



The State of the Tribunal: The Georgia Tax Tribunal Turns Two

Synopsis: The Georgia Tax Tribunal has been in existence for just over two years, and in that time, the Tribunal's first judge (Charles Beaudrot) has done a commendable job of establishing the Tribunal as a forum for Georgia taxpayers to receive a fair and efficient adjudication of a Georgia tax dispute. As the State of Georgia seeks a replacement for the departing Judge Beaudrot, Alston & Bird partners Mary Benton and Clark Calhoun discuss aspects of litigating a case before the Tribunal and review some of the key decisions of the Tribunal's first two years.

By: Mary T. Benton, Esq.
Alston & Bird LLP
Atlanta, GA
Phone: (404) 881-7255
E-mail: mary.benton@alston.com

Clark R. Calhoun, Esq.
Alston & Bird LLP
Los Angeles, CA
Phone: (213) 576-1137
E-mail: clark.calhoun@alston.com

On January 1, 2013, the Georgia Tax Tribunal (the "Tribunal")—through its first appointed judge, the Hon. Charles Beaudrot—began accepting cases. This fall, as the Tribunal approached the close of its second year, Judge Beaudrot announced his intention to return to private practice. In just two years, Judge Beaudrot has done a commendable job of putting systems and rules in place for the efficient administration of the Tribunal, most notably including:

- Working with the Department and taxpayer groups to adopt forms for the proper filing of appeals to the Tribunal;
- Adopting rules of practice and procedure for the Tribunal;
- Imposing an "automatic remand" order which stays all appeals filed to the Tribunal for 90 days to allow a period for taxpayers and the Georgia Department of Revenue (the "Department") to resolve any issues that could not be resolved prior to the taxpayer's deadline for filing an appeal;
- Adopting procedures for handling "appeals" to the Tribunal that are not within the Tribunal's jurisdiction (a frequent issue in the context of individual taxpayers);
- Working with, and providing guidance to, taxpayers, the Department, and the Office of the Attorney General regarding the Tribunal's jurisdiction;
- Providing regular updates regarding the status of the Tribunal's docket (including cases filed, resolved, and pending on a monthly and cumulative basis) to practitioners before the Tribunal and other interested parties; and
- Working with the Office of Administrative Hearings to establish and maintain a user-friendly website for the Tribunal which contains the Tribunal's rules, helpful forms, information for filing and litigating a case before the Tribunal, and links to all of the Tribunal's issued decisions.

Those early decisions have been just as valuable as all of the work done to establish the Tribunal's practices and procedures, as the Tribunal's early decisions have been well-reasoned, balanced, and have taken care to address the positions of both sides—even, in many cases, where unrepresented taxpayers did an inadequate job of stating their positions. Thus, after two years, the



Tribunal appears well on its way toward satisfying the legislature's stated goals when it established the forum: (1) to use judicial resources more efficiently by having a forum dedicated to tax cases; (2) to make

decision-making in tax cases more uniform; (3) to make judicial review of Georgia tax issues more accessible; and (4) to increase public confidence in the fairness of the state tax system.¹

Of course, after two years, the vast majority of taxpayers have—thankfully—not yet had any reason to appear before the Tribunal. Accordingly, while the Governor works on selecting a new judge to preside over the Tribunal's next chapter, we thought it useful to provide a short summary (i) describing aspects of litigating a case before the Tribunal and (ii) reviewing some of the key decisions of the Tribunal's first two years.

I. DECIDING WHETHER TO BRING A CASE TO THE TRIBUNAL

A. *Taxpayers Should Almost Always Choose to Appeal Georgia Tax Disputes to the Tribunal.*

Even though superior court technically remains an option for pursuing a tax appeal in Georgia, there are likely few situations in which a taxpayer would 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.² Furthermore, in cases we have argued to the Tribunal, Judge Beaudrot has quickly grasped the issues and directed the parties to focus on the essential facts and authorities on which his decision will turn, and the decisions he has rendered have been very thorough and thoughtful. Conversely, most state 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 state tax issues), and even then they were often decided in a manner that had little to do with the parties' positions or arguments, and were issued without extensive reasoning as to the basis for the decision.

