

NEW YORK STATE
DIVISION OF TAX APPEALS
TAX APPEALS TRIBUNAL



ANNUAL REPORT
FISCAL YEAR 2008 - 2009

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CHARLES H. NESBITT, PRESIDENT & COMMISSIONER
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NEW YORK STATE
DIVISION OF TAX APPEALS
AND TAX APPEALS TRIBUNAL

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TABLE OF CONTENTS

INTRODUCTION	1
OVERVIEW	1
PURPOSE	1
FORMAL HEARING	1
TRIBUNAL REVIEW	1
SMALL CLAIMS PROCEEDINGS	2
TRIBUNAL HISTORY	2
PUBLICATION OF TRIBUNAL DECISIONS AND ADMINISTRATIVE LAW JUDGE DETERMINATIONS	2
OPERATIONS	3
RECENT DEVELOPMENTS	3
DISPOSITION OF CASES	5
INTRODUCTION	5
FORMAL HEARINGS	6
SMALL CLAIMS HEARINGS	8
TAX APPEALS TRIBUNAL	10
EMPLOYEE DIRECTORY	15

INTRODUCTION

This report is prepared pursuant to Tax Law § 2006(13), which provides that the Tax Appeals Tribunal shall "collect, compile and prepare for publication statistics and other data with respect to the operations of the division of tax appeals, and ... submit annually to the governor, the temporary president of the senate and the speaker of the assembly a report on such operations including but not limited to, the number of proceedings initiated, the types of dispositions made and the number of proceedings pending."

OVERVIEW

The New York State Division of Tax Appeals ("Division") was created by Chapter 282 of the Laws of 1986 as an independent division within the New York State Department of Taxation and Finance (Tax Law § 2002) effective September 1, 1987. The Division is headed by the Tax Appeals Tribunal ("Tribunal"), which consists of three commissioners appointed by the Governor and confirmed by the State Senate. The commissioners are appointed for nine-year terms. One of these commissioners is designated as the President of the Tribunal by the Governor and is solely responsible for the administration of the Division as a whole.

At least two of the commissioners must be attorneys admitted to practice in New York State for a period of at least ten years and be knowledgeable on the subject of taxation. The third member need not be an attorney but must also be knowledgeable on the subject of taxation (Tax Law § 2004).

At present, the Tribunal consists of Charles H. Nesbitt, President and Commissioner, and Carroll R. Jenkins, Commissioner.

PURPOSE

The Tribunal is charged with the responsibility of "providing the public with a just system of resolving controversies with [the] department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies" (Tax Law § 2000, *emphasis added*). This purpose is accomplished by separating the administration of taxes from the adjudication of disputes between taxpayers and the Department of Taxation and Finance. The administration of taxes is solely the responsibility of

the Department while the adjudication of disputes falls solely under the province of the Division of Tax Appeals.

FORMAL HEARINGS

Formal hearings are held before an Administrative Law Judge. The Administrative Law Judge hears the testimony, evaluates the evidence and prepares and issues a written determination within six months after the completion of the hearing or submission of briefs of the parties, whichever is later. The determination of the Administrative Law Judge sets forth the issues in the case, the relevant facts established by the parties and the conclusions of law relevant to the issues. The determination is binding on both parties (i.e., the taxpayer and the Department) unless one or both of the parties request a review of the determination by the Tribunal by filing an exception with the Secretary to the Tribunal within 30 days of notification of the determination of the Administrative Law Judge.

TRIBUNAL REVIEW

After reviewing the record of the hearing and any arguments, oral or by brief, the Tribunal issues a written decision either affirming, reversing or modifying the determination of the Administrative Law Judge, or remanding the case for additional proceedings before such Administrative Law Judge. Each decision of the Tribunal sets forth the issues in the case, the relevant facts established by the parties in the record at hearing and the Tribunal's opinion, which applies applicable law to such facts. Each decision must be rendered within six months from the date of notice to the Tribunal that exception is being taken to the determination of the Administrative Law Judge. This period is extended if oral or written argument is made before the Tribunal (Tax Law § 2006[7]).

