

The Advantages of Independent State Tax Tribunals

by Bruce Ely, and Judges Martha Wentworth, Cade Cole, and Bill Thompson

The following is an edited transcript of a discussion at a May 8 meeting of the American Bar Association Section of Taxation's State and Local Taxes Committee in Washington. Bruce Ely, a partner at Bradley Arant Boult Cummings LLP, Birmingham, Alabama, led a panel titled "The State of State Tax Courts." The panel included Judge Martha Wentworth of Indiana, Alabama Tax Tribunal Chief Judge Bill Thompson, and Judge Cade Cole of the Louisiana Board of Tax Appeals.

The session included discussion of the history of the tax tribunals in each judge's state, how to best argue a tax case in state court, and the advantages of having an independent tax tribunal.

Bruce Ely: You will notice in the handouts the COST [Council On State Taxation] Scorecard. This scorecard is quite important to a lot of judges and a lot of legislators. I have used this to our benefit in Alabama, and it does seem to influence legislators. It certainly affects commissioners of revenue, sometimes positively, sometimes negatively. But this is a template that COST imposes, and it's consistent with the ABA Model State Tax Tribunal Act. And I praise Craig Fields and Gar Allen and a number of others who worked on the ABA Model Act for a number of years.

There are extra copies on the table along with the AICPA [American Institute of Certified Public Accountants] State and Local Tax Resource Panel's tax tribunal chart. The AICPA, of course, is also focused on whether CPAs can practice before the various state tax tribunals. But it's a good list of the states with some sort of tax tribunal and recent state efforts, so I commend it to your reading. As we note, there are six judicial branch tax courts, including Indiana, and then — and I'll have to confirm my numbers here — I think there are about 26 executive branch tribunals, of which both the Alabama Tax Tribunal and the Louisiana Board of Tax Appeals (BTA) are included.

There are a number of states that are trying hard. I appreciate Mike Parker's efforts. They've at least gotten rid of "pay to play" in Arkansas. When is that change effective, Mike?

Mike Parker: October 1.

Ely: October 1 of this year. Good deal. Bob Mahon, tell us what's going on in Washington with their tax tribunal bill?

Bob Mahon: Washington is trying to pass a bill creating a tax court inside of our state's Court of Appeals, which is an odd arrangement. It got through our Senate. It got held up in the House. Democrats are fans, and it's going to get discussed as part of a budget package, but I don't think anybody's holding their breath for passage this year.

Ely: Well, we'll try again next year. Iowa has an effort as well, although they are running in reverse. The Iowa bill would get rid of their Board of Tax Appeals and allow appeals to be filed with the revenue commissioner. That doesn't give me a very warm, fuzzy feeling about independence.

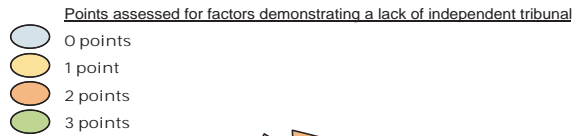
But there are a number of states moving in the right direction. Again, we are commending the ABA Model Act to each of those states as being the pattern, and I hope that those of you who are practicing in states that don't have an independent tax tribunal will work to create one. We're now over the tipping point, I think, in terms of the number of states that have adopted these. For the record, the AICPA chart points out there are 16 states that do not have an independent tax tribunal: Arkansas, California, Colorado, Florida, Maine, Nebraska, Nevada, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, and Washington. We don't want to put your state in the Paul Frankel Hall of Shame, so we do ask you to please advocate for the ABA Model Act when you have the opportunity.

Washington is trying to pass a bill creating a tax court inside of our state's Court of Appeals, which is an odd arrangement. I don't think anybody's holding their breath for passage this year.

All right, next, let's turn to our panelists to talk a bit about the history of their respective tax tribunals, how they came about, their jurisdiction, the types of tax appeals they hear, and where do the appeals both to them and from them lie. Judge Wentworth?

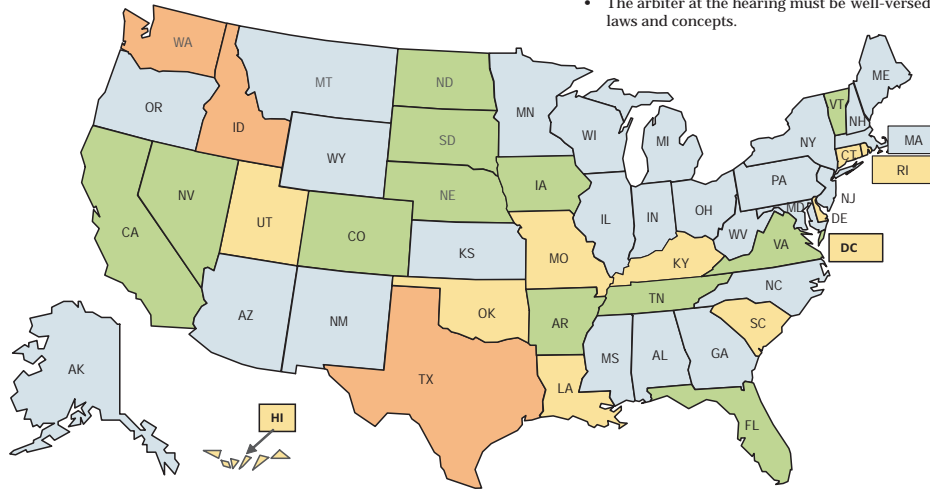
Martha Wentworth: Yes. Thanks for having me. The Indiana Tax Court was formed by the legislature and went online July 1, 1986. It was formed in response to the situation that I think is common in most states before they get some sort of independent tribunal: that tax appeals —

COST Administrative Scorecard — Independent Dispute Forums (May 2015)



Elements of an effective and independent state tax appeals process considered:

- The appeals forum must be truly independent;
- Taxpayers must not be forced to pay or post a bond prior to an independent hearing and resolution of a dispute;
- The record for further appeals must be established before an independent body; and
- The arbiter at the hearing must be well-versed in the intricacies of state tax laws and concepts.



property tax, income tax, sales, all of those types of appeals — would first receive an administrative review, then the appeal would lie in a trial court of general jurisdiction.

The trial court with jurisdiction was generally where the property or the taxpayer was located, but most trial courts didn't like tax cases. Trial court judges weren't experts in the tax area, and many litigants would try to forum shop for the judges that seemed more sympathetic to taxpayers. If an appeal was taken from the trial court, it would go to the Court of Appeals. There were 12 judges on the Court of Appeals who sat in panels of three by district, and you could choose a trial court with an eye to getting a more favorable Court of Appeals district panel. As a result, there were competing precedential decisions on similar facts, which could take 10 to 15 years to be resolved by the Indiana Supreme Court setting one statewide precedent.

To prevent forum shopping, create earlier precedent, and provide independent tax expertise, the legislature formed the Indiana Tax Court to review tax determinations by the tax administrative agencies. At the time the Tax Court was formed, there were two tax administrative agencies that reviewed all tax appeals. Neither was independent of the agency administering taxes, but now one executive branch agency that is independent of the tax administrator hears most property tax appeals before coming to the Tax Court. The Department of Revenue still hears administrative protests in house, however, before an appeal can be made to the Tax Court.

Unique on this panel, the Indiana Tax Court is a judicial appellate court that has two faces: It hears Department of Revenue cases, sales and use taxes, income taxes, and, all told, 44 different taxes after a protest is heard in an informal administrative hearing. Department of Revenue appeals are heard by the Tax Court *de novo*, similar to a trial court. An appeal from the Tax Court is made directly to the Indiana Supreme Court, which has the discretion to grant or deny review. At the time the Tax Court was formed, appeals from the Tax Court were mandatory, but they did not want to review all the tax cases, so they made it discretionary.

To prevent forum shopping, create earlier precedent, and provide independent tax expertise, the legislature formed the Indiana Tax Court to review tax determinations by the tax administrative agencies.

On the property tax side, an appeal was formerly taken from the state Board of Tax Review — the administrator of all Indiana property taxes. In 2002 that agency was separated into two agencies: the Indiana Board of Tax Review, which is now independent of the tax administrator, and as its sole purpose, hears most of the administrative appeals of property taxes; and the Department of Local Government Finance, which creates property tax policy, administers property taxes, and hears certain property tax appeals. An

appeal from the decision of either agency is heard as a record review — as an appellate court. Again, a direct appeal from the Tax Court lies with the Indiana Supreme Court at its discretion. So I hear all tax cases regardless of type, the property tax cases as an appellate court and the Department of Revenue cases *de novo*, like a trial court. Also, I hear appeals of every tax type.

Ely: Judge Cole?

Cade Cole: Louisiana enacted an income tax in 1934 and by 1937 needed a board of tax appeals. So the Louisiana Board of Tax Appeals existed in some form going back for a long time. There were some deficiencies in it. The biggest deficiencies were the fact that we have an extremely complicated and comparatively confrontational system of local sales tax administration, and there was no appeal in that system. You had to pay under protest the full amount of whatever they said you owed and then sue them in their home parish to try to get your money back. So it created a bifurcated system that taxpayers didn't like very much, where your state appeal was to the BTA while the local appeal was not.

We had a unique system where the department can sue you on a proposed assessment before issuing you an assessment.

We fixed that. We brought all of the local sales tax matters in, and I hear those by myself. The rest of the board members are required to be board-certified tax lawyers, or one of them can be a retired judge, but anyway that's what we have now: a retired judge and two board-certified tax lawyers. We sit as a panel of three to hear Department of Revenue and Department of the Treasury disputes, and then I hear all of the local cases by myself. That was a function of the [2014] legislation.

We are a tribunal of record. You make the record before us and don't have to have a hearing at the administrative level with the department or local collector. The state supreme court has said we can even hear class actions.

We do hear the matters *de novo*. When we are done with a case, we write an opinion, and the appeal is from us to the state's circuit courts of appeal, which we have five, and the respective court of appeal will hear it just like a case that would come from a general trial court.

The record and judgment from the BTA is treated like it would if the case came up from a general trial court. The appellate court has to give us manifest error deference on the facts and is limited to the record made before us.

When the COST Scorecard was up, we were still being assessed with one point. The reason for that is we had a unique system where the department can sue you on a proposed assessment before issuing you an assessment. And so that prevents you from accessing the BTA. If you don't have an assessment, you can't come to us, and so that kind of

is a way of locking you out by preemptively suing you. So that bill at issue, HB 338, which should be law by July 1 [HB 338 became Act 210 of 2015], will stop that and help fix that practice. So that's kind of where we are.

Ely: Judge Thompson?

Bill Thompson: Thank you. My history as a judge goes back to 1983. Before then I was assistant counsel for the Department of Revenue. The Alabama Legislature passed the Administrative Procedures Act (APA) effective in October 1983, which requires a government agency to have contested case hearings. I got appointed at the time. I was 32 years old, and for years after that I used to hear that I was too young to be a judge. I don't hear that any more. But the APA is very loosely drafted; it doesn't set any procedures for how you hold these hearings. So I took it upon myself to establish what I thought were reasonable procedures. The only flaw with being an administrative law judge under the APA was that all of my orders were recommended orders. So if I had a hearing and issued an order, the commissioner of revenue could just insert a "not" at the end and reverse it.

