

## Report on Public Policy Position

**Name of section:**

Taxation Section

**Contact person:**

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**Regarding:**

Tax Tribunal Reform

**Date position was adopted:**

August 27, 2009

**Process used to take the ideological position:**

Position adopted after an electronic discussion and vote.

**Number of members in the decision-making body:**

18

**Number who voted in favor and opposed to the position:**

15 Voted for position

0 Voted against position

0 Abstained from vote

3 Did not vote

**Explanation of the position, including any recommended amendments:**

It is recommended that the Tax Tribunal be modified so that its judges are not selected through only a political process without proper oversight (along with its resulting political pressures), and all judges should have BOTH legal and tax backgrounds. Toward this end, the statutory language set forth below is recommended. An advisory board with some members who are not attorneys is recommended to assist with judge selection.

**REASONS FOR PROPOSED LEGISLATION:**

- 1) Judges reviewing Tax Tribunal decisions at the Appeals Court and Supreme Court levels are attorneys who generally do not have tax backgrounds. Such judges expect that legal decisions be written and organized in a certain manner, in order to properly resolve issues raised upon appeal. It is better that Tax Tribunal judges be licensed Michigan attorneys who are subject to the Michigan rules of professional conduct. Attorneys are trained in how to properly write legal opinions. If litigating parties are provided a proper record for review and a well reasoned opinion, more appeals from the Tax Tribunal can be avoided, which saves the State of Michigan significant tax dollars that are otherwise used for expensive and needless litigation. Consequently, it is recommended that only attorneys with legal training take part in writing Tax Tribunal decisions. The Tax Tribunal is very much like any other court where matters are litigated and its decisions should be written and determined consistent with procedures followed in other courts.
- 2) The proposed legislation ensures that the judges have proper legal backgrounds as well as experience in the field of taxation. A committee must determine the applicant for a judge position has proper experience; alternatively, the candidate must pass a test confirming basic knowledge.
- 3) The fact that most states within the U.S. require lawyers to act as judges for tax litigation matters is persuasive. Consequently, Michigan's Tax Tribunal statutes should be modified to be consistent with how other states resolve their tax controversies. Businesses desire certain commonality among state tax systems. Michigan is in the minority of states with its current system and beliefs, and this detracts from the credibility and fairness of tax administration in Michigan.
- 4) Other reforms should be considered, such as allocating additional funding to the Tax Tribunal. A properly staffed and functioning Tax Tribunal will minimize potential large refunds of government tax dollars with burdensome interest liabilities. Reform and additional funding should thus increase state revenues rather than deplete them.
- 5) The proposed statutory language is similar to the statute that governs the appointment of worker compensation judges. The worker compensation appointment statute does not select doctors rather than lawyers even though many of the issues involve predominantly medical matters over legal matters.
- 6) Because the Michigan Court of Claims requires prepayment of the tax in controversy, prior to use of its forum, it is not a realistic venue for many taxpayers who desire legal training for their issue but cannot afford to immediately pay the disputed tax. The current prepayment requirement acts as a limitation to judicial access in Michigan. The Michigan Court of Claims should be available to taxpayers without the need to first pay the tax, especially if the backlog of cases and other issues with the Tax Tribunal are not addressed in the near future by the legislature.

**THE PROPOSED STATUTORY LANGUAGE IS AS FOLLOWS:**

**205.721a Tribunal advisory committee; appointment, qualifications, and terms of members; quorum; compensation; staff and offices; powers and duties of committee.**

Sec. 21a.

- (1) The governor shall appoint a 7-member tribunal advisory committee. The committee shall consist of individuals who have experience in the area of state and local taxation.
- (2) Of the committee members, 2 shall be members of the taxation section of the state bar of Michigan, 1 shall be a member of the real property law section of the state bar of Michigan, 1 shall be a member of the public corporation section of the state bar of Michigan, 1 shall be a member of the Michigan association of municipal attorneys, 1 shall be an employee of the Michigan department of treasury and 1 shall be a member of the Michigan association of certified public accountants.
- (3) Members shall be appointed for terms of 4 years except that of the members first appointed, 3 shall be appointed for terms of 2 years, 2 shall be appointed for terms of 3 years, and 2 shall be appointed for terms of 4 years. A member shall not serve beyond the expiration of his or her term. The initial members shall be appointed not later than October 1, 2009.
- (4) A quorum shall consist of 5 members. All business of the committee shall be conducted by not less than a quorum.
- (5) Members of the Tax Tribunal advisory committee shall serve without compensation, but shall be reimbursed for all necessary expenses in connection with the discharge of their official duties as members of the committee.
- (6) Staff and offices for the committee shall be provided by the department of labor and economic growth.
- (7) The committee shall have the powers and perform the duties provided for under sections 21b and 21c, and 22.

