with only a few hundred dollars or less at issue—seeking relief that is clearly outside the Tribunal's jurisdiction. For example, taxpayers have sought to involve the Tribunal in working out payment plans with the Department or to have the Tribunal intervene in and manage the Department's valid collection efforts. More broadly, taxpayers have also sought to appeal local ad valorem tax valuation or exemption issues to the Tribunal (even though the Tribunal has no jurisdiction over local property tax matters) or to appeal disputes with the Department that are not yet ripe for appeal to the Tribunal (such as proposed assessments or claims for refund that have not yet been filed with the Department). Accordingly, a substantial portion of the Tribunal's efforts to date have focused on implementing and improving processes for filing and handling such petitions.<sup>3</sup> Now that taxpayers have had a year to become aware of the new forum and to see some of their early cases proceed before the Tribunal, taxpayers and court observers can expect to see the Tribunal issue an increasing number of substantive decisions.

Nevertheless, recognizing that the paint on the Tribunal's doors is still fresh, and to help taxpayers become a bit more familiar with the new forum, this article presents a short primer on the nuts and bolts of filing and litigating a case in the Tribunal. This article is aimed primarily toward sophisticated multistate taxpayers weighing an appeal from an assessment, denial of a refund claim or other adverse decision or action taken by the Department (hereinafter, "Department Decisions"). However, it will also be relevant to those individual taxpayers who are in similar situations and whose appeals fall within the Tribunal's jurisdiction, as set forth in O.C.G.A. § 50-13A-9 and as discussed by the Tribunal in its first two published decisions, *John Doe*<sup>4</sup> and *Moon*.<sup>5</sup> Furthermore, to help taxpayers understand the alternatives to filing a case in the Tribunal, and in part to emphasize the advantages of Georgia's new forum, this article also includes a brief description of the appeal options that were available to taxpayers prior to 2013.

## I. CHOOSING AN APPEAL FORUM FOR A GEORGIA TAX DISPUTE

### A. *Prior to the Creation of the Tribunal, Taxpayers Could Choose from Two Options for Georgia Tax Appeals.*

Prior to the creation of the Tribunal, taxpayers who wished to appeal from a Department Decision possessed two fairly uninviting options. First, a taxpayer could demand a hearing in front of an administrative law judge at the Office of State Administrative Hearings (OSAH). There were no "pay to play" requirements to pursue an OSAH appeal, but any decision issued by an OSAH judge was subject to review—and could be modified or

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3 Along those lines, Judge Beaudrot reported that as of September 1, 2013, the Tax Tribunal had already resolved 202 cases, with 324 remaining on its docket. Michael Malihi, "A Conversation with Honorable Charles R. Beaudrot Jr., Chief Judge of the Georgia Tax Tribunal," ADMINISTRATIVE LAW REPORT, <http://administrativelawreport.com/?p=2176>.

4 *John Doe v. MacGinnitie*, No. 1343294 (Ga. Tax. Trib., Oct. 1, 2013), available at <http://gataxtribunal.georgia.gov/documents/decisions> (see discussion *infra*).

5 *Moon v. MacGinnitie*, No. Tax-WT-1400721 (Ga. Tax. Trib., Dec. 13, 2013), available at <http://gataxtribunal.georgia.gov/documents/decisions> (see discussion *infra*).

overruled—by the Department’s Commissioner.<sup>6</sup> OSAH judges also generally lacked substantial experience or expertise in state tax law.

Alternatively, prior to the creation of the Tribunal, a taxpayer could appeal a Department Decision to a Georgia superior court under O.C.G.A. § 48-2-59. This approach had the advantage of presenting the dispute to an impartial and experienced judge whose decisions could not be overturned by the Department. However, as with the trial courts of most states, superior court judges in Georgia are general jurisdiction judges with limited experience in—and often limited appetite for—cases involving complex state tax issues. Thus, most tax cases in superior courts languished on the docket for years before reaching a conclusion (due to courts’ heavy caseloads and the need to provide superior courts with extensive context and background regarding tax issues), and even then they were often decided in a manner that had little to do with the parties’ positions or arguments.