In the late '80s and early '90s, Bruce and I were on a committee that I chaired that was tasked with drafting a Taxpayers' Bill of Rights and a Uniform Revenue Procedures Act. We worked at it for three years, and we passed the Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act in '92, and it was passed unanimously by the Legislature. And because I helped draft it, the act included the same procedures that I had been following for the prior nine years because I thought they worked, and it did other things. One of the most important things it did was to make my orders final. The commissioner of revenue could not thereafter change it. So if a party didn't like the outcome, the department could appeal, or the taxpayer could appeal to the next level. Shortly after '92, Bruce and I and others started doing work to get an independent tax court. We tried for how many years. Twenty?

If you had a local business that got audited by a city or county, maybe the county attorney would help the assessment division in setting up the assessment, and then if the taxpayer appealed, it would be the county attorney who heard the appeal. I didn't think that was very fair. It was clearly a lack of due process.

Ely: Fifteen years?

Thompson: Fifteen, maybe. And it finally passed this past year. And effective October 1, 2014, I became the Tax Tribunal's chief judge. Again, I helped write that statute, so I put in there about four different times that I would be appointed [the chief judge] after it got set up.

Ely: And we were still worried. I'm sorry — just joking.

Thompson: The two big things that the Tax Tribunal act did was that it took me out from under the revenue department. And Alabama, like Louisiana, is unusual because all of the local jurisdictions can be self-administered. The revenue department administers some of them, but most of them are self-administered. So if you had a local business that got audited by a city or county, maybe the county attorney would help the assessment division in setting up the assessment, and then if the taxpayer appealed, it would be the county attorney who heard the appeal. I didn't think that was very fair. It was clearly a lack of due process. So what the act did is it allows local jurisdictions to opt out, but otherwise requires the local jurisdiction to appeal a local assessment to the Tax Tribunal. And because of the opt-out provision, it was expected that of the 500 local jurisdictions in Alabama, maybe half of them would opt out. We had 12 opt out.

Oftentimes if we appeal Judge Thompson's ruling, the circuit court judge goes, 'Well, what am I supposed to do? This guy knows this stuff better than I do. I'll just affirm.'

And I didn't know how many local appeals I would get. I figured I would get 20 or 30 a month. We've had five in six months. And the good thing about it, I know some people who work at the private auditing firms that represent these self-administered jurisdictions. They've told me that they usually had 20 to 30 or 40 appeals a year, but that now that the appeal goes to the tribunal, they just try their best to settle a case. They don't want to have to go to the tribunal, which is a good thing. I think they were putting a lot of pressure on the local business people to pay the full assessment, so being more amenable to settling is a good thing. All taxes are within the jurisdiction of the tribunal, except for property taxes. Basically, the tribunal has jurisdiction over any action or inaction by the department that a taxpayer disputes. So it could be a disallowed license or any kind of licensing procedure.

And an unusual thing the revenue department does is administer all motor vehicle registrations. So those are appealed to me, too, and those are some of the most contentious cases I have. I'll get an appeal about the title for a 1982 Toyota Tercel. There will be 15 people on one side and 15 on the other. They're all family members. And when I get in there, they yell at each other. "Daddy gave me the car." "Well, I paid for it. I should get it." I mean, it's back and forth.

Ely: And he has no bailiff. I can certify that.

Thompson: No. Unless I can get the court reporter to break up the fight.

It is a very simple procedure. You file a complaint. The department files an answer. We go to a hearing, unless we can settle it or the parties settle it. A lot of times I'll see what

the issue is and enter a preliminary order to try to get them to provide records or take some other action as appropriate under the circumstances. I get 1,000 to 1,200 cases a year. I probably have 300 to 400 actual hearings. The rest of them are settled in one way or the other. And the appeal is to circuit court, but the record is established at my level.

Ely: It is a trial *de novo*, but your rulings are presumed prima facie correct, which sometimes confuses certain circuit judges?

Thompson: Yes. The law says it's appealed on the record, and the parties can agree to have the record at my level submitted. And most of them do. Now, I've had a couple of cases where I've ruled for the state, but I've said in the order that if this fact was in the record, then the taxpayer would win. And, of course, you know what happens next. They appeal to circuit court, and that fact gets introduced. But that's ok, too.

Ely: And let me tell you, the judge is very careful about his affirmance ratio. I don't know that any other judge really watches that closely, but I would suspect so. He has a running list, I think, of the few cases where he's been reversed, and he likes to keep that list short. I tell our clients that if you go to Judge Thompson, that is probably where you're going to stop, win or lose, because, as we discussed this morning at breakfast, the circuit judges usually don't want these cases. They are very happy with Judge Wentworth, Judge Cole, and Judge Thompson taking all of the tax cases they want.

So oftentimes if we appeal Judge Thompson's ruling, the circuit court judge goes, "Well, what am I supposed to do? This guy knows this stuff better than I do. I'll just affirm." And oftentimes that's what happens. It's a one-page ruling that simply says: "This court hereby adopts the attached Tribunal ruling." Affirmed. Boom.

Thompson: And I'm proud to say that Bruce has had a number of cases with me and he's won just a little bit more than he's lost, but he's never gotten me reversed.

Ely: I think I've had you reversed once.

Thompson: You name the case?

Ely: You didn't see my fingerprints on all of those cases.

Thompson: Well, I've had about 23,000 cases, and I've had about 14 cases appealed and reversed by the appellate courts, and I was telling them at breakfast, I think everybody's wrong sometimes, including the appellate courts.

Ely: But the other major change is we now have an independent appeal route for local tax assessments. These days the local jurisdictions are as revenue hungry as the states.

Mahon: What is the "pay to play" situation in each of your jurisdictions? Is prepayment required?

Wentworth: In Indiana, you don't have to pay to play except in some of the property tax cases, because the appeal period is so short you've already paid before you can get it appealed, and sometimes it's because homeowners have exemption issues but the mortgagor has already paid the tax.

The bank pays their taxes before they can appeal either their mortgage exemption or their homestead exemption.

Cole: The reform we just completed was to generally solve pay to play. There's a limited exception with local sales tax if you failed to file a return unless you were either an out-of-state dealer or are a filer who paid the wrong parish. The general rule is that you have a pre-payment appeal, there are some limited exceptions and then there are exceptions to the exceptions, but we have generally solved pay to play. The idea was it was the price of getting what we were doing last year, and it has been very narrowly constructed, and I don't believe it's been a problem to date. Jaye [Calhoun] may feel differently, but it's now a very narrow pay to play. We took away almost all of it. We gave the local cases a new prepayment appeal to the BTA, so they can now access an independent, professionally qualified tax tribunal.

These days the local jurisdictions are as revenue hungry as the states.

Thompson: Never had to prepay at my level. You don't have to do that. And I think that makes it very attractive, especially for low-income taxpayers to come to the tribunal.

Wentworth: In Indiana, we did have a situation where in sales and use tax, if a retailer wanted a refund because they overpaid, they couldn't get it, unless they proved they refunded all of the money to the customers, which is usually impossible to do. But one case came before me, and I think I took care of that, finding that the statutory language only requires the customers be paid back after they win, rather than before they even bring the appeal.

Cole: And I wanted to make one comment on Bruce's point about the locals. We still have contingency fee attorneys at the local level and contract auditors. And although Judge Thompson mentioned they've only had five [local tax appeals] since June, I've gotten about 160 local cases worth about \$257 million. So there's definitely room for disputes at the local level in our state. I think we win the race for worst, if that's the comparison.

Glenn Newman: Can the state appeal your decision? Or can both sides appeal?

Thompson: Yes [both sides can appeal].

Wentworth: Yes.

Cole: Yes.

Wentworth: It's new in property tax, but both sides can now appeal the administrative determination to the Tax Court.

Ely: I appreciate Janette Lohman's and Jaye Calhoun's assistance with the questions that we've put together. So we're going to move on to Question 1. I'm going to again start with Judge Wentworth. What should the role of the state be in tax litigation? Is the state supposed to seek the correct result, or is the revenue department's lawyer supposed to defend his or her client zealously and take advan-

tage of every procedural obstacle to ensure victory, even if the department agrees that the taxpayer's claim has merit?

Wentworth: This is a serious issue in Indiana. Our attorney general's tax section has for the last decade or so taken every opportunity to argue procedural problems that often postpone getting to the merits of a case and make it more expensive to bring a case. The Indiana Supreme Court is reviewing the Tax Court right now to, among other things, see what can be done to shorten the time it takes to issue a decision. One of the big problems is that discovery in Department of Revenue cases is often abused in the tax arena where an audit has already occurred and revealed all the facts to the state. The state therefore usually already knows everything or almost everything. There might be some small discovery issues, but it seems that this is being abused. Also, the attorney general does not define its role as having a traditional attorney-client relationship with the tax agencies it represents.

So decisions usually left to the client are instead made by the attorney: the attorney general. Indeed, I have been told that direct requests by the commissioner of the Department of Revenue have been ignored. As a result, whenever a taxpayer wins at the Tax Court, it is fairly certain that it will be appealed to the supreme court. You can count on one hand the number of cases where a taxpayer has won, certainly since I've been on the bench, but probably in the last decade — where it was not appealed by the state. The legislature has considered enacting a law that requires the attorney general to adhere to the normal attorney-client relationship where the client controls decisions such as when to appeal or not to appeal, but it has been defeated the last two legislatures.

Ely: Judge Cole, what's the Louisiana Department of Revenue's current thought about tax litigation?

Cole: I think it's very similar. Now, I will say this, the secretary that we have now, I believe, is very business friendly and has a reputation for that. If you can get to him, you will get a very fair hearing.

One of the big problems is that discovery in Department of Revenue cases is often abused in the tax arena where an audit has already occurred and revealed all the facts to the state.

However, the department's litigation division can sometimes be quite ardent, and the private attorneys used by the locals are often referred to as aggressive.

And we just talked at breakfast how most of the fights lately have been about procedure. The one issue that we take great umbrage to is when a party tries to use procedure as an artifice to defeat our jurisdiction. The case I submitted in the materials was related to that, where they didn't like the answer that we gave them on a very, very technical point about the refund statute, where we felt the [Louisiana]

Supreme Court had clearly resolved it, so they decided they would file a declaratory judgment action in the district [general trial] court in order to try to end run around that. And to the credit of the First Circuit and the Louisiana Supreme Court, they've been very helpful at maintaining our jurisdiction and kind of punching them back in the nose about attacks on jurisdiction.

In the *KCS* decision, they specifically said that this is clearly an end run around the exclusive jurisdiction of the Board of Tax Appeals, and we're not going to put up with it.¹ And so it has been a problem.

The second thing I would say in response to the part of the question that relates to how do you get to the right answer instead of the procedural technicality. Sometimes I might try to bring that out in a question, asking what do you think about a particular issue? It is hard, because we are supposed to be an impartial court of record and our hands are a little bit tied.