Decisions rendered by the Tribunal are final and binding on the Department; i.e., there is no right of appeal. Taxpayers who are not satisfied with the decision of the Tribunal have the right to appeal the Tribunal's decision by instituting a proceeding pursuant to Article 78 of the Civil Practice Law and Rules (CPLR) to the Appellate Division, Third Department of the State Supreme Court.

SMALL CLAIMS PROCEEDINGS

As an alternative to a formal hearing, taxpayers have the right to elect a small claims proceeding if the amount in dispute is within certain dollar limits as prescribed by regulations adopted by the Tribunal. Currently, the limits are \$20,000 (not including penalty and interest) for any 12-month period for personal income and corporate franchise tax and \$40,000 for sales and compensating use taxes (20 NYCRR 3000.13). A small claims hearing is conducted informally by a presiding officer, whose determination is final for both parties. However, at any time before the conclusion of the small claims hearing, a taxpayer may discontinue the proceeding and request that a formal hearing be held before an Administrative Law Judge.

TRIBUNAL HISTORY

The establishment of the Tribunal on September 1, 1987 separated the administration of taxes from the adjudication of disputes between taxpayers and the Department of Taxation and Finance. Under prior law, disputes between taxpayers and the Department were resolved by a three-member State Tax Commission, the President of which was also the Commissioner of the Department. Since the Department was always one of the parties before the Commission, critics of the system noted that there was, at the least, a perception of bias.

In addition, the regulations that were at issue in many of the cases were promulgated by the Commission itself. Again, the criticism was that the body that had adopted the regulations at issue could not fairly and objectively review their validity or application in an adjudicatory proceeding.

Finally, under the former system the hearing function was performed by a hearing officer who heard the case and recommended a decision to the Tax Commission, which then rendered the decision. Critics argued that the person who had the opportunity to weigh the evidence and evaluate the credibility of the witnesses at the hearing should be the person to make the decision.

Under the current system, the Commissioner of the Department is not a member of the Tribunal, and the members of the Tribunal and the Division of Tax Appeals are fully independent from the Department. The Tribunal has the authority to adopt rules and regulations relating only to the exercise of its duties, including rules of practice and procedure, and the duties of the Administrative Law Judges to hear and determine the cases before them.

The first Administrative Law Judge determinations were issued in the fall of 1987. The first determination of a Presiding Officer in a small claims case was issued in January of 1988. The first decision of the Tribunal was issued in February of 1988.

In April of 1989, the Tribunal moved its headquarters from the Tax Department building (#9) at the State Office Building Campus in Albany to the Riverfront Professional Tower, 500 Federal Street, Troy, New York. This physical separation of the Tribunal from the Department of Taxation and Finance was the necessary final step in the separation of administration of taxes from the adjudication of tax controversies between taxpayers and the Department.

On July 1, 1993, the Division closed its New York City office and centralized its operations in Troy, New York as a result of budgetary constraints. The Division continued to conduct small claims proceedings at various locations throughout the state including sites in the cities of Buffalo, Rochester, Syracuse, Binghamton, Troy and New York City as well as in the counties of Westchester, Nassau and Suffolk.

Beginning in January 1997, the Division implemented a pilot program and began once again holding hearings in New York City. The Tribunal utilized office space at the New York State Housing Finance Agency in Manhattan as part of a cooperative arrangement. This program was implemented to ensure that taxpayers had greater access to administrative tax proceedings. Given the success of that program, Administrative Law Judge hearings are now conducted in New York City, Rochester and Troy. In 2006, the Tribunal also began utilizing the New York City facilities of the Public Service Commission, and continued utilizing these facilities for Fiscal Year 2007-2008. Oral argument proceedings before the Tribunal are held in New York City and Troy.

PUBLICATION OF TRIBUNAL DECISIONS AND ADMINISTRATIVE LAW JUDGE DETERMINATIONS

The law requires the Tribunal to publish and make available to the public all determinations rendered by Administrative Law Judges and all decisions rendered by the Tribunal. The Tribunal may charge a reasonable fee for a copy of such determinations or decisions.