Thus, given the tax expertise and efficient procedures available at the Tribunal, a taxpayer with a strong legal and/or policy argument should almost always choose to go to the Tribunal. While we will of course have to revisit this view when the new Judge is chosen, early signals suggest that the candidates who will receive serious consideration as Judge Beaudrot's successor will again be drawn from a pool of individuals with deep credentials within Georgia's tax community—thus reinforcing our view that the Tribunal is the best forum for receiving a fair and efficient adjudication of a Georgia tax dispute.

B. *The Tribunal Has Jurisdiction Over Appeals From Assessments, Denials of Refund Claims, and Declaratory Judgment Actions, But It Cannot Decide Constitutional Questions.*

O.C.G.A. § 50-13A-9 provides that the Tribunal has jurisdiction over, *inter alia*, actions brought under O.C.G.A. §§ 48-2-35 (appeals from denials of claims for refund), 48-2-59 (appeals from assessments and other Department decisions), 48-2-18 (centrally-assessed property tax assessments), and actions for certain declaratory judgments under O.C.G.A. § 50-13-10(a). In the Tribunal's very first decision, *John Doe v. MacGinnitie*,³ the Tribunal held that Section 48-2-59(a)'s provision that a party may

¹ See O.C.G.A. § 50-13A-2.

² Contrast O.C.G.A. § 48-2-59 with O.C.G.A. § 50-13A-9(d).

³ *John Doe v. MacGinnitie*, No. 1343294 (Ga. Tax. Trib., Oct. 1, 2013), available at <http://gataxtribunal.georgia.gov/documents/decisions>.



appeal to the Tribunal from “any order, ruling, or finding” of the Department means exactly what it says: taxpayers may appeal from *any* such Department action to the Tribunal. In that case, 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 Department argued that the Tribunal lacked

jurisdiction over the taxpayer’s claims. In rejecting the Commissioner’s argument, Judge Beaudrot discussed the history behind 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.”⁴

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 did not warrant a three-year look-back period and the Commissioner’s *ruling* not to grant the taxpayer the three-year agreement.⁵ The taxpayer’s appeal, however, failed on the merits, because Georgia’s Voluntary Disclosure Program is available only by the “administrative grace” of the Commissioner and is not subject to any statutory right.⁶ The taxpayer was therefore denied relief, but the case was important in explicitly establishing the Tribunal’s jurisdiction over any “order, ruling, or finding” of the Commissioner of the Department of Revenue. The Tribunal may not, however, hear an appeal from a *proposed* assessment of taxes.⁷

The Tribunal’s jurisdiction to review appeals from Department decisions is, accordingly, quite broad; furthermore, 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.⁸ 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—meaning that so long as a party is properly before the Tribunal, it should be able to advance any factual or legal basis for why it is entitled to the relief it seeks.

Finally, 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). The Tribunal judge may, however, take evidence and make findings of facts related to constitutional challenges.⁹ And while the Tribunal cannot declare a statute or regulation unconstitutional, it may interpret a statute or regulation in a manner that avoids an unconstitutional result.

II. PRACTICING BEFORE THE TRIBUNAL

A. ***During the Pre-Hearing Phase, Taxpayers and the Department Are Expected to Work Together To Resolve As Many Factual and Legal Questions as Possible.***

Taxpayers may file a petition in the Tribunal either (a) after receiving a final assessment or decision from the Department or (b) after paying the disputed liability and exhausting the administrative conditions required for filing a refund action.¹⁰ Filing the petition stays any enforcement against the taxpayer.

⁴ *Id.* at 6.

⁵ *Id.* at 12.

⁶ *Id.* at 8.

⁷ See *Moon v. MacGinnitie*, No. Tax-WT-1400721 (Ga. Tax. Trib., Dec. 13, 2013).

⁸ See Ga. Comp. R. & Regs. 616-1-3-.11; see also O.C.G.A. § 50-13A-14(a).