The department wanted to show up and just talk without having done any due diligence, without having really gone through the records. It was the most bizarre thing I've ever seen.

One instance where it was a big problem lately was in a case we had with perhaps the worst lawyering I've ever seen, and it was a lot of money. It was so big that it seemed the department's attorney really didn't want to do the mountain of work. They just left it for the taxpayer's side to dump a couple of thousand pages of documents on us. And the department wanted to show up and just talk about it, without having done any due diligence, without having really gone through the records. It was the most bizarre thing I've ever seen. That was very hard on us, because we obviously don't have the resources to do their work for them. So we didn't. I don't know if they liked the result of that.

Thompson: What was it that Lincoln once said about government by the people, for the people, of the people? Not necessarily in that order but, you know, taxpayers are the people. So the government ought to respect people and their positions.

So I think the revenue department ought to do the right thing by taxpayers. And most of the time it does. Especially people in the operating divisions. They'll have a case, and they'll be working it, and the taxpayer will come up with something. And sometimes they'll bend over backwards to give the taxpayer a break, and it will never get to me. But if it ever gets to the Legal Division, they are more hard-nosed and think they're supposed to win every case. In some cases

it doesn't matter what evidence they see. They will use procedural tactics to win the case, which I don't think is right. But by and large the department lawyers also try and do the right thing.

I just recently decided a case that I will tell you about. There's a facility up in North Alabama that hosts weddings. They have a beautiful 100-acre piece of property. They have a wedding chapel. They have a reception area. They have after-dinner rehearsal facilities. They've been in business for years, and it's a lodgings tax case. And of course they've never had to pay a lodgings tax because they didn't have transients staying overnight. In January 2013, though, they build three cabins. They call them "chalets," but there's no such thing in Alabama.

Ely: Having been to a wedding there, I can certify they are *not* chalets.

Thompson: Having lived in Alabama 64 years, I know that, too. And the business got a lodgings tax license, and they started paying lodgings tax on the proceeds from these three shacks. The department audited them, and the department has a regulation that says if a business has a facility that is subject to lodgings tax, where transients stay overnight, then all of the gross proceeds of the business are subject to the lodgings tax.

And I looked at that, and I said that doesn't make sense. A wedding chapel shouldn't be subject to a lodgings tax. Well, the guy that owns the business appealed pro se. I set a hearing. He didn't show up. And the department had put the [lodgings tax] regulation in their answer, and normally when a taxpayer doesn't show up, I still get the department just to basically for the record tell me what the case is about. And they say, "Well, we've got this regulation, and this is what it says."

Well, I strike the regulation and void the assessment. And they, of course, apply for a rehearing and say I'm being an advocate for the taxpayer. My response is that I'm just coming to the right decision. I mean, you know, if I didn't strike the assessment, he's going to be paying tax he didn't owe. I just think that's wrong. So I think I do have the authority to void a department regulation. They've appealed.

By and large the department lawyers try and do the right thing.

Ely: Well, that case is on appeal to Circuit Court, but it is also interesting from a national perspective. Judge Thompson can exegete on what his authority is under the Tax Tribunal Act and what any judge should do in a situation like that, even if the taxpayer is pro se, and maybe even more so, to arrive at the right answer. This ruling illustrates the question of what should be the role of the Department of Revenue, particularly the Legal Division or Attorney General's Office, in prosecuting a case when it's really not about the substantive ruling. They just didn't like the fact that the

¹2014 WL 1285742 (La. App. 1 Cir. 3/31/14).

judge ruled against them without the taxpayer having shown up at the hearing or even filed a brief.

Thompson: They didn't dispute that he doesn't owe the tax. They just appealed on procedural grounds.

Mark Sommer: This question follows up on that. You know, as a member of the bar appearing before the tax tribunal, we have a duty to zealously represent our client. [But] we have a duty to the tribunal. It has limitations, certainly. We have a duty to zealously represent our client's interest. The government has these same burdens and obligations, but they also have a burden and obligation to do justice and protect the system. So how do you reconcile the observations you each just made? Because we see that [conflict] more and more. Again, I don't know the circumstances or the descriptions each of you gave, and it varies greatly from state to state. It's not just about winning from the government's side. It's about doing justice and preserving the system. So comments on that, if you would?

Sometimes the tax administrator goes too far.

Thompson: If the state attorney doesn't do the right thing, it poisons the state's relationship with the private bar.

Wentworth: I think the problem is between the Department of Revenue or the administrative agency and its role in it because the attorney general in our state, it's usually — not always any more — the attorney general that is the attorney for the state agency. And attorneys all, even government attorneys, should zealously litigate a case on the point of view or policy position of the agency even if the taxpayers disagree with the government policy. That is perfectly appropriate to litigate; that's our system of justice, to have two sides equally litigate and then the court decides. I have no problem with that.

The problem is, I think, that sometimes the tax administrator goes too far. Like in *Stone Bridge*, where the regulation went too far. It went beyond what was intended to be taxed. Similarly, in the *Lowe's* case, which I can talk about only very narrowly because it's under appeal to the supreme court, I invalidated a Department of Revenue regulation. Who knows what will happen to that, but the case stated that the regulation created something new that the statute it was interpreting did not include and so it was invalidated. The case also found against the state on general sales and use tax law, so it was decided on two independent grounds. Nonetheless, I think that it's our job as the arbiter of the parties' argument to do the right thing. It's our job to apply the law as it's written and not let anybody go beyond that.

Cole: I don't really have anything to add except on the point of regulations since we're bringing up regulations. We take the view that the regulations — and the [Louisiana] Supreme Court upheld this — that regulations are binding on the department but not on us.

If the law is in conflict with a regulation, then we follow the law. That is not to say that we disregard regulations just because we don't like them, but it is fair to say we look through to the law when it is in the taxpayers' favor. However, we do not allow [the Department of Revenue] to get relief from its own regulations; that would be unfair since it promulgated them.

This doctrine allows relief to taxpayers, since they are not involved in making the regulations, but they can reasonably expect protection when relying upon one.

Ely: I like it. All right, we're going to move on to Judge Wentworth's slides. I like them so much, because they really answer a lot of the questions that you [the audience] posed to us regarding what the judges like, what they don't like, how to prepare a case, and those kinds of things. So let's move over to Judge Wentworth. Judge, will you set up these slides for us?

Wentworth: Sure. I do a lot of speaking. I'm the only Tax Court judge in Indiana, so I try to go to various locations around the state and interest young attorneys and young law students in practicing state tax law. In addition, I hope to influence how attorneys behave in a court. I was a practitioner for 20 years, so I probably did some of the things that I don't like other people doing right now. But I've been editing this presentation on how to be persuasive to a judge, and I will continue to edit it as I see things that I like and things that I don't like. So this is my advice to practitioners about how to best persuade a judge, both in writing and orally.

Because the judge is not the advocate, it is the role of the litigating attorney to provide the judge with the tools needed to find in your favor. Therefore, the first element of persuasive advocacy is to give the judge the tools — like case authority, fact scenarios, and equitable rationale such as laches or something else — that the judge can hang her hat on. You cannot just hope that a judge will find in your favor on her own; the judge is not the advocate.

Because the judge is not the advocate, it is the role of the litigating attorney to provide the judge with the tools needed to find in your favor.

It improves your persuasiveness when you are brief. When I first took the bench, the first brief I read was about 130 pages long. My court had no page limits then. It took me a week to wade through the whole record. I found that when attorneys are brief, however, the arguments are much more organized. You can't be James Joyce and just write things as they come into your head, and believe me — that 130-page brief was James Joyce.

Ely: Judge, let me stop you here and bring in the other two judges. You know, there are two ways to approach this. We [practitioners] can file a very skeletal notice of appeal or complaint with you and then file a thorough brief either at

the hearing, after the hearing, or maybe as a pre-hearing brief. Judge Wentworth, Judge Cole, and Judge Thompson, what do you each favor?

Wentworth: Well, a Department of Revenue case is initiated by the filing of a petition, then we have an attorney conference to set up a briefing schedule where first the petitioner files a brief, then the respondent files a brief, and then the petitioner files a reply brief. The trial or hearing is held thereafter.

Cole: Yeah, we follow that model. I mean generally you have to be careful not to lose something by not raising it, but I can tell you in a 130-page brief, the length greatly decreases its chances of being properly read. I say that not just from what I've been doing as a tax judge, but you know, I recall my time as a law clerk at the Louisiana Supreme Court, where you are reading 60, 70 writ applications a week. The ones that make their point in five pages or less are a lot more likely to make their point.

We struggle with people who raise 10 grounds for an exemption, 10 bites at the apple for why something is not taxable. You prepare for all of that, then you show up at the hearing, and they really only want to talk about one because only one has any merit. I would say that makes it much more difficult to properly prepare for the case, and makes it more difficult on the litigator to break through; it hurts the credibility of their good argument to make nine that grasp at straws. They probably should have focused mostly on the one winning argument the whole time. So that would be my comment.

The more the judge knows about your argument at the hearing, the better he'll understand it.

Ely: Judge Thompson?

Thompson: If I got a 130-page brief, it would become a true paperweight.

That's about as far as it would get. I like Bruce's method. When Bruce files a notice of appeal, he will elaborate and cite some law. Most people don't. And I think it's an effective tool, especially if it's a complicated case involving legal issues, for the parties to file pre-hearing briefs. The more the judge knows about your argument at the hearing, the better he'll understand it. The better he'll understand the witnesses and the points they're trying to make, and I think it would be very beneficial. And I can't emphasize enough the preciseness with which you need to write. Active voice. And don't just put a fact in the brief because it happens to be a fact that came out at the hearing. If it's not relevant to your position, take it out.

There's a great book called *The Elements of Legal Style* by Bryan Garner. You know, I mean little stuff like instead of saying "prior to," say "before." Two words into one. And work on that consistently, because when the judge reads something that's concise and well-written, he says gosh, this

guy may have a good argument. I understand it, instead of saying what the heck is he trying to say?

Ely: And he doesn't like "thereto" and "thereunder," either. I would caution you not to use Latin or long words that are passive. I've learned the hard way.

Thompson: And I think it's in Judge Wentworth's slides up here, but if you have a bad argument but you know the state's going to raise it or something that is a good argument for the state, address it. Take it head on and say, "You know, I understand this is the argument," but try to deflect it.

Cole: I did have one follow-up. Sometimes your client is too invested in the case to be a good witness. So, please spend extra time preparing them as a witness. Perhaps your client is a CFO or CPA who needs to understand that if the law says $2 + 2 = 5$, then that means it equals 5, even if their accounting book tells them something different. I'd do a great deal of work preparing them as a witness, because I can tell you that many cases unravel on a witness's insistence on spending their time all on something that has nothing to do with what the case is about. They are not really answering your questions; they are providing their own narration. I see that pretty commonly, and it makes it difficult to get to the relevant facts in the case.

