

What Keeps Your SALT Practitioner Up at Night

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In this inaugural edition of *Pushing the Envelope*, Robinson and Nogid discuss the challenges state and local tax practitioners face regarding issues such as missing jurisdictional deadlines, failing to timely raise or preserve arguments, and other procedural missteps.

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Practicing in the state and local tax (SALT) world can be daunting. SALT practitioners constantly

juggle clients, jurisdictions, and tax types. While we are never bored, it is certainly a challenge to keep all the balls in the air. This article discusses some of the always-looming pitfalls that keep SALT practitioners up at night, such as missing jurisdictional deadlines, failing to timely raise or preserve arguments, and other procedural missteps. Recognizing these potential issues is the first step to avoiding errors — and getting a good night's sleep. Sweet dreams!

Missing Jurisdictional Deadlines

Jurisdictional deadlines are those that, if not met, result in some or all protest rights being forfeited. Some of the most common jurisdictional deadlines that we SALT practitioners see are the deadlines to protest proposed assessments, to appeal refund denials, and to file appeals from adverse determinations or decisions. They are often absolute, and if they are missed, the taxpayer's right to proceed in the forum no longer exists. While there may be workarounds in specific limited instances — for example, by paying the assessment and requesting a refund — a jurisdictional deadline should *never* be missed.

Keeping multiple calendars or “dockets” to monitor jurisdictional deadlines is advisable and is the method used by many SALT practitioners. But as they used to say in the field of computer science, “Garbage in, garbage out.” Calendaring is far from foolproof. A jurisdictional deadline can be incorrectly computed (for example, should it be computed from the date of the notice or document from which review is sought? the date of receipt? the assessment date? some other date?). At one time, Massachusetts took the position that the date of assessment rather than the date of the notice of assessment (which might be issued many days after the assessment) started the clock running for filing an application for assessment. That position was not applied uniformly over time, with the Department of Revenue alternating between using the notice date and the assessment date. The Massachusetts Supreme Judicial Court needed to step in to set the matter right to produce “a rational result consonant with common sense and sound judgment.”¹

There can also be a user error, such as misentering details or incorrectly counting days. We encountered a paralegal who had counted the 90-day time frame for filing a New Jersey Tax Court complaint by using only business days rather than all days. Luckily, the error was caught early and rectified.

Further, even if the calendaring is done correctly, a jurisdictional document that does not timely arrive at the forum or comply with the forum's particular filing requirements can still blow the jurisdictional deadline. For example, while many jurisdictions provide for a “mailbox” rule, whereby a document that is timely mailed is “deemed” timely filed even if the document is never received as long as adequate proof of mailing is provided, SALT practitioners must still ensure that they comply with that forum's approved mailing methods and retain adequate proof of mailing. Some forums limit the mailbox rule to the U.S. Postal Service (not privately metered), while other forums may allow for the use of some private delivery services. SALT practitioners should carefully review the forum's accepted mailing methods each and every time because they are subject to change. For example, New Jersey enacted a general law, effective January 16, 2016, that expanded the definition of certified mail to include private express carrier services that can provide confirmation of mailing.² And, always keep in mind that different levels of review within the same jurisdiction can have different mailing rules. New Jersey, for example, has a mailbox rule that applies to the filing of informal protests to the Conference and Appeals

Bureau, but complaints filed with the New Jersey Tax Court must actually be received by the court by the jurisdictional due date.³

But, you're not out of the woods yet. Most forums have very specific requirements regarding the sufficiency of the jurisdictional document or the particular person(s) who must be served. Many forums will require that the jurisdictional document be signed,⁴ while others may require not only that the protest or complaint be signed but that its facts be verified by someone with personal knowledge of their truth. Whether the failure to verify the document will be fatal varies by jurisdiction or forum, but it is good practice to simply avoid the issue by ensuring compliance with all requirements.⁵ Similarly, many jurisdictional documents require a signature by an authorized representative. Having an unauthorized person (and, yes, you guessed it — who is authorized to sign also varies by jurisdiction and forum) can result in the document being deemed defective and the matter being dismissed.

Generally, court pleadings must be filed by an attorney licensed to practice (or admitted to practice *pro hac vice* (“for this occasion”)) in the particular state. Regarding filings to administrative bodies, an attorney admitted in the particular jurisdiction can usually sign a jurisdictional document; whether an attorney admitted in another jurisdiction, a CPA, a noncertified accountant, an in-house employee of the taxpayer, or other representative can validly execute a non-court jurisdictional document runs the gamut, so a review of the particular forum's rules is essential.