⁹ Ga. Comp. R. & Regs. 616-1-3-.21.

¹⁰ See *Moon*, No. Tax-WT-1400721, at 2 (noting that the Tribunal does not have jurisdiction until one of these conditions is met).



By standing order, cases filed with the Tribunal are automatically remanded to the Department for ninety days.¹¹ 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 (e.g., a computational issue that could not be resolved prior to the taxpayer’s deadline to file an appeal). The remand period also gives the Department

a chance to remedy any clerical errors that may have caused an erroneous assessment.¹² 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.

Once the remand period closes, the Tribunal expects that taxpayers and the Department will confer with respect to a scheduling order that will govern discovery and set the case for motions on summary judgment or, if necessary, a trial. Scheduling orders may be amended by the judge for cause. The Tribunal and its procedures have been fashioned after the United States Tax Court; accordingly, practitioners before the Tribunal are expected to work cooperatively during discovery and prior to dispositive motions (or trial) to resolve as many factual issues as possible via stipulation, so as to permit the Tribunal to focus on resolving the central legal issues in the case.¹³ Discovery disputes, if any, are handled by phone conference among the parties and the judge in an efficient manner.

B. Hearings on Summary Judgment and Trials in the Tribunal are Somewhat Informal.

The date for the hearing or trial before the Tribunal is set either in the scheduling order at the outset of the litigation or by mutual agreement among the parties and the judge after the completion of discovery and pre-trial matters. The hearing on dispositive motions proceeds in a manner similar to a case brought in superior court, with each party receiving thirty minutes for argument and the party bringing the case receiving the opportunity to go first and to save time for rebuttal. However, in our experience, the argument experience itself has been quite different before Judge Beaudrot than before a general superior court judge. First, proceedings before the Tribunal are somewhat less formal than a typical superior court proceeding, and are more typical of an administrative law setting. Moreover, there is no doubt that Judge Beaudrot reads and studies all of the briefs that are filed prior to the argument and thoroughly understands the issues to be decided. He then directs the flow of the argument based upon his understanding of the issues raised in the briefs. This is helpful because it informs counsel of what the focus of the argument should be.

In addition, Judge Beaudrot has asked relevant and direct questions of each party during the course of the argument. While Judge Beaudrot’s successor will of course establish his or her own *modus operandi* during Tribunal hearings, we anticipate that the successor will take as many cues as possible from the established procedures. Accordingly, counsel appearing in an argument before the Tribunal should not plan to read through a prepared text, but instead should be prepared to thoughtfully engage with the judge regarding the substantive issues in the case as well as respond to arguments presented by

¹¹ Standing Remand Order of the Ga. Tax Trib. (Dec. 23, 2014), *available at* http://gataxtribunal.georgia.gov/sites/gataxtribunal.georgia.gov/files/related_files/document/Standing-Remand-Order-for-Tax-Tribunal.pdf.

¹² See FAQ’s, GEORGIA TAX TRIBUNAL, <http://gataxtribunal.georgia.gov/faqs>.

¹³ See Ga. Comp. R. & Regs. 616-1-3-.18.



counsel for the opposing party. It is possible at the end of the argument that the judge will request additional information from either party.

Once the argument has been completed, Judge Beaudrot has worked to set the parties' expectations regarding when a decision will be rendered. Counsel should be prepared to send electronic copies of the briefs and any stipulations to the Tribunal to assist in the preparation of a decision. Decisions of the Tribunal have tended to be extensive and thoroughly address the issues in the case, providing helpful precedent for all Georgia taxpayers. Because of the care taken in drafting the decisions and crafting a decision specifically for each case, the length of time involved in rendering decisions has varied from several weeks to several months.