**205.721b Development of written examination; administration of written examination to applicants for position of Tax Tribunal member; interviews; appointment of qualified applicants; pamphlets.**

Sec. 21b.

- (1) The tribunal advisory committee, in consultation with the Tax Tribunal, shall develop a written examination for applicants with less than 5 years experience as an attorney in the field of state and local taxation. Such examination may be administered to applicants for the position of Tax Tribunal member in order to determine the applicant's ability and knowledge with regard to state and local taxation in the following areas:
  - (a) Knowledge of the Tax Tribunal act.
  - (b) Knowledge of the general property tax act, the revenue act and all tax acts administered under the revenue act.
  - (c) Knowledge of the methods of assessment and valuation of real and personal property.

(d) Skills with regard to fact finding.

(e) The Michigan rules of evidence.

(f) Skills with regard to legal opinion writing.

(2) An applicant for the position of Tax Tribunal member, including each person who was employed as a Tax Tribunal member under this act on or before May 31, 2009, who successfully completes the examination provided for under subsection (1) or who has not less than 5 years experience as an attorney in the field of state and local taxation shall be interviewed by the tribunal advisory committee for the position of Tax Tribunal member. To meet the requirement of 5 years' legal experience as an attorney in the field of state and local taxation, an applicant must document to the tribunal advisory committee a period of time totaling 5 years during which the applicant met 1 of the following criteria:

(a) A significant portion of the applicant's personal practice has been in active state and local tax practice.

(b) Service as a member of the Tax Tribunal.

(3) The tribunal advisory committee, after completing personal interviews of the eligible applicants, shall determine which of the applicants are considered qualified for the position of Tax Tribunal member. The personal interviews shall be used to determine the applicant's suitability for the position, especially with regard to his or her objectivity.

(4) The governor shall appoint only an applicant determined to be qualified by the tribunal advisory committee as a Tax Tribunal member for each available position pursuant to section 22.

(5) The department of labor and economic growth may develop pamphlets to assist those persons who desire to take the examination for Tax Tribunal member.

**205.721c Evaluating performance of Tax Tribunal member and Tax Tribunal; frequency; criteria; report; response.**

Sec. 21c.

(1) The tribunal advisory committee shall evaluate the performance of each Tax Tribunal member at least once every 2 years. The evaluation shall be based upon at least the following criteria:

(a) The rate of affirmance by the Court of Appeals of the Tax Tribunal member's opinions and orders.

(b) Productivity including reasonable time deadlines for disposing of cases.

(c) Manner in conducting hearings.

(d) Knowledge of rules of evidence as demonstrated by transcripts of the hearings conducted by the Tax Tribunal member.

- (e) Knowledge of the law.
  - (f) Evidence of any demonstrable bias against particular taxpayers, treasury officials, representatives or attorneys.
  - (g) Written surveys or comments of all interested parties. Information obtained under this subdivision shall be exempt from disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.
- (2) The tribunal advisory committee in consultation with the Tax Tribunal shall evaluate the performance of the Tax Tribunal at least once every 2 years. The evaluation shall include an evaluation of the following criteria:
- (a) The management by the chief clerk and senior staff of the Tax Tribunal.
  - (b) The productivity of Tax Tribunal staff.
  - (c) The productivity and conduct of contract referees and administrative law judges.
  - (d) The adequacy of technology, budget, salary of tribunal members and other resource needs.
  - (e) The adequacy of the administrative rules or statutes.
  - (f) Evidence of any demonstrable bias against particular taxpayers, treasury officials, representatives or attorneys.
  - (g) Written surveys or comments of all interested parties. Information obtained under this subdivision shall be exempt from disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.
- (3) Upon completing an evaluation under this section, the tribunal advisory committee shall submit a written report including any supporting documentation to the governor regarding that evaluation which may include recommendations with regard to 1 or more of the following:
- (a) The promotion, suspension, removal or additional training or education of tribunal members, contract referees, administrative law judges and staff.
  - (b) The recommendation of any budgetary, rule, statutory or other reform.
  - (4) The governor shall respond in writing to the committee regarding the action taken in response to the report of the committee.