Moreover, filing a tax appeal to a Georgia superior court also carried distinct procedural disadvantages, chief among them being the condition in O.C.G.A. § 48-2-59(c) that, prior to appearing in superior court, a taxpayer was required to pay the tax, post a bond or demonstrate real property ownership within the state. Accordingly, prior to the creation of the Tribunal, both appeal options available to taxpayers carried significant disadvantages that often dissuaded taxpayers—even taxpayers with compelling factual and legal positions—from litigating their appeals.

***B. Since Jan. 1, 2013, Taxpayers Still Have the Option of Appealing to Superior Court, But Most Taxpayers Should Now Opt to Appeal Adverse Department Decisions to the Tribunal.***

To address the lack of an efficient, independent and specialized forum for the resolution of state tax disputes, the Special Council on Tax Reform and Fairness for Georgians, chartered by the Georgia General Assembly, recommended the creation of an independent tax court.<sup>7</sup> Noting that the increasing complexity of the state’s tax system had raised the cost of tax compliance, the Special Council found that a specialized tax court would provide better guidance to taxpayers, increase tax compliance and position Georgia as a more business-friendly state.<sup>8</sup> The General Assembly responded to the Special Council’s recommendation with the passage of House Bill 100, The Georgia Tax Tribunal Act (the “Act”).<sup>9</sup>

As described in the following sections, the Act solved many of the problems with the previously available tax appeal routes. The Tribunal is set up as an autonomous division of the executive branch of government, and it can hear cases at its Fulton County location or, for the convenience of taxpayers, at any location in Georgia.<sup>10</sup> Pursuant to the Act, the Tribunal shares concurrent jurisdiction with the superior courts over most

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<sup>6</sup> See O.C.G.A. § 50-13-41(e) (providing a 30-day agency review of OSAH decisions). The OSAH provisions are no longer applicable to matters before the Tribunal. *Id.* § 50-13-42(e).

<sup>7</sup> 2010 SPECIAL COUNCIL ON TAX REFORM AND FAIRNESS FOR GEORGIANS, RECOMMENDATIONS 32 (2011), available at <http://www.terry.uga.edu/media/documents/selig/georgia-tax-reform.pdf>.

<sup>8</sup> See generally Minschwaner, Ruffin, *Georgia Tax Tribunal Act of 2012*, 29 Ga. St. U. L. Rev. 70 (2012).

<sup>9</sup> See *supra* note 1.

<sup>10</sup> Pursuant to O.C.G.A. § 50-13A-7, the Tribunal *must* be located in a facility that is separate and distinct from the Department. The Tribunal’s chambers and courtroom are located in OSAH’s downtown Atlanta offices.

tax matters; therefore, following a Department Decision, a taxpayer can file an appeal *either* to the Tribunal or to superior court.<sup>11</sup>

Even though superior court technically remains an option for appeal, there are very few situations in which we would advise a taxpayer to choose that appeal avenue over the Tribunal. First, the procedural disadvantages of proceeding in superior court are eliminated at the Tribunal, as taxpayers filing an appeal to the Tribunal are not required to pay the tax, post a bond or demonstrate real property ownership within the state.<sup>12</sup> Furthermore, in keeping with the legislature's intent for creating the Tribunal, Judge Beaudrot is more likely than the typical superior court judge to quickly grasp the issues in a Georgia tax case and to efficiently render a decision based on those issues. Judge Beaudrot was appointed by Governor Nathan Deal because of his standing within Georgia's tax community, and his deep tax experience ensures that in each case, he will understand the context of the issues between the taxpayer and the Department, quickly grasp the parties' arguments and positions and recognize the implications of the parties' statutory interpretations and requests for relief.

## II. LITIGATING IN THE TRIBUNAL

### ***A. Once Filed, Tribunal Cases Go Immediately into a Remand Period.***

Taxpayers may file a petition in the Tribunal either after (a) receiving a final assessment or decision from the Department or (b) paying the disputed liability and exhausting the administrative conditions required for filing a refund action.<sup>13</sup> Filing the petition stays any enforcement against the taxpayer.

By standing order, cases filed with the Tribunal are automatically remanded to the Department for 90 days.<sup>14</sup> During the "remand period," the parties can discuss settlement or work to resolve any issues that do not need to be presented to the Tribunal. The remand period also gives the Department a chance to remedy any clerical errors that may have caused an erroneous assessment.<sup>15</sup> Once the parties have successfully conferred—or once either party determines that additional discussions are unnecessary or would be unproductive—either party may file a notice to terminate the remand period and to return the case to the Tribunal. Alternatively, the parties may jointly agree to have the case returned to the Tribunal at any time.