III. A REVIEW OF THE TRIBUNAL'S KEY DECISIONS TO DATE

As noted earlier, the common thread in the Tribunal's early decisions has been a commitment to well-reasoned, well-cited opinions that take pains to address the positions advanced by both sides and to provide guidance to both the taxpayer before the Tribunal as well as the taxpaying community at large. During its first eighteen months, the Tribunal's decisions were almost entirely concerned with defining the limits of the Tribunal's jurisdiction, as the Tribunal issued important decisions in *John Doe* (holding that the Tribunal has jurisdiction over any "order, ruling, or finding of the Department"),¹⁴ *Moon* (holding, *inter alia*, that the Tribunal lacks jurisdiction over a proposed assessment),¹⁵ and *Barber* (holding that the Tribunal lacks jurisdiction over most ad valorem property tax assessments).¹⁶

More recently, however, the Tribunal's substantive pronouncements have become more substantive. In its most recent decision, the Tribunal held that a couple who had moved to London while one of them served as an attaché with the U.S. Embassy nevertheless remained Georgia residents during that period.¹⁷ There, the couple owned a home in Georgia and resided there prior to moving to London, where Petitioner F-1 had agreed to serve as an attaché for a two-year term (a term that was later extended to five years). The Petitioners indisputably lived in London during that period, and it was undisputed that they had moved out of their Georgia home and leased it to a tenant. They also retained their Georgia driver's licenses and submitted absentee ballots in U.S. elections during the years in question, although they did not have any specific intention to return to Georgia.¹⁸ While expressing clear sympathy for the taxpayers' position (and noting the common criticisms of the United States' policy of taxing its citizens' income earned while working outside the country), the Tribunal held that under Georgia law, a Georgia resident does not cease to be a Georgia resident simply by moving away; rather, a Georgia resident continues to be domiciled in Georgia until he or she establishes a *new domicile* in another state or country.¹⁹ Because the Petitioners had not evinced a clear intention to remain in London, they had not established a new domicile and were—*despite their proven lack of intention to return to Georgia*—still Georgia "residents" for tax purposes.²⁰ Given the Tribunal's excellent analysis and clear

¹⁴ See *supra* note 3.

¹⁵ See *supra* note 7.

¹⁶ *Barber v. Commissioner*, No. Tax-Other-1403538 (Ga. Tax. Trib., Jan. 23, 2014).

¹⁷ *Petitioner F-1 and Petitioner F-2 v. MacGinnitie*, No. Tax-ILT-1345974 (Ga. Tax. Trib., Dec. 10, 2014).

¹⁸ See *id.* at 2-4.

¹⁹ *Id.* at 5 ("Although the use of such citizenship-based taxation has been widely criticized on a variety of policy grounds, it is still the rule in this country."); *id.* ("Moreover, under Georgia law, once an individual becomes a Georgia resident for tax purposes, the taxpayer continues to be taxable in Georgia for income tax purposes until 'he or she has become a legal resident or domiciliary of another state.'") (citing O.C.G.A. § 48-7-1(10)(B)).

²⁰ *Id.* at 7-9; see *id.* at 9 ("So although it is undisputed that Petitioners have not decided where they will go once Petitioner F-1's tour as an attaché is over, they have not taken the steps necessary to establish domicile anywhere other than Georgia.").



statements of law, the *Petitioner F-1 and F-2* decision now stands as the seminal discussion of residency under Georgia law.

Just before the *F-1 and F-2* decision, the Tribunal issued another important substantive decision in *Rosenberg v. MacGinnitie*.²¹ In this case, a Georgia taxpayer received income from his ownership interests in two pass-through entities which received pass-through income that had been subject to Texas franchise tax at the entity level. The question before the Tribunal was whether the Georgia taxpayer could utilize the relief provisions of O.C.G.A. § 48-7-27(d)(1)(C) in computing his taxable Georgia income. In a 44-page decision on the parties' motions for partial summary judgment, Judge Beaudrot ruled that the Texas franchise tax imposed on the pass-through entity is "a tax on or measured by income" pursuant to O.C.G.A. § 48-7-27(d)(1)(C), thereby allowing the entity's owners to reduce their Georgia taxable income by the amount of income already taxed by Texas.