Wentworth: The next slide recommends avoiding the use of hyperbole. Using provocative adjectives and adverbs, such as "the taxpayer's corrupt intent" or "that auditor should be run out of town on a rail or tarred and feathered for making the assessment," does you no good. This is very distracting. We spend time either laughing at it or trying to ignore it — and neither reaction improves the persuasiveness of your argument. You might use it in a last sentence or something, but if you've peppered this type of language throughout your brief, it's just like using "prior to" instead of "before"; it's just distracting the judge from understanding the argument.

Thompson: Don't use words that aren't used in common language, big words, so to speak. I caught myself one time writing an order and I was going to use the word "erudite," and I realized I wasn't sure how to spell it, so I just said "smart."

Wentworth: Judge Thompson just made this next point. In fact, I think this is the most important element of persuasion in my presentation: When you are making your argument, you truly believe you have the strongest position; nonetheless, all positions have at least one weakness that the opposing party will no doubt try to exploit. My advice is to be the first to raise the weakness in your case so that you can characterize it more favorably right out of the gate — why it may seem contrary to your position but it really supports your position because . . . or why this weakness is merely incidental and should not be given weight. Thus, the elephant in the room is out on the table on your terms — not the terms of opposing counsel. Also, it leads the judge away from the weakness, if, God forbid, the judge is the one that discovers it without any argument to assist her thinking.

Thompson: You tell the judge, “I’m not scared of it, because we’ll win anyway.”

Wentworth: It gives the judge tools to see it your way. Don’t sit down and just have shown the best of your argument and let the other guy get up there and say, “Well, judge, this is a horrendous hole in their argument.” If this happens, the opposing party gets first crack at getting the judge to agree with them, rather than you influencing the judge’s thinking first. I think this is a huge benefit to persuasiveness with the judge.

Cole: I think that’s right. It is especially true with us, because for the state cases, we sit as a panel of three, and we’ve also got a couple of staff attorneys. I strongly recommend people to raise it early because, even though we’re not generally supposed to consider things that nobody raised, there have been instances where nobody raised a point — but you’ve got five of us lawyers sitting back and looking at it and talking about it. In the end, somebody is going to think of it, and you would have been a lot better off if you’d addressed it, explained it, and if we’d been inoculated against it along the way.

Wentworth: The next slide has an important point as well. When I prepare to hear a motion or an oral argument, I will read every piece of paper that has been filed: all the briefs and the record if it’s a record review. I’ll have read every single thing, and I’ll have read most of the key authority cited, trying to understand each party’s argument. And if I don’t understand them, I am prepared with lots of questions to try to understand each argument. If I don’t understand an advocate’s rationale, the chances of my agreeing with it are slim. Many attorneys stand up before the judge and merely read from their brief. I’ve already read the brief. What I want to know, I ask, so questions are your friends.

Ely: Sounds like Justice Thomas? Sorry . . .

Wentworth: I want to know what I need to understand. So, my advice is to listen to your judge’s questions. Be prepared. Know your case better than the judge does. I’ll often ask questions thinking I know how counsel is going to answer, and they won’t have a clue how to answer. Sometimes it seems that the attorney does not remember their own case or has not made it their own before coming to court. Good lawyers, therefore, always welcome a judge’s questions because they are a window into what the judge is thinking about your case.

Cole: I always thought it bizarre for counsel to ignore questions. I mean, I remember a couple of instances along the way where you ask a pointed question and the answer is: “Well, judge, I’m going to get to that.” And they then proceed along with their speech.

And then you get to the end of their argument, and you’re thinking, “Well, that’s interesting, but it misses the point.” I think what Judge Wentworth is saying is that the judge’s question will be critical to your case. That’s probably where you should pivot your focus.

Ely: In the remaining five minutes, we have two more questions to cover. So this is going to be the lightning round.

The next one we talked about over breakfast is ADR, alternate dispute resolution, and the judges’ views on how to implement that, or if we should, for example, to resolve a lot of pro se taxpayer appeals and give them a more informal way to resolve their issues. Or maybe the answer is a small claims division? Judge Wentworth, what do you think?

Wentworth: Well, to be brief on this, we have pro se litigants in our court, and all the courts in the state are deluged with unrepresented litigants. As a result, there is a big push to get attorneys to represent low-income pro se litigants. We have used mediation to resolve cases. I’ve had two mediations since I’ve taken the bench, and we have a 50-50 record right now. The problem is that it may take longer if the mediation does not resolve the case. The Tax Court has not used ADR, perhaps because it is a more formal process where the parties give up control.

We are working, however, to get a small claims option to lessen the number of written opinions the court must write. Because Tax Court opinions are precedential and may be appealed to the supreme court, all the opinions are fully written with the full rationale to fulfill the Tax Court’s purpose of expressing the view of the tax expert court. We are considering small claims that would not be precedential or eligible for appeal, no discovery would be allowed, and the decision would be written but without rationale and issued quickly.

Cole: I think ADR could be useful in getting cases settled. It is very frustrating to us to do all of this preparatory work, and then, about three days before trial, the case settles. I’d encourage the revenue department and the tax bar to consider whether ADR would be appropriate about four or five months out. The idea didn’t really ever take off because you couldn’t get to the central decision-makers. The secretary couldn’t put time aside to deal with it properly.

For small cases, we implemented something that I think works well. With the consent of the collector, we can do really small cases over the phone. Almost all those involve someone who has a prescribed claim — you all call that at common law a statute of limitations — so it’s a time-barred claim that you know they’re not going to win anyway, so why make them drive all the way to Baton Rouge to tell them that? And that resolves a lot of cases. We also generally do prescheduled status conferences at 120-day intervals, unless the parties want their case to be on a stay. The status conferences are very helpful at moving cases since it will have the effect of moving the case out of the stack in their office and putting it on the radar of the respective attorneys involved.

Thompson: I probably have 300 to 400 pro se taxpayer appeals a year, and I welcome them. I mean, these are usually good people; it’s usually a small amount of money. They can’t afford an attorney or CPA, and they want their day in court. A lot of them will file a complaint that simply says, “I don’t owe this money.” And you send the appeal to the Legal

Division, and they'll explain why they assessed them. The taxpayer didn't report income, they got IRS information, etc.

And a lot of times, we'll send a preliminary order saying this is why the department assessed you, and a lot of times they don't show up [for the hearing]. Sometimes they do, and I pretty much know on most of them that they're going to owe the money. I travel around the state, so they don't have to go too far. But they just want their day in court, and two hours later they'll tell me, "Well, judge, I guess I owe the money. Thank you for explaining why." And I think that's good.

I mean, I've personally dealt with mortgage companies that have screwed up my account, and I've had to spend three months trying just to get an answer, so I can understand their frustration. So that's a part of my practice, if I can call it that, that I really enjoy. Just giving the taxpayer their day in court.

Newman: We've discussed this at the National Conference of State Tax Judges, over and over. Do you feel it's your role to have two sides presenting issues and you have to pick one or the other, or do you try to get the right answer? I guess it's different in a pro se matter where you have one side that may be sophisticated and the other side that just says, "Why do I owe this?" But I've had practitioners tell me if I don't

Chart of States With and Without State Tax Tribunals (as of April 8, 2015) Prepared by AICPA State and Local Tax Technical Resource Panel

[This chart was prepared by the AICPA State and Local Tax Technical Resource Panel and is current as of April 8, 2015. It is reprinted with permission of the AICPA.] This is an evolving issue, and the particular rules concerning state tax tribunals differ in each state, so taxpayers and practitioners should do their own independent research to verify the current rules.

The first 2 columns of the chart is a list of states that do and do not have a tax adjudication forum that is independent (to some extent) from the DOR and handles appeals of a variety of state taxes, not just property taxes. "No" means that the state does not have an independent forum, "EB" that the independent forum is located in the executive branch, and "JB" that the forum is a regular court whose jurisdiction is limited to tax cases.

The 3rd column of the chart "Allows CPAs authorized to practice in the states" refers to mobility for accountants — including out-of-state CPAs being allowed to represent clients without needing to obtain permission, so a response of Yes means it is automatic, and No means permission is required or it is not allowed.

SUMMARY:

No Tribunal — 17 states do not have tribunals (No) — AR, CA, CO, FL, ME, NE, NV, ND, OK, RI, SD, TN, TX, UT, VT, VA, WA

Tax Tribunal — 34 states (including DC) have some form of tax tribunal/court (28 executive branch (EB) + 6 judicial branch (JB) = 34) (Yes) —

28 EB — AL, AK, DE, DC, GA, ID, IL, IA, KS, KY, LA, MD, MA, MI, MN, MS, MO, MT, NH, NM, NY, NC, OH, PA, SC, WV, WI, WY

6 JB — AZ, CT, HI, FN, NJ, OR

CPA Representation

- Five states, *AL, DC, MS, NM* and *WY* allow CPAs (in state and out of state) full rights to represent taxpayers in all tax matters before an independent tax forum with no additional steps required.
- There are 11 states that allow CPAs (but with limitations or additional steps required) to represent taxpayers in some fashion in an independent tax forum (non-court) in some tax matters.
- These 16 states include (with limitations unless in *italics*): *AL, AK, AZ, DE, DC, GA, IA, MI, MS, NM, NY,*

PA, SC, TX, WV, and *WY*. Some of the limitations include: *AK* (CPAs need to submit power of attorney), *AZ* (limited cases), *DE* (out-of-state CPAs need permission) (though note that Tax Appeals Board and Division of Revenue are both located in Department of Finance), *DC, GA* (enacted April 19, 2012, CPAs can represent only in small claims division), *IA* (CPAs authorized to practice in the state), *LA* (with some limitations on CPAs), *MI* (CPAs can represent in the tax tribunal, not in the claims court), *MS, NY* (NY CPAs allowed, out of state CPAs, and out of state attorneys need special permission), *SC* (tax matters, no unauthorized practice of law), *TX, PA* and *WV* (in-state and out of state CPAs, but there are strong limitations (that is, questioning a witness) against unauthorized practice of law) and *WY*.

- Note that our analysis on CPA representation at a state tax tribunal is based on our research of state legislation and state published guidance and does not include possible restrictions from professional regulatory guidelines, such as *the International Federation of Accountants (IFAC)*, *AICPA*, and *SEC*, which might limit the ability of CPAs to represent clients before certain bodies under various circumstances. Other regulatory rules (e.g., *AICPA, IFAC, SEC*) might supersede/limit the application of the state laws. For example, while the state laws may be the only laws to consider when providing services to a non-restricted (i.e., no-assurance) client, *AICPA, IFAC* and *SEC* independence rules must be considered when working with restricted clients. In general, CPAs must apply the most restrictive independence rules that apply to them in the context of a service offering in determining whether they can perform a certain service.

2015 Enacted legislation — relating to state tax tribunals

NM — (**SB 356**) — enacted the Administrative Hearings Office Act, providing for independent hearing officers and creates a hearing office separate from the Taxation and Revenue Department for administrative hearings. CPAs may represent taxpayers. "A taxpayer may appear at the hearing on the taxpayer's own behalf or may be represented by a bona fide employee, an attorney, a certified public accountant or, with respect only to tax imposed pursuant to the Income Tax Act, a person who is an enrolled agent for federal income tax purposes." It was signed into law on April 7, 2015. NMSCPA supported the bill.

put an issue before your tribunal, I don't want you talking about that. And my feeling is, we're setting precedent, how can you not get the right answer? You know, you don't want to be stuck with some precedent that is based on two [opposing] lawyers deciding they don't want to argue that issue.

