SB
401

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 2/25/88 5-DAY NOTICE
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER:

**FISCAL NOTE(S) ATTACHED ____ **
IN ACCORDANCE WITH AS 24.08.035
(see below)

2/9/88

DATE TURNED INTO OFFICE 4/26/88

Mr. President:

Finance Committee considered SB 401

appeals of information requests in the administration of state tax laws; to audits, investigations, and inspections for certain taxes and for oil- and gas-related royalties and net profits; amending provisions relating to administrative and judicial review of decisions relating to taxes, penalties, tax refunds, and assessments in the administration of state tax laws; efd

and recommended:

[✓] replace with CS SB 401 (Fin) [ ] same title [✓] new title

[ ] attached amendment(s) and

[ ] do pass

[ ] do not pass

[ ] no recommendation

[✓] individual recommendations

[ ] further referral to ____

[ ] letter of intent adopted and attached

** Committee [✓] attached or [ ] adopted fiscal note(s)
[✓] zero(1) DOR (Comm Office)(3) [✓] fiscal impact (4)
(1) SFC 303.1 (DOR Income & Excise Audit Div)
(2) SFC 563.2 (DOR O&G Audit)
(3) SFC 372.5 (DOL-Adm)
(4) SFC 316.8 (Court)

MEMBERS SIGNING DO PASS

Dave Frink
Rick Halford

OTHER RECOMMENDATIONS

No Rec
No Rec
No Rec.

Rick Halford do pass
Chairman signature and recommendation

[ ] Committee Backup Attached

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 401 (FIN)
PUBLISH DATE: 4/25/88

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Relating to disclosure to the Legislature of tax returns...
Sponsor: Faiks
Requestor: _____

Agency Affected: Revenue
BRU: Income and Excise Audit Division
_____
Components: _____
_____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		187.0	187.0	187.0	187.0	187.0
TRAVEL		82.0	82.0	82.0	82.0	82.0
CONTRACTUAL		14.1	14.1	14.1	14.1	14.1
SUPPLIES		3.0	3.0	3.0	3.0	3.0
EQUIPMENT		17.0	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		303.1	286.1	286.1	286.1	286.1
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		303.1	286.1	286.1	286.1	286.1
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		4	4	4	4	4
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See attached.

Rick Halford

Prepared by: Senator Rick Halford, Co-Chairman
Phone: 465-3753
Division: Senate Finance Committee
Date: 4/25/88

Approved by Commissioner: _____
Date: _____
Agency: _____

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

page ____ of ____

SB 401 Analysis

Income and Excise Audit Division

Appeals Section		
Personal Services:		137.
Revenue Auditor IV	57.8	
Revenue Auditor III	51.0	
Clerk Typist III	28.2	
Travel		64.1
Closing Conferences	33.6	
Policy Review	25.2	
Court Travel	5.3	
Contractual		9.7
Telephone	1.8	
Printing	1.4	
Office Furnitures	6.0	
Printer Maintenance	.5	
Commodities		2.5
Equipment		13.0
TOTAL - Appeals Section		226.3
FIELD AUDIT		
Personal Services		51.0
Revenue Auditor III	51.0	
Travel		17.9
Contractual		4.4
Commodities		.5
Equipment		3.0
TOTAL - Field Audit		76.8
TOTAL		303.1

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB 401 (Fin)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST: _____

Revision Date: _____
Title: Relating to disclosure to the legislature of tax returns...
Sponsor: Faiks
Requestor: _____

Agency Affected: Revenue
BRU: Oil and Gas Audit
_____
Components: _____
_____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		471.2	471.2	471.2	471.2	471.2
TRAVEL		50.0	50.0	50.0	50.0	50.0
CONTRACTUAL		20.0	20.0	20.0	20.0	20.0
SUPPLIES		5.0	5.0	5.0	5.0	5.0
EQUIPMENT		17.0	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		563.2	546.2	546.2	546.2	546.2
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		563.2	546.2	546.2	546.2	546.2
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		9	9	9	9	9
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Rick Halford

Prepared by: Senator Rick Halford, Co-Chairman
Phone: 465-3752
Division: Senate Finance Committee
Date: 4/25/88

Approved by Commissioner: _____ Date: _____
Agency: _____

Distribution (by preparer):
Legislative Finance
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Impacted Agency(ies)

page ____ of ____

CSSB 401 (Finance)

Analysis

Oil and Gas Audit Division

Personal Services		471.2
Revenue Auditor V (2) @ 66.0	130.2	
Revenue Auditor IV (1) @ 57.8	57.8	
Revenue Auditor III (5) @ 51.0	255.0	
Clerk Typist (1) @ 28.2	28.8	
Travel		
Closing Conferences, Policy Review, Court Travel		50.0
Contractual		20.0
Commodities		5.0
Equipment		17.0
TOTAL		563.2

In future fiscal years, requests for any additional positions which may be necessary to implement the bill will be considered by the Legislature as part of the agency's budget process.

3

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB 401 (Finance)
PUBLISH DATE: 04/21/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to appeals of information requests...state tax laws
Sponsor: Senator Faiks
Requestor: Senate Finance

Agency Affected: Revenue
BRU: Commissioner's Office
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
PERSONAL SERVICES	-	-	-	437.0	874.0	874.0
TRAVEL	-	-	-	65.5	131.0	131.0
CONTRACTUAL	-	-	-	28.8	57.6	57.6
SUPPLIES	-	-	-	5.0	10.0	10.0
EQUIPMENT	-	-	-	30.3	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	-	-	566.6	1,072.6	1,072.6
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	-	-	566.6	1,072.6	1,072.6
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-					

POSITIONS:

FULL-TIME	-	-	-	6	11	11
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Deborah Vogt, Senior Hearing Officer
Phone: (907) 465-2300
Division: Commissioner's Office
Date: April 21, 1988

Approved by Commissioner: Hugh Malone
Date: April 21, 1988
Agency: Department of Revenue

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Distribution (by preparer):
Legislative Finance
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Office of Management and Budget
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SB 401 Analysis