The Tribunal provides copies of individual decisions and determinations upon request. In addition, decisions and determinations are available on our website at www.nysdta.org. All Tribunal decisions and

determinations of Administrative Law Judges are carried on Westlaw and Lexis and are commercially published by William S. Hein Company, Buffalo, New York. Also, Commerce Clearing House publishes selected determinations and decisions. The Tribunal provides a monthly docket, also published by the Hein Company, which indicates Administrative Law Judge determinations and Tribunal decisions issued for the month, as well as exceptions to Administrative Law Judge determinations and Article 78 proceedings instituted by taxpayers to review Tribunal decisions. All above-referenced materials are available on the agency's website at www.nysdta.org.

OPERATIONS

THE TRIBUNAL

The Secretary to the Tribunal assists the President in administering the judicial functions of the Division and handles all procedural matters with regard to the calendaring of cases before the Tribunal.

The Counsel to the Tribunal assists the Tribunal in the preparation of decisions on cases before it as well as preparing the Division's regulatory and legislative proposals, and advises the Tribunal on legal issues as they arise.

THE DIVISION OF TAX APPEALS

The Chief Administrative Law Judge is responsible for the day-to-day administration of both formal hearings before Administrative Law Judges and the small claims hearings before Presiding Officers. The hearing staff of the Division is comprised of the Assistant Chief Administrative Law Judge, nine Administrative Law Judges and one Presiding Officer. All of these positions, including the Chief Administrative Law Judge position, are in the competitive class of the Civil Service.

The remaining principal staff operations in the Division are the Petition Intake, Reception and File Maintenance Unit, Hearing Support Operations Unit, Word Processing and Determination Publishing Unit and Computer Support Unit.

RECENT DEVELOPMENTS

President Nesbitt has engaged in a full functional assessment of the facilities and operations of the Division since his appointment in November 2005. As a result of

such assessments, the Division has undertaken several initiatives to improve its facilities and procedures. The first such initiative addressed a severe backlog in the Division's records retention practices and resulted in the removal of over seven tons of paper and file cabinets from its offices. Additionally, the Division initiated a comprehensive effort to identify and surplus out an additional five tons of outdated or obsolete furniture and equipment.

As a component of the records management and retention initiative, the Division scanned and uploaded to its website 17,000 State Tax Commission (the predecessor organization to the Tax Appeals Tribunal) decisions from as far back as the 1960s, which are now available to the public and fully searchable. The Division has also implemented a new records management and retention policy to ensure that all files remain current and appropriately streamlined.

Another initiative borne of the facilities assessment was a major renovation of the Division's office space in Troy, New York. These renovations included the upgrading of the Tribunal's oral argument hearing room and the Division's other hearing rooms to provide access to natural light, increased security measures and closet space, and the inclusion of an additional counsel room so that all parties have space to confer privately. Additionally, individual offices were built for each of the Administrative Law Judges and the Presiding Officer, who had been working in cubicles since the creation of the agency in 1987. The entire floor that the Hearing Unit occupies was also renovated to provide upgraded workspace and access to natural light for the support staff, enhanced security measures, an updated reception area, two secure evidence rooms, and a more organized and user friendly records room. A secure, state-of-the-art climate-controlled computer room was built to house the Division's computer servers and computer wiring was upgraded throughout the agency. A Libraries Committee was also formed to assess the state of the Division's two libraries. As a result, physical upgrades were made to one of the libraries, measures were implemented to ensure that library resources are kept as up-to-date as possible, and employees were provided with enhanced access to online research.

As a result of the functional assessment of the agency's procedural operations, and in response to feedback received from the tax bar and others who practice before the Division, the Tribunal on June 18, 2007 implemented new procedures for the handling of all matters pending before the Division's Hearing Unit. These procedures were designed to produce more active and efficient handling of cases, the conduct of more thorough and streamlined hearings, the creation of more

complete and accurate trial records, and ultimately, the most proper and fair disposition of cases possible. Under the new policy, cases are immediately assigned to an Administrative Law Judge (ALJ) upon receipt of the Answer, and prehearing conferences are initiated by the presiding ALJ in all cases. A new Hearing Support Operations Unit has been created within the Division to assist the ALJs in handling the additional and revised workload that has been created as a result of their more active management of their caseloads.

