NEW YORK STATE | Tax Appeals

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

RULES OF PRACTICE AND PROCEDURE

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June 2021

Title 20, Part 3000

Tax Appeals Tribunal
Rules of Practice and Procedure

(Statutory authority: Tax Law Sections 2006, 2012, 2014, 2018)

Section 3000.0 General

(a) Intent. The rules of practice and procedure contained in this Part are intended to provide the public with a clear, uniform, rapid, inexpensive and just system of resolving controversies with the Division of Taxation of the New York State Department of Taxation and Finance. In this Part, the Tax Appeals Tribunal has set forth rules of practice and procedure to afford the public both due process of law and the legal tools necessary to facilitate the rapid resolution of controversies while at the same time avoiding undue formality and complexity.

(b) Scope. This Part shall govern all proceedings before the Division of Tax Appeals in which a hearing is permitted or required by the Tax Law.

(c) Construction. This Part shall be liberally construed to secure the just, speedy and inexpensive determination of every controversy and shall not be construed to limit or repeal rights afforded or requirements imposed by statute or otherwise.

Section 3000.1 Definitions

Unless the context of this Part requires otherwise, the definitions contained in this section apply.

(a) Tribunal. The term "tribunal" means the New York State Tax Appeals Tribunal. The tribunal, which consists of three commissioners, shall be responsible for operating and administering the division of tax appeals and issuing decisions after review of determinations by administrative law judges.

(b) Department. The term "department" means the Department of Taxation and Finance.

(c) Division of taxation. The term "division of taxation" means the Division of Taxation of the department.

(d) Division of tax appeals. The term "division of tax appeals" means the separate and independent division in the department which is responsible for processing and reviewing petitions, providing the hearing for which the petition was filed, rendering determinations and decisions and all other matters relating to the administration of the administrative hearing process. This division is not involved in the administration or collection of taxes, or in any other activity of the department which would be conducted prior to the filing of a petition. This division consists of the tribunal, the administrative law judge unit and the small claims unit.

(1) The administrative law judge unit is responsible for the scheduling and conducting of all hearings on petitions submitted to it, the reviewing of all motions made pursuant to this Part when designated to do so by the tribunal and the issuing of determinations after hearings and on motions.

(2) The small claims unit is responsible for the scheduling and conducting of hearings on petitions submitted to it, provided the criteria for small claims contained in section 3000.13(b) of this Part are met, and for issuing final determinations after small claims hearings.

(e) Petition, petitioner. The term "petition" shall include an "application", "petition", "demand for hearing" or variation of such terms as used in the applicable statutory sections of the Tax Law. The term "petitioner" means the person (see subdivision [j] of this section) who files a petition (see Section 3000.3 of this Part).

(f) Proceeding. The term "proceeding" means all practice pursuant to this part, commencing with the filing of a petition in response to a statutory notice (defined in subdivision [k] of this section) and concluding with a determination by an administrative law judge or presiding officer or, where exception is taken to an administrative law judge's determination, with a decision by the tribunal.

(g) Secretary. The term "secretary" means the Secretary to the Tax Appeals Tribunal.

(h) Office of counsel. The term "office of counsel" means that office within the department which represents the division of taxation in proceedings.

(i) Party. The term "party" means the "petitioner" or the "division of taxation" or any other person or political subdivision of the State of New York that must be made a party if complete resolution of the controversy is to be reached.

(j) Person. The term "person" includes but is not limited to an individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee, and any other individual or entity acting in a fiduciary or representative capacity, and any combination of the foregoing.

(k) Statutory notice. The term "statutory notice" means any written notice of the commissioner of taxation and finance which advises a person of a tax deficiency, determination of tax due, assessment, or denial of a refund, credit or reimbursement application, or of cancellation, revocation, suspension or denial of an application for a license, permit or registration, or of the denial or revocation of an exempt status, or any other notice which gives the person a right to a hearing in the division of tax appeals.

(l) Determination. The term "determination" means the report which concludes a hearing before an administrative law judge or presiding officer, or which grants or denies a motion to dismiss the petition or for summary determination.

(m) Decision. The term "decision" shall mean the report which concludes the review by the tribunal of an administrative law judge's determination.

(n) Administrative law judge. The term "administrative law judge" means any person duly designated and empowered by the tribunal to conduct any hearing or motion procedure authorized to be held within the division of tax appeals.

(o) Presiding officer. The term "presiding officer" means any person duly designated and empowered by the tribunal to conduct a small claims hearing pursuant to section 3000.13 of this Part.

(p) CPLR. The abbreviation "CPLR" means the Civil Practice Law and Rules.

(q) Business day. The term "business day" means any day of the week other than a Saturday, Sunday or a legal holiday in the State of New York.

Section 3000.2 Representation

(a) Representation of petitioner in proceedings before the tribunal and administrative law judges.

(1) Personal appearance. Appearances in proceedings conducted before the tribunal or administrative law judges may be by the petitioner or the petitioner's spouse. A partnership may act through one of its general partners without filing any power of attorney provided that the partner is authorized to act for the partnership and certifies that he or she has such authority. Where a corporation files a petition, it may act through one of its officers or employees. Where the corporation acts through an employee, a power of attorney must be filed pursuant to subdivision (c) of this section.

(2) Representation by others. Any of the following may act as the representative of a taxpayer at all stages of proceedings before the tribunal and administrative law judges, if authorized by a proper power of attorney:

(i) an attorney-at-law licensed to practice in New York State;

(ii) a certified public accountant duly qualified to practice in New York State;

(iii) an enrolled agent enrolled to practice before the internal revenue service; and

(iv) a public accountant enrolled with the New York State Education Department under article 149 of the Education Law.

(3) Minors and individuals under disability. If the taxpayer is under 18 years of age, the adult spouse, parent or guardian of the minor or the person who prepared the taxpayer's return may file a petition and appear on the taxpayer's behalf without filing any power of attorney. If the taxpayer is mentally or physically incapable of filing a petition or appearing on his or her own behalf, anyone having a proper interest in doing so may file a petition or appear on behalf of said individual without filing any power of attorney.

(4) Representation by permission of Tribunal. An attorney, certified public accountant or licensed public accountant authorized to practice or licensed in any other jurisdiction of the United States may appear and represent a petitioner for a particular matter after receiving special permission from the Tribunal. A request for such permission shall be made in writing addressed to:

Secretary to the Tax Appeals Tribunal
State of New York Division of Tax Appeals
Agency Building One
Empire State Plaza
Albany, NY 12223

(b) Representation of petitioner in proceedings in the small claims unit before presiding officers. In proceedings in the small claims unit before presiding officers, the representatives authorized in subdivision (a) of this section, the petitioner's child or the petitioner's parent may appear and represent the petitioner. Another individual may appear and represent a petitioner for a particular matter by special permission of the tribunal.

(c) Power of attorney. ***(1) Requirement of a power of attorney.*** A power of attorney is required whenever a petitioner acts through a representative. An individual will not be recognized as the representative of a taxpayer until a power of attorney in proper form is filed with the division of tax appeals. A power of attorney must also contain a declaration, signed by the petitioner's representative, stating that:

(i) the representative agrees to represent the petitioner in the matter for which the power of attorney is being executed; and

(ii) the representative is authorized to act as a taxpayer representative pursuant to subdivision (a) of this section.

(2) For the purposes of this section, a "proper power of attorney" shall include: a power of attorney executed on a form prescribed by the tax appeals tribunal, a copy of a power of attorney previously filed with the division of taxation pursuant to part 2390 of this title or any other form creating a legal power of attorney.

(d) Other representation forbidden. No person other than those described in the foregoing subdivisions of this section may represent a taxpayer in filing a petition or at a hearing or argument upon such petition.

(e) Representation of division of taxation. The division of taxation will be represented in all proceedings before the tribunal, administrative law judges and presiding officers by the chief counsel of the division of taxation or by a representative of such chief counsel.

Section 3000.3 Commencement of proceedings

(a) General. All proceedings in the division of tax appeals must be commenced by the filing of a petition. A form of petition and the rules of practice are available from the division of tax appeals and the division of taxation upon written request. The petition and two conformed copies shall be typewritten, if possible, and shall include all of the information required in subdivision (b) of this section.