Thompson: Glenn, I've had a number of cases over the years with a department attorney and a taxpayer attorney involved, not even pro se. It will be a complex case, and they'll argue A and B on one side and X and Y on the other, and I'm at a disadvantage because I'm the only one there; I don't have anybody to consult with. And I'll look at it, and I'll say, "Well . . . M's the law. And so I'll declare M's the law. You all are wrong. This is the law. This is how it is."

Newman: And however the tax comes out, based on that ruling?

Thompson: [Nodding] Because you come to the right answer. Again, the whole idea of these courts is to come to the right answer.

Wentworth: And if it's facts and they didn't give me sufficient facts, they lose because they didn't bring the right facts. But if it's a legal issue, I'm the arbiter of the law, and so I will come to the right answer.

Cole: I would agree with that. We're bound by the rules of evidence so sometimes you're handcuffed, but in general, on the legal questions, you should be able to get the right answer.

Wentworth: Yes.

Ely: Professor Brunori, last question.

David Brunori: Thank you, Bruce. As Judge Thompson and Judge Wentworth know, I actually hang out with tax court judges once in a while.

Chart of States With and Without State Tax Tribunals (as of April 8, 2015) (continued)

2015 Proposed legislation — relating to state tax tribunals —

IA — (HSB 73) — would repeal the state board of tax review and provide for appeals to go to the Director of Revenue.

KY — (HB 361) — a taxpayer bill of rights bill, taxpayer representative includes any accountant, attorney, tax practitioner, or other person designated in writing by a taxpayer to represent that taxpayer before the department in any matter relating to taxes administered by the department. Kentucky legislature has adjourned without considering the bill.

MO — (H 838) — would allow a tax preparer, enrolled agent, or certified public accountant to represent a client before the Administrative hearing commission in matters relating to an assessment or reassessment of taxes.

MT — (SB 413) — would create a Small Claims Division within the State Tax Appeal Board — CPAs could represent if issue less than \$5,000.

NM — (H 292 and SB 356) — would enact the Administrative Hearings Office Act, providing for independent hearing officers and creates a hearing office separate from the Taxation and Revenue Department for administrative hearings. CPAs may represent taxpayers. "A taxpayer may appear at the hearing on the taxpayer's own behalf or may be represented by a bona fide employee, an attorney, a certified public accountant or, with respect only to tax imposed pursuant to the Income Tax Act, a person who is an enrolled agent for federal income tax purposes." NMSCPA supports the bill.

WA — (SB 5449) — establishes a new tax appeal division in the court of appeals to resolve tax disputes to create an independent tax appeal forum within the judicial branch of government and provides for informal appeals and taxpayer representation by nonlawyers.

2014 Enacted Legislation — 1 bill in 1 state enacted legislation relating to state tax tribunals

AL (HI05 Sub.) — effective 10/1/14, created an independent tax tribunal. Alabama Tax Tribunal (EB) — CPAs (in state and out of state) can represent taxpayers if have written authority or power of attorney. Enacted 3/4/14.

2014 Proposed Legislation in addition to the above enacted legislation, 9 bills in 6 states proposed legislation relating to state tax tribunals —

KS (H 2413) — would make administrative changes to the already existing tribunal — would rename the state court of tax appeals to the state board of tax appeals and deals with removal of members.

MI (S 1039) — would diminish the role of the profession on Michigan's Tax Tribunal. The bill moves the tribunal from the Department of Treasury to the Department of Licensing and Regulatory Affairs. It also revises the membership of the tribunal by deleting a requirement that one seat be held by a CPA and establishes the requirement that all members of the tribunal be attorneys.

MO (H 2250) — would allow a tax preparer, enrolled agent, or certified public accountant to represent his or her client before the Administrative Hearing Commission in matters relating to an assessment or reassessment of tax.

OK (S 392) — would create a State Office of Administrative Tax Hearings (EB), an independent office of administrative tax hearings within the executive branch of government. May be represented by an accountant licensed in the state. May allow an accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a taxpayer for a particular matter.

"Appearances in proceedings conducted by the State Office of Administrative Tax Hearings may be by the taxpayer, by an attorney admitted to practice in this state, including an attorney who is a partner or member of, or is employed by, an accounting or other professional services firm, by an accountant licensed in this state, or by an enrolled agent authorized to practice before the Internal Revenue Service. The State Office of Administrative Tax Hearings may allow any attorney or accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a taxpayer in proceedings before the State Office of Administrative Tax Hearings for a particular matter. In addition, the State Office of Administrative Tax Hearings may promulgate rules permitting a taxpayer to be represented by an officer, employee, partner, or member."

Wentworth: I'll be seeing you again soon.

Brunori: Great. I want to know, and I've heard this from judges in other states, is your tax court adequately funded? And do you have a serious backlog of cases? I'd like to know that.

Wentworth: The budget bill just passed, and I got some much-needed additional funding to give the Tax Court similar resources to other appellate courts, which I believe will take care of a backlog that we've accumulated.

Now it turns out that not everyone defines a backlog the same way. I consider that a backlog is measured from the date I take a case under advisement. At that point, the time to disposition is all on me. Before I took the bench, this time period was about a year. It has grown to just under two years now. This is unacceptable. The way to issue more timely dispositions is to find ways to be more efficient. The output of a court is directly attributable to the resources available, which is why I requested an increase from the legislature to the Tax Court's budget — giving me the ability to hire

Chart of States With and Without State Tax Tribunals (as of April 8, 2015) (continued)

TN (H 961, S 734) — would create the Tennessee Administrative Tax Tribunal — establishing an independent tax tribunal within the executive branch of government (EB). May be represented by an accountant licensed in the state. May allow an accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a taxpayer for a particular matter.

“SECTION 18. (a) Appearances in proceedings conducted by the tax tribunal may be by the taxpayer, by an attorney admitted to practice in this state, including an attorney who is a partner or member of, or is employed by, an accounting or other professional services firm, by an accountant licensed in this state, or by an enrolled agent authorized to practice before the internal revenue service. The tax tribunal may allow any attorney or accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a taxpayer in proceedings before the tax tribunal for a particular matter. In addition, the tax tribunal may promulgate rules and regulations permitting a taxpayer to be represented by an officer, employee, partner, or member.”

WA (SB 6175, SB 6176, H 2635) — would create a new state tax tribunal (EB) as an agency of state government (and eliminate the BOTA). Accountants licensed in the state and accountants authorized to practice and licensed in another state may appear before the tribunal. Introduced 1/16/14.

“NEW SECTION. Sec. 19. (1) Appearances in proceedings conducted by the tax tribunal may be by the taxpayer, by an attorney admitted to practice in this state (including an attorney who is a partner or member of, or is employed by, an accounting or other professional services firm), by an accountant licensed in this state, or by an enrolled agent authorized to represent taxpayers before the federal internal revenue service. The tax tribunal may allow any attorney or accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a taxpayer in proceedings before the tax tribunal for a particular matter. In addition, the tax tribunal may promulgate rules and regulations permitting a taxpayer to be represented by an officer, employee, partner, or member.”

2013 Enacted Legislation

PA (HB 465) — Act of July 9, 2013, P.L. 270, No. 52 — would reconstitute the Board of Finance and Revenue. CPAs (in and out of state) would be allowed to represent taxpayers,

but limited to no unauthorized practice of law. This was enacted July 9, 2013, and the new independent board became effective April 1, 2014.

2013 Proposed Legislation 11 bills in 8 states had proposed legislation relating to state tax tribunals —

AL (H 264, S 223) — would have created independent tax tribunal Alabama Tax Appeals Commission (EB) — CPAs (in state and out of state) could represent taxpayers if have written authority or power of attorney. Alabama's legislative session ended without passing this legislation.

CO (HB 13-1140) — would have created the Colorado independent tax appeal court — (JB), CPAs (in state can represent taxpayers (and out of state on particular matters)). Colorado's legislative session ended without passing this legislation.

IA (HB 1446) — would have provided for a study of the effectiveness of the state's current administrative processes for tax matters and the feasibility of consolidating these processes under a tax appeals court. (HSB 228) — would have required a study by Jan. 8, 2014, of the current administrative appeals processes for tax matters and make recommendations for changes if necessary and study the possibility of creating a new consolidated tax appeal board.

KS — (HB 2413) — would have changed court to board — CPAs would not be allowed to represent to the board.

LA — (HB 585, HB 515) — HB 585 would have created a Tax Court (JB), CPAs (in and out of state) would be allowed to represent taxpayers if the CPA passes a test. HB 515 does not have language referencing the ability of CPAs to represent their clients.

OK (SB 392) — would have created the State Office of Administrative Tax Hearings (EB), CPAs (in and out of state) would be allowed to represent taxpayers.

PA (HB 465) — Act of July 9, 2013, P.L. 270, No. 52 — reconstituted the Board of Finance and Revenue. CPAs (in and out of state) would be allowed to represent taxpayers, but limited to no unauthorized practice of law. This was enacted July 9, 2013, and the new independent board became effective April 1, 2014.

TN (SB 0734, H 961) — would have created an independent tax tribunal within the executive branch (EB), CPAs (in state can represent taxpayers (and out of state on particular matters)).

TX (HB 2488) — would have created a tax tribunal (EB) — with authorized representatives including an accountant licensed in this State or any other jurisdiction of the United States.

additional legal staff and bringing our resources closer to those available to the other appellate courts.

The Tax Court has asked the tax section of the state bar association to make recommendations regarding the small claims option I spoke about earlier. Both the additional legal staff and a small claims option will positively impact the time it takes to issue decisions. Moreover, the supreme court task force is reviewing other structural or other improvements with an eye to increasing the efficiency of dispositions.

Cole: Generally, if you want a case heard, we can have it heard within four to five months. The backlog we have is when people don't want their cases heard. We always hear that they were working on a settlement. Nine years later, maybe we should do something about that settlement you all have been working on. We've taken a stance; we have a policy where if a couple of years has gone by and you haven't asked for a trial, we're just going to set it for hearing, unless you file a joint motion for a stay. That way it is on you if your case is not being heard.

As to resources, what I worked on last year added quite a bit of resources to the board; that money is paid by the locals, so it's not coming from the state's coffers. Our state is in a budget crunch, but it was OK with the fact that we were getting more money, because it wasn't coming from their pocket.

My predecessor, who now sits on the First Circuit Court of Appeal, had been in the Legislature, so he went and got additional resources when he was appointed. We can always use more resources, and we could be more efficient with another staff attorney and another staff clerk, but we're not in terrible shape on resources.

Thompson: David, I have three people in my office: Me, a paralegal, and a secretary. And I thought what we did was smart. We were in the revenue department [until last October] and got funded through the department. And what we put in the [2014] legislation is that the Tax Tribunal would be funded through the Revenue Administrative Fund, and they get unlimited money, basically. And so because of the budget crunch, you know, a lot of the agencies are getting cut 10 and 20 percent, but we didn't. So we're just getting money through the revenue department, so we're sufficiently funded. So we haven't had a problem with that.