Fiscal Year 2007-2008 was dedicated to implementing the new prehearing conference procedures, identifying areas in which new internal policies and procedures were necessary, and developing and implementing the same. The administration worked with all of the Administrative Law Judges and the Presiding Officer to identify and develop best practices for the implementation of the new prehearing procedures and the conduct of hearings in the context of the new procedures. This was an ongoing and cumulative effort throughout fiscal year 2008-2009.

As a result of State budget constraints and a hiring freeze, limitations on availability of New York City hearing space, a significant increase in cases filed, and employee departures, the Division of Tax Appeals has had to implement measures to allow it to "do more with less." This has resulted in a slow down in case processing and the development of a case backlog as DIA moves into fiscal year 2009-2010.

DISPOSITION OF CASES

INTRODUCTION

The system over which the Tribunal presides is clearly adversarial in nature involving, in 73% of the cases, the assertion by the Department that the taxpayer owes additional taxes. The remaining cases involve situations where taxpayers claim refunds of taxes paid (22%) and controversies over licenses that the Department administers (5%). The annual dollar value of the Division's case inventory for 2008-2009 was approximately \$184 million. That portion of the inventory in which the outcome was favorable to New York State resulted in over \$116 million in revenue to the state.

A taxpayer can protest any written notice of the Department of Taxation that has advised the taxpayer of a tax deficiency, a determination of tax due, a denial of a refund or credit application, a denial, cancellation, revocation or suspension of a license, permit or registration or any other notice that gives a person the right to a hearing in the Division of Tax Appeals (Tax Law § 2008) by filing a petition for a hearing with the Division. Unless protested by the taxpayer affected by such action, the action asserted by the Department will stand.

The guarantee of "justice" and "due process" in the system is rooted, simply, in the opportunity for all taxpayers to timely and adequately pursue their cases and, conversely, the opportunity for the Department, on behalf of the people of the State, to timely and adequately pursue the State's interest in tax controversies. The Tribunal's procedural regulations are geared to this purpose and provide the needed flexibility to account for the variables in each case. However, once the parties have presented their cases, the statute requires that the determination of the Administrative Law Judge or the decision of the Tribunal be rendered within six months.

The following tables and charts show the inventory of cases before the Tribunal/Division of Tax Appeals and the disposition of cases by Administrative Law Judges, Presiding Officers and the Tribunal itself for state fiscal year 2008-2009.

FORMAL HEARINGS

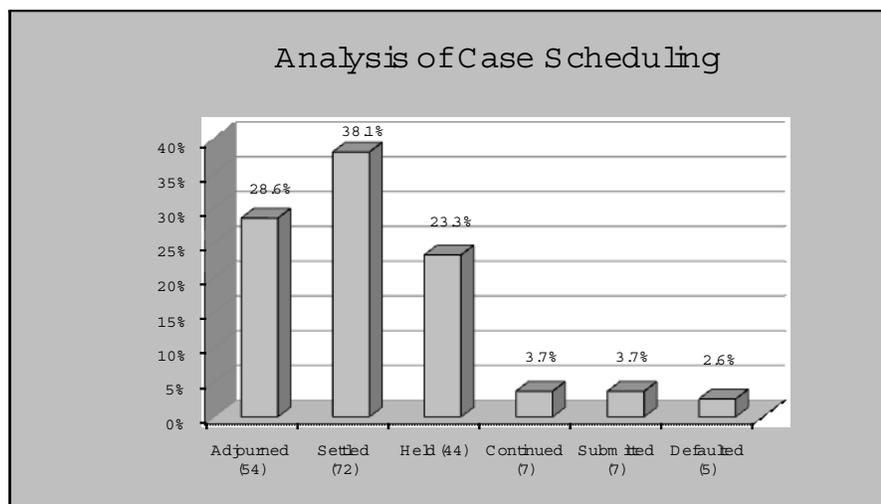
2008-2009 INVENTORY (NET CASES):