(b) Form of petition. The petition shall contain:

(1) the name, address and telephone number of the petitioner;

(2) the name, address and telephone number of the petitioner's representative, if any;

(3) the division, bureau or unit of the department which sent the statutory notice, the date of the notice, the tax article involved, and the nature of the tax;

(4) if applicable, the taxable years or periods involved and the amount of tax in controversy;

(5) separately numbered paragraphs stating, in clear and concise terms, each and every error which the petitioner alleges has been made by the division, bureau or unit (e.g. in issuing a notice of deficiency or in denying a refund application), together with a statement of the facts upon which the petitioner relies to establish each said error;

(6) the relief sought by the petitioner;

(7) the signature of the petitioner or the petitioner's representative beneath a statement that the petition is made with knowledge that a willfully false representation is a misdemeanor punishable under section 210.45 of the Penal Law;

(8) for the sole purpose of establishing the timeliness of the petition, a legible copy of the order of the conciliation conferee if issued; if no such order was previously issued, a legible copy of any other statutory notice being protested;

(9) the original or a legible copy of the power of attorney;

(10) an identifying number or numbers as prescribed by the commissioner of taxation and finance in the form of social security numbers, employer identification numbers or other numeric designations suitable for proper identification of the petitioner, which numbers shall be used by the division of tax appeals for administration purposes only. The provisions of section 152.1(c) of this Title, where not in conflict with this Part, are applicable to this paragraph.

(c) Filing of petition. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of those time limitations. The petition should be filed, along with the two conformed copies, with the supervising administrative law judge either in person at the offices in Albany or by mail addressed to:

Supervising Administrative Law Judge
State of New York Division of Tax Appeals
Agency Building 1
Empire State Plaza
Albany, NY 12223

Where the supervising administrative law judge determines that the petition is in proper form, he or she will immediately forward it to the Office of Counsel for preparation of the answer. The time within which the Office of Counsel must answer the petition shall start to run from the date the supervising administrative law judge acknowledges receipt of a petition in proper form.

(d) Failure to correct. (1) Where the petition filed by a petitioner is not in the form required by this section, the supervising administrative law judge shall promptly return it to the petitioner together with a statement indicating the requirements with which the petition does not comply, and extend to the petitioner an additional 30 days within which to file a corrected petition with the supervising administrative law judge. The supervising administrative law judge shall then forward the corrected petition to the office of counsel pursuant to subdivision (c) of this section. For purposes of the time limitations, a corrected petition is deemed to have been filed at the time the original petition was filed.

(2) Where the petitioner fails to serve a corrected petition within the time prescribed in paragraph (1) of this subdivision, the supervising administrative law judge will issue a determination dismissing the petition.

(e) Reference to conciliation and mediation. Where a conciliation conference has not been conducted and it appears that the petitioner intended to file a request for a conciliation conference or that a conciliation conference would serve a useful purpose, the division of tax appeals may, at the request of the petitioner and with the consent of the office of counsel, suspend action on the petition and refer the matter to the bureau of conciliation and mediation services (see Part 4000 of this Title).

(f) DTA number. Upon receipt of a petition by the division of tax appeals, the case will be assigned a DTA number and the parties will be notified thereof. The DTA number shall be placed by the parties on all papers thereafter filed in the case and shall be referred to in all correspondence with the division of tax appeals.

Section 3000.4 Pleadings, amended pleadings

(a) Purpose. The purpose of the pleadings is to give the parties and the division of tax appeals fair notice of the matters in controversy and the basis for the parties' respective positions. All pleadings shall be liberally construed so as to do substantial justice.

(b) Answer. (1) The office of counsel shall serve an answer on the petitioner or the petitioner's representative, if any, within 75 days from the date the supervising administrative law judge acknowledged receipt of a petition in proper form. Upon written request, the supervising administrative law judge may extend the time to serve an answer to no more than 90 days. A copy of the answer with proof of service on the petitioner or petitioner's representative, if any, shall be filed with the supervising administrative law judge within the same period prescribed for serving the answer.

(2) The answer as drawn shall contain numbered paragraphs corresponding to the petition and shall fully and completely advise the petitioner and the division of tax appeals of the defense. It shall contain:

(i) a specific admission or denial of each statement contained in the petition; however, if the division of taxation is without knowledge or information sufficient to form a belief as to the truth of a statement, then the answer shall so state, and such statements shall have the effect of a denial;

(ii) a statement of any additional facts to be proven by the division of taxation either as a defense, or for affirmative relief, or to sustain any issue raised in the petition upon which the division of taxation has the burden of proof; and

(iii) the relief sought by the division of taxation.

(3) Material allegations of fact set forth in the petition which are not expressly admitted or denied in the answer shall be deemed to be admitted.

(4) Where the division of taxation fails to answer within the prescribed time, all material allegations of facts set forth in the petition shall be deemed to be admitted.

(c) Reply. The petitioner may serve a reply on the office of counsel within 20 days after service of the answer. A copy of the reply with proof of service on the office of counsel shall be filed with the supervising administrative law judge within the period prescribed for service of the reply. When a reply has been filed, or after expiration of the 20 days, the controversy shall be deemed to be at issue and will be scheduled for a hearing.

(d) Amended pleadings. ***(1) General.*** Either party may amend a pleading once without leave at any time before the period for responding to it expires. After such time, a pleading may be amended only by the written consent of the adverse party or by the consent of the supervising administrative law judge or the administrative law judge or presiding officer assigned to the matter. Leave shall be freely given upon such terms as may be just, including the granting of continuances. Except as otherwise ordered by the supervising administrative law judge or the administrative law judge or presiding officer assigned to the case, there shall be an answer or reply to an amended pleading if an answer or reply is required to the pleading being amended. Service of such answer shall be made within 75 days after service of the amended petition, and service of a reply shall be made within 20 days after service of the amended pleading to which it responds. No amendment shall be allowed under this subdivision after the expiration of the time for filing the petition, if such amendment would have the effect of conferring jurisdiction on the division of tax appeals over a matter which otherwise would not come within its jurisdiction under the petition as then on file.

(2) Amendment to conform to the evidence. *(i) Issues tried by consent.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. The administrative law judge or presiding officer, upon motion of any party at any time, may allow such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues; but failure to amend does not affect the result of the trial of these issues.

(ii) Other evidence. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the pleadings, then the administrative law judge or presiding officer may receive the evidence and at any time allow the pleadings to be amended to conform to the proof, and shall do so freely when justice so requires and the objecting party fails to satisfy the administrative law judge or presiding officer that the admission of such evidence would prejudice such party in maintaining such party's position on the merits.

(3) Relation back of amendments. When an amendment of a pleading is permitted, it shall relate back to the time of filing of that pleading, unless the administrative law judge or presiding officer shall order otherwise either on motion of a party or on his or her own initiative.

Section 3000.5 Motion practice

(a) General. To better enable the parties to expeditiously resolve the controversy, this Part permits an application to the tribunal and to an administrative law judge for an order, known as a motion. Motions for costs or disbursements or motions related to discovery procedures as provided for in the CPLR will not be entertained. With the exception of motions filed pursuant to section 3000.9 of this Part, the tribunal and the administrative law judge shall be guided but not bound by the CPLR in resolving motions made pursuant to this Part.

(b) Procedure for filing a motion. A motion to the tax appeals tribunal shall be addressed to and filed with the secretary. All other motions shall be addressed to and filed with the administrative law judge assigned to the proceeding or, if an administrative law judge has not been assigned, to the supervising administrative law judge. All motions shall be made in writing, except that oral motions may be made at hearings or in exceptional circumstances with permission of the secretary or the supervising administrative law judge. A copy of each written motion shall be served on the adverse party. Unless a different time period is otherwise prescribed by this Part or by

direction of the administrative law judge, the adverse party shall have 30 days after the date of service of the motion to file a response and to serve a copy on the moving party. Replies to responses will not be entertained except with permission of the administrative law judge or the secretary. Papers may be filed or served as provided in section 3000.22 of this Part.

(c) Contents. A notice of motion must be typewritten and specify the supporting papers (e.g., affidavits, admissions) upon which the motion is based and, in separate numbered paragraphs, the relief demanded and the grounds for such relief. Any brief shall be filed with the motion and a copy served on the adverse party. Any answering brief must be served with the response to the motion. Oral argument is not heard on a motion unless specific application is made for oral argument by a party and the administrative law judge or the secretary grants that application.