Ely: Well, I think you could use a staff attorney or an extra law clerk.

Thompson: I'll take that under advisement.

Post-Session Question

Ely e-mailed the judges another question after the session. Their responses are below.

Ely: Final question, and one posed by *State Tax Notes*. What do you see as the benefits of an independent tax tribunal — one that is independent both in fact and in appearance?

Thompson: I have a somewhat unique perspective on the importance of having an independent tax tribunal,

because I have served as both an administrative law judge within the Alabama Department of Revenue, and since October 2, 2014, as chief judge in the newly established Alabama Tax Tribunal, which is an independent executive branch agency.

As the department's only administrative law judge, I always attempted to decide cases in an impartial, fair manner. To that end, I always fully addressed all issues raised by the parties, so that my analysis and logic was apparent. I still do so. A judge should never issue a ruling without an analysis of how the result was reached. While one party or the other may not like the decision, when a judge fully explains the rationale and logic behind a decision, it should become apparent to any fair-minded individual that the case was fairly and impartially, and hopefully, correctly decided.

But regardless of how independent and impartial in fact an in-house judge may be, some taxpayers will nonetheless suspect that they will not receive a fair ruling because the judge is employed (and controlled) by the revenue department. Having an independent tax court is thus essential and assures taxpayers that they will get a fair hearing.

Regardless of how independent and impartial in fact an in-house judge may be, some taxpayers will nonetheless suspect that they will not receive a fair ruling because the judge is employed (and controlled) by the revenue department.

In my years as the revenue department's administrative law judge, most of the revenue commissioners treated me and my position with respect and did not attempt either directly or indirectly to influence my decisions, with one glaring exception. In the mid-1990s, several revenue department employees who didn't like that I occasionally ruled against the department attempted to poison the then-commissioner against me. They told him that I was friends with and favored various tax attorneys who had cases with the department and that as principal author of the Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, which the Alabama Legislature unanimously passed in 1992, I had intentionally skewed the law to favor taxpayers and put the department at a disadvantage.

The commissioner was more than willing to believe them. He immediately ordered an audit of my Alabama income tax returns going back 10 years. Three revenue department special agents investigated my past house and land transactions, interrogated various of my friends and a past partner in a non-tax-related business transaction, and they even contacted a country club that I belonged to see if a third party had paid my initiation fee and was paying my monthly dues. The witch hunt abruptly ended only when the department audit showed that I owed no tax and was, in fact, due refunds in two of the open years. Importantly, one

of my accusers and the commissioner became embroiled in a very public dispute with certain members of the Alabama Legislature. The heat was suddenly off of me and on them, much to my relief.

The above is a drastic example that illustrates the advantages of having a truly independent tax tribunal, of whatever name. I feel sure that most in-house administrative law judges and hearings officers attempt to be fair and unbiased. But in such cases, it is human nature for a taxpayer to suspect that the administrative law judge or hearing officer may favor the state, to curry favor with his or her employer. Having an independent tax court or tribunal resolves that problem, be it real or only perceived.

Wentworth: First, I agree with Judge Thompson's sage response. The importance of a tax court or a tax tribunal being independent of the tax administrator cannot be overstated. Indeed, the perception that decisions would favor taxation when the judge is employed by, reviewed by, and paid by the very agency he or she reviews is impossible to refute. Even though judges in that circumstance would be committed to impartiality, this reality would not convince the public that the decisions were truly impartial given the structural hierarchy.

The Indiana Tax Court is one of six judicial branch tax courts. This is the gold standard of independence. Not only is a judicial tax court free of any perceived or real influence by the administrative agency it reviews, but it is also free of any perceived or real influence that could be exerted by the executive branch. This influence can rear its head when least expected when dealing with budgetary recommendations, salary considerations of judicial staff — if not the judge herself — and other insidious ways. One important func-

tion of the judicial branch is to review executive branch actions; therefore, a quasi-judicial tax tribunal cannot exercise the same degree of independent review as a judicial branch tax court cloaked by the constitutional precept of separation of powers.

Cole: An independent tribunal is key to having an opportunity for a fair appeal process. I would say that the tax-specialized nature of the tribunal is also critically important. The consternation with the local tax appeal system came from both the hometown feel of going to a local judge and the total lack of basic tax knowledge by those judges.

The Indiana Tax Court is one of six judicial branch tax courts. This is the gold standard of independence.

The growing complexity of state and local tax law, both in law and due to the modern economy, necessitates a decision-maker with the proper technical background and perspective. By bringing local tax cases to the BTA, we have inserted both independence and tax experience into the review process. The result has been a more uniform and logical jurisprudence.

Tribunals that are not independent obviously can be driven by concerns over the need for revenue, the need to support the departmental line on policies, or a fear of offending departmental bigwigs. An independent tribunal is better in fact and is far superior in perception. The impartiality can help inspire confidence in the fairness of the process.

Chart of States With and Without State Tax Tribunals						
State	Independent Tax Tribunal (No, EB, or JB)	Allows CPAs in the State to Represent Clients? (Yes or No)	Allows CPAs Authorized to Practice in the State?	Pending Legislation (Pending — Bill Reference, Allows CPAs? — Yes or No)	Reference/Citation to Statute (and Year Created) and Link to More Information	Other Info/Comments (Including CPA Experiences)
AL	Yes	Yes	Yes		Alabama Code section 40-2B-1 et. seq.	AL (H 105 Sub.) — effective Oct. 1, 2014, created independent tax tribunal Alabama Tax Tribunal (EB) — CPAs (in state and out of state) can represent taxpayers if they have written authority or power of attorney. Enacted Mar. 4, 2014.
AK	EB — Office of Admin Hearings, Department of Administration	Yes	Limited — At an informal conference and at a formal hearing, a person may be represented by an attorney, by a certified public accountant, or by another representative. A representative, other than an attorney, must file a completed power of attorney at the time the representative enters an appearance in the proceeding.		Alaska State Tax Reporter, regulation, Alaska, 15 AAC 05.010(d), Request for Appeal PRACTICE AND PROCEDURE — REGULATIONS, Title 15 Revenue, Chapter 05 Administration of Revenue Laws, Article 1 Hearing Procedures	
AZ	JB — Tax Court + EB — Board of Tax Appeals	Limited — Sometimes CPA can appear before Board of Tax Appeals if the amount in dispute is less than \$25k; CPA can represent taxpayer in tax court if approved by the Presiding tax judge and the case relates to certain property tax issues or the amount of taxes, interest, and penalties is less than \$5k.	Yes — with permission		Board of Tax Appeals Reference A.R.S. section 42-1253(D) http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/42/01253.htm&Title=42&DocType=A RS Arizona Tax Court A.R.S. section 12-172 & 12-174 http://www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=12 <i>See also</i> http://www.superiorcourt.maricopa.gov/SuperiorCourt/TaxCourt/genInfo.asp	
AR	No	N/A	N/A			The Office of Hearings & Appeals is part of the Revenue Division of the Arkansas Department of Finance and Administration.

Chart of States With and Without State Tax Tribunals <i>(continued)</i>						
State	Independent Tax Tribunal (No, EB, or JB)	Allows CPAs in the State to Represent Clients? (Yes or No)	Allows CPAs Authorized to Practice in the State?	Pending Legislation (Pending — Bill Reference, Allows CPAs? — Yes or No)	Reference/Citation to Statute (and Year Created) and Link to More Information	Other Info/Comments (Including CPA Experiences)
CA	No [BOE not independent]	N/A	N/A		http://www.boe.ca.gov/meetings/pdf/pub143.pdf Cal. Code Regs. 5223.	
CO	No	N/A	N/A	CO HB 13-1140 CPAs in state can represent taxpayers (and out of state on particular matters)). p. 12 — Representation. (1) (a) APPEARANCES IN PROCEEDINGS CONDUCTED BY THE TAX APPEAL COURT MAY BE BY: (I) THE TAXPAYER; (II) AN ATTORNEY ADMITTED TO PRACTICE IN THIS STATE, INCLUDING AN ATTORNEY WHO IS A PARTNER OR MEMBER OF, OR IS EMPLOYED BY, AN ACCOUNTING OR OTHER PROFESSIONAL SERVICES FIRM; (III) AN ACCOUNTANT LICENSED IN THIS STATE; OR (IV) AN ENROLLED AGENT AUTHORIZED TO PRACTICE BEFORE THE INTERNAL REVENUE SERVICE. (b) (I) THE TAX APPEAL COURT MAY ALLOW ANY ATTORNEY OR ACCOUNTANT AUTHORIZED TO PRACTICE OR LICENSED IN ANY OTHER JURISDICTION OF THE UNITED STATES TO APPEAR AND REPRESENT A TAXPAYER IN PROCEEDINGS BEFORE THE TAX APPEAL COURT FOR A PARTICULAR MATTER.		CO HB 13-1140 — would create the Colorado independent tax appeal court — (JB), CPAs (in state can represent taxpayers (and out of state on particular matters)).
CT	JB — Superior Court Tax Session	No	N/A		Tax Session are governed by General Statutes section 12-39.	
DE	EB — Tax Appeal Board	Yes	Yes — with permission		Del. Code Ann. tit. 30, section 334 Rules of Tax Appeal Board (<i>See</i> section II)	Question of whether tax appeal board is truly independent as it is housed in the Department of Finance (along with the Department of Revenue).

Chart of States With and Without State Tax Tribunals
(continued)

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DC	EB — Office of Admin Hearings	Yes	Yes		There is nothing in the OAH Procedural Rules that explicitly disallows CPAs from representing taxpayers. Per experience, CPAs have represented taxpayers in the DC Office of Administrative Hearings. DC OAH Rules	
FL	No	N/A	N/A		N/A	Taxpayers may file a formal protest with the Division of Administrative Hearings or file an action in circuit court. http://dor.myflorida.com/dor/forms/2010/gr800004.pdf
GA	EB — Office of State Administrative Hearings	Limited — Yes — only in small claims division	No	2012: enacted — (HB 100), GA Society of CPAs contacted by AICPA. Implementation bill — exec. branch — accountants would be able to represent in small claims division.	Administrative Rules of Procedure Chapter 616-1-2-.34 Effective 3/19/97 and as amended Dec. 5, 2010.	Apr. 19, 2012 HB 100 enacted. See HB 100 re: creation of GA Tax Court. Note, CPA can accompany taxpayer in small claims division, but may not represent taxpayer otherwise.
HI	JB — Tax Appeal Court	No	N/A		www.hawaii.gov/tax/taxfacts/tf01-01.pdf http://www.courts.state.hi.us/legal_references/rules/rulesOfCourt.html	
ID	EB — Board of Tax Appeals	No	N/A		Tax Appeals Court rules do not speak to authorized representative. Department of Revenue publication explicitly states that attorney or pro se representation is authorized. IDAPA 36.030 http://adminrules.idaho.gov/rules/current/36/0101.pdf Created in 1969	
IL	EB (in 2013)	No	No	In 2012 implementing legislation passed: tribunal to be created in July 2013.	PA 97-0636 HB 5192	June 1, 2012 — HB 5192 passed unanimously Senate after passing House — to Governor for signature. In 2011, passed law to create new tribunal. Current Administrative Hearings do not allow CPAs to represent clients. New Tribunal rules have not been established yet but are not expected to allow CPA representation.