Some forums require that specific taxpayers be represented by an attorney licensed in that jurisdiction. In-house employees (including attorneys) or non-attorneys do not fit the bill.⁶ Often the determination of who can represent the taxpayer involves the state's view as to what constitutes the unauthorized practice of law.⁷ Other forums take a broader approach and allow taxpayers discretion as to who will represent them, although the jurisdictions taking a broader approach may require a power of attorney (even for in-house personnel) or may require that permission to appear in the forum first be sought.⁸ For example, the New York State Tax Appeals Tribunal's rules provide that partnerships can be represented by their general partners without the need to file a power of attorney if the partner certifies that he or she is authorized to represent the partnership; corporations can be represented by their officers or employees, but employees must file powers of attorney; and petitioners may be represented by an attorney admitted to practice in New York, a CPA qualified to practice in New York, an IRS enrolled agent, or a public accountant enrolled with the New York State Education Department.⁹ However, an attorney, CPA, or licensed public accountant of another state can represent a taxpayer only by special permission of the New York State Tax Appeals Tribunal.¹⁰

The American Institute of CPAs has prepared a chart reflecting the 35 states that have independent tax tribunals, with information regarding whether CPAs can represent taxpayers.¹¹ Of the 35 jurisdictions with independent tribunals, only five states allow both in-state and out-of-state CPAs to represent taxpayers without the need to take particular action.

Omitting a copy of the document from which the protest or appeal is taken can also be a fatal faux pas in some jurisdictions,¹² while other jurisdictions provide latitude for an administrative law judge to allow specific defects to be “cured” — that is, corrected by the petitioner in the interest of allowing the forum to provide substantial justice.¹³

Some forums also require that service of the jurisdictional document be made on specific

persons or entities, such as the state’s attorney general (in cases raising constitutional questions), the department or commissioner of revenue, or some other body or person. Failure to serve the required or “necessary” party may result in dismissal of the case.¹⁴

Failing to Raise or Preserve Issues

Even though administrative forums may not be able to address whether a statute is facially unconstitutional, the issue should still be raised in the administrative forum so that it can be “preserved” and addressed on appeal.¹⁵ While courts may decide at their discretion to hear a constitutional issue, not preserving the issue is a risk that is best not taken.¹⁶ Failing to raise an issue at the earliest opportunity can also cause the reviewing body to deem the issue “waived” by the tardy party.¹⁷ Similarly, while litigation-related epiphanies are often welcome, if they come after the record is closed, the party raising the new issue may be precluded from doing so because of prejudice to the other party.¹⁸

Other Possible Procedural Missteps

As if there weren’t already enough potential pitfalls to challenging tax assessments, if the entity challenging an assessment is not registered to do business in the state, its ability to maintain a suit in the courts of that jurisdiction may be challenged.¹⁹ While often the error can be cured, that is not always the case.²⁰

Also, some states require payment of the assessed tax or the posting of a bond as a prerequisite for challenging an assessment. For example, to challenge specific adverse New York State Tax Appeals Tribunal sales tax determinations, taxpayers must deposit the tax, interest, and penalty being challenged with the state’s tax department, along with a surety bond to secure payment of costs and charges that may accrue, or a bond covering the tax, interest, and penalty along with costs and charges can instead be posted.²¹ Compliance with this provision has been held to be a “strict condition precedent to judicial review.”²²

For those involved in drafting briefs and taking appeals, some jurisdictions have quirky and sometimes nonsensical rules that must be followed. Many courts issue “unpublished” decisions that may, or may not (or may but with provisos), be cited.²³ For example, New Jersey provides that unpublished decisions “shall not be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and all contrary unpublished decisions known to counsel.”²⁴ Although marginalizing the value of prior decisions undermines the judicial process, some jurisdictions limit the administrative levels whose decisions can be cited. New York, for example, does not allow determinations issued by ALJs to be cited, considered as precedent, or “given any force or effect in any other proceedings conducted pursuant to the authority of the division or in any judicial proceedings conducted in this state.”²⁵

Speaking of citations, states often have their own style manuals that prescribe the format to be used. While the formats may be similar to those in *The Bluebook*,²⁶ they often vary. The rules for the briefs themselves can be daunting to navigate. Courts and administrative forums often require that briefs comply with specified margin size, use only a particular font type and size, include a word count certification, use only a specific binding, and use only a specific color for

the brief cover. For those who practice in appellate arenas, even the height of the volumes containing the record on appeal may be mandated, so keep your ruler handy.