(d) Issuance of order. All motions shall be decided on the moving papers, supporting papers and oral argument, if any. An order by an administrative law judge or by the tribunal will be issued within ninety days after a response has been served or the time to serve a response has expired. With notice to the parties, the time period for issuing a summary determination may be extended to six months.

(e) Postponement of hearing. The filing of a motion does not constitute cause for postponement of a hearing from the date set, unless such continuance is specifically ordered by the administrative law judge following receipt of such motion.

(f) Review. An order by an administrative law judge on any motion which does not finally determine all matters and issues contained in the petition, for purposes of review by the tribunal, shall not be deemed final and conclusive until the administrative law judge shall have rendered a determination on the remaining matters and issues. An order by the tribunal which does not finally determine all matters and issues contained in the petition, for purposes of review under article 78 of the CPLR, shall not be deemed final and conclusive until the tribunal shall have rendered a decision on the remaining matters and issues.

Section 3000.6 Bills of particulars; admissions; depositions; disclosure prior to a licensing hearing

(a) Bills of particulars. (1) After all pleadings have been served, a party may wish the adverse party to supply further details of the allegations in a pleading to prevent surprise at the hearing and to limit the scope of the proof. For this purpose, a party may serve written notice on the adverse party demanding a bill of particulars within 30 days from the date on which the last pleading was served.

(2) The written demand for a bill of particulars must state the items concerning which such particulars are desired. If the party upon whom such demand is served is unwilling to give such particulars, he or she may, in writing to the supervising administrative law judge, make a motion to the tribunal to vacate or modify such demand within 20 days after receipt thereof. The motion to vacate or modify should be supported by papers which specify clearly the objections and the grounds for objection. If no such motion is made, the bill of particulars demanded shall be served within 30 days after the demand, unless the administrative law judge designated by the tribunal shall direct otherwise.

(3) In the event a party fails to furnish a bill of particulars, the administrative law judge designated by the tribunal may, upon motion, issue an order precluding the party from giving evidence at the hearing of items of which particulars have not been delivered. A motion for such relief shall be made within 30 days of the expiration of the date specified for compliance with the request.

(4) Where a bill of particulars is regarded as defective by the party upon whom it is served, the administrative law judge designated by the tribunal may, upon notice, make an order of preclusion or direct the service of a further bill. In the absence of special circumstances, a motion for such relief shall be made within 30 days after the receipt of the bill claimed to be insufficient.

(5) A preclusion order may provide that it will be effective unless a proper bill is served within a specified time.

(b) Admissions. (1) At any time after service of the answer and not later than 20 days before the hearing, a party may serve upon any other party a written request for admission of the following:

(i) the genuineness of any papers or documents;

(ii) the correctness or fairness of representation of any photographs described in and served with the request;

(iii) the truth of any matters of fact set forth in the request. The request shall pertain to matters as to which the party requesting the admission reasonably believes there can be no substantial dispute at the hearing and which are within the knowledge of the adverse party or can be ascertained by him or her upon reasonable inquiry. Copies of the papers, documents or photographs shall be served with the request unless copies have already been furnished.

(2) The party to whom the request to admit is directed may choose to respond by serving a statement expressly admitting the matters in question. However, the party is deemed to admit each of the matters as to which an admission was properly requested unless, within 20 days after service of the request, or within such further time as the supervising administrative law judge may allow, the party to whom the request is directed serves upon the party requesting the admission, a verified statement:

(i) denying specifically the matters of which an admission is requested;

(ii) setting forth in detail the reasons why those matters cannot be truthfully admitted or denied; or

(iii) setting forth a claim in detail that the matters of which an admission is requested cannot be fairly admitted without some material qualification or explanation, that the matters constitute a trade secret or that such party would be privileged or disqualified from testifying concerning them. Where the claim is that the matters cannot be fairly admitted without some material qualification or explanation, the party must admit the matters with such qualification or explanation.

(3) Any admission made, or deemed to be made, by a party pursuant to a request made under this section, is for the purpose of the pending proceeding only, and does not constitute an admission for any other purpose, nor may it be used in any other proceeding in the division of tax appeals. The administrative law judge designated by the tribunal may, at any time, allow a party to amend or withdraw any admission on such terms as may be just. Any admission shall be subject to all pertinent objections to admissibility which may be interposed at the hearing.

(c) Depositions to perpetuate testimony. A party to a case pending in the division of tax appeals, who desires to perpetuate his own testimony or that of any other person or to preserve any document or thing, shall file an application pursuant to this section for an order of an administrative law judge authorizing such party to take a deposition for such purpose. Such depositions shall be taken only where there is a substantial risk that the person or document or thing involved will not be available at the hearing of the case, and shall relate only to testimony or document or thing which is not privileged and is material to a matter in controversy.

(1) The application. Content of application. The application to take a deposition shall be signed by the party seeking the deposition or his representative, and shall show the following:

(i) the names and addresses of the persons to be examined;

(ii) the reasons for deposing those persons rather than waiting to call them as witnesses at the hearing;

(iii) the substance of the testimony which the party expects to elicit from each of those persons;

(iv) a statement showing how the proposed testimony or document or thing is material to a matter in controversy;

(v) a statement describing any books, papers, documents, or tangible things to be produced at the deposition by the persons to be examined;

(vi) the time and place proposed for the deposition;

(vii) the officer before whom the deposition is to be taken;

(viii) the date on which the petition was filed with the division of tax appeals;

(ix) any provision desired with respect to payment of expenses, fees, and charges relating to the deposition (see, subdivision [6] of this section); and

(x) if the applicant proposes to videotape the deposition, the application shall so state, and shall show the name and address of the videotape operator and of his employer.

(2) Filing and disposition of application. The application may be filed with the division of tax appeals at any time after the petition is filed. The application shall be made to the administrative law judge assigned to the case or if no administrative law judge has yet been assigned, to the supervising administrative law judge. The applicant shall serve a copy of the application on each of the other parties to the case, as well as on such other persons who are to be examined pursuant to the application, and shall file with the application a certificate showing such service. Such other parties or persons shall file their objections or other response, with a certificate of service thereof on the other parties and such other persons, within 15 days after such service of the application. A hearing on the application will be held only if directed by the administrative law judge. Unless the administrative law judge shall determine otherwise for good cause shown, an application to take a deposition will not be regarded as sufficient ground for granting an adjournment from a date of hearing theretofore set. If the administrative law judge approves the taking of a deposition, he will issue an order which will include in its terms the name of the person to be examined, the time and place of the deposition, and the officer before whom it is to be taken. If the deposition is to be videotaped, the administrative law judge's order will so state.

(3) Use of stipulation. The parties or their counsel may execute and file a stipulation to take a deposition by agreement instead of filing an application as hereinabove provided. Such a stipulation shall be filed with the supervising administrative law judge in duplicate, and shall contain the same information as is required in subparagraphs (i), (vi), (vii), (ix), and (x) of paragraph (1) of this subdivision but shall not require the approval or an order of the administrative law judge unless the effect is to delay the hearing of the case. A deposition taken pursuant to a stipulation shall in all respects conform to the requirements of this section.

(4) Person before whom deposition taken. Depositions shall be taken before an officer, other than a party, or the attorney or employee of a party, authorized to administer oaths by the laws of the place where the examination is held.

(5) Arrangements. All arrangements necessary for the taking of the deposition shall be made by the party filing the application or, in the case of a stipulation, by such other persons as may be agreed upon by the parties.

(6) Expenses. The party taking the deposition shall pay all the expenses, fees and charges of the witness whose deposition is taken by him, any charges of the officer presiding at or recording the deposition other than for copies of the deposition, and any expenses involved in providing a place for the deposition. The party taking the deposition shall pay for the original of the deposition; and, upon payment of reasonable charges therefor, the officer shall also furnish a copy of the deposition to any party or the deponent. By stipulation between the parties, provision may be made for any costs, charges or expenses relating to the deposition. Except under extraordinary circumstances, an administrative law judge shall not order

a deposition to be held outside of the State of New York unless the expenses of the division of taxation are paid by the party requesting the deposition.

(7) Use of deposition. At the hearing or in any other proceeding in the case, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(i) The deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(ii) The deposition of a party may be used by an adverse party for any purpose.