**205.722 Tax Tribunal members; establishment; appointment, qualifications, and terms of members; designation of chairperson; vacancy; reappointment; removal; powers and duties of chairperson; duties of members; term of chairperson; compensation of members; employment of staff; tribunal as independent body; powers and duties of tribunal; rules; assignment and reassignment of member; office space.**

## Sec. 22.

- (1) The Tax Tribunal is established as an autonomous entity in the department of labor and economic growth. The Tax Tribunal shall consist of 9 members recommended by the tribunal advisory committee and appointed by the governor with the advice and consent of the senate. The governor shall designate 1 of the appointees as the member that will be chairperson. A person shall not be appointed to the Tax Tribunal who has not been recommended by the tribunal advisory committee. All members of the Tax Tribunal shall be members of the State Bar of Michigan.
- (2) The members of the Tax Tribunal shall be appointed for terms of 4 years. A vacancy caused by the expiration of a term shall be filled in the same manner as the original appointment. A member shall not serve beyond the expiration of his or her term unless the tribunal advisory committee fails to submit a recommendation to the governor before the expiration of the term. A member may be reappointed. A member appointed to fill a vacancy created other than by expiration of a term shall be appointed for the balance of the unexpired term. A member of the tribunal may be removed by the governor for good cause which shall be explained in writing to the tribunal member. Good cause for removal shall include, but not be limited to, lack of productivity or other neglect of duties.
- (3) The governor may designate a member of the Tax Tribunal as the chairperson upon a vacancy occurring in that position. The chairperson of the Tax Tribunal shall have general supervisory control of and be in charge of the employees of the Tax Tribunal and the assignment and scheduling of the work of the Tax Tribunal. Whenever the Tax Tribunal trial docket becomes congested or a tribunal member is absent, disqualified or for any other reason unable to perform his or her duties as tribunal member, the chairperson may select temporary members to serve for not more than 6 months in any 2-year period from a list maintained by the Tax Tribunal advisory committee. The list shall be composed of persons determined qualified by the Tax Tribunal advisory committee who are former or retired Tax Tribunal members, or former or retired Tax Tribunal administrative law judges. A temporary member selected by the chairperson shall have the same powers and duties as an appointed member under this act. The chairperson may also establish productivity standards that are to be adhered to by employees of the Tax Tribunal, and individual members. Each member of the Tax Tribunal shall devote full time during business hours to the duties of his or her office and shall not engage in gainful employment or business, nor hold another office or position of profit in government. Notwithstanding, a tribunal member may own passive interest in business entities and earn income from teaching or scholarly activities to the extent those activities do not detract from the dignity of the office and are approved by the tribunal advisory committee. Each member of the Tax Tribunal shall personally perform the duties of the office in a manner, at locations and during the hours generally worked by officers and employees of the department of labor and economic growth.
- (4) The chairperson of the Tax Tribunal shall serve as chairperson at the pleasure of the governor.
- (5) Each member of the Tax Tribunal shall receive an annual salary and shall be entitled to necessary traveling and other expenses incurred in the performance of official duties subject to the standardized regulations of the state.
- (6) The Tax Tribunal may employ the staff it considers necessary to be able to perform its duties under this act which may include legal assistants for the purpose of legal research and otherwise assisting the Tax Tribunal and individual members of the Tax Tribunal, and hearing referees to conduct hearings in the small claims division.

- (7) The Tax Tribunal is an independent body with the powers and duties as provided for under this act. The Tax Tribunal may promulgate rules on administrative hearing procedures for purposes under this act.
- (8) The chairperson of the Tax Tribunal may assign and reassign Tax Tribunal members to hear cases at locations in this state.
- (9) A tribunal member may disqualify himself or herself on his or her own motion in any matter, and may be disqualified for any of the causes specified in chapter two of the Michigan court rules of 1985.
- (10) If a tribunal member violates the Code of Judicial Conduct or similar code applicable to administrative law judges or fails to render a decision within the prescribed time period, either party may, after consultation with the tribunal advisory committee, petition the circuit court for Ingham County for superintending control.
- (11) The department of labor and economic growth shall provide suitable office space for the Tax Tribunal, tribunal members and the employees of the Tax Tribunal.