Hearing Officer Section

Personal Services		
Revenue Hearing Officer (Anch)	86.9	
Revenue Hearing Officer (Anch)	86.9	
Revenue Hearing Officer (Anch)	86.9	
Revenue Hearing Officer (Juneau)	86.9	
Clerk IV (Juneau)	34.9	
Accounting Clerk III (Juneau)	34.9	
Law Clerk (Juneau)	80.0	
Law Clerk (Anch)	84.9	
Law Clerk (Anch)	84.9	
Law Clerk (Anch)	84.9	
Accounting Clerk III (Anch)	34.9	
Clerk Typist III (Juneau)	29.0	
Clerk Typist III (Anch)	29.0	
Clerk Typist III (Anch)	29.0	
		Total $874.0
Travel		
Income & Excise Hearings	$36.0	
Oil & Gas Hearings	55.0	
Court/Income & Excise	10.0	
Court/Oil & Gas	30.0	
		Total $131.0
Contractual		
Research	$18.0	
Space Costs	35.6	
Telephone	10.0	
Printing	5.0	
Maintenance	7.0	
		Total $75.6
Supplies		Total $10.0
Equipment		
Office Chairs/Equipment	$22.0	
Computer Terminals/Printers	38.5	
		Total $60.5

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 401 (Fin)
PUBLISH DATE: 4/25/88

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Relating to appeals of information requests...state tax laws
Sponsor: Faiks
Requestor: _____

Agency Affected: Law
BRU: Oil & Gas Sol. Litigation Appropriation and Oil & Gas Sol. Project BRU
Components: Oil & Gas Sol. Litigation Appropriation and Oil & Gas Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		274.2	282.4	290.9	151.3	155.8
TRAVEL		9.6	9.9	10.2	5.3	5.5
CONTRACTUAL		31.8	32.8	33.8	20.4	21.0
SUPPLIES		21.3	21.9	22.6	13.4	13.8
EQUIPMENT		35.6	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		372.5	347.0	357.5	190.4	196.1
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		372.5	347.0	357.5	190.4	196.1
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		5	5	5	3	3
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Rick Halford

Prepared by: Senator Rick Halford, Co-Chairman
Division: Senate Finance Committee
Phone: 465-3753
Date: 4/25/88

Approved by Commissioner: _____
Agency: _____
Date: _____

Distribution (by preparer):
Legislative Finance
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Office of Management and Budget
Impacted Agency(ies)

page ____ of ____

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 401 (Jud.)

This fiscal note supercedes the note of March 1, 1988. Nevertheless, observations made in that note continue to be relevent.

The addition of HB 58 provisions in section 7, particularly with respect to transfer review (AS 43.05.234(a)), edited transcripts (AS 43.05.236), and drafting regulations (AS 43.05.238) creates a substantially increased legal workload. Of these, the editing of transcripts is the most highly speculative. If legislative committees undertake major tax policy review, this function will be especially critical. We note, however, that section 1 of the original SB 401 has been deleted, thus offsetting what we believe to be a reasonable estimate of resources required under new section 7.

Under section 1., the new procedures in the bill would apply to grievances, that have not been appealed to the superior court as of the effective date of the bill. This section raises serious statute of limitation problems as well a practical ones for all current cases. Issues include whether the statute of limitations, which would have run in June 1988, for example, is tolled for a case that is (a) awaiting the commissioner's decision, (b) in hearing, (c) in conference at the division level, or (d) recently assessed or whether a case that is at any given stage at the time of this bill's effective date must begin anew if the taxpayer so desires. We believe that litigation over this section will be particularly intense because its effect could be to eliminate or substantially reduce every taxpayer's ultimate tax exposure. The total at stake in the tax cases that are in some stage of administrative appeal exceeds $2.5 billion.

We believe that enactment of this section would require two full-time attorneys over a period of three years. Combined with the impact of section seven of the bill, we would also require one full-time secretary.

The timelines and appellate scheme in proposed AS 43.05.248 will also dramatically affect the Deaprtment of Law. Currently, the Department of Law handles only a very limited number of tax cases. The litigaiton model both the Department of Revenue and the Department of Law have been working toward is one in which oil and gas tax cases would not require significant attorney representation at the administrative level within the Department of Revenue. This bill, which places the trial in the court system, will require attorneys for all tax cases because only attorneys are allowed to represent the state in Alaska's superior courts.

We believe that these tax cases must be litigated in the same manner as our current oil and gas litigation, in which we use a combination of outside counsel and experts with state personnel. There are three reasons for this:

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 401 (Jud.)

1. There are millions of dollars at stake in each of the cases -- the industry will continue to devote the best legal resources available to these cases;

2. Adverse precedent in one case could seriously harm the state in other cases; and

3. The Department of Revenue, rather than the court system has a corps of decision-makers with expertise in the field of oil and gas taxation. Such a radical change of forum, in the earliest cases at least, could place the state at greater risk in attempting to recover its properly due taxes..

The following table shows the level of expenditure for the two proceedings that are most analogous to the cases that would be generated under this bill; a current tax proceeding and the Amerada Hess royalty case which involves many of the same issues presented in the major tax cases.

Amerada Hess

	Total Expended	Annual Expended
6/30/84	1,722,340.51	1,722,340.51
6/30/85	3,598,666.50	1,876,375.91
6/30/86	6,909,832.82	3,401,166.32
6/30/87	11,478,296.44	4,478,463.57
6/30/88 (Est.)		5,620,000.00
Total		17,098,346.41
Avg All		3,419,669.28
Avg last 3 yrs		4,499,876.66

Production, Oil Income Tax

	Total Expended	Annual Expended
6/30/84	191,041.75	191,041.75
6/30/85	695,356.71	504,314.96
6/30/86	1,568,254.63	872,897.92
6/30/87	2,922,618.52	1,354,363.92
6/30/88 (Est.)		3,975,000.00
Total		6,847,618.55
Avg All		1,369,523.71
Avg last 3 yrs		2,050,753.95

The bill could effectively require the Department Law to litigate simultaneously several trial level cases, while appeals are being argued in the Alaska Supreme Court. Looking at our experience in the tax cases and in Amerada Hess we regard the current expenditure level of $4 million annually as our base for revenue tax cases. There are several other cases that justify an effort paralleling the current tax case because of the amount at stake. There will also be numerous cases that each involve tens of millions of dollars. In FY 89 we have requested $1 million above our base. This amount reflects our belief that cases under this bill will not be ready for Department of Law prosecution until mid-year. For FY 90 and FY 91 we believe that in order to effectively prosecute an additional four to six cases per year at the trial court level we would require an additional $4 million. After that period the amount required should be reduced substantially because of court precedent established through the earlier cases, elimination of backlog, and new cases with substantially less at stake. Accordingly, we believe that in FY 92 and 93 our trial level expenditures could be reduced to $2 million above base for each year and in FY 94 to our base. Additionally, we have requested $372,500 in FY 89 for the five new staff positions described above. The impact of Section 1 and Section 7 will be felt on our staff as soon as the bill goes into effect. Two of the five positions will be deleted in FY 92 when work from the transitional period should be completed. We note that extensive litigation will be ongoing even after that fiscal year as audits and tax laws for the years after 1981 are challenged.