A. Beginning Inventory:	<u>309</u>
Add (+)	
Cases Received	461
Default Vacated	<u>0</u>
Subtotal	461
 B. Total Cases for Hearing:	 <u>770</u>
Deduct (-)	
Petitions Withdrawn	45
Closing Orders Issued	192
Defaults	3
Determinations Issued	94
Petitions Dismissed	40
Referred to BCMS	30
Bankruptcy	<u>4</u>
Subtotal	408
 C. Ending Inventory:	 <u>362</u>

ANALYSIS OF CASE SCHEDULING :

During fiscal year 2008-2009, 189 cases were scheduled for formal hearing before Administrative Law Judges. Of that total:

- 54 cases (28.6%) were adjourned before hearing.
- 72 cases (38.1%) were settled by the parties before hearing.
- 44 cases (23.3%) were held and completed on the scheduled date.
- 7 cases (3.7%) were held but continued for completion on a subsequent date.
- 7 cases (3.7%) were submitted on the papers without a hearing.
- 5 cases (2.6%) were defaulted due to failure of one of the parties to appear at the hearing.

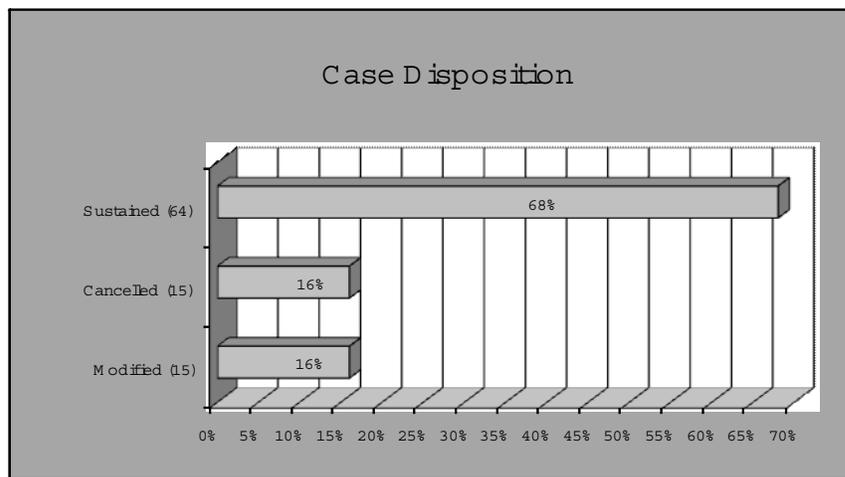


ANALYSIS OF DETERMINATIONS

A. Case Disposition:

During the state fiscal year 2008-2009, the Administrative Law Judges issued 94 determinations. Of that total:

- 64 determinations (68%) sustained the deficiency or other action asserted by the Department.
- 15 determinations (16%) cancelled the deficiency or other action asserted by the Department.
- 15 determinations (16%) modified the deficiency or other action asserted by the Department, e.g., tax reduced, penalty waived or audit period reduced.



B. Average Elapsed Time:

The average elapsed time between the later of the hearing date or the last brief date and the issuance of the determination was:

Mean: 4.05 months
Median: 5.00 months

C. Breakdown of Determinations by Tax:

Tax	Number	Percent
Sales	45	46
Income	36	37
Corp. Franchise	4	4
Miscellaneous	12	12
Total*	97	99

*Some cases involve more than one type of tax.

SMALL CLAIMS HEARINGS

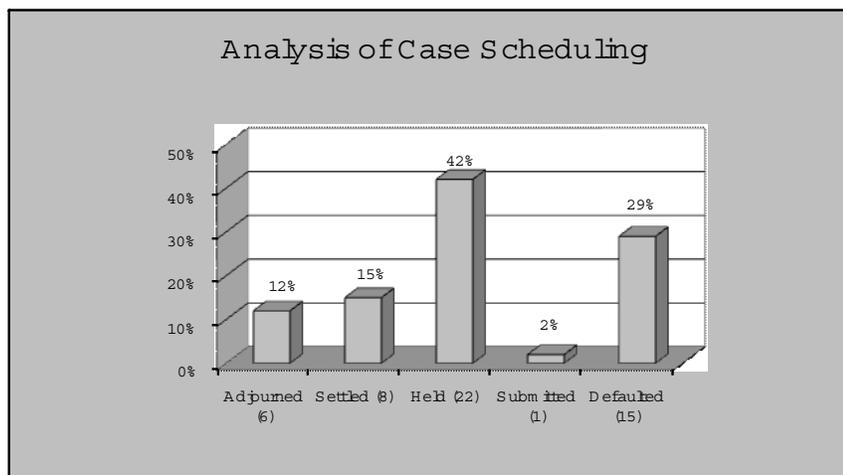
2008-2009 INVENTORY (NET CASES):

