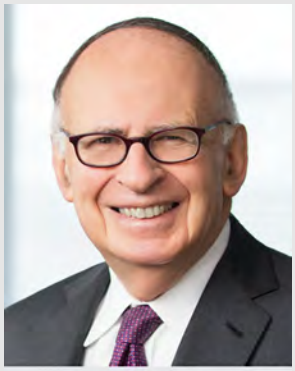
Using Taxpayer Bill of Rights Laws

by Peter L. Faber



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In this edition of In the Trenches, Faber looks at whether New York's Taxpayer Bill of Rights provides meaningful protections for taxpayers.

Many states have adopted taxpayer bill of rights legislation that provides various types of protections for taxpayers. When working on audits and appeals, taxpayers and their representatives typically focus on the substantive provisions of statutes, regulations, and rulings and don't look at more general taxpayer protection rules of the sort that are embodied in bill of rights legislation. This may be a mistake. There are times when these rules can be helpful in controversy situations.

New York state's Taxpayer Bill of Rights is quixotic in that it imposes obligations on the Department of Taxation and Finance and yet often provides that the department's failure to meet those obligations may have little or no consequence. Nevertheless, such a failure may give some leverage to taxpayers in negotiations, as may the existence of the rules in the first place. In the remainder of this article I will focus on New York's bill of rights, but state and local tax professionals dealing with tax issues in other states should examine those states' laws to see if they have provisions that are like New York's and that may be useful.

The New York law is set forth in sections 3000-3013 of the tax law. It applies to all taxes administered by the department, which include corporate and individual income taxes, sales and use taxes, real property transfer taxes (but not ad valorem property taxes on real property), estate taxes, and excise taxes. It also applies to special assessments, fees, and "other impositions" that are administered by the department.[1] The legislature giveth and the legislature taketh away! Section 3002(c) states that except as explicitly provided, the department's failure to comply with the law shall not excuse any taxpayer from paying any tax due or excuse a taxpayer from compliance with any other duty imposed by the tax law, nor will it "cure any procedural defect in an administrative or judicial proceeding or case involving such taxpayer with respect to such taxes shown to be owed or compliance with any such duty." One can understand why the State Legislature included this provision. If a taxpayer owes a tax, a procedural foot fault by the department should not excuse the taxpayer from paying that tax. On the other hand, this provision may negate the benefit of "rights" that are conferred on taxpayers by the bill of rights. The bill does not impose fines or other penalties on the department for a failure to meet its requirements. Does section 3002(c) strip the remaining provisions of the bill of any real substance, leaving them to stand as meaningless symbols of the Legislature's desire to be seen as a protector of taxpayer rights? That question will be examined below in the context of specific provisions.

A continuing complaint that New York SALT practitioners have had over the years has been the reluctance of department auditors to give reasons for proposed deficiencies. It is common for department auditors to send taxpayers detailed workpapers supporting proposed deficiencies

[1] N.Y. Tax Law section 3002(a).

that are filled with numbers but that contain not one word of explanation of the issues that have led to the proposals or of the legal support for the auditors' positions. While often these workpapers are issued only after extended audits so that the taxpayer has some idea of the issues on which they are based, the taxpayer typically has no way of knowing which issues the auditors are conceding, which issues they are asserting result in deficiencies, and how the deficiencies are calculated. A more serious problem is the failure to articulate reasons for the deficiencies. Large corporate audits typically involve many issues. Corporations, particularly publicly held ones that must reserve for contingent liabilities in published financial statements, generally try in good faith to pay the proper amount of tax, but given the ambiguity of many tax laws, they will inevitably take positions that are challenged by department auditors. The analysis of whether additional taxes are owed can be complex, and it is a source of great frustration to many taxpayers to receive notices of proposed deficiencies amounting to tens of millions of dollars without one word of explanation as to the legal basis for the auditors' position.

Section 3003 of the tax law purports to address this problem. It provides that "[a]ny first letter of proposed deficiency or determination (commonly called a thirty day letter) issued by the commissioner, and any notice and demand, notice of deficiency or notice of determination which is issued by the commissioner, which is manually initiated and which is the first such letter or notice issued to the taxpayer regarding the subject matter of such notice, shall describe the basis for (such as the statutory or regulatory law, or judicial or tax appeals tribunal decision), and identify the amounts (if any) of the tax due. An inadequate description under the section shall not invalidate such letter or notice." What does this mean for taxpayers? One of my clients recently received a statutory notice of determination, the response to which must be a request for a formal conciliation conference or a hearing before the Tax Appeals Tribunal, that contained no explanation of the basis for the deficiencies, which were substantial. The auditors a year before had sent the taxpayer a detailed memorandum indicating why they disagreed with the taxpayer's position. The taxpayer has no way of knowing whether the views expressed in the earlier letter are still the basis for the notice of determination or whether the auditors are asserting some other theory. A taxpayer that receives such a notice should refer to the bill of rights in requesting a clarification. It should also refer to the bill of rights when, as is common, the auditors have never articulated the basis for their position. Although section 3003 says that a failure to meet this requirement does not invalidate a letter or notice, the department does not want to be seen as violating the bill of rights, and referring to it may be a way of putting pressure on the department to explain its reasoning. If, as is often the case, the auditors are still reluctant to do this, or confine themselves to a simple citation to a section of the tax law, the taxpayer should press the point, perhaps going to senior department staff, pointing out that the notice in question does not meet the law's requirements, even if technically the failure does not invalidate it.