Appeals to the Supreme Court would occur under either the current or proposed framework. Accordingly we have not included costs for appeal.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 401 (Jud.)

CSSB 401 Fiscal Analysis

Department of Law Staff Costs

	Section 7 Costs		Section 12 Costs			
	Atty III	Paralegal Asst. II	Atty IV	Atty III	Leg Sec I	TOTAL
Per. Svcs.	63.7	43.3	72.0	63.7	31.5	274.2
Travel	2.4	2.4	2.4	2.4	-0-	9.6
Contractual	6.6	6.6	6.6	6.6	5.4	31.8
Supplies	4.5	4.5	4.5	4.5	3.3	21.3
Equipment	6.8	6.8	6.8	6.8	8.4	35.6
Total	84.0	63.6	92.3	84.0	48.6	372.5

Position and associated costs beyond FY 89 include a 3% annual inflation factor, less one-time items. The two attorneys required for Section 7 transitional ligitation are deleted after FY 91. The costs for these new positions will occur in the Oil & Gas BRU as interagency funded. However, general funds must also be included in the annual separate appropriation for oil and gas special litigation to offset these costs.

Position Title	No. of Positions	Range/Step	Barg. Unit
Attorney III	1	22A	PX

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	49,140	
Benefits	14,597	
Premium Pay		
Other		
Total Personal Services		63,738
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		84,038

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	84,038

Justification

This position is required to review legislative reports of critical tax information to insure confidentiality, if the provisions of Section 7 of CSSB 401 become law. There are literally thousands of documents that are subject to inspection and examination during a legislative oversight review of the tax assessments and taxpayer records of oil and gas production and income taxes. A review of any oversight reports issued by the legislature must be conducted carefully to insure taxpayer confidentiality as required by this section, as well as the U.S. Tax Code. Substantial coordination between the Departments of Law and Revenue, and the legislative oversight committee will be required. Allocation of the position one grade lower than the full journey level of Attorney IV is appropriate for this work because it mainly addresses procedural issues rather than substantive legal issues.

Request For New Position

Agency: Department of Law

BRU: Oil & Gas Special Projects

Component: Operations

Revised Date

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Paralegal Assistant II	1	16A	GGU

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	32,424	
Benefits	10,901	
Premium Pay		
Other		
Total Personal Services		43,325
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		63,625

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	63,625
GF Program Receipts 1005	
Other	

Justification

This position is needed to monitor and control tax documents transferred to the legislature, if the provisions of Section 7 of CSSB 401 become law. There are literally thousands of documents that are subject to inspection and examination during a legislative oversight review of tax assessments and taxpayer records of oil and gas production and income taxes. Careful review and scrutiny of any reports issued to insure taxpayer confidentiality are essential under the proposed statute as well as the U.S. Tax Code. This Paralegal Assistant II position is ideally suited to assist the attorney responsible for review of reports in monitoring and controlling tax report documents.

Request For New Position

Agency: Department of Law

BRU: Oil & Gas Special Projects

Component: Operations

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Attorney IV	1	24A	PX

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	56,244	
Benefits	15,713	
Premium Pay		
Other		
Total Personal Services		71,957
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		92,257

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	92,257

Justification

This is one of three positions that will be needed to handle litigation that is expected to arise from the transitional provisions of CSSB 401, if Section 12 is adopted and becomes law. This section raises serious statute of limitation problems as well as practical ones for all current oil and gas cases. Litigation over this section will be particularly intense because its effect could be to entirely eliminate or substantially reduce every taxpayer's ultimate tax exposure. The total at stake in the oil and gas income and production tax cases that are in some state of administrative appeal, and which would be subject to the bill's transitional provisions, exceed $2.5 billion. Allocation to the Attorney IV level is recommended because of the substantive legal issues involved in this aspect of the bill.

Request For New Position

Agency: Department of Law

BRU: Oil & Gas Special Projects

Component: Operations

Revised Date

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Attorney III	1	22A	PX

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	49,140	
Benefits	14,597	
Premium Pay		
Other		
Total Personal Services		63,738
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		84,038

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	84,038

Justification

This is the second of three positions that will be needed to handle litigation that is expected to arise from the transitional provisions of CSSB 401, if Section 12 is adopted and becomes law. This section raises serious statute of limitation problems as well as practical ones for all current oil and gas cases. Litigation over this section will be particularly intense because its effect could be to entirely eliminate or substantially reduce every taxpayer's ultimate tax exposure. The total at stake in the oil and gas income and production tax cases that are in some state of administrative appeal, and which would be subject to the bill's transitional provisions, exceed $2.5 billion. This position will assist the Attorney IV responsible for statute of limitation problems in the conduct of extensive and complex litigation raised by the bill's transitional provisions.

Request For New Position

Agency Department of Law

BRU Oil & Gas Special Projects

Component Operations

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Legal Secretary I	1	10B	GGU

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	22,716	
Benefits	8,749	
Premium Pay		
Other		
Total Personal Services		31,465
Travel		-0-
Contractual		5,400
Commodities		3,300
Equipment		8,400
Other		
Total Cost		48,565

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	48,565

Justification

This is the third of three positions that will be needed to handle litigation that is expected to arise from the transitional provisions of CSSB 401, if Section 12 is adopted and becomes law. The position will provide law office support for the two attorneys required by Section 12, and the position will also provide office support for the attorney and the paralegal required by the two-step appeals provisions of Section 7. Consequently, the position will provide full-spectrum law office clerical services, and allocation to Legal Secretary I is therefore recommended.