(iii) The deposition may be used for any purpose if the parties have stipulated to the use of a deposition or if the administrative law judge finds: (A) that the witness is dead; or (B) that the witness is at such distance from the place of trial that it is not practicable for him to attend, unless it appears that the absence of the witness was procured by the party seeking to use the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to obtain attendance of the witness at the hearing, as to make it desirable in the interests of justice, to allow the deposition to be used; or (E) that such exceptional circumstances exist, in regard to the absence of the witness at the hearing, as to make it desirable in the interests of justice, to allow the deposition to be used.

(iv) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which in fairness ought to be considered with the evidence the party introduced, and any party may introduce any other parts.

(8) Depositions on written questions.

(i) A deposition may be taken on written questions when the parties so stipulate or when the administrative law judge so orders because the testimony is to be taken outside New York State.

(ii) The party seeking the deposition shall serve the written questions upon each party. Within 10 days thereafter, a party so served may serve written cross questions upon each party. Within five days thereafter, the original party may serve written redirect questions upon each party. Within three days after being served with written redirect questions, a party may serve written recross questions upon each party.

(iii) Copies of all written questions served shall be delivered by the party seeking the deposition to the office designated in the administrative law judge's order.

(d) Disclosure of evidence prior to a license revocation hearing. When the division of taxation seeks the revocation of a license or permit, as such terms are used in section 401.4 of the State Administrative Procedure Act, either party shall, upon demand and at least seven days prior to the hearing, disclose the evidence that the party intends to introduce at the hearing, including documentary evidence and the identification of witnesses. The provisions of this subdivision shall not be deemed to require the disclosure of information or material otherwise protected by law from disclosure, including information and material protected because of privilege, the secrecy provisions of the Tax Law or confidentiality. If, after such disclosure, a party determines to rely upon other witnesses or information, the party shall, as soon as practicable, supplement its disclosure by providing the names of such witnesses or the additional documents.

Section 3000.7 Subpoenas

(a) General. Upon the request of any party, the administrative law judge or presiding officer assigned to the case will issue subpoenas to require the attendance of witnesses or to require the production of documentary evidence (at a hearing): provided, however, that, where it appears to the person requested to issue the subpoena that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he may in his discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought. In the event that the person requested to issue the subpoena shall after consideration of all of the circumstances determine that the subpoena or any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena, or issue it only upon such conditions as he or she deems appropriate. However, an attorney representing any party in a proceeding may issue a subpoena pursuant to section 2302 of the CPLR.

(b) Filing the request for a subpoena. A request for a subpoena shall be made in writing at least 20 days in advance of the hearing. In the event that an administrative law judge or presiding officer has not been assigned to the case or the administrative law judge or presiding officer is unavailable, the request to issue subpoenas may be made to the supervising administrative law judge. Subpoenas will be delivered to the person requesting them; however service of the subpoena and the fee of the witness subpoenaed will be the responsibility of the person requesting the subpoena.

(c) Request to withdraw or modify subpoena. Upon service of a subpoena pursuant to this section, any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, request that the subpoena be withdrawn or modified by filing such request with the administrative law judge or presiding officer assigned to the case or if no administrative law judge or presiding officer has been assigned, then to the person who issued the subpoena.

Such request shall be upon notice to the other party and shall otherwise conform to the procedural requirements of this Part for motions.

(d) Appeal to tax appeals tribunal. Notwithstanding the provisions of subdivision (f) of section 3000.5 of this Part, a party may appeal an order of an administrative law judge or presiding officer granting or denying the request to withdraw or modify the subpoena by filing an exception with the tax appeals tribunal.

(e) Motion to quash. Thereafter, pursuant to the provisions of section 2304 of the CPLR, a motion to quash, fix conditions or modify may be made in the supreme court.

Section 3000.8 Recusal

(a) Motion to recuse an administrative law judge or presiding officer.

(1) Either party may move before the supervising administrative law judge to recuse the administrative law judge or presiding officer assigned to its case on the basis that the administrative law judge or presiding officer has a personal bias with respect to the case or that the administrative law judge or presiding officer is otherwise disqualified to hear and decide the case.

(2) The motion to recuse the administrative law judge or presiding officer must be accompanied by an affidavit setting forth the facts upon which the assertion of bias or other disqualification is based. The motion shall be on notice to the other party and to the extent possible shall comply with the procedural provisions of this Part that are not inconsistent with this subdivision. The supervising administrative law judge may entertain an oral motion made under this section if necessary.

(3) The adverse party may respond to the motion to recuse by serving its response on the supervising administrative law judge and the moving party.

(4) In response to the motion to recuse, the supervising administrative law judge shall assign a different administrative law judge or presiding officer to the case or deny the motion by order. A party may not file an exception to such an order until the administrative law judge or presiding officer shall render a determination on the remaining matters and issues.

(b) Motion to recuse a commissioner of the tribunal.

(1) On exception, either party may move to recuse a commissioner of the tribunal on the basis that the commissioner has a personal bias with respect to the case or that the commissioner is otherwise disqualified to hear and decide the case.

(2) The motion to recuse must be accompanied by an affidavit setting forth the facts upon which the assertion of bias or other disqualification is based.

(3) Except under exceptional circumstances, the motion must be made with the exception where the movant is the party taking the exception or with the brief in opposition to the exception where the movant is not the party taking the exception. The motion to recuse shall be on notice to the other party and shall comply with the procedural provisions of this Part that are not inconsistent with the provisions of this subdivision.

(4) The adverse party may respond to the motion to recuse by serving its response on the tribunal and the moving party not later than five days from the date the motion to recuse was served on such adverse party.

(5) In response to the motion, the tribunal shall either deny the motion or shall decide the exception without the commissioner who was the subject of the motion. The tribunal shall not issue a separate decision on the motion.

Section 3000.9 Accelerated determination

(a) Motion to dismiss. ***(1) Grounds.*** A party may move to dismiss a petition on the grounds that:

(i) a defense is founded on documentary evidence;

(ii) the division of tax appeals lacks jurisdiction of the subject matter of the petition;

(iii) the petitioner lacks legal capacity to petition;

(iv) there is an action pending between the same parties on the same controversy in a court of any state or the United States; the administrative law judge need not dismiss on this ground but may make such order as justice requires;

(v) the petition may not be maintained because of discharge in bankruptcy, infancy or other disability of the moving party, payment, release, or statute of limitations;

(vi) the pleading fails to state a cause for relief;

(vii) the division of tax appeals lacks jurisdiction over the taxpayer; or

(viii) the division of tax appeals should not proceed in the absence of a person who should be a party.

Only one such motion shall be made.

(2) Procedure. (i) Either party may submit any evidence that could properly be considered on a motion for summary determination. Whether or not issue has been joined, the administrative law judge, after adequate notice to the parties, may treat the motion as a motion for summary determination. The administrative law judge may order immediate hearing of the issues raised on the motion.

(ii) Should it appear from affidavits submitted in opposition to a motion, that facts essential to justify opposition may exist but cannot then be stated, the administrative law judge may deny the motion, allowing the moving party to assert the objection in his or her responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained, or may make such other order as may be just.

(3) Review. A determination of an administrative law judge denying the motion to dismiss is not subject to review by the tribunal.

(4) Notice of intent to dismiss petition. The supervising administrative law judge on his or her own

motion may, upon notice to the parties, issue a determination dismissing the petition on the ground that:

(i) the division of tax appeals lacks jurisdiction of the subject matter of the petition; or

(ii) the division of tax appeals lacks jurisdiction over the taxpayer.

The notice of intent to dismiss shall inform the parties of the facts and the reasons providing the basis for the intended dismissal. The notice of intent to dismiss shall also provide the parties with thirty days to submit written comments on the proposed dismissal.

(5) Motion to dismiss exception. Any party may move to dismiss an exception on the ground that the exception was not filed within 30 days of the issuance of the administrative law judge determination as provided for in Tax Law section 2006(7).

(6) Notice of intent to dismiss exception. The tribunal on its own motion may, upon notice to the parties, issue a decision dismissing the exception on the ground that the tribunal lacks jurisdiction over the subject matter of the exception. The notice of intent to dismiss shall be issued in the same manner as that set forth in paragraph (4) of this subdivision.

(b) Motion for summary determination. ***(1) General.*** After issue has been joined (see section 3000.4[c] of this Part), any party may move for summary determination. Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot be stated, the administrative law judge may deny the motion or may order a continuance to permit affidavits or admissions to be obtained and may make such other order as may be just.