Section 3004-(a) of the tax law provides that the department must disclose to a taxpayer any instance of an overpayment of tax that the department discovers during an audit, assessment, collection, or enforcement proceeding.

My experience has been that department auditors do not take the initiative in looking for overpayments during an audit but that they are willing to reduce proposed deficiencies by examples of overpayments that are brought to their attention by taxpayers. Moreover, if an auditor is reluctant to complicate the proceeding by offsetting proposed deficiencies with overpayments, or if the auditor is reluctant to close an audit with a net refund, the taxpayer should point out this provision and insist that the overpayment be processed. The statutory language is not limited to overpayments that the auditors discover on their own initiative. It applies as well to overpayments that are brought to the auditors' attention by the taxpayer.

Tax Law section 3006 includes detailed provisions regarding taxpayer interviews. Many taxpayers and their representatives are unaware of this provision, but they should be prepared to use it in appropriate circumstances. Section 3006(a)(1) provides that the taxpayer must be

allowed to make an audio recording of an interview by the department with the "taxpayer" if the taxpayer so requests in advance. The provision is limited to interviews with the "taxpayer," which suggests that it does not apply to interviews with third parties such as prospective witnesses or people asked by the department to provide information. Nevertheless, taxpayers should consider asking to record such interviews. Would an interview with an employee of a corporate taxpayer be considered to be an interview with the "taxpayer"? The answer should be yes. The employee is being interviewed in connection with the employer's lax liability and he or she is acting as the taxpayer's voice in the interview. Memories fade and I have seen instances in which a department auditor's recollection of an interview that took place months before was different from mine. Making a recording can eliminate such problems.

Section 3006(a)(2) provides that the department can also record an interview with the taxpayer if it gives the taxpayer advance notice and provides the taxpayer with a transcript or copy of the recording at the taxpayer's expense. Taxpayers should always insist on getting a copy of the recording (an actual audio tape or disc is safer than a transcript, which could be inaccurate). Whatever the cost is, it will be worth it. For the reasons indicated above, it is important that the taxpayer have an accurate record of what was said, and, if a case goes to litigation, it may not be relevant until years after the interview.

Section 3006(b)(2) provides that a taxpayer has the right to consult with an attorney or other adviser during an interview and that the interview will be suspended if the taxpayer indicates a desire for such a consultation and the adviser is not present. The best approach in interviews is to have the adviser present so that this does not become a problem, and section 3006(c) provides that a taxpayer has a right to have an attorney or other adviser present at an interview. Attorneys or other advisers should always be present, and people should be prepared before the interview as if they were witnesses in a court case. In-house or outside tax professionals should meet with prospective witnesses before an interview with the department and should go over the materials and information that are expected to be addressed.

Section 3006(d) provides that the interview provisions do not apply to "criminal investigations or investigations relating to the integrity of any officer or employee of the division of taxation." Does it apply to an interview by the attorney general's office in connection with a False Claims Act investigation if the attorney general is working with the department and the department is actively involved in the proceeding? A False Claims Act investigation is not a criminal investigation, although it can certainly lead to criminal prosecution. If department representatives are present at the interview, in person or by telephone or video, the provisions of section 3006 would seem to apply.

Section 3008 provides for the abatement of interest and penalties under some circumstances. Section 3008(a) provides that the department "may" abate the assessment or final determination of interest if the interest is "attributable to unreasonable errors and delays by the department" in connection with a "ministerial or managerial act." Department auditors routinely assert that they have no power to abate interest, but this provision gives the department that power under some circumstances. It is not clear what a "ministerial or managerial act" means. The most common situation in which taxpayers object to interest is when in their view an audit takes too long. If the taxpayer provides information and documents in response to an information document request and does not hear from the auditors about the materials for six months, this would clearly seem to be "unreasonable," and I would argue that the failure to respond would be a "managerial act," but the department might well object. Nevertheless, taxpayers should push for the abatement of interest when basic fairness would seem to justify the abatement. The statute provides only that the department "may" abate interest, suggesting that the department cannot be required to do so even when its delay is unreasonable. Still, a grant of discretion requires the department to make a good-faith effort to determine if that discretion should be exercised, and this argument should be made in support of any effort to get interest abated.

Section 3008(a)(2) provides that an unreasonable error or delay by the department will justify an abatement of interest "only if no significant aspect of such unreasonable error or delay can be attributed to the taxpayer involved." A delay by a taxpayer in responding to an information document request could be cited by the department in opposing taxpayer efforts to get interest abated. Still, the critical point in applying this provision should be department delays, not taxpayer delays. Interest attributable to department delay should be abated, even if some of the interest asserted in the case results from taxpayer delays.

Section 3008(b) provides that penalties or excess interest "attributable to erroneous written advice by the department of taxation and finance" must (not "may") be abated by the department. This applies only if the written advice was "reasonably relied upon by the taxpayer" and was in response to a "specific written request of the taxpayer." Thus, the provision does not apply to oral advice by an auditor or other department representative.

SALT professionals should be familiar with taxpayer bills of rights in the jurisdictions in which they practice. While some provisions may be nothing more than nice-sounding fluff, other provisions may confer substantive procedural rights that can be important in handling audits and other controversies. ■