Request For New Position

Agency Department of Law

BRU Oil & Gas Special Projects

Component Operations

Revised Date

FY 89

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STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB 401 (Finance)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Relating to administration of state tax laws
Sponsor: Senator Faiks
Requestor: Senate Finance Committee

Agency Affected: Alaska Court System
BRU: Trial Courts
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		290.6	798.5	798.5	581.2	581.2
TRAVEL						
CONTRACTUAL		10.0	30.0	30.0	20.0	20.0
SUPPLIES		1.5	5.0	5.0	3.0	3.0
EQUIPMENT		14.7	10.0			
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		316.8	843.5	833.5	604.2	604.2
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		316.8	843.5	833.5	604.2	604.2
FEDERAL FUNDS						
OTHER						
TOTAL		316.8	843.5	833.5	604.2	604.2

POSITIONS:

FULL-TIME		5	16	16	10	10
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) Funds the following positions:

1 Superior Court Judge, PFT, Anchorage
1 In-Court Clerk, Range 12B, PFT, Anchorage
1 Secretary, Range 12B, PFT, Anchorage
1 Law Clerk, Range 13A, PFT, Anchorage
1 Court Clerk II, Range 10B, PFT, Anchorage

Prepared by: Rick Halford Phone: 465-3753
Division: Senator Rick Halford, Co-chairman Senate Finance Committee Date: 4/26/88

Approved by Commissioner: _____ Date: _____
Agency: _____

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
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IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 401 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to disclosure to the legislature of tax returns and return information for certain critical taxes; providing for procedures, penalties, and other safeguards to ensure the continued confidentiality of tax returns and return information; relating to audits, investigations, and inspections for certain taxes; allowing a person to seek administrative review of a denial of a tax refund request; providing for informal, nonadversarial review of an assessment with the taxpayer for certain taxes before the assessment becomes final; providing for departmental review of the policies reflected in assessments or denials of refund requests for certain taxes before those assessments and denials become final administrative actions subject to judicial review; providing for the judicial review of the administrative policy review hearing for certain taxes; amending the statute of limitations period for certain taxes; amending Rule 609 of the Alaska Rules of Appellate Procedure to require de novo review of certain final administrative tax decisions, and restricting the claims, counterclaims, and defenses that may be raised; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature finds that

(1) tax revenue is necessary to enable the state to provide essential services for its citizens and to ensure the public health and welfare;

(2) the great majority of the state's tax revenue is derived from certain critical taxes imposed on taxpayers in the oil and gas industry, including in particular, the production taxes levied under AS 43.55 and AS 43.57, the income tax levied under AS 43.20 when AS 43.20.072 applies, and the income tax levied under former AS 43.21;

(3) the relatively small number of taxpayers of these critical taxes often makes it difficult or impossible for the Department of Revenue to review the administration and operation of these taxes with the legislature without disclosing information that allows a particular taxpayer to be identified;

(4) the legislature must be able to review and oversee the administration and operation of these critical taxes in order to be assured that the state is receiving its proper tax revenue and that these critical tax laws are operating in the manner intended by the legislature;

(5) the legislature must exercise its review authority to ensure that the collection of this critical tax revenue by the Department of Revenue is efficient, fair, prompt, and in the best interest of the state;

(6) tax returns and return information are confidential and often contain information of a proprietary or sensitive business nature;

(7) taxpayers are entitled to protections against public disclosure of their tax returns and return information;

(8) exchange agreements with the Internal Revenue Service prevent certain tax information from being disclosed;

(9) protection of tax returns and return information fosters and allows for full disclosure by taxpayers to taxing authorities and, therefore, promotes effective administration of, and compliance with, tax programs;

(10) legislators and legislative employees who are given access to tax returns and return information and who improperly breach confidentiality by disclosing or allowing the information to be disclosed should be subject to the same sanctions that are imposed for the violations by employees of the executive branch;

(11) because of the natural resource revenue sharing provisions under 43 U.S.C. 1606(i) - (j), disclosure of tax returns or tax information with respect to oil and gas activities by Alaska Native corporations would intrude into the affairs and privacy not only of the Alaska Native regional corporations actually engaging in oil and gas activities, but also of all other Alaska Native regional corporations except the 13th regional corporation, all Alaska Native village corporations, and Alaska Natives who own stock in one of the original 12 regional corporations but not in a village corporation;

(12) the taxes that have been and are being paid under AS 43.20, AS 43.55, AS 43.57, and under former AS 43.21 with respect to oil and gas activities by Alaska Native corporations represent too small a fraction of the total amount of these taxes paid to the state to warrant the degree of intrusion into the affairs and privacy of Alaska Natives and Alaska Native corporations that would be caused by disclosure of tax returns or tax information to the legislature;

(13) the Department of Revenue has issued assessments against approximately two dozen oil and gas taxpayers for additional taxes, penalties, and interest that total more than $2,500,000,000, primarily for oil and gas production taxes under AS 43.55 and AS 43.57 before 1983, for

corporate income taxes under separate accounting under former AS 43.21 during the 1978 - 1981 period, and under modified apportionment, particularly under AS 43.20 and AS 43.20.072, for subsequent periods;

(14) excessive delays have occurred within the Department of Revenue in the handling of administrative appeals regarding these taxes;

(15) the penalties and interest associated with these assessments are, on the average, approximately equal to the amount of additional tax being claimed under the assessments, so that for each dollar's change in the underlying tax claim, there is a change of approximately two dollars in the total figure of $2,500,000,000 for these assessments;

(16) very large assessments regarding these taxes have been made with inadequate prior review within the Department of Revenue and with the taxpayers involved;

(17) the sheer magnitude of these assessments affects the finances and operations of the state government itself, and the collection of the taxes due, plus interest and penalties that may be appropriate, will significantly affect the ability of the state to provide for the public health and welfare of its citizens;

(18) for later tax periods that are still under audit and for tax periods in the future, the best interest of the state and its citizens requires that the audits, the administrative review, and the collection of additional assessed taxes be conducted and completed in a more orderly and expeditious fashion than is currently the case; and

(19) to avoid the risks and delays that could arise from taxpayer challenges to the administrative appeal process within the Department of Revenue on the ground that the department's hearing officers are not disinterested and impartial, Alaska Rule of Appellate Procedure 609 must be changed to provide for mandatory instead of discretionary de novo review by the superior court of disputed factual issues in the department's final

decisions regarding these critical oil and gas taxes.