(2) Review. A determination of an administrative law judge denying the motion for summary determination is not subject to review by the tribunal (see, section 3000.5[f]).

(c) Application of CPLR. Where not otherwise in conflict with this Part, a motion to dismiss filed pursuant to this section shall be subject to the same provisions as motions filed pursuant to section three thousand two hundred eleven of the CPLR and a motion for summary determination filed pursuant to this section shall be subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.

Section 3000.10 Ex parte communications

(a) Administrative law judges and presiding officers. All litigants and representatives shall have access to administrative law judges and presiding officers on an equal basis. No party shall communicate in writing with an administrative law judge or presiding officer assigned to a case in connection with any aspect of that case unless a copy of such communication is promptly delivered to the opposing representative or, if there is none, to the opposing party. No party shall, either directly or through a representative, communicate orally with the administrative law judge or presiding officer assigned to a case in connection with any aspect of that case without providing prior notice to the opposing representative or, if there is none, to the opposing party. Any party may seek clarification of procedural matters, either verbally or in writing, by directing questions to the office of the supervising administrative law judge.

(b) Tax Appeals Tribunal. All litigants and representatives shall have access to the tax appeals tribunal on an equal basis. However, no party shall communicate directly either in writing or orally with a member of the tribunal in connection with any aspect of a case before the tribunal. Access to the tribunal shall be through the office of the secretary to the tax appeals tribunal. No party shall communicate in writing with the office of the secretary to the tax appeals tribunal in connection with any aspect of a case unless a copy of such communication is promptly delivered to the opposing representative or, if there is none, to the opposing party. No party shall, either directly or through a representative, communicate orally with the office of the secretary to the tax appeals tribunal in connection with any aspect of a case without providing prior notice to the opposing representative or, if there is none, to the opposing party. However, any party may seek clarification of procedural matters by directing questions to the office of the secretary to the tax appeals tribunal.

Section 3000.11 Stipulations for hearing.

Section 3000.11 Stipulations for hearing

(**a) General.** (1) (i) With the exception of those instances where the petitioner does not desire to stipulate any facts, the parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all facts not privileged which are relevant to the pending controversy. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence which fairly should not be in dispute. Where the truth or authenticity of facts or evidence claimed to be relevant by one party is not disputed, an objection on the ground of materiality or

relevance may be noted by any other party but is not to be regarded as just cause for refusal to stipulate. The requirement of stipulation applies under this Part without regard to where the burden of proof may lie with respect to the controversies involved. Documents or papers or other exhibits annexed to or filed with the stipulation shall be considered to be part of the stipulation.

(ii) After the petitioner initiates conferences with the office of counsel to facilitate agreement on the facts, the petitioner shall draw a proposed stipulation of facts and submit it to the office of counsel. Failure to complete a stipulation is not a basis for adjournment of the hearing, and the parties shall endeavor to conclude the drafting of the stipulation in advance of the scheduled hearing. The office of counsel shall review the proposed stipulation drawn by the petitioner and shall indicate its agreement or disagreement with every proposed fact to be stipulated. Where the office of counsel disagrees, its position as to the fact in question should be stated.

(2) The fact that any matter may have been obtained through any other authorized procedure is not a ground for omitting such matter from the stipulation. Such other procedures should be regarded as aids to stipulation, and matter obtained through them, which is within the scope of paragraph (1) of this subdivision, must be set forth comprehensively in the stipulation, in logical order in the context of all other provisions of the stipulation.

(b) Form. Stipulations shall be in writing signed by the parties thereto or by their representative, and shall be filed with the supervising administrative law judge in duplicate. Only one set of exhibits shall be required. Documents or other papers, which are the subject of stipulation in any respect and which the parties intend to place before the division of tax appeals, shall be annexed to or filed with the stipulation. The stipulation shall be clear and concise. Separate items shall be stated in separate paragraphs, and shall be appropriately numbered. Exhibits attached to a stipulation shall be lettered serially.

(c) Filing. Executed stipulations prepared pursuant to this subdivision, and related exhibits, shall be filed by the parties with the supervising administrative law judge, at or before commencement of the hearing of the controversy, unless the supervising administrative law judge shall otherwise specify. A stipulation, when filed, need not be offered formally to be considered in evidence.

(d) Objections. Any objection to all or any part of a stipulation should be noted in the stipulation, but the administrative law judge or presiding officer will consider any objection to a stipulated matter made at the commencement of the hearing, or for good cause shown made during the hearing.

(e) Binding effect. A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the tribunal, administrative law judge or presiding officer, or agreed upon by the parties. The tribunal, administrative law judge or presiding officer will not permit a party to a stipulation to qualify, change or contradict a stipulation in whole or in part, except where justice requires. A stipulation and the admissions therein shall be binding and have effect only in the pending proceeding and not for any other purpose, and cannot be used against any of the parties thereto in any other proceeding.

(f) Noncompliance by a party. ***(1) Motion to compel stipulation.*** If at the date of issuance of a hearing notice in a controversy, a party has refused or failed to confer with his or her adversary with respect to entering into a stipulation in accordance with this section, or has refused or failed to make such a stipulation of any matter within the terms of this section, the party proposing to stipulate may, within 90 days of service of the proposed stipulation, make a motion to the tribunal, on notice to the other party or representative, if any, for an order directing that the matters covered in the motion should be deemed admitted for the purposes of the hearing. The motion shall be filed with the supervising administrative law judge and shall:

(i) show with particularity and by separately numbered paragraphs each matter which is claimed for stipulation;

(ii) set forth the specific stipulation which the moving party proposes with respect to each such matter together with a copy of each document or other paper as to which the moving party desires a stipulation;

(iii) set forth the sources, reasons, and basis for claiming, with respect to each such matter, why it should be stipulated to;

(iv) show that the other party has been informed of and has had reasonable access to the sources or bases for the stipulation, and the reasons for stipulation; and

(v) show proof of service of a copy of the motion papers on the other party or the party's representative, if any.

(2) Procedure. Within 20 days of the service of the notice of the motion, that party shall file a response with the supervising administrative law judge with proof of service of a copy thereof on the other party or representative, if any, showing why the matter set forth in the motion papers should not be deemed admitted for purposes of the pending controversy. The response shall list each matter involved on which there is no dispute, referring specifically to the numbered paragraphs in the motion to which the admissions relate. Where a matter is disputed only in part, the response shall show the part admitted and the part disputed. Where the responding party is willing to stipulate in whole or in part with respect to any matter in the motion by varying or qualifying a matter in the proposed stipulation, the response shall set forth the variance or qualification and the admission which the responding party is willing to make. Where the response claims that there is a dispute as to any matter in part or in whole, or where the response presents a variance or qualification with respect to any matter in the motion, the response shall show the sources, reasons and basis on which the responding party relies for that purpose. The supervising administrative law judge, where

it is found appropriate, may schedule the motion for a hearing before an administrative law judge at such time as the supervising administrative law judge shall determine.

(3) Failure to respond. If no response is filed within the period specified with respect to any matter or portion thereof, or if the response is evasive or not fairly directed to the proposed stipulation or portion thereof, that matter or portion thereof will be deemed stipulated for purposes of the pending controversy, and an order will be entered accordingly.

(4) Matters considered. Opposing claims of evidence will not be weighed unless such evidence is patently incredible. Nor will a genuinely controverted or doubtful issue of fact be determined in advance of the hearing. The supervising administrative law judge will determine whether a genuine dispute exists, or whether in the interests of justice a matter ought not be deemed stipulated.

Section 3000.12 Submission without hearing

(a) General. The parties may consent in writing to have the controversy determined on submission without need for appearance at a hearing.

(b) Procedure. After receipt of the written consent of both parties, the administrative law judge or presiding officer assigned to the case shall establish a schedule for submission of all documentary evidence relevant to the issues, including any stipulation entered into by the parties.

(1) The office of counsel shall submit to the administrative law judge or presiding officer and to the opposing party all documentary evidence relevant to the issues, including any stipulation entered into by the parties, in accordance with the schedule established.

(2) In accordance with the schedule established, the petitioner may submit additional documents in support of the petition. The petitioner shall provide the office of counsel with copies of any such documentary evidence submitted.

(3) The parties may submit briefs within the period of time prescribed by the administrative law judge or presiding officer as provided in section 3000.15(c)(3) of this Part. The parties may also submit proposed findings of fact and conclusions of law within such time period as the administrative law judge or presiding officer may prescribe.

