

## Best practices for resolving state tax disputes

TEI

Portland Chapter Meeting

**November 19, 2019**

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# Agenda

- State tax controversy overview
- Administrative appeal considerations
- Judicial appeal considerations
- Settlement considerations

# State tax controversy overview

# State tax controversy overview

## State tax controversy landscape

- What is driving state tax audits and appeals?
  - Budget shortfalls
  - Novel issues (e.g., state conformity to federal tax provisions)
  
- What are states doing?
  - Increase in frequency, number and scope of state audits
  - Broad interpretations of the law
  - Broad requests for information
  - Coordinated multistate efforts
    - Information sharing
    - MTC Joint Audit Program
  - Increased reporting requirements (e.g., addbacks, credits and incentives)
  - Legislative changes to address shortfalls and evolving businesses
  - Aggressive positions

# State tax controversy overview

When does a state tax controversy start?

- All state tax controversies start long before any audit
- Tax return is not just a form containing information to determine tax liability
- Consequences extend well after filing:
  - Ability to establish positions
  - Composition of filing group
  - Apportionment, including alternative apportionment
  - Business versus non-business income
  - Tax credits
  - Addbacks
  - Ability to seek refunds
  - Establishing and evaluating FIN 48 reserves

# State tax controversy overview

## Why planning ahead matters

- Contemporaneous documentation is one of the best ways to support a tax position
  - Create and gather all relevant documents at the outset for positions you anticipate will be litigated
- Designate an individual member(s) of your tax/legal department to be the person(s) overseeing these matters for the company
- Obtaining an expert's opinion early ensures consistency between the taxpayer's filing position and the expert's opinion
  - Courts may rely on a taxpayer's expert's studies to uphold taxpayer's return filing position

# Administrative appeal considerations

# Key considerations for administrative appeals

- State tax appeal systems vary dramatically
- Most states have an administrative appeal **option** or **requirement** before a dispute has to be taken to court:
  - California Office of Tax Appeals
  - Utah State Tax Commission
  - Pennsylvania Board of Appeals, Board of Finance and Revenue
  - Oregon Department of Revenue
- Multistate considerations
  - Choosing the right forum



# Key considerations for administrative appeals

- What is the timing?
  - Consider all deadlines in protest/appeals process
- Who will decide your appeal?
  - Impartial and independent forum?
  - Know your decision-maker (background, training and experience of appeal officer/judge)
- Are more IDRs a possibility?

## Key considerations for administrative appeals

- Is it pay-to-play?
- Would it make sense to pay even if it is not required?
- Are you setting the record?
- Confidentiality?
- Published/precedential opinions?

# Key considerations for administrative appeals

- Is there a “hearing”?
  - Participate telephonically or in-person?
- Right to appeal (California/New York)

# Key considerations for administrative appeals

- If you do not like the answers to the above questions, can you skip the administrative appeal?
  - Considerations for skipping administrative appeal
    - Decision-makers part of Department
    - Pure legal issue where Department dug in on position
    - Dispute requires discretionary relief, and Department is not likely to give adequate relief

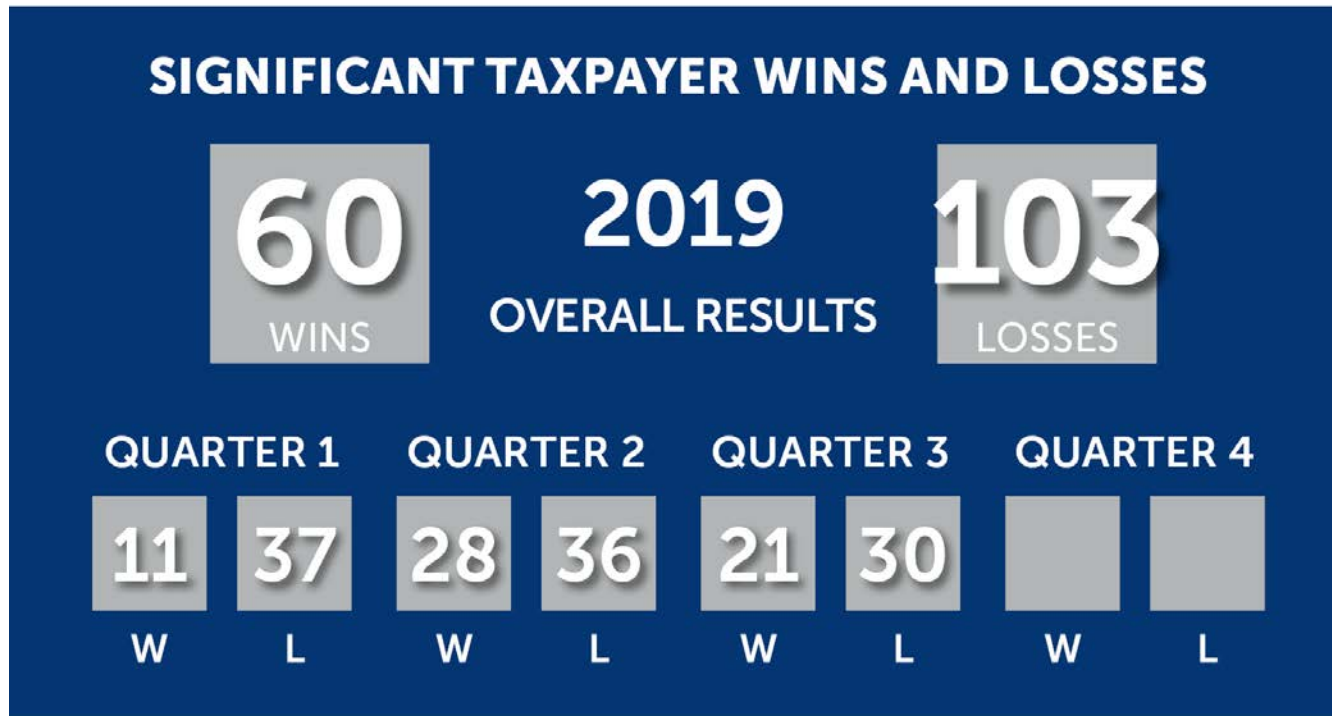
# Judicial appeal considerations

# Key considerations for judicial appeals

- What kind of “court” are we talking about?
  - Oregon Tax Court
  - California Superior Court
  - Utah District Court
  - Commonwealth Court of Pennsylvania
- Level of review?

# Key considerations for judicial appeals

- Multistate considerations
- SALT Scoreboard



# Key considerations for judicial appeals

- Timing
- Pay-to-play?
- Setting the record
- Confidentiality/availability of protective orders
- Appeals – how many levels?



# Key considerations for judicial appeals

- Major differences between an administrative appeal and judicial appeal
  - Opposing Counsel
  - Discovery
  - Stipulations of Fact
  - Briefing
    - Some disputes can be resolved by a judge with briefing on the parties' legal positions
  - Trials/Summary Judgment Motions
    - Some disputes require a trial for a judge to hear the testimony of the taxpayer's witnesses
  - Settlement

# Settlement considerations

# Settlement considerations

- When can you settle?
- How does the Department settle?
  - Principled methodology or hazards of litigation
- How long does settlement take?
- Multistate considerations:
  - Impact on other pending controversies?
  - Same set of issues in multiple states? Or only some overlap?
  - A taxpayer might opt to settle a case in a less favorable state
  - Principled settlement vs. dollar-value settlement

# Settlement considerations

- What is the appropriate starting place for a settlement offer?
- Who is the right person to negotiate with?
- How does the settlement impact future years involving similar issues?

Questions?



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