(b) The purposes of this Act are to ensure that

(1) the public health and welfare of the citizens of the state are provided for through the receipt and expeditious collection of all tax revenue that the state is entitled to receive under its tax laws;

(2) the legislature is able to fulfill effectively its responsibilities to monitor and review the administration of the state's tax laws and to consider changes that may become necessary or desirable from time to time for those laws;

(3) taxpayers are protected from improper disclosure of tax returns and return information;

(4) the exchange agreements with the Internal Revenue Service regarding tax information are not jeopardized;

(5) the tax laws of the state are administered fairly and uniformly; and

(6) the right to privacy is recognized, respected, and properly protected.

* Sec. 2. AS 24.10 is amended by adding a new section to article 2 to read:

Sec. 24.10.070. CONFIDENTIALITY OF INFORMATION. A present or former employee or agent of the legislature may not disclose tax information contained in a report or return filed under AS 43 without the prior consent of the person whose tax information would be disclosed.

* Sec. 3. AS 24.60.060 is amended by adding a new subsection to read:

(b) A person to whom this chapter applies may not disclose or use for personal gain or for the personal gain of another person any confidential tax information contained in a report or a return filed under AS 43 and furnished to the person under AS 43.05.231 -

43.05.239. A violation of this subsection is one of the most serious breaches of the standards of conduct established by this chapter.

* Sec. 4. AS 24.60 is amended by adding a new section to read:

Sec. 24.60.172. SPECIAL PROCEEDINGS BEFORE THE COMMITTEE. (a) If a complaint before the committee involves an allegation that a person to whom this chapter applies has disclosed confidential tax information contained in a report or return filed under AS 43 with the Department of Revenue and furnished to the person under AS 43.05.231 - 43.05.239, the proceedings of the committee under AS 24.60.170 are modified as follows:

(1) the complaint may be initiated and filed at any time within one year of the alleged disclosure;

(2) proceedings on the complaint that are pending before the committee on the 60th day before a state primary or general election are not stayed.

(b) Unless the taxpayer or a third party whose tax information is alleged to have been improperly disclosed consents to the public disclosure of the tax information or of the person's identity, the proceedings of the committee under AS 24.60.170 are further modified as follows:

(1) the hearing may not be held in open session;

(2) before being made public, a transcript containing the information shall be edited to prevent the disclosure of the information and the identity of the taxpayer or the third party;

(3) a decision, if made public, shall be edited to prevent the disclosure of the information and to protect the identity of the taxpayer or the third party; and

(4) a public statement may not contain information identifying the taxpayer, a third party, or the tax information.

(c) A person whose tax information is alleged to have been improperly disclosed may consent to the public disclosure of the person's identity and of certain portions of the information without waiving the right to keep confidential the remainder of the tax information. The release must be in writing unless given orally by the person on the record before the committee. The information released from confidentiality under this subsection may be disclosed in the materials released to the public under (b)(2) - (4) of this section.

* Sec. 5. AS 43.05.230(a) is amended to read:

(a) It is unlawful for a current or former officer, <u>legislator,</u> employee, or agent of the state to divulge the amount of income or the particulars set out or disclosed in a report or return made under this title, except

(1) in connection with official investigations or proceedings of the department, whether judicial or administrative, involving taxes due under this title

(2) in connection with official investigations or proceedings of the child support enforcement agency, whether judicial or administrative, involving child support obligations imposed or imposable under AS 25 or AS 47;

(3) as provided in AS 38.05.035 pertaining to audit functions; and

(4) as otherwise provided in this section <u>or in AS 43.05.231 - 43.05.239</u>.

* Sec. 6. AS 43.05.230(f) is repealed and reenacted to read:

(f) A person who knowingly violates a provision of this section is guilty of a class C felony. If the negligence of a member or former member of the legislature or a present or former employee or agent of the legislature results in a violation of this section, the

member, employee, or agent of the legislature is subject to a civil penalty of $5,000. The department shall enforce this section and collect the civil penalty established by this subsection. This subsection is not intended to impair, limit, or abolish a right, claim, or cause of action that a person may have whose information is unlawfully disclosed.

* Sec. 7. AS 43.05 is amended by adding new sections to read:

Sec. 43.05.231. LEGISLATIVE REQUEST FOR TAX INFORMATION. Subject to AS 43.05.233, after a legislative committee identifies the scope of an investigation or inquiry relating to taxes, and after adoption by either house of the legislature of a simple resolution giving the committee authority to receive tax information about critical taxes, the committee chair or co-chair may request tax returns and return information relating to critical taxes, and the commissioner of revenue shall provide the requested tax returns or return information under AS 43.05.231 - 43.05.239. The request shall be in writing and may identify a particular taxpayer.

Sec. 43.05.232. COMMISSIONER'S TRANSFER OF UNREQUESTED TAX INFORMATION. (a) Subject to AS 43.05.233, the commissioner may transfer unrequested tax returns or return information regarding critical taxes to a legislative committee after making a written determination that the transfer of the tax returns or return information is in the best interest of the state.

(b) In making a determination under (a) of this section, the commissioner shall consider

(1) if the legislative committee is reviewing the administration of a critical tax, whether the tax returns or return information would demonstrate the application of a critical tax more clearly than a hypothetical example would, and if so, whether the aspects of

tax administration that would be more clearly demonstrated are material and significant to the committee's review;

(2) if the legislative committee is considering adding a new tax or amending an existing tax, how necessary it is to transfer tax returns or return information regarding critical taxes in order to demonstrate the effect on taxpayers of the tax law change being considered;

(3) whether the tax returns or return information would clarify or rectify information provided by a taxpayer to a legislative committee;

(4) the potential harm the taxpayer may suffer if the taxpayer's tax returns or return information is subsequently disclosed illegally;

(5) any other interest of the taxpayer in avoiding the transfer of the tax returns or return information;

(6) if a taxpayer's tax returns or return information is being transferred at the taxpayer's request under AS 43.05.235(e), whether it is necessary or appropriate to supplement the tax returns or return information in order to give the committee a balanced and complete presentation.

Sec. 43.05.233. GENERAL LIMITATIONS ON REQUESTS AND TRANSFERS. (a) Tax returns and return information for critical taxes may be requested by a legislative committee under AS 43.05.231 or transferred to a legislative committee under AS 43.05.232 only if the purpose of the committee's request or transfer is to assist the committee in carrying out its responsibilities to

(1) consider tax legislation; or

(2) oversee the effective and efficient administration of the state's laws regarding critical taxes, including the review of

audits, litigation, or settlements.