A. Beginning Inventory:		<u>76</u>
Add (+)		
Cases Received	129	
Default Vacated	<u>2</u>	
Subtotal	131	
B. Total Cases for Hearing:		<u>207</u>
Deduct (-)		
Petitions Withdrawn	2	
Closing Orders Issued	26	
Defaults	16	
Determinations Issued	<u>23</u>	
Subtotal	67	
C. Ending Inventory:		<u>140</u>

ANALYSIS OF CASE SCHEDULING :

During fiscal year 2008-2009, 52 cases were scheduled for a small claims hearings before Presiding Officers. Of that total:

- 6 cases (12%) were adjourned before hearing.
- 8 cases (15%) were settled by the parties before hearing.
- 22 cases (42%) were held and completed on the scheduled date.
- 1 case (2%) was submitted on the papers without a hearing.
- 15 cases (29%) were defaulted due to failure of one of the parties to appear at the hearing.

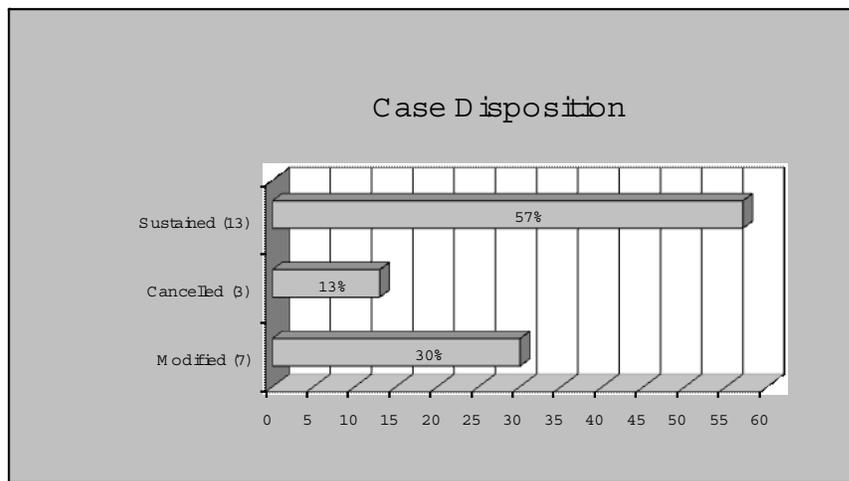


ANALYSIS OF DETERMINATIONS

A. Case Disposition:

During the state fiscal year 2008-2009, the Presiding Officer issued 23 small claims determinations. Of that total:

- 13 determinations (57%) sustained the deficiency or other action asserted by the Department.
- 3 determinations (13%) cancelled the deficiency or other action asserted by the Department.
- 7 determinations (30%) modified the deficiency or other action asserted by the Department. e.g., tax reduced, penalty waived or audit period reduced.



B. Average Elapsed Time:

The average elapsed time between the later of the hearing date or the last brief date and the issuance of the determination was:

Mean: 2.00 months
Median: 2.00 months

Tax	Number	Percent
Sales	7	30
Income	14	61
Corp. Franchise	1	4
Miscellaneous	1	4
Total*	23	99

*Some cases involve more than one type of tax.