Words to the Wise

Practicing in the SALT (mine)field is not for the faint of heart, but it remains for many of us our field of choice. Getting a good night's sleep may be elusive, but diligence and vigilant attention to each jurisdiction's procedural rules and applying a "belt and suspenders" (and a safety pin) model of practice are as good as an Ambien any time.

FOOTNOTES

¹ *EMC Corp. v. Commissioner of Revenue*, 433 Mass. 568 (2001) (citing *State Tax Commission v. La Touraine Coffee Co.*, 361 Mass. 773, 778 (1972)).

² N.J.S.A. section 1:1-2. Confirmation of mailing can be made electronically and must include at a minimum: confirmation and time of mailing, date and time of delivery, attempted delivery, signature, or other similar information for proof of delivery service. *Id.* The definition of registered mail was also amended to include certified mail. *Id.*

³ N.J.S.A. section 54:49-3.1.

⁴ *Callahan v. Lorain County Board of Revision*, No. 2016-795 (Ohio Bd. of Tax App. Nov. 2, 2016) (not precedential). Since the complaint was unsigned by the deadline for filing complaints, the complaint was defective and was required to be dismissed.

⁵ *Akron Standard Division of Eagle-Picher Industries Inc. v. Lindley*, 462 N.E.2d 419 (Ohio 1984) (held that the lack of a verified signature did not divest the jurisdiction of the Ohio Board of Tax Appeals of a protest to a sales and use tax reassessment petition. The court applied the substantial compliance test and found that the lack of a verified signature did not amount to a failure to comply with either timely filing the appeal or the requirement that a copy of the order be included in the notice of appeal).

⁶ *Stephens Production Co. v. Bennett*, 2015 Ark. App. 617 (Ark. Ct. App. 2015) (appeal dismissed for lack of jurisdiction because petition to appeal was signed by the taxpayer's tax accounting manager, a non-attorney, and corporations may be represented only through a licensed attorney); and *Georgetown Centre Partnem v. Revenue Cabinet*, KBTA No. K98-S-194, Order No. K-17540 (Ky. Bd. Tax App. Feb. 23, 1999) (partnership taxpayer's challenge to property tax assessment was dismissed under Ky. Rev. Stat. 13B.080(5); corporations and other artificial entities were required to be represented by an attorney, and no attorney entered a timely entry of appearance in the case).

⁷ For example, in adopting new rules for practice before the Pennsylvania Board of Finance and Revenue, rulemaking stated that “nonattorneys have always been permitted to represent petitioners before this Board so long as that representation does not constitute the unauthorized practice of law as defined by the Pennsylvania Supreme Court. The Board has not experienced any problems regarding nonattorney representatives.” 61 Pa. Code Ch. 703 (adopted July 9, 2016). See also *In re Burson*, 909 S.W.2d 768 (Tenn. 1995) (attorney general and the Tennessee State Board of Equalization petitioned the Tennessee Supreme Court for a ruling on whether a provision allowing non-attorneys to represent taxpayers contesting their real and personal property assessments before boards of equalization violated the separation of powers provisions of the Tennessee Constitution by allowing the unauthorized practice of law. Although the long-standing practice in the state was to allow non-attorneys to practice before such boards, the Tennessee attorney general had issued two opinions concluding that the practice constituted the unauthorized practice of law, leading to the enactment of the challenged provision. The court ruled that the services performed for taxpayers or taxing authorities before the boards of equalization do not require the professional judgment of a lawyer and that, accordingly, the provision did not sanction the unauthorized practice of law).

⁸ *Interstate North Sporting Club v. Cobb County Board of Tax Assessors*, 551 S.E.2d 91 (Ga. 2001) (tax consultant’s filing of notice of appeal with board of tax assessors did not constitute the unauthorized practice of law and the letter requesting certification of appeal was accepted); and *Jemo Associates Inc. v. Lindley*, 415 N.E.2d 292 (Ohio 1980) (the court reversed Board of Tax Appeal’s dismissal of an appeal filed by the taxpayer’s accountant. The court concluded that “sanctions short of dismissal ordinarily will assure compliance with this signature requirement, without unnecessarily forfeiting a corporation’s right to appeal”).

⁹ 20 NYCRR section 3000.2(a)(2).

¹⁰ 20 NYCRR section 3000.2(a)(4).