(b) A request or transfer may not be made under AS 43.05.231 or 43.05.232 if the purpose of the request or transfer is to direct the executive branch in its audit, litigation, or settlement efforts, or to collect information to embarrass, harass, or discriminate against a taxpayer.

(c) AS 43.05.231 - 43.05.239 do not permit the transfer to a legislative committee of tax returns and return information provided by the Internal Revenue Service under exchange agreements with the department, or the transfer to a legislative committee of tax returns and return information for taxes other than critical taxes.

Sec. 43.05.234. PREPARATION AND TRANSMITTAL OF TAX INFORMATION. (a) Before providing tax returns or return information in response to a legislative request under AS 43.05.231 or under a commissioner's determination made under AS 43.05.232, the commissioner shall review the purpose of the proposed transfer of the tax returns or return information to determine what type of tax return or return information will provide the needed information. If more than one type of tax return or return information will provide the needed information, the commissioner shall choose the return or return information that, in the commissioner's discretion, is the least commercially sensitive. Whenever possible, instead of transactional documents, the commissioner shall transfer summary documents or analyses that have been prepared by the department. In this subsection, "summary documents or analyses" includes audit narratives, informal conference decisions, and formal hearing decisions.

(b) When the period for submitting additional analysis, comment, or information under AS 43.05.235(b) has expired, the commissioner shall transfer to the committee the tax return or return information,

including the additional analysis, comment, or information, if any, received by the commissioner from the taxpayer under AS 43.05.235(b).

(c) If a taxpayer submits analysis, comment, and other written information to a committee under AS 43.05.235(d), the department shall transfer the analysis, comment, or other information to the committee within 24 hours after receiving it and the request.

(d) The commissioner shall transfer all the tax returns and return information requested to be transferred by the taxpayer under AS 43.05.235(e) within 24 hours after receiving the request, except for return information that needs to be extracted or compiled by the department from other materials. Return information that needs to be extracted or compiled by the department shall be transferred within five days after the request. The chair or co-chair of the committee to which the return information is to be transferred may for good cause grant a reasonable extension of time for making the transfer and shall immediately notify the taxpayer of the extension.

(e) The department has exclusive responsibility for duplicating and numbering the copies of tax returns and return information provided to a legislative committee under AS 43.05.231 - 43.05.235.

Sec. 43.05.235. TAXPAYER NOTIFICATION AND SUBMISSION OF TAX INFORMATION. (a) Before transferring a tax return or return information under AS 43.05.231 or 43.05.232, the commissioner shall notify the taxpayer whose tax return or return information is to be transferred of the proposed transfer and the content of the tax return or return information to be transferred, and, if the transfer is under AS 43.05.232, shall provide the taxpayer with a copy of the commissioner's determination.

(b) Within seven days after receiving the notice of a transfer proposed under AS 43.05.231 or the notice and determination of a

transfer proposed under AS 43.05.232, the taxpayer may submit additional analysis, comment, or other information to the department for transfer under AS 43.05.234(b).

(c) A taxpayer may waive the provisions of (a) - (b) of this section by providing the commissioner with a written waiver signed by the taxpayer.

(d) If, in addition to the additional analysis, comment, and other information filed by the taxpayer with the department under (b) of this section, a taxpayer wants to provide the legislative committee with analysis, comment, and other written information regarding the taxpayer's tax return or return information being considered by the committee, the taxpayer shall file the analysis, comment, or other information with the department and request that the department transfer the information to the legislative committee.

(e) A taxpayer may at any time request the commissioner to transfer the taxpayer's tax returns or return information to a legislative committee. The request must be in writing, must state which tax returns or return information is to be transferred, and must state the legislative committee to which the tax returns or return information is to be transferred. The taxpayer shall pay the department the reasonable cost of duplicating the material for the transfer.

(f) A taxpayer's request under (e) of this section is not a waiver of confidentiality, and the tax returns and return information transferred under (e) of this section are subject to the same sanctions and safeguards against disclosure as other tax returns and return information transferred under AS 43.05.231 - 43.05.235.

Sec. 43.05.236. CONSIDERATION OF TAX INFORMATION BY LEGISLATIVE COMMITTEE. (a) A legislative committee shall consider tax returns and return information transferred under AS 43.05.231 - 43.05.235 in

executive session only, unless the taxpayer and any third party whose tax return or return information is being considered in conjunction with the taxpayer's tax return or return information consent in writing to a disclosure in open session. The executive session must be open to all legislators.

(b) The committee chair or co-chair may designate legislative employees and agents to inspect the tax returns and return information, but the chair or co-chair shall limit the number of designated employees and agents to the fewest number necessary that is consistent with the need of the committee and its individual members to analyze and understand the tax return and return information fully. Legislative employees and agents who are not designated under this subsection may not attend the executive session.

(c) If a tax return or return information regarding only one taxpayer is being presented to the committee or is being discussed by it, the chair or co-chair shall allow the taxpayer to attend the portions of the executive session when the taxpayer's tax return or return information is presented or discussed, and the taxpayer shall have a reasonable opportunity to address the committee at the conclusion of the presentation or discussion.

(d) If a tax return or return information regarding more than one taxpayer is being presented to or considered by the committee at one time, a transcript of the executive session shall be prepared and presented to each taxpayer within 48 hours after the executive session. The portions of the transcript pertaining to tax returns and return information of a taxpayer other than the one to whom it is presented shall be blanked out or otherwise deleted while at the same time preserving the coherence of the transcript as much as possible.

(e) At the request of the taxpayer, a taxpayer receiving an

edited transcript under (d) of this section shall be given a reasonable opportunity as soon as practicable to address the committee in executive session about the presentation and discussion of the taxpayer's tax returns and return information.

Sec. 43.05.237. PROHIBITION AGAINST DISCLOSURE. (a) Disclosure contrary to the provisions of AS 43.05.231 - 43.05.239 by a member or former member of the legislature or by a present or former employee or agent of the legislature of all or part of a tax return or return information that is confidential under AS 43.05.230 and transferred to a legislative committee under AS 43.05.231 - 43.05.235 is a violation of AS 43.05.230.

(b) Before receiving or reviewing a return or return information provided by the commissioner under AS 43.05.231 - 43.05.235, a member of the legislature or an employee or agent of the legislature shall, on a form prepared by the commissioner,

(1) acknowledge that the return or return information is confidential and that a disclosure of part or all of the return or return information contrary to the provisions of this section is prohibited by law; and

(2) execute an agreement with the department to keep the return or return information confidential, to abide by regulations adopted by the department under AS 43.05.238, and to return the documents to the department.