### ***B. Once the Remand Period Closes, Taxpayers Should Expect to Work With the Department During Discovery to Resolve as Many Factual Issues as Possible to Prepare the Case for Disposition by the Tribunal.***

Following the close of the remand period, taxpayers should contact the Department to prepare a scheduling order regarding deadlines for informal and formal discovery, as well as the filing of dispositive motions.

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<sup>11</sup> O.C.G.A. § 50-13A-9(b).

<sup>12</sup> O.C.G.A. § 50-13A-9(d).

<sup>13</sup> See *Moon v. MacGinnitie*, No. Tax-WT-1400721, at 2 (Ga. Tax. Trib., Dec. 13, 2013) (noting that the Tribunal does not have jurisdiction until one of these conditions is met).

<sup>14</sup> Standing Remand Order of the Ga. Tax Trib. (Jan. 25, 2013), available at [http://gataxtribunal.georgia.gov/sites/gataxtribunal.georgia.gov/files/related\\_files/document/Standing-Remand-Order-for-Tax-Tribunal.pdf](http://gataxtribunal.georgia.gov/sites/gataxtribunal.georgia.gov/files/related_files/document/Standing-Remand-Order-for-Tax-Tribunal.pdf).

<sup>15</sup> See FAQ's, GEORGIA TAX TRIBUNAL, <http://gataxtribunal.georgia.gov/faqs>.

Discovery in the Tribunal is governed by the provisions of the Georgia Civil Practice Act (O.C.G.A. § 9-11-5), but the Act states that taxpayers and the Department should “make every effort to conduct discovery by informal consultation or communication.”<sup>16</sup> Furthermore, the Act gives the Tribunal discretion to limit formal discovery if, after considering the amount in controversy, the limitations of the parties’ resources and the importance of the issues in the case, the Tribunal finds that such discovery is unduly burdensome or expensive.

The Tribunal’s regulations add that, as much as possible, the parties are required to stipulate to the relevant facts and to the admissibility of relevant documents.<sup>17</sup> Judge Beaudrot’s public comments indicate that he takes this rule seriously and believes that in *most* tax cases, the parties should be able to stipulate to *all* of the relevant facts and documents and focus their arguments exclusively on the proper interpretation and application of the tax laws to those facts.<sup>18</sup> Finally, taxpayers should note that the Tribunal hears cases *de novo* and is not limited to considering the arguments that were made or the facts that were presented to the Department. That rule should eliminate any need for the parties to argue over whether a particular issue or argument has been properly preserved for presentation to the Tribunal.<sup>19</sup>

**C. Following Motions for Summary Judgment or—in Rare Cases—Trial, the Tribunal Will Decide the Case and Publish a Written Opinion.**

As noted earlier, to this point, the Tribunal has issued only two written opinions, both of which focus on the Tribunal’s jurisdiction to hear the taxpayer’s appeal in the first place. Those opinions contain the first expressions of what we expect to be common themes during Judge Beaudrot’s tenure on the bench, namely (1) a muscular application of both the Tribunal’s statutorily prescribed jurisdiction and the remedies available to the Tribunal; and (2) a strong commitment to explaining the statutory and policy grounds for the Tribunal’s findings and holdings.

In the first of those two opinions, *John Doe v. MacGinnitie*,<sup>20</sup> the taxpayer protested that the Department had demanded a five-year “look-back” period in conjunction with a voluntary disclosure agreement (VDA), rather than the three-year period discussed in the Department’s VDA guide and application instructions. In response, the Commissioner of Revenue argued that the Tribunal lacked jurisdiction over the taxpayer’s claims. In rejecting the Commissioner’s argument, Judge Beaudrot discussed the history of the Tribunal’s formation and its legislative mandates, finding that “the jurisdiction of the Tribunal and nature of relief that can be granted by the Tribunal must be consistent with those that would be available to litigants if the action before the Tribunal were brought in Superior Court.”<sup>21</sup> Therefore, the Tribunal found that it had jurisdiction under O.C.G.A. § 48-2-59(a) to review both the Commissioner’s *finding* that the taxpayer’s circumstances

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16 O.C.G.A § 50-13A-13.