¹¹ American Institute of CPAs, [“Chart of States With and Without State Tax Tribunals”](#) (Feb. 3, 2016).

¹² *Lee Jewelry Co. v. Bowers*, 124 N.E.2d 415 (Ohio 1955) (court upheld dismissal of appeal for lack of jurisdiction because the notice of appeal failed to include a copy of the final determination being appealed).

¹³ *In re Kokotas*, DTA 826379 (N.Y.S. Tax App. Trib., Dec. 11, 2015) (reversing ALJ’s dismissal of petition lacking a copy of the jurisdictional notice, and remanding to the ALJ for the issuance of a notice of intent to dismiss on the basis of timeliness); and *In re Choudry*, DTA No. 827671 (N.Y.S. Div. of Tax App. Dec. 1, 2016) (withdrawing notice of intent to dismiss issued due to the failure to provide a copy of the conciliation order, the document that would allow for a determination of timeliness, because petitioner provided identifying information regarding the

order, and the department did not raise any jurisdictional issue despite being put on notice).

¹⁴ See, e.g., *Atheer Wireless LLC v. State Department of Revenue*, No. 2150645 (Ala. Civ. App. Nov. 10, 2016) (noting in dicta that failing to serve the attorney general when a constitutional violation is alleged as required by Ala. Code section 6-6-227 would be grounds to dismiss the action); and *Schenck v. State Tax Commission*, 490 N.Y.S.2d 922 (3d Dep't 1985) (failure to serve the attorney general and serve a notice of petition were jurisdictional defects that could not be cured by the subsequent service of the petition and notice of petition on the attorney general).

¹⁵ See, e.g., *Borden Chemicals & Plastics L.P. v. Zehnder*, 726 N.E.2d 73 (Ill. App. Ct. 2000) (raising the constitutional issue in the brief filed in the administrative hearing preserved the issue); *In re Siemens Corp.*, TAT(E) 93-237(GC) (N.Y.C. Tax App. Trib. May 6, 1999) (tribunal's jurisdiction does not include the authority to determine whether a statute is facially unconstitutional, but it can address whether a statute as applied is constitutional); and *Minchin v. Commissioner of Revenue*, 471 N.E.2d 53 (Mass. 1984).

¹⁶ See, e.g., *Witte Bros. Exchange Inc. v. Hamer*, 997 N.E.2d 903 (Ill. App. Ct. 2013) (failure to raise constitutional issue before trial court precluded appellate court from addressing the issue); and *Durnil v. Snyder*, Dkt. E029185, SCV70426 (Cal. Ct. App. Feb. 8, 2002).

¹⁷ See, e.g., *Scarpulla v. State Tax Commission*, 502 N.Y.S.2d 113 (3d Dep't 1986).

¹⁸ See, e.g., *Airwork Service Division v. Director, Division of Taxation*, 478 A.2d 729 (N.J. Sup. Ct. 1984).

¹⁹ *Appeal of Reitman Atlantic Corp.*, 2001-SBE-002-A (Cal. State Bd. of Equalization Nov. 29, 2001) (corporation that was incorporated in another state and that did not register to do business in California was permitted to challenge an assessment because it could be "doing business" in California for tax purposes, but not "transacting intrastate business," which would require that it qualify with the secretary of state).

²⁰ For example, in *Drake Manufacturing Co. Inc. v. Polyflow Inc.*, 109 A.3d 250 (Pa. Super. Ct. 2015), the court overturned a verdict in favor of the plaintiff because it lacked a certificate of authority to do business in Pennsylvania. Although a certificate of authority was obtained just days after defendant's post-trial motion for a judgment notwithstanding the verdict, the court held that plaintiff could not cure the defect, and it reversed the plaintiff's favorable verdict.

²¹ N.Y. Tax Law section 1138(a)(4).

²² *Morris v. State Tax Commissioner*, 529 N.Y.S.2d 43 (3d Dep't 1988) (citing *Parsons v. State Tax Commission*, 356 N.Y.S.2d 593 (1974)).

²³ It is beyond the scope of this article to address the questionable wisdom of courts issuing unpublished decisions, particularly given the ease with which these decisions can be electronically accessed, sometimes on the courts' own websites.

²⁴ N.J. R. 1:36-3. This rule also provides that the courts themselves cannot treat any unpublished decision as precedent.

²⁵ N.Y. Tax Law section 2010.5.

²⁶ *The Bluebook: A Uniform System of Citation*, Harvard Law Review Association.

END FOOTNOTES