Sec. 43.05.238. REGULATIONS. To ensure confidentiality, the commissioner shall adopt regulations governing the transmittal, receipt, safekeeping, removal from storage or filing location, accounting for possession, and return to the department of tax returns and return information transferred under AS 43.05.231 - 43.05.235.

Sec. 43.05.239. DEFINITIONS. In AS 43.05.231 - 43.05.239

(1) "critical tax" means

(A) a tax imposed under AS 43.55 or AS 43.57;

(B) the tax imposed under former AS 43.21, unless the taxpayer is a corporation established under 43 U.S.C. 1606; and

(C) the tax imposed under AS 43.20 if AS 43.20.072 applies when determining the amount of the tax and the taxpayer is not a corporation established under 43 U.S.C. 1606;

(2) "return" has the meaning given in 26 U.S.C. 6103(b)(1), except that "secretary" is read as "department" and "this title" means AS 43;

(3) "return information" has the meaning given in 26 U.S.C. 6103(b)(2)(A), except that "secretary" is read as "department" and "this title" means AS 43; "return information" does not include transactional documents prepared during a tax period that ended within two years of the date of the transfer of the "return information" under AS 43.05.231 - 43.05.235;

(4) "transactional document" means a document that relates to the sale, exchange, or other transfer by a taxpayer of real property or tangible or intangible personal property and that

(A) constitutes all or part of a contract or agreement concerning the sale, exchange, or other transfer, including contract amendments, billings, and invoices; or

(B) summarizes one or more of the terms of the sale, exchange, or other transfer.

* Sec. 8. AS 43.05.240(a) is amended to read:

(a) <u>Except as to a matter for which procedures are provided in AS 43.05.246 - 43.05.248, a</u> [A] person aggrieved by the action of the department in fixing the amount of a tax, [OR] in imposing a penalty, <u>or in denying a request for refund of tax</u> may apply to the department

within 60 days from the date of mailing the notice required to be given to the person by the department, giving notice of the grievance [,] and requesting an informal conference. At the conference the person aggrieved may present arguments and evidence relevant to the grievance [AMOUNT OF TAX OR PENALTY DUE THE STATE]. If the department determines that a correction is warranted, the department shall make the correction.

* Sec. 9. AS 43.05.240(b) is amended to read:

(b) Except as to a matter for which procedures are provided in AS 43.05.246 - 43.05.248, a [A] person aggrieved by the action of the department in fixing the amount of a tax, [OR] in imposing a penalty, or in denying a request for refund of tax may apply to the department and request a formal hearing

(1) in place of the informal conference provided for in (a) of this section, within 60 days from the date of mailing the notice required to be given to the person by the department; or

(2) within 30 days after decision resulting from an informal conference.

* Sec. 10. AS 43.05.240(c) is amended to read:

(c) At the formal hearing the department may subpoena witnesses and may administer oaths and make inquiries necessary to consider and decide the grievance [DETERMINE THE AMOUNT OF THE TAX OR PENALTY DUE THE STATE]. The person aggrieved may present arguments and evidence relevant to the amount of the tax or penalty due the state. If the department determines that a correction is warranted, the department shall make the correction.

* Sec. 11. AS 43.05.245 is amended to read:

Sec. 43.05.245. ASSESSMENT AND COLLECTION OF TAX, PENALTIES, AND INTEREST. If a taxpayer fails to file a return or report required by

this title in the time required by law or regulation, or makes an erroneous or fraudulent return, the department shall proceed to assess the license fees, tax, penalties, or interest and make a return from information which it obtains. A return made and subscribed by the department in accordance with this section is presumed sufficient for all legal purposes. However, nothing prevents a taxpayer from presenting evidence or other information on an appeal under AS 43.05.240 or under procedures provided by AS 43.05.246 - 43.05.248 in order to rebut the presumed sufficiency of a return made and subscribed by the department, nor does the presumption of sufficiency alter the parties' respective burdens of proof once the taxpayer has presented evidence or other material information to rebut that presumption. The assessment of license fees, tax, penalties, or interest under this section occurs when the department issues a notice and demand for payment of the license fees, tax, penalties, or interest, when a notice and demand for payment becomes final under AS 43.05.246(g), or when the department issues a final notice and demand for payment under AS 43.05.247(f). The notice and demand for payment is issued when the notice and demand is delivered to the taxpayer in person or placed in the United States mail, addressed to the last known address of the taxpayer. Penalties and interest assessed under this title shall be collected in the same manner as provided in this title for the collection of tax or license fees.

* Sec. 12. AS 43.05 is amended by adding new sections to read:

Sec. 43.05.246. CLOSING CONFERENCE AND PRELIMINARY ASSESSMENT. (a) The procedures under this section apply to taxes under AS 43.20, AS 43.55, AS 43.57, and former AS 43.21.

(b) Before issuing a notice and demand for payment for a tax described in (a) of this section, the department shall give the

taxpayer a written draft of its preliminary conclusions. The draft of the preliminary conclusions must contain the following:

(1) a draft of any notice and demand for payment that the department preliminarily concludes may be in order;

(2) a draft narrative fully explaining how and why the preliminary assessment of tax or penalty has been determined; and

(3) schedules or worksheets in written or computer-readable format setting out the calculations for the preliminary assessment.

(c) The department shall schedule a closing conference with the taxpayer, to be held not less than 60 nor more than 90 days after the department delivers its preliminary audit conclusions under (b) of this section to the taxpayer in person or places those materials in the United States mail, addressed to the last known address of the taxpayer. The parties may extend the date for the closing conference by agreement.

(d) The purpose of the closing conference is to conclude the audit process and allow the parties to review and discuss the preliminary results and conclusions of that process informally so that any mistaken assumptions, misunderstandings, and other errors or mistakes can be identified and eliminated as much as possible and so that incomplete information and unsubstantiated items can be supplemented and substantiated. Although the interests of the parties are divergent, the closing conference is not an adversarial proceeding. The taxpayer may submit written and oral evidence, materials, and statements, but may not be required to do so. The department's employee in immediate charge of the audit, investigation, or inspection may also submit written and oral evidence, materials, and statements at the closing conference. By agreement, written materials may be submitted at other times before or after the closing conference.