Section 3000.13 Small claims hearings

(a) General. A petitioner who wishes to have the proceedings in his or her case conducted in the small claims unit may so elect at the time of the filing of the petition, if the amount in controversy meets the criteria contained in subdivision (b) of this section. The small claims hearing will be an adversary proceeding conducted by an impartial presiding officer. The presiding officer will know nothing of the controversy prior to the hearing and shall conduct the hearing (see subdivision [f] of this section) in a fair manner so as to permit the parties to offer all relevant evidence to establish their positions. Where certain points or issues are unclear, the presiding officer may ask questions of the parties or of witnesses for the purpose of clarifying the record.

(b) Criteria for small claims. Controversies which may be heard by the small claims unit are restricted in amount to $20,000 (not including penalty and interest) for any 12-month period in question. However, with respect to cases arising out of sales and compensating use taxes pursuant to Articles 28 and 29 of the Tax Law, the amount in controversy may not exceed $40,000 (not including penalty and interest) for each 12-month period.

(c) Pleadings; applicable sections; notice.

(1) The only pleadings to be served by the parties are a petition by the petitioner (see section 3000.3 of this Part) and an answer by the office of counsel (see section 3000.4[b] of this Part).

(2) The parties may file briefs, additional documents or other material in support of their pleadings.

(3) The provisions of section 3000.4(d) of this Part regarding amended pleadings are applicable to this section. The provisions of sections 3000.5, 3000.6 and 3000.9 of this Part are not applicable to this section.

(4) After the petition and answer have been served or the time for serving an answer has expired, the controversy shall be at issue and the small claims unit shall schedule the controversy for a small claims hearing. The parties shall be given at least 30 days' notice of the first hearing date, and at least 10 days' notice of any adjourned or continued hearing date. A request by any party for a preference in scheduling will be honored to the extent possible.

(d) Adjournment, default. (1) At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjournment may be granted on less notice. Upon continued and unwarranted delay of the proceedings by either party, the presiding officer shall render a default determination against the dilatory party.

(2) In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.

(3) Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case.

(e) Presiding officer. The small claims hearing shall be conducted by a presiding officer with the same

authorization provided an administrative law judge conducting a hearing by section 3000.15(c) of this Part.

(f) Conduct of hearing.

(1) The small claims hearing shall be conducted by a presiding officer in such a manner as to do substantial justice between the parties according to the rules of substantive and administrative law. The hearing shall be conducted as informally as possible, consistent with orderly procedure. Any evidence which the presiding officer considers necessary or desirable for a just and equitable determination will be received, except that effect shall be given to the rules of privilege recognized by law. The burden of proof shall be upon the petitioner except as otherwise provided by law.

(2) The provisions contained in section 3000.15(d)(l)-(6) of this Part, regarding conduct of a hearing, are applicable to a small claims hearing; however, such applicability is not intended to alter the informal nature of the small claims hearing.

(3) The small claims hearing will be stenographically reported or otherwise recorded, but a transcript thereof need not be made unless the presiding officer otherwise directs. Where a transcript is made, it shall be available for examination at the offices of the division of tax appeals in Albany, or may be purchased pursuant to section 3000.19 of this Part.

(g) Transfer to administrative law judge. At any time before the conclusion of a small claims hearing, the petitioner may, by written notice to the secretary, discontinue such small claims proceeding and request that the hearing on the petition be transferred to and conducted by an administrative law judge. Such discontinuance will be without prejudice to any subsequent proceeding before an administrative law judge.

(h) Determination. ***(1) Issuance of determination.*** After the small claims hearing, the presiding officer shall review the evidence and render a determination which will contain findings of fact and conclusions of law. The presiding officer will render a determination within three months after completion of the hearing or the submission of briefs, whichever is later. The division of tax appeals will serve a copy of the determination on the petitioner, the petitioner's representative and the office of counsel.

(2) Effect of determination. The final determination of the presiding officer shall be conclusive upon all parties and shall not be subject to review by any other unit in the division of tax appeals or by the tribunal. However, on the motion of either party, the tribunal may order a rehearing upon proof or allegation of misconduct by the presiding officer. Determinations of presiding officers are not considered precedent, nor are they given any force or effect in other proceedings in the division of tax appeals.

(i) Assignment of another presiding officer. Whenever a presiding officer is disqualified or it becomes impractical for him or her to continue the hearing, another presiding officer may be assigned to continue with the case, unless it is shown that substantial prejudice to a party will result therefrom.

Section 3000.14 Hearing memorandum

(a) General. Each party shall prepare a hearing memorandum on a form prescribed by the supervising administrative law judge and shall submit copies of the same with all attachments to the supervising administrative law judge and to the opposing party not less than 10 days before the hearing date specified in the hearing notice.

(b) Contents. The hearing memorandum shall contain the following information:

(1) a list of all witnesses to be called to testify and a very brief summary of the anticipated testimony of such witnesses;

(2) a list of all exhibits to be introduced at hearing;

(3) a brief statement of the issues being contested;

(4) a statement of the legal authorities relied on; and

(5) if the parties have reached stipulation on any facts, a copy of the stipulation.

(c) Amendment. If, after filing a hearing memorandum, a party determines to rely on other witnesses or evidence, the party shall amend its hearing memorandum as soon as practicable.

(d) Failure to comply. (1) Upon a finding that a party has failed to make a good faith effort to comply with the requirements of this section, the administrative law judge may preclude the testimony of witnesses or introduction of evidence not included in the hearing memorandum.

(2) Documents and testimony introduced only for purposes of rebuttal or to impeach a witness may be allowed without inclusion on the hearing memorandum.

Section 3000.15 Hearings before administrative law judges

(a) Notice. After issue is joined (see section 3000.4[c] of this Part), the administrative law judge unit shall schedule the controversy for a hearing. The parties shall be given at least 30 days' notice of the first hearing date, and at least 10 days' notice of any adjourned or continued hearing date. A request by any party for a preference in scheduling will be honored to the extent possible.

(b) Adjournment, default. (1) At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjournment may be granted on less notice. Upon continued and unwarranted delay of the proceedings by either party, the administrative law judge shall render a default determination against the dilatory party.

(2) In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the administrative law judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.

(3) Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case.

(c) Administrative law judge. The hearing shall be conducted by an impartial administrative law judge who is authorized to:

(1) administer oaths and affirmations;

(2) sign and issue subpoenas as provided in section 3000.7 of this Part;

(3) regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of legal memoranda and other documents;

(4) rule upon questions of evidence; such rulings shall be deemed incorporated in the administrative law judge's determination for purposes of review by the tribunal; and

(5) render determinations after hearings.

(d) Conduct of hearing. (1) At the hearing, the parties may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in direct examination, impeach any witness regardless of which party first called the witness to testify, and rebut the evidence against them. All witnesses shall testify under oath or by affirmation. The office of counsel shall introduce a copy of each statutory notice at issue or satisfactory evidence that each such statutory notice has in fact been issued. A copy of a Federal determination relating to the issues may be received in evidence to show such determination. Affidavits as to relevant facts may be received, for whatever value they may have, in lieu of the oral testimony of the persons making such affidavits. Technical rules of evidence will be disregarded to the extent permitted by the decisions of the courts of this State, provided the evidence offered appears to be relevant and material to the issues. However, effect shall be given to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Upon a finding of good cause, the administrative law judge may order that any witness be examined separately and apart from all other witnesses, except those who are parties. The administrative law judge may, where the record appears unclear, ask questions of the parties or of witnesses for the purpose of clarifying the record.

(2) Where books, records, papers or other documents have been received in evidence, the substitution of a copy thereof may be permitted. Where original exhibits have been received in evidence, the party who offered such exhibits may be permitted to withdraw them after the determination of the administrative law judge or the decision of the tribunal is final.

(3) If a party refuses or fails without reasonable cause to obey any subpoena or subpoena duces tecum issued by an administrative law judge, the administrative law judge shall have the power to preclude the noncomplying party from introducing any proofs concerning such witnesses, documents or things, or from introducing them in evidence and may draw the inference that the precluded evidence is unfavorable to the noncomplying party's position.

(4) For purpose of expedition, stipulation and submission of evidence is encouraged, provided the interests of parties will not be substantially prejudiced thereby. Although objections to a particular part of a stipulation should be noted therein the administrative law judge will give consideration to any objection to irrelevancy of stipulated facts made at the hearing (see section 3000.11 of this Part).