Judge Beaudrot held that "the plain language of the statute, the policy underlying its enactment, the applicable rules of statutory construction, and the substantial weight of judicial, administrative and financial authority both in Georgia and in other jurisdictions lead ineluctably to the conclusion that the Texas Franchise Tax is indeed a tax 'on or measured by income.'"²² Because the taxpayer did not move for summary judgment with respect to the computation of the adjustment under O.C.G.A. § 48-7-27(d)(1)(C), the case is now slated to proceed to a second hearing in which the parties will present their arguments for the proper computation of the adjustment due on account of the income that was previously subject to tax in Texas.

The Tribunal has issued two other recent decisions of note. First, in *Parker v. MacGinnitie*,²³ the Tribunal examined, *sua sponte*, whether the Department's assessments issued nearly 10 years after the most recent tax year in question were barred by the statute of limitations. The Tribunal first noted the language of Section 48-2-59, which provides that in the case of a failure to file a return, "the amount of any tax imposed by this title may be assessed at any time."²⁴ However, while "at first blush" that language would appear to allow the Department's assessments where the taxpayer had not filed a return, the Tribunal acknowledged "a line of cases going back over a century" that had interpreted the statutory language to impose "a seven year statute of limitations on the entry of *all* tax assessments *even when no return has been filed*."²⁵ Accordingly, based on those authorities, the Tribunal denied the Department's motion for summary judgment with respect to the assessments, holding that in order to validate the assessments, the Department would need to demonstrate reasons why it had not issued them for so long.²⁶ The case was otherwise resolved following the Tribunal's order, meaning that there was not an opportunity for the Tribunal to reach a final conclusion as to whether the Department's assessments were valid despite the length of time that passed before they were issued.

Finally, in *Herring v. MacGinnitie*,²⁷ an individual taxpayer challenged an assessment against him based on "responsible person" liability as an owner of a Georgia business that had failed to remit collected sales and use taxes. After describing the facts, Judge Beaudrot characterized the case as an "all too common example of a sad story . . . of a failing enterprise where the principals unwisely 'borrow' sales and use taxes that they have collected and use those funds to continue to operate . . ."²⁸ The Tribunal then affirmed the assessment of taxes against the owner as a "responsible person," noting

²¹ No. Tax-IIT-1414626 (Ga. Tax. Trib., Nov. 25, 2014). Alston & Bird represents the taxpayer in *Rosenberg*.

²² *Id.* at 1.

²³ *Parker v. MacGinnitie*, No. Tax-IT-1422684 (Ga. Tax. Trib., June 3, 2014).

²⁴ *Id.* at 6.

²⁵ *Id.* (emphasis in original) (citing, *inter alia*, *Suttles v. Dickey*, 192 Ga. 382 (1941)).

²⁶ *Id.* at 7.

²⁷ *Herring v. MacGinnitie*, No. Tax-SUT-1407352 (Ga. Tax. Trib., Aug. 27, 2014).

²⁸ *Id.* at 5.



especially that responsible person liability requires “willfulness,” which is satisfied if the person is shown to pay over taxes to creditors other than the state when the person has knowledge of the tax responsibility to the state.²⁹ Thus, regardless of the taxpayer’s “good intentions” to improve the business

and (eventually) to pay back the state, the taxpayer acted “willfully” and was held responsible for the unpaid taxes.³⁰

IV. CONCLUSION

After two years, the Georgia Tax Tribunal is on its way to being the clear forum of choice for Georgia taxpayers. While we anxiously await the naming of the new Judge, we remain optimistic that the Tribunal will remain a forum where taxpayers can be confident that they will receive a fair and efficient hearing of their Georgia tax disputes.

²⁹ *Id.* at 8.

³⁰ *Id.* at 5 (“Often this [the diversion of collected taxes] is done with good intentions in the hope and expectation that the diverted funds will be ‘made up’ and remitted when business improves. Unfortunately, there is much truth in the sad proverb that the road to hell is paved with such good intentions. This case is yet another example of why it is never wise to divert and use sales taxes for business purposes.”).