

29th ANNUAL

PAUL J. HARTMAN
STATE AND LOCAL TAX FORUM

VANDERBILT UNIVERSITY LAW SCHOOL

Emerging Practices as the World Reopens Audits, Controversies, and Alternative Dispute Resolutions

29th Annual

Paul J. Hartman State and Local Tax Forum

Vanderbilt University Law School

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Agenda

- Audit Trends and Tribulations
- Anatomy of a State Tax Controversy
 - Audit Process
 - Informal Administrative Appeals
 - Formal Administrative/Judicial Appeals
- Potential Dispute Resolution Alternatives
 - Voluntary Disclosures
 - Other State Initiatives
 - Mediation

Audit Trends and Tribulations – Developments Affecting the State Tax Landscape

- Evolution of Nexus Standards
 - *Wayfair*
 - Economic Nexus and Market-Based Sourcing
 - P.L. 86-272 Revisited
- Federal Income Tax Changes and State Conformity Issues
 - Tax Cuts and Jobs Act and CARES Act
 - BBA Centralized Partnership Audit Regime

Audit Trends and Tribulations – COVID-19 Impact on State Tax Audits

- Remote Work
 - Desk Audits
- Delays
 - Mail
 - Audit Process
- Acceptance of Email / Electronic Signatures
- State Tax Portals

Polling Question #1

- Have you noticed an increase in the volume of your company's state tax audit activity over the past year?
 1. Yes, a significant increase
 2. Yes, a slight increase
 3. Not really, about the same as usual
 4. No, a slight decrease
 5. No, a significant decrease

Anatomy of a State Tax Controversy – The Audit Process

- Initiation Letter / Opening Conference
- Information Document Requests
- Statute of Limitations Waiver(s)(?)
- Exit Conference / Statement of Proposed Audit Adjustments
- Notice of Proposed Assessment
 - Informal Administrative Appeals
- Notice of Assessment
 - Administrative/Judicial Appeals

Anatomy of a State Tax Controversy – Pre-Audit Preparation

- Complexity and the Known Unknowns
 - State Tax Reserves
 - Other Positions
- Other Issues - The Unknown Unknowns
 - “SALY” and State Tax Law Changes
- Important to stay current on state tax law developments and historical filing positions to identify potential issues while still eligible for any pre-audit remedies (i.e., voluntary disclosures/amnesties, amended returns, etc.)

Anatomy of a State Tax Controversy – Handling the Audit

- Production of Books and Records
 - Confidentiality of Taxpayer Information
- Meeting the Burden of Proof
 - Explain the books and records
 - Understand what the auditor is asking and why
- Statute of Limitations and Other Timing Issues
- Representation Considerations
 - Power of Attorney
- Exit Conference / Statement of Proposed Audit Adjustments
 - Agree / Disagree / Further Discussion with Auditor/ Supervisor

Polling Question #2

- How do you typically respond to a proposed state tax audit assessment?
 1. I have never received one.
 2. I appeal it and request reconsideration on the papers.
 3. I appeal it and request an informal conference.
 4. I ignore it so I can appeal the actual assessment.
 5. I ignore it. What could go wrong?

Anatomy of a State Tax Controversy – Informal Administrative Appeals

- Notice of Proposed Assessment / Intent to Assess, etc.
 - Statutory due date for making an informal appeal
 - Ability to appeal without payment (though interest accrues)
- Informal Appeal Rights differ by State, but Generally:
 - To a Department of Revenue appeals forum
 - Timely filing required
 - Opportunity to provide background information and discuss substantive issues underlying the proposed assessment
 - Considerations for engaging in settlement discussions
 - Representation requirements?

Anatomy of a State Tax Controversy – Informal Administrative Appeals

- Evaluating whether to make an informal administrative appeal?
 - Underlying substantive issue(s) / amounts
 - Audit Workpaper Review
 - Understand whether this step is a prerequisite for further appeals
 - What are you trying to accomplish? How do you define a win?
- Trends and Observations
 - Informal conferences conducted via videoconference
 - Advance requests for presentation materials via email
 - Audit review and action prior to the informal conference in some cases
 - Longer resolution period after the informal conference in some cases

Anatomy of a State Tax Controversy – Formal Administrative Appeals

- Informal vs. Formal
 - Timing / Effort / Cost Considerations
 - Representation Considerations
 - Procedural Issues / Evidentiary Rules
 - Possibility of Setting the Record for Future Appeals
 - Possibility of Published Decision
 - Settlement Agreements / Considerations
- Examples of Formal Administrative Forums
 - State Tax Tribunals (e.g., AL, GA, IL, etc.)
 - California Office of Tax Appeals
 - Massachusetts Appellate Tax Board

Anatomy of a State Tax Controversy – Formal Appeals

- Evaluating the Case
 - Facts
 - What has been previously presented / disclosed?
 - What additional facts would be helpful?
 - Could those facts be established? How?
 - Relevant Authority
 - Statute
 - Regulations / Administrative Guidance
 - Case law
 - Issues
 - Is this purely a legal issue? Or is this a factual dispute? Or both?
 - Ability/Possibility of Settlement?

Anatomy of a State Tax Controversy – Formal Appeals

- Petition
 - Facts and Law Organized to Persuade
 - Storytelling 101 and the Importance of a Cohesive Narrative
 - Complain about Errors
 - Explain
 - Pray for Relief
- Answer
 - Review for Admissions
 - Evaluate whether Petition needs to be amended
 - Consider whether to Reply

Anatomy of a State Tax Controversy – Formal Appeals

- Stipulation of Facts
 - Limits the scope
 - Can the parties agree on the relevant facts?
 - What issues do the parties agree on?
 - Frames the narrative
 - Assists in determination of viability of Motion for Summary Judgment
- Fact Finding After/Without a Stipulation of Facts
 - Freedom of Information Act Requests
 - Request for Admissions
 - Interrogatories / Requests for Documents
 - Subpoenas
 - Depositions

Anatomy of a State Tax Controversy – Formal Appeals

- Motion for Summary Judgment
 - Potential to resolve case prior to trial
 - No material dispute of facts
 - Facts generally viewed in light most favorable to non-moving party
 - Judgment based on legal issue and stipulated facts
 - Procedural Considerations
 - Briefing Calendar
 - Oral Argument

Anatomy of a State Tax Controversy – Formal Appeals

- Fact Trials
 - Opening Statement
 - Witnesses
 - Who do you need on the record?
 - Who do you have?
 - Closing Statements
 - Briefs / Memoranda
 - Orders/Decision
 - Motion for Reconsideration / Grounds for Exception
- Appeals
 - Based on Record previously established
 - May require payment of contested amounts

Potential Dispute Resolution Alternatives

- Voluntary Disclosures
 - Prerequisites and terms vary by state
 - Filer vs. Non-Filer
 - Prior contact from State
 - Typically offers a limited lookback period and penalty waiver
- State Tax Amnesty Programs
- State Transfer Pricing Initiatives
- Mediation

Questions?

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