TAX APPEALS TRIBUNAL

2008-2009 INVENTORY (NET CASES)

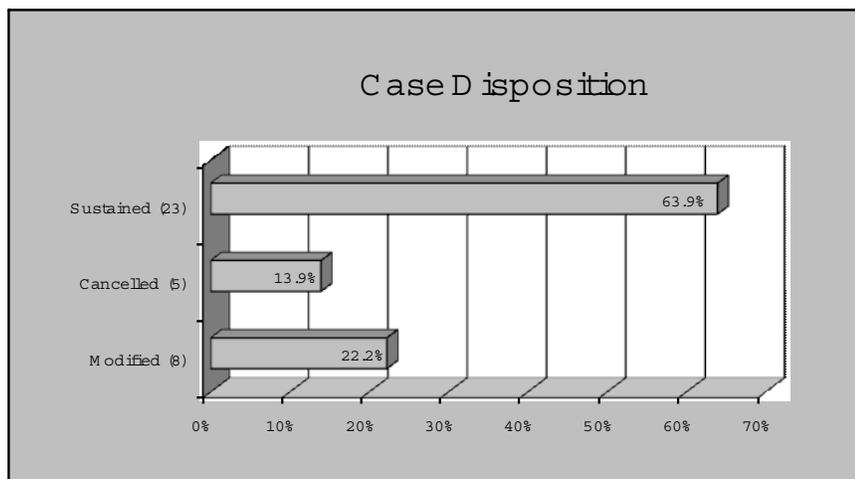
A. Beginning Inventory:		<u>46</u>
Add (+)		
Cases Received	<u>42</u>	
B. Total Cases for Hearing:		<u>88</u>
Deduct (-)		
Decisions Issued	36	
Settled	0	
Withdrawn	<u>0</u>	
Subtotal	36	
C. Ending Inventory:		<u>52</u>

ANALYSIS OF DECISIONS

A. Case Disposition:

During the state fiscal year 2008-2009, the Tax Appeals Tribunal issued 36 decisions. Of that total:

- 23 decisions (63.9%) sustained the deficiency or other action asserted by the Department.
- 5 decisions (13.9%) cancelled the deficiency or other action asserted by the Department.
- 8 decisions (22.2%) modified the deficiency or other action asserted by the Department, e.g., tax reduced, penalty waived or audit period reduced.



B. Average Elapsed Time:

The average elapsed time between the later of the oral argument date or the last brief date and the issuance of the decision was:

Mean: 5.63 months
Median: 5.75 months

C. Breakdown of Tribunal Decisions by Tax:

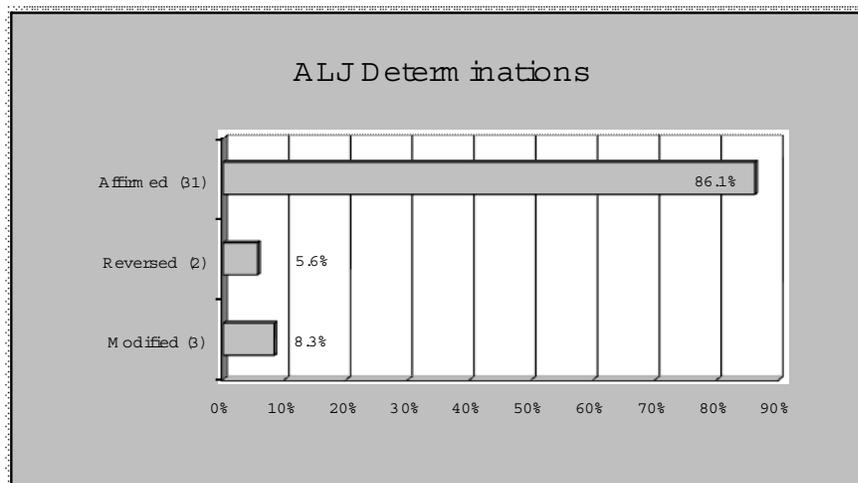
Tax	Number	Percent
Sales	21	48.8
Income	15	34.9
Corporate Franchise	1	2.3
Miscellaneous	6	14.0
Total*	43	100.0

*Some cases involve more than one type of tax.