Chart of States With and Without State Tax Tribunals
(continued)

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IN	JB — Tax Court	No	N/A	Considering amending existing tax court.	Tax Court was established in 1986	Considering amending existing tax court. Notice of Appearance form allows for attorney or pro se representation.
IA	EB — Dept of Inspection & Appeals — by agreement w/ DOR	Technically yes, but practically, most appeals go to the State Board of Tax Appeals	Any appellant may appear in person or by its duly authorized representative, or by an attorney-at-law or a certified public accountant authorized to practice in the state of Iowa.	HSB 73 introduced Jan. 2015 — providing for the future repeal of the state board of tax review, providing for appeals to the director of revenue for certain tax matters and modifying the powers and duties of the director of revenue. IA (HSB 228) — would require a study by Jan. 8, 2014 of the current administrative appeals processes for tax matters and make recommendations for changes if necessary and study the possibility of creating a new consolidated tax appeal board.	Iowa Admin. Code section 701-2.25.	HSB 73 introduced Jan. 2015 — providing for the future repeal of the state board of tax review, providing for appeals to the director of revenue for certain tax matters and modifying the powers and duties of the director of revenue. IA (HSB 228) — would require a study by Jan. 8, 2014 of the current administrative appeals processes for tax matters and make recommendations for changes if necessary and study the possibility of creating a new consolidated tax appeal board. Currently, appeals usually go to the State Board of Tax Appeals, which is affiliated with the Iowa Department of Revenue
KS	EB — Court of Tax Appeals	No	N/A	KS (H 2413) — makes administrative changes to the already existing tribunal — would rename the state court of tax appeals to the state board of tax appeals and deals with removal of members.	Kan. Admin. Regs. section 94-5-6.	Comprised of two divisions: 1. Regular Division — Has broad jurisdiction over all tax matters. 2. Small Claims and Expedited Hearings Division — Informal forum for property valuations under \$2 million and tax controversy less than \$15K.

Chart of States With and Without State Tax Tribunals
(continued)

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KY	EB — Board of Tax Appeals	No	N/A	2015 — KY — (HB 361) — a taxpayer bill of rights bill, taxpayer representative includes any accountant, attorney, tax practitioner, or other person designated in writing by a taxpayer to represent that taxpayer before the department in any matter relating to taxes administered by the department. KY legislature has adjourned without considering the bill.	Ky. Admin. Regs. 1:010 section 3.	2015 — KY — (HB 361) — a taxpayer bill of rights bill, taxpayer representative includes any accountant, attorney, tax practitioner, or other person designated in writing by a taxpayer to represent that taxpayer before the department in any matter relating to taxes administered by the department.
LA	EB — Board of Tax Appeals	Yes — CPAs duly qualified to practice in Louisiana, public accountants, and enrolled agents may represent any taxpayer or other contestant in any matter to which the board has jurisdiction, CPAs licensed outside LA may represent any taxpayer before the board with prior board approval	Yes — public accountants of other states when authorized by the Board.	In 2013: LA — (HB 585) — would create a Tax Court (JB), CPAs (in and out of state) would be allowed to represent taxpayers if the CPA passes a test. In 2012: Proposed, but not enacted (2012 LA H 376) — establish tax court, require CPAs to take test, governor's office — executive branch — Accountants licensed under the Louisiana laws and who pass a test would be allowed to represent clients. Louisiana Society of CPAs on judge nominating committee. AICPA contacted Louisiana Society of CPAs.	La. R.S. 47:1401 et seq.	(HB 585) — would create a Tax Court (JB), CPAs (in and out of state) would be allowed to represent taxpayers if the CPA passes a test. CPAs duly qualified to practice in Louisiana, public accountants, and enrolled agents may represent any taxpayer or other contestant in any matter to which the board has jurisdiction. CPAs licensed outside LA may represent any taxpayer before the board with prior board approval.
ME	No	N/A	N/A			
MD	EB — Tax Court	No. Taxpayer must be represented by a MD attorney.	N/A		http://www.txcrct.state.md.us/randp/procedur.html <i>See</i> Procedures of the Maryland Tax Court.	
MA	EB — Appellate Tax Board	No	N/A	N/A	831 CMR 1.01 — Rules of Practice and Procedure of the Appellate Tax Board.	

Chart of States With and Without State Tax Tribunals
(continued)

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MI	EB — Tax Tribunal + JB — Court of Claims	Yes for Tax Tribunal. No for Court of Claims	Yes for Tax Tribunal. No for Court of Claims.	MI (S 1039) — diminishes the role of the profession on Michigan's Tax Tribunal. The bill moves the tribunal from the Department of Treasury to the Department of Licensing and Regulatory Affairs. It also revises the membership of the tribunal by deleting a requirement that one seat be held by a CPA and establishes the requirement that all members of the tribunal be attorneys.	R. 205.1101: Tax Tribunal: "Authorized representative" means an attorney or other person who is selected by a party to appear on the party's behalf before the tribunal.	MI (S 1039) — diminishes the role of the profession on Michigan's Tax Tribunal. The bill moves the tribunal from the Department of Treasury to the Department of Licensing and Regulatory Affairs. It also revises the membership of the tribunal by deleting a requirement that one seat be held by a CPA and establishes the requirement that all members of the tribunal be attorneys.
MN	EB — Tax Court	No	No		Rule 8610.0010 Minn. Rules	Only lawyers can represent at Tax Court
MS	EB — Board of Tax Appeals	Yes — All accountants who have received a certified public accountant from the Mississippi State Board of Public Accountancy and maintain such certification.	Yes — Certified public accountants duly admitted to practice accountancy by the appropriate authorities in other states, the District of Columbia, or other American jurisdiction and other accountants practicing accountancy outside of this State who are entitled to practice as enrolled agents before the Internal Revenue Service.		Miss. Code Ann. section 27-77-1(g), 27-4-3(1)(a) (Rev. 2010)	General representative powers of CPAs extended to BOTTA (created in 2010)

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MO	EB — Admin Hearing Commission	No. However, a CPA can start a case for another person or entity with power of attorney.	No. Any individual, including a CPA, can present their own case before the AHC. Anyone, including a CPA, may start a case for another person. After that, the only person who may represent someone else — including a single-shareholder corporation — before the AHC is a licensed lawyer.	2015 — MO — (H 838) — would allow a tax preparer, enrolled agent, or certified public accountant to represent a client before the Administrative hearing commission in matters relating to an assessment or reassessment of taxes. 2014 — MO (H 2250) — allows a tax preparer, enrolled agent, or certified public accountant to represent his or her client before the Administrative Hearing Commission in matters relating to an assessment or reassessment of tax. Before a case enters into a discovery phase before the AHC, a CPA may attempt to informally settle the matter by working with the General Counsel Office of the Missouri Director of Revenue	http://oa.mo.gov/ahc/faq/faq.html#3	2015 — MO — (H 838) — would allow a tax preparer, enrolled agent, or certified public accountant to represent a client before the Administrative hearing commission in matters relating to an assessment or reassessment of taxes. 2014 — MO (H 2250) — allows a tax preparer, enrolled agent, or certified public accountant to represent his or her client before the Administrative Hearing Commission in matters relating to an assessment or reassessment of tax. Before a case enters into a discovery phase before the AHC, a CPA may attempt to informally settle the matter by working with the General Counsel Office of the Missouri Director of Revenue
MT	EB — State Tax Appeal Board	No — but bill introduced to allow CPAs to represent in small claims division	N/A — but bill introduced to allow CPAs to represent in small claims division	2015 — SB 413 — would create a Small Claims Division within the State Tax Appeals Board — CPAs could represent.	Mont. Code. Ann. sections 15-2-101 to 15-2-307; <i>see also</i> "State Tax Disputes and the Issue of Representation"	A CPA can represent a taxpayer before the County Tax Appeal Boards
NE	No	N/A	N/A	N/A	N/A	N/A
NV	No	N/A	N/A	N/A	N/A	N/A
NH	EB — Board of Tax and Land Appeals	No	N/A		http://www.nh.gov/bitla/adminrules/index.htm <i>See</i> N.H. Code of Admin. Rule 102.03; 201.07; 207.02(a) (5); and 207.03.	
NJ	JB — Tax Court	No	N/A		http://www.judiciary.state.nj.us/rules/r1-21.htm N.J. Rule 1:21-1(a).	

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(continued)

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NM	Yes — EB	Yes	Yes		SB 356 (2015), Laws 2015, Chap. 73.	2015 — NM — (H 292 and SB 356) — establishes the Administrative Hearings Office Act, providing for independent hearing officers and creates a hearing office separate from the Taxation and Revenue Department for administrative hearings. CPAs may represent taxpayers. "A taxpayer may appear at the hearing on the taxpayer's own behalf or may be represented by a bona fide employee, an attorney, a certified public accountant or, with respect only to tax imposed pursuant to the Income Tax Act, a person who is an enrolled agent for federal income tax purposes."
NY	EB — State Tax Appeals Tribunal	Yes	Yes — with "special permission" (parallel to requirement of special permission for out-of-state attorneys).		Division of Tax Appeals Rules of Practice and Procedure section 3000.2(a) (2), (4). http://www.nysdta.org/ http://www.nysdta.org/rules2.htm #Section 3000.2 Representation. Tax Appeals Tribunal created in 1986.	NMSCPA supported the bill. It was signed into law on Apr. 7, 2015.
NC	EB — Office of Adm Hearings	No	N/A		N.C. Gen. Stat. section 105-241.15; 26 NCAC 03 .0120(d)	
ND	No	N/A	N/A			
OH	EB — Board of Tax Appeals	No — though a CPA can start a matter before the board.	N/A		Ohio Adm. Code 5717-1-02.	