(5) The burden of proof shall be upon the petitioner except as otherwise provided by law.

(6) After the parties have completed the submission of the evidence, they may orally argue the applicability of the law to the facts. If the parties also wish to submit briefs, they may do so, within the time restrictions fixed by the administrative law judge. Each party shall serve a copy thereof on the other party. The parties may also submit proposed findings of fact and conclusions of law. The proposed findings of fact shall refer, wherever possible, to the relevant pages of the transcript of hearing and exhibits.

(7) The hearing will be stenographically reported. A transcript thereof will be made available for examination at the offices of the division of tax appeals in Albany, or may be purchased pursuant to section 3000.19 of this Part. If either party deems the transcript to be inaccurate in any material respect, the party shall promptly notify the administrative law judge, setting forth specifically the alleged inaccuracies. The administrative law judge shall specify the corrections to be made in the transcript, and such corrections shall be made a part of the record.

(e) Determination. ***(1) Issuance of determination.*** The administrative law judge shall review the evidence and render a determination which will contain findings of fact and conclusions of law. The administrative law judge will render a determination within six months after completion of the hearing or the submission of briefs, whichever is later. The administrative law judge may extend such six-month period, for good cause shown, to no more than an additional three months. The division of tax appeals will serve a copy of the determination on the petitioner, the petitioner's representative and the office of counsel.

(2) Effect of determination. The determination of the administrative law judge shall finally decide the matters in controversy unless a party takes exception by timely requesting review by the tribunal (see section 3000.17 of this Part). Determinations of administrative law judges are not considered precedent, nor are they given any force or effect in other proceedings in the division of tax appeals.

(f) Assignment of another administrative law judge. Whenever an administrative law judge is disqualified or it

becomes impractical for him or her to continue the hearing, another administrative law judge may be assigned to continue with the case, unless it is shown that substantial prejudice to a party will result therefrom.

Section 3000.16 Motions to reopen record or for reargument

(a) Determinations. An administrative law judge may, upon motion of a party, issue an order vacating a determination rendered by such administrative law judge upon the grounds of:

(1) newly discovered evidence which, if introduced into the record, would probably have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding, or

(2) fraud, misrepresentation, or other misconduct of an opposing party.

(b) Procedure. A motion to reopen the record or for reargument, with or without a new hearing, shall be made to the administrative law judge who rendered the determination within thirty days after the determination has been served. A timely motion to reopen or reargue shall not extend the time limit for taking an exception to such determination; however, upon application for an extension of time to file an exception pursuant to section 3000.20 of this Part "good cause" shall be deemed to include the timely filing of a motion to reopen the record or reargue. An administrative law judge shall have no power to grant a motion made pursuant to this section after the filing of an exception with the tax appeals tribunal.

(c) Decisions. A motion for reargument shall be made to the tribunal and served upon the office of the secretary to the tribunal within four months after the decision has been served. The tribunal shall have no power to grant a motion made pursuant to this section after a petition for judicial review has been commenced as provided by section 2016 of the Tax Law.

Section 3000.17 Review by tribunal

(a) Filing of exception. (1) Within 30 days after the giving of notice of the determination of the administrative law judge, any party may take exception to such determination and seek review thereof by the tribunal by filing an exception with the secretary. The exception should be filed with the secretary either in person at the offices in Albany or by mail addressed to:

Secretary to the Tax Appeals Tribunal
Division of Tax Appeals
Agency Building1
Empire State Plaza
Albany, NY 12223

A copy of the exception shall be served at the same time on the other party. When the division of taxation is the other party, service shall be made on the office of counsel.

(2) The tribunal may extend the 30-day period for filing an exception, provided an application for extension is filed within such period and served on the other party, and if good cause is shown. "Good cause" depends on the circumstances of each case but would include any cause which appears to an ordinarily prudent person as a reasonable ground for failure to file an exception within the prescribed period.

(b) Form of exception; briefs. (1) The exception shall contain:

(i) the particular findings of fact and conclusions of law with which the party disagrees;

(ii) the grounds of the exception with references, wherever possible, to the relevant pages of the transcript of hearing and exhibits; and

(iii) alternative findings of fact and conclusions of law. A form of exception is available from the division of tax appeals upon written request.

(2) A brief in support of the exception may be submitted at the time the exception is filed or within 30 days thereafter. The party taking exception shall serve a copy of the brief in support on the other party. Within 30 days after service of the brief in support, the other party may submit a brief in opposition and shall serve a copy thereof on the party taking exception.

(c) Transmittal of record. Whenever an exception to an administrative law judge's determination is filed, the supervising administrative law judge shall transmit to the secretary the record of the hearing before the administrative law judge.

(d) Oral argument. (1) A party taking exception may request, at the time of the filing of the exception, an opportunity for oral argument before the tribunal. Within the time allowed for submitting a brief in opposition, the other party may request, in writing, an opportunity for oral argument. Failure to make such a request in writing within the prescribed time period shall be deemed a waiver of oral argument.

(2) The tribunal may grant, deny or limit any request for oral argument. The secretary will advise the parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made in writing at least 15 days in advance of the date fixed for argument.

(3) The oral argument will be stenographically reported. A commissioner who is not present at oral argument but who is otherwise authorized to participate in a decision may participate in rendering such decision after reading the transcript of the oral argument.

(e) Decision. (1) The tribunal shall review the record and shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the determination.

(2) After such review, the tribunal will issue a decision affirming, reversing or modifying the administrative law judge's determination, or the tribunal may remand the case for additional proceedings before the administrative law judge. The decision will include a statement setting forth the facts which form the basis thereof. The tribunal will issue its decision within 6 months from the date of the filing of the exception; however, where oral argument is granted or briefs are submitted, the 6-month period will begin on the date oral argument is concluded or briefs are submitted, whichever is later.

(3) The tribunal is authorized to rule on the validity of the regulations of the commissioner of taxation and finance where such regulations are at issue.

Section 3000.18 Expedited hearings

(a) Hearing preference. Whenever a petition is filed protesting a statutory notice which advises a person of the denial of such person's application for a license, permit, registration or certificate of authority or which advises a person of an increase in the amount of a bond or other security required to be filed, an expedited hearing shall be granted. A form of petition together with the Rules of Practice and Procedure will be enclosed with such notice. Section 3000.4, which provides for pleadings and amended pleadings, shall not apply when a preference for an expedited hearing is exercised; however, a petition for an expedited hearing shall be acknowledged and reviewed for timeliness and acceptability as to content. With the exception of the time limitations described in subdivision (b) of this section for the rendering of expedited determinations and decisions, all other provisions of this Part shall apply. Within 10 business days of the receipt of the petition for an expedited hearing (determined with regard to any postponement of any scheduled hearing or other delay made at the request of the petitioner), a hearing will be scheduled at an office of the division of tax appeals in Albany or New York City, or at a convenient office of the division of taxation as determined by the supervising administrative law judge.

(b) Determinations and decisions. The administrative law judge or presiding officer shall render a determination within 30 days from the date of the petition for the expedited hearing. Where exception is taken to an administrative law judge's determination, the tribunal shall issue its decision within 3 months from the date of the petition for the expedited hearing. Any request by the petitioner which delays the expedited hearing process shall extend the time limitations imposed on the tribunal or the administrative law judge or presiding officer to issue a decision or determination.

Section 3000.19 Record of hearing

(a) Within a reasonable period of time after a determination of an administrative law judge, or where exception is taken to an administrative law judge's determination within a reasonable period of time after a decision of the tribunal but prior to the commencement of judicial review of such decision, a petitioner may request that the division of tax appeals provide a copy of the record. The record shall consist of:

(1) all notices, pleadings, motions and intermediate rulings;

(2) a transcript of the hearing, if any;

(3) copies of all exhibits or, where the parties consented to have the controversy determined on submission without hearing, the documents submitted to the administrative law judge pursuant to section 3000.8(b) of this Part;

(4) a transcript of oral argument before the tribunal, if any;

(5) the determination of the administrative law judge and exceptions thereto, if any;

(6) the decision of the tribunal where exception was taken to the determination of the administrative law judge.