D. Tribunal Disposition of ALJ Determinations:

During the state fiscal year 2008-2009, the Tribunal issued 36 decisions reviewing determinations of Administrative Law Judges. Of that total:

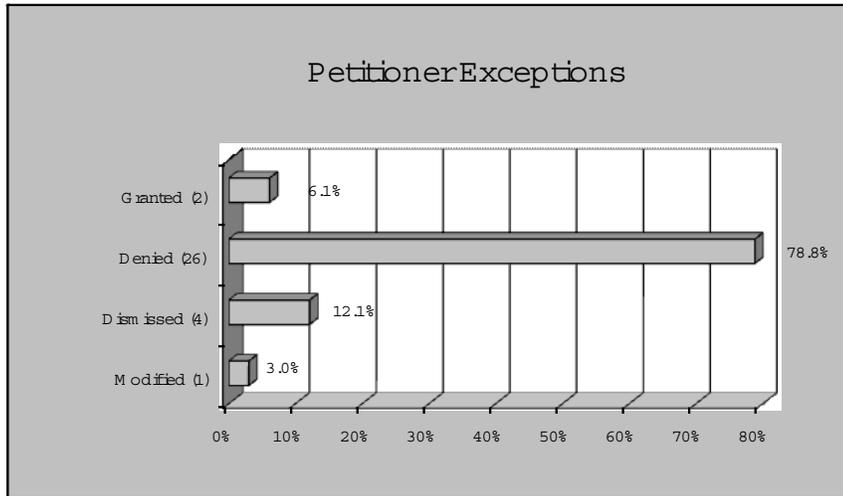
- 31 decisions (86.1%) affirmed the determination of the Administrative Law Judge.
- 2 decisions (5.6%) reversed the determination of the Administrative Law Judge.
- 3 decisions (8.3%) modified the determination of the Administrative Law Judge.



E. Tribunal Disposition of Petitioner Exceptions:

During the state fiscal year 2008-2009, the Tribunal rendered 33* decisions with respect to exceptions filed by Petitioners. Of that total:

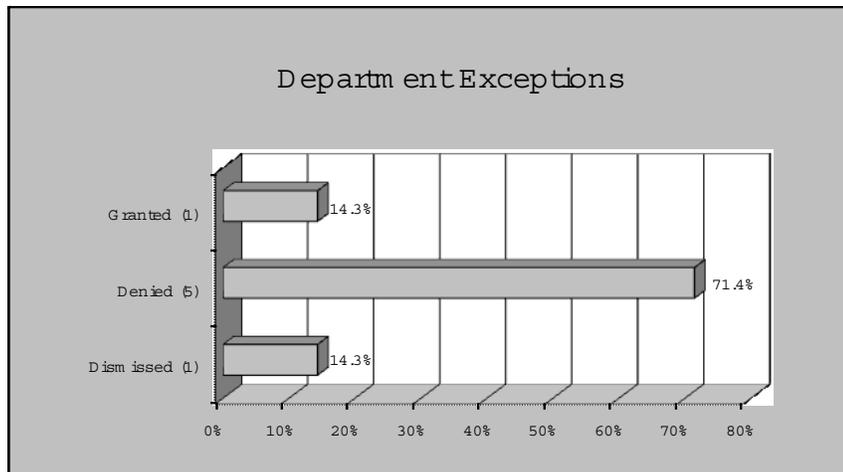
- 2 decisions (6.1%) granted Petitioner's exception.
- 26 decisions (78.8%) denied Petitioner's exception.
- 4 decisions (12.1%) dismissed Petitioner's exception due to lack of jurisdiction.
- 1 decision (3%) modified Petitioner's exception.



F. Tribunal Disposition of Department Exceptions:

During the state fiscal year 2008-2009, the Tribunal rendered 7* decisions with respect to exceptions filed by the Department.

- 1 decision (14.3%) granted Division's exception.
- 5 decisions (71.4%) denied Division's exception.
- 1 decision (14.3%) dismissed Division's exception as moot.



*Four decisions rendered by the Tribunal involved cases in which dual exceptions were filed.

G. Tribunal Disposition of Oral Argument Requests:

During the state fiscal year 2008-2009, the Tribunal received 28 requests for oral argument and granted it in 22 cases (78.6%).

H. Judicial Review:

During state fiscal year 2008-2009, 10 Tribunal decisions were subject to judicial review as provided in Article 78 of the New York's Civil Practice Law and Rules.

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