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OK	No	N/A	N/A	<p>In 2013: SB 392 — creating the State Office of Administrative Tax Hearings (EB), CPAs (in and out of state) would be allowed to represent taxpayers; would require Oklahoma Tax Commission to provide certain independent administrative appeals function:</p> <p>“8. The taxpayer may participate in appeals conferences without representation; may be represented by an officer, employee, partner or member of the taxpayer; or may be represented by a third-party representative”</p> <p>p. 29 — A. Appearances in proceedings conducted by the State Office of Administrative Tax Hearings may be by the taxpayer, by an attorney admitted to practice in this state, including an attorney who is a partner or member of, or is employed by, an accounting or other professional services firm, by an accountant licensed in this state, or by an enrolled agent authorized to practice before the Internal Revenue Service. The State Office of Administrative Tax Hearings may allow any attorney or accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a taxpayer in proceedings before the State Office of Administrative Tax Hearings for a particular matter. In addition, the State Office of Administrative Tax Hearings may promulgate rules permitting a taxpayer to be represented by an officer, employee, partner, or member.</p> <p>In 2012: Proposed and not enacted.</p>	N/A	<p><i>Note:</i> Currently, CPAs can represent taxpayers at administrative proceedings before OK Tax Commission. Rule 710:1-5-27(a). http://www.tax.ok.gov/rules/Rules2011/Chapter%201%20Administrative%20Operations.pdf</p> <p>2013: SB 392 introduced — to provide an independent administrative office or agency with tax expertise to resolve disputes between the Oklahoma Tax Commission and taxpayers, prior to requiring the payment of the amounts in issue or the posting of a bond, but after the taxpayer has had a full opportunity to attempt settlement with the Tax Commission based, among other things, on the hazards of litigation. By establishing an independent office of administrative tax hearings within the executive branch of government, the State Office of Administrative Tax Hearings Act provides taxpayers with a means of resolving controversies that ensures both the appearance and the reality of due process and fundamental fairness. The State Office of Administrative Tax Hearings shall be created and exist on and after Jan. 1, 2014.</p>

Chart of States With and Without State Tax Tribunals (continued)						
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OR	JB — Tax Court	No — Not before Tax Court, but can represent taxpayer before Magistrate Division	N/A		Oregon Tax Court Regular Rule 1(f). http://www.ojd.state.or.us/web/ojpublications.nsf/Files/feb2011RegularRules.pdf/\$File/feb2011RegularRules.pdf Oregon Tax Court Rule 1(e) Magistrate Division. http://www.ojd.state.or.us/web/ojpublications.nsf/Files/feb2011MagistrateRules.pdf/\$File/feb2011MagistrateRules.pdf	
PA	EB — Board of Finance and Revenue is independent forum	Yes, but limited to no unauthorized practice of law.	Yes, but limited to no unauthorized practice of law.	In 2013: PA (HB 465) — Act of July 9, 2013, PL. 270, No. 52 — would reconstitute the Board of Finance and Revenue. CPAs (in and out of state) would be allowed to represent taxpayers, but limited to no unauthorized practice of law. This was enacted July 9, 2013, and the new independent board became effective Apr. 1, 2014. In 2012: Introduced, but not enacted: HB 2383 was referred to the House Finance Committee on May 16. Would allow licensed CPA but not out of state CPA.		<i>Note:</i> Board of Finance and Revenue is an independent forum/body — effective Apr. 1, 2014 reorganized. CPAs and attorneys disagree on whether CPAs can represent or not. Section 2818. Representation. (a) Taxpayer — Appearances in proceedings conducted by the tribunal may be by the taxpayer or by an attorney admitted to practice in this Commonwealth. Parties may also be represented by an attorney who is a member of or is employed by an accounting or other professional services firm, by an accountant licensed in this Commonwealth or by an enrolled agent authorized to practice before the Internal Revenue Service provided the representation does not constitute the unauthorized practice of law as determined by the Supreme Court of this Commonwealth. Doesn't seem to allow mobility for either lawyers or accountants. <i>Note:</i> current system in PA has two levels of admin appeals at which all can currently represent.
RI	No	N/A	N/A			

Chart of States With and Without State Tax Tribunals <i>(continued)</i>						
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SC	EB — Administrative Law Court	Yes — A party may be represented only by an attorney, or in tax related matters by a CPA. Representation of a party before the Court is permitted only to the extent that such representation does not conflict with the rules governing the unauthorized practice of law.	Yes		Rules of Procedure for the Administrative Law Court http://www.scalc.net/pub/pub/Officialrules2011.pdf	
SD	No	N/A	N/A			
TN	No	N/A	N/A	TN (SB 0734 — creates an independent tax tribunal within the executive branch (EB), CPAs (in state can represent taxpayers (and out of state on particular matters))). p. 15 Section 18. (a) Appearances in proceedings conducted by the tax tribunal may be by the taxpayer, by an attorney admitted to practice in this state, including an attorney who is a partner or member of, or is employed by, an accounting or other professional services firm, by an accountant licensed in this state, or by an enrolled agent authorized to practice before the internal revenue service. The tax tribunal may allow any attorney or accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a taxpayer in proceedings before the tax tribunal for a particular matter. In addition, the tax tribunal may promulgate rules and regulations permitting a taxpayer to be represented by an officer, employee, partner, or member.	N/A	<p>Taxpayers may challenge tax assessments by filing suit in chancery court. TN Code Ann. section 67-1-1801 http://www.lexisnexis.com/hottopics/mcode/</p> <p>TN (SB 0734 — creates an independent tax tribunal within the executive branch (EB), CPAs (in state can represent taxpayers (and out of state on particular matters))).</p>

Chart of States With and Without State Tax Tribunals
(continued)

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TX	No	Note that CPAs are allowed to represent clients up through the ALJ level.	Note: Appearances in hearings conducted for the comptroller by the office may be by: (1) the taxpayer; (2) an attorney licensed to practice law in this state; (3) a certified public accountant; or (4) any other person designated by the taxpayer who is not otherwise prohibited from appearing in the hearing.	2013 — TX (HB 2488) — would create a tax tribunal (EB) — with authorized representatives including an accountant licensed in this State or any other jurisdiction of the United States.	Tex. Gov't Code section 2003.101; Texas State Office of Administrative Hearings — http://www.soah.state.tx.us/not-an-attorney/hearings.asp	Experience is that Texas Comptroller has power to influence decisions of the SOAH, so there's a question as to how independent the SOAH truly can be. 2013 — TX (HB 2488) — would create a tax tribunal (EB) — with authorized representatives including an accountant licensed in this State or any other jurisdiction of the United States.
UT	No	N/A	N/A	N/A	N/A	N/A
VT	No	N/A	N/A		Vt. Stat. Ann. 32 section 5887(a). [See also, <i>Riley v. State</i> (1974) 133 Vt 116, 329 A2d 631], regarding exclusive remedy issue.	The taxpayer's exclusive remedy to respond to a notice of deficiency or assessment is to petition for determination of the deficiency or assessment. A taxpayer may appeal a notice of deficiency, of denial or reduction of a refund claim or, of assessment of penalty or interest by petitioning the commissioner in writing for a determination of the deficiency or assessment or denial of claim for refund within 60 days after the date of the mailing of the notice of deficiency, refund, or assessment. Taxpayers dissatisfied with an assessment must first appeal to the Commissioner of Taxes before taking their case to court. Court appeal is only allowed after an adverse determination by the commissioner.
VA	No	N/A	N/A			

Chart of States With and Without State Tax Tribunals
(continued)

State	Independent Tax Tribunal (No, EB, or JB)	Allows CPAs in the State to Represent Clients? (Yes or No)	Allows CPAs Authorized to Practice in the State?	Pending Legislation (Pending — Bill Reference, Allows CPAs? — Yes or No)	Reference/Citation to Statute (and Year Created) and Link to More Information	Other Info/Comments (Including CPA Experiences)
WA	No	Yes — CPAs licensed in the state of Washington	Sometimes (with permission) — Other persons designated by a taxpayer with approval of the board may be able to represent the taxpayer	<p>2015 — S 5449 — allows representation by nonlawyers — judicial tribunal —</p> <p>(2) Therefore, the Legislature finds that establishing a new tax appeal division in the court of appeals to resolve tax disputes will create an independent tax appeal forum within the judicial branch of government to promote public confidence in the tax system, insuring both the appearance and reality of due process and fundamental fairness, while promoting the consistency and predictability of tax decisions. The Legislature further finds that hearing procedures should recognize financial practicalities, and finds that the procedural rules for the commissioner department should therefore provide for informal appeals and taxpayer representation by nonlawyers.</p> <p>[N/A SB 6176 — 16 NEW SECTION, section 19. (1)] Appearances in proceedings conducted by the tax tribunal may be by the taxpayer, by an attorney admitted to practice in this state (including an attorney who is a partner or member of, or is employed by, an accounting or other professional services firm), by an accountant licensed in this state, or by an enrolled agent authorized to represent taxpayers before the federal internal revenue service. The tax tribunal may allow any attorney or accountant authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a taxpayer in proceedings before the tax tribunal for a particular matter. In addition, the tax tribunal may promulgate rules and regulations permitting a taxpayer to be represented by an officer, employee, partner, or member.</p> <p>(2) The tax administration agency must be represented in all proceedings before the tax tribunal.</p>	WAC 456-10-210(4), (7)	<p>2015 WA S 5449</p> <p>SB 6176 introduced in Jan. 2014.</p> <p>introduced 2014 — WA (SB 6175, SB 6176, H 2635) (WA CPAs allowed, out of state CPAs with permission of the Board)</p> <p>EB-Board of Tax Appeals — but limited scope of tax appeals its BTA handles.</p> <p>Washington has the Board of Tax Appeals which is independent. Not considered sophisticated as they mostly hear property tax cases — one lawyer, one assessor, and one former clerk of the board make up the members. However, excise tax cases have the option of going there or directly to superior court even though they hear mostly (80%-90%) property tax cases. There are a lot of deficiencies with the BTA and that's why there is a current legislative proposal to get rid of it with a new court.</p> <p>While the Board of Tax Appeals functions as an independent tax dispute forum, a significant shortcoming is that tax expertise is not required for its members.</p> <p>Changes — — to further define “tax adjudication forum” as not being a body that hears only property tax appeals or similar limited-scope tax appeals — such as the WA BTA.</p> <p>(1) WA DOR asserts it is not bound by informal decisions of the Board of Tax Appeals for any other taxpayer or same taxpayer for different tax years.</p> <p>(2) Significant backlog of Board of Tax Appeals cases (almost 4,000 cases at beginning of 2013).</p>

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WV	EB — Office of Tax Appeals	Yes	Yes — automatic		<p>Rule section 121-1-17(1)</p> <p>http://www.wvota.gov/docs/OTAProceduralRulesApr20_03_121C.S.R.1.pdf</p> <p>WV Office of Tax Appeals began operations on Jan. 1, 2003</p>	<p>CPAs can represent taxpayers before Office of Tax Appeals but cannot engage in the unauthorized practice of law. For example, may not conduct direct examination of a witness, argue constitutionality issues, or argue the meaning of an ambiguous statute, regulation or other document.</p> <p>Rule section 121-1-17(3)</p> <p>http://www.wvota.gov/docs/OTAProceduralRulesApr20_03_121C.S.R.1.pdf</p>
WI	EB — Tax Appeals Commission	No	No		<p>Wisconsin Publication 507</p> <p>http://www.dor.state.wi.us/pubs/pb507.pdf</p>	
WY	EB — State Board of Equalization	Yes	<p>Yes — Any party may represent himself at such a hearing, or may be represented by a person designated by the party. The Department may be represented by any of its employees or by its attorney. It shall be the responsibility of every party to be familiar with and comply with the Board's rules. The Board's rules are available at the office of the Board and on the Board's website at http://taxappeals.state.wy.us.</p>		<p>Chapter 2, section 17(b) of Rules of Practice and Procedure for cases before the Wyoming State Board of Equalization</p> <p>http://taxappeals.state.wy.us/Chapter2_final_sep05.htm</p>	

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