17 See Ga. Comp. R. & Regs. 616-1-3-.18 (pending final adoption).

18 See, e.g., *supra* note 3 (“Discovery disputes are intended to be rare and the Tax Tribunal will view delay tactics and ‘fishing expeditions’ unfavorably, and will require considerable justification for burdensome discovery requests. Both sides must cooperate to minimize costs and assure prompt resolution of cases.”).

19 See *id.* at 616-1-3-.11; see also O.C.G.A § 50-13A-14(a).

20 See *supra* note 4.

21 *Id.* at 6.

did not warrant a three-year look-back period and the Commissioner's *ruling* not to grant the taxpayer the three-year agreement.<sup>22</sup>

The taxpayer's appeal, however, failed on the merits. Judge Beaudrot noted that the taxpayer was essentially requesting a mandamus order to compel the Commissioner to change the terms of the VDA; Georgia's Voluntary Disclosure Program, however, is available only by the "administrative grace" of the Commissioner and is not subject to any statutory right.<sup>23</sup> Thus, although the Tribunal has no power to issue a writ of mandamus, "the same prudential considerations which underlie limitations on the grant of mandamus relief [by superior courts] apply to the entry of orders by the Tribunal."<sup>24</sup> Accordingly, the Tribunal held that the taxpayer was not entitled to the requested relief.

In the second case decided by the Tribunal, *Moon v. Commissioner*,<sup>25</sup> the Tribunal held that it lacked subject matter jurisdiction to hear the taxpayer's appeal, in which the taxpayer objected to a *proposed* assessment of state withholding taxes. O.C.G.A. § 50-13A-9(a) defines the Tribunal's jurisdiction, and there is nothing in that statute that permits a taxpayer to seek relief from a *proposed* assessment of taxes. Consequently, the Tribunal may only hear the taxpayer's appeal after he receives an official (final) assessment or pays the tax and satisfies the administrative exhaustion conditions required for bringing a refund action to the Tribunal.

Last, while the Tribunal's early opinions have demonstrated a muscular interpretation of the Tribunal's jurisdiction, taxpayers must be aware of a key limitation on the Tribunal's authority: by virtue of its executive-branch positioning, the Tribunal cannot resolve issues of United States or Georgia constitutional law (i.e., it cannot determine that a statute is unconstitutional). A tribunal judge may, however, take evidence and make findings of facts related to constitutional challenges.<sup>26</sup>

#### ***D. Taxpayers May Appeal from Adverse Decisions of the Tribunal to the Business Division of the Fulton County Superior Court.***

A taxpayer may appeal an adverse decision of the Tribunal to the Business Division of the Superior Court of Fulton County within 30 days of the Tribunal's final judgment.<sup>27</sup> The Superior Court's review, however, is limited; it may not alter judgments of fact, and it may only modify the Tribunal's final judgment if the Tribunal's conclusions are in violation of constitutional or statutory provisions, are made under unlawful procedure, are clearly erroneous or are arbitrary or capricious. A taxpayer may further appeal decisions originating from the Tribunal to the Georgia Court of Appeals and the Georgia Supreme Court, but review by Georgia's appellate courts will be discretionary.<sup>28</sup>

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22 *Id.* at 12 (noting that O.C.G.A. § 48-2-59(a) allows a party to "appeal from any order, ruling, or finding of the commissioner to the superior court of the county of the residence of the taxpayer").

23 *Id.* at 8.

24 *Id.* at 15.

25 *See supra* note 5.

26 Ga. Comp. R. & Regs. 616-1-3-.21 (pending final adoption).

27 O.C.G.A. § 50-13A-17.

28 *See* O.C.G.A. §§ 50-13A-17(h), 5-6-35(a).

### **III. CONCLUSION**

The Georgia Tax Tribunal has only been accepting cases for one year, but in our view it has already improved the perception that taxpayers have an available forum in which they can receive a fair and efficient resolution of Georgia tax disputes. Accordingly, taxpayers subject to an adverse Georgia tax decision with which they disagree should strongly consider this new appeal forum.

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