(b) The transcript of the hearing and of the oral argument, if any, may be purchased from the hearing reporter at a charge not to exceed that paid by the division of tax appeals for a transcript pursuant to rates fixed by the Comptroller, or rates as may be reasonably fixed by the tribunal. Requests for copies of other parts of the record shall be made to the records access officer for the division of tax appeals. The cost of such copies shall be at the rate of 25 cents per page.

Section 3000.20 Judicial review

A decision of the tribunal which is not subject to any further administrative review shall irrevocably decide all the issues which were raised in the proceeding, unless within four months after the issuance of such decision by the tribunal and the giving of notice of such decision to the parties, the petitioner applies for judicial review in the manner provided by article seventy-eight of the civil practice law and rules. Appeals from tribunal decisions shall go directly to the appellate division of the supreme court, third department, but in all other respects the provisions and standards of article seventy-eight shall apply. The tribunal may, in its discretion, certify to such appellate division of the supreme court questions of law involved in its decision.

Section 3000.21 Frivolous petitions

If a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the tribunal may, on its own motion

or on the motion of the office of counsel, impose a penalty against such petitioner of not more than $500. This penalty shall be in addition to any other penalty provided by law and shall be collected and distributed in the same manner as the tax to which the penalty relates. The following are examples of frivolous positions:

(a) that wages are not taxable as income;

(b) that petitioner is not liable for income tax because petitioner has not exercised any privileges of government;

(c) that the income tax system is based on voluntary compliance and petitioner therefore need not file a return;

(d) that federal reserve notes are not "legal tender" or "dollars" and petitioner therefore cannot measure his or her income; and

(e) that only states can be billed and taxed directly.

Section 3000.22 Service and filing of documents

(a) General rule. ***(1) Date of filing.*** If any document required to be filed under this Part within a prescribed period or on or before a prescribed date under authority of any provision of article 40 of the Tax Law is, after such period or date, delivered by United States mail to the New York State Division of Tax Appeals or Tax Appeals Tribunal, Agency Building1, Empire State Plaza, Albany, NY 12223, the date of the United States postmark stamped on the envelope or other appropriate wrapper in which such document is contained will be deemed to be the date of filing. Where delivery is made by courier, delivery, messenger or similar services, the date of delivery will be deemed to be the date of filing.

(2) Mailing requirements. Any document required to be filed under this Part will not be considered to be timely mailed or timely filed unless the document is mailed in accordance with the following requirements:

(i) The document must be contained in an envelope or other appropriate wrapper and properly addressed to: State of New York, Division of Tax Appeals or Tax Appeals Tribunal, Agency Building1, Empire State Plaza, Albany, NY 12223,

(ii) The envelope containing the document must be deposited in the mail of the United States within the prescribed period or on or before the prescribed date with sufficient postage prepaid. For this purpose, such document is considered to be deposited in the mail of the United States when it is deposited with the domestic mail service of the United States Postal Service. The domestic mail service of the United States Postal Service includes mail transmitted within, among and between the United States, its territories and possessions, and Army-Air Force (APO) and Navy (FPO) post offices.

(iii) The envelope or other wrapper containing the document must bear a date stamped by the United States Postal Service which is within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing such document). If the postmark stamped by the United States Postal Service on the envelope or wrapper containing the document does not bear a date which falls within the prescribed period or on or before the prescribed date for filing such document in accordance with part 40 of the Tax Law, the document will be considered not to be timely filed, regardless of when the envelope or wrapper containing such document is deposited in the mail. Accordingly, the sender assumes the risk that the envelope containing the document will bear a postmark date stamped by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing such document), but see subdivision (c) of this section with respect to the use of registered mail or certified mail to avoid this risk. Furthermore, if the postmark made by the United States Postal Service on the envelope or wrapper containing the document is not legible, the person who is required to file the document has the burden of proving when the postmark was made.

(3) If an envelope or wrapper containing a document and bearing sufficient United States postage is missing a postmark which should have been affixed by the United States Postal Service, then whether the envelope or wrapper was mailed in accordance with this subdivision will be determined solely by applying the provisions of subdivision (b) of this section, except for the postmarked date required by subparagraph (i) of paragraph (1) of said subdivision (b).

(b) Postmarks not made by the United States Postal Service. (1) If the postmark on the envelope or wrapper containing the document is made by other than the United States Postal Service (i.e. office metered mail):

(i) the postmark so made must bear a date which falls within the prescribed period or on or before the prescribed date for filing the document (including any extension of time granted for filing the document); and

(ii) the document must be received by the New York State Division of Tax Appeals or Tax Appeals Tribunal, Agency Building1, Empire State Plaza, Albany, NY 12223, not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document).

(2) In case the document is received after the time when a document so mailed and so postmarked by the United States Postal Service would ordinarily be received, such document will be treated as having been received at the time when a document so mailed and so postmarked would ordinarily be received, if the person who is required to file the document establishes:

(i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the United States Postal Service within the prescribed period or on or before the prescribed date for filing the document;

(ii) that the delay in receiving the document was due to a delay in the transmission of the mail; and

(iii) the cause of such delay.

(3) If the envelope or wrapper containing the document has a postmark made by the United States Postal Service in addition to the postmark not so made, the postmark which was not made by the United States Postal Service will be disregarded, and whether the envelope or wrapper was mailed in accordance with this subdivision will be determined solely by applying the provisions of subdivision (a) of this section.

(c) Registered and certified mailing. (1) If an envelope or wrapper containing a document is sent by United States registered mail, the date of such registration is treated as the postmark date and the date of filing.

(2) If an envelope or wrapper containing a document is sent by United States certified mail and the sender's receipt is postmarked by the postal employee to whom such envelope is presented, the date of the postmark on such receipt is treated as the postmark date of the document and the date of filing.

(d) Document defined. The term "document", as used in this section, means any Exception to Administrative Law Judge's Determination, Petition or other document required to be filed under the authority of any provision of Article 40 of the Tax Law.

(e) Filing and service. ***(1) Filing.*** Filing of all pleadings, motions, exceptions and other papers with the division of tax appeals or the tribunal pursuant to this Part shall be made by either delivery during business hours to its Albany offices or by mail properly addressed to New York State Division of Tax Appeals or Tax Appeals Tribunal, Agency Building1, Empire State Plaza, Albany, NY 12223.

(2) Service. Service of all motions, exceptions and other papers on the office of counsel of the division of taxation pursuant to this Part shall be made by either delivery during business hours to its Albany offices or by mail properly addressed to the appropriate person at the Office of Counsel, Division of Taxation, Building 9, W.A. Harriman Campus, Albany, NY 12227.

(f) If the envelope or wrapper containing the document is mailed in a foreign country, the date of receipt of the envelope or wrapper will be deemed to be the date of filing.

Section 3000.23 Miscellaneous provisions

(a) Service of decisions, determinations and orders of the tribunal, administrative law judges and presiding officers shall be made by mail. Registered and certified mail will be used and service shall be complete upon the deposit of the appropriate document, enclosed in a post-paid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States postal service. Such service shall constitute the giving of notice pursuant to section 2006(7) of the Tax Law and service pursuant to section 2016 of the Tax Law.

(b) Extension of time. The tribunal, administrative law judges or presiding officers may, on its or their own motion, or on the motion of any party, order a continuance, extension of time or adjournment for good cause, provided no statutory prohibition exists. Notice of any such order shall be given to all parties. Where the dates for filing briefs are fixed, an extension of time for filing a brief shall correspondingly extend the time for filing any other brief due at the same time and for filing succeeding briefs, unless the tribunal, administrative law judge or presiding officer shall order otherwise.

(c) Resolution of controversies. The provisions of Part 4000 are not to be construed as the sole opportunity for resolution of a controversy other than by decision of the tribunal or determination of an administrative law judge or presiding officer. The petitioner and the petitioner's representative, if any, and the office of counsel are encouraged to confer at all times prior to the decision or determination in an effort to resolve the controversy.

(d) Availability of decisions and determinations. All decisions of the tribunal and determinations of the administrative law judge shall be available for public inspection pursuant to the provisions of Part 800 of this Title. A request for a copy of a decision or determination shall be made to:

Records Access Officer
Department of Taxation and Finance
Building 9, Room 211,
W. A. Harriman Campus
Albany, New York 12227

A copy will be furnished at a cost of 25 cents a page.

(e) Availability of rules. This Part shall be generally available to the public and copies shall be obtainable at all offices of the division of tax appeals and all district offices of the department.