(e) The taxpayer may send one or more representatives to the closing conference. The auditor or other person in immediate charge of the audit, investigation, or inspection upon which the preliminary assessment has been made shall attend the closing conference, and the director of the division proposing the assessment or the director's immediate subordinate designated for this purpose other than the person in immediate charge of the audit, investigation, or inspection shall preside at the closing conference. The department may have additional representatives at the closing conference. The person in immediate charge of the audit, investigation, or inspection may be excused from attending the closing conference with the consent of the taxpayer or because of serious illness or injury, incapacitation, death, or termination of employment with the department.

(f) Not more than 60 days after the conclusion of the closing conference, the presiding officer shall issue a written decision. If the presiding officer determines that additional tax is owed or that a penalty should be assessed, or both, the closing conference decision shall include a proposed notice and demand for payment for the additional tax and interest and any penalty. The proposed notice and demand for payment shall include a written narrative fully explaining how and why the assessment of tax or penalty has been determined, together with schedules or worksheets in written or computer-readable format setting out the calculations for the proposed assessment. If the presiding officer determines that no assessment is in order, the taxpayer shall be given written notice to that effect within this 60-day period. By agreement, the parties may extend the date for issuing a notice of assessment and demand for payment or a notice of no assessment.

(g) Unless the taxpayer requests a policy review hearing under

AS 43.05.247, a proposed notice and demand for payment issued under (f) of this section is final 30 days after its issuance and may not thereafter be made the subject of judicial review.

Sec. 43.05.247. POLICY REVIEW HEARING. (a) A person aggrieved by the action of the department in issuing a closing conference decision under AS 43.05.246(f) or in denying a request for refund of tax under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21 may request a policy review hearing within 30 days after the date of mailing of the notice required to be given under AS 43.05.246(f) or the denial of the request for refund. For purposes of this section, a failure by the department to grant or deny a request for refund within 60 days from the time the request is made shall be considered a denial of that request, unless the parties have extended the period by agreement.

(b) The department shall schedule the policy review hearing to be held within 30 days after the aggrieved person's request for it. The parties may extend the date for the policy review hearing by agreement.

(c) The purpose of the policy review hearing is to allow the commissioner to determine whether the action causing the grievance under (a) of this section reflects and incorporates the correct policies of the department, and if so, whether those policies are being applied correctly to the aggrieved person's circumstances.

(d) The commissioner or an authorized representative of the commissioner other than an employee in the division taking the action causing the grievance shall preside at the policy review hearing. The aggrieved person, acting in person or through one or more authorized representatives, shall have the opportunity to explain the nature of the grievance and the relief sought. If the person is aggrieved by a proposed assessment based on facts that the person believes are

incorrect or incomplete, the person shall present written and oral evidence and materials to correct or complete the facts. After the presentation of the aggrieved person's case, the director of the division taking the action causing the grievance or another authorized representative of the division shall have the opportunity to explain that action and the policies and reasons for it. The division shall have the opportunity to present written and oral evidence and materials to prove facts that it has asserted and that the aggrieved person has challenged as incorrect and to rebut or disprove any supplemental facts that the aggrieved person has sought to establish. The formal rules of evidence do not apply to either party's presentations on factual issues, but the presiding officer may require witnesses for both parties to give their testimony under oath and shall allow each party's witnesses to be examined by the other party. The proceedings of the policy review hearing shall be recorded and made part of the administrative record, together with any materials that may be submitted for the policy review in advance of, or after, the hearing.

(e) Not more than 90 days after the conclusion of the policy review hearing the commissioner shall issue a policy review decision. The policy review decision must

(1) state what relief, if any, is being granted to the aggrieved person, and state which portions, if any, of the department's action giving rise to the grievance are being upheld;

(2) state which additional facts, if any, that the aggrieved person sought to show at the hearing are being recognized and which additional facts are being disregarded;

(3) for each disputed fact when there is a dispute as to one or more facts, state what is being taken as being the actual fact;

and

(4) state, as specifically as possible, which statutory and regulatory provisions are being relied on in granting or denying relief to the aggrieved person, how those provisions are being interpreted and applied, and the specific policy considerations for the particular interpretation and application of these provisions; broad, unspecific policies, such as maximizing the state's tax revenue, are not sufficient for justifying a particular interpretation or application of a statute or regulation.

(f) If the policy review decision concludes that a notice and demand for payment should be made for additional tax and interest, or penalties, if any, a final notice and demand assessing the tax and interest, or penalties, if any, shall be issued at the same time as, and as part of, the policy review decision. The final notice and demand shall include a narrative fully explaining how and why the final assessment of tax and any penalty has been determined, together with schedules or worksheets in written or computer-readable format setting out the calculations for the final assessment. For purposes of AS 43.05.260, a final notice and demand for payment is not considered made until the narrative and the schedules or worksheets setting out the calculations for the final assessment have been served on the aggrieved person.

Sec. 43.05.248. APPEAL. Within 30 days after the issuance of the commissioner's policy review decision under AS 43.05.247, a person aggrieved by the decision may file an action in the superior court in the judicial district where the person resides or conducts business, for a trial de novo of those portions of the policy review decision giving rise to the grievance. Neither party may raise as a claim, counterclaim, or defense any portion or portions of the policy review

decision that are not contested and do not give rise to the grievance. The aggrieved person shall be given access to the files of the department in the matter for preparing the appeal. If the court determines that the assessment or the tax payment was correct, it shall confirm the tax. If the assessment or tax payment was incorrect, the court shall determine the amount of the tax and order the payment of the deficiency or the refund of the excess, as the case may be. The department shall immediately pay any refund due and attach a certified copy of the judgment to the payment.

* Sec. 13. AS 43.05.260(a) is amended to read:

(a) Except as provided in (c) and (d) of this section and AS 43.20.200(b), the amount of a tax imposed by this title must be assessed within three years after the return was filed, whether or not a return was filed on or after the date prescribed by law. If the tax is not assessed before the expiration of the three-year period, a proceeding [NO PROCEEDINGS] may not be instituted in court for the collection of the tax.

* Sec. 14. AS 43.05.260(c) is amended to read:

(c) The following exceptions apply to the limitation periods [PERIOD] in (a) and (d) of this section:

(1) in the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of the tax may be begun without assessment, at any time;

(2) in the case of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time;

(3) if, before the expiration of the time prescribed in this section for the assessment of a tax imposed by this title, both

the department and the taxpayer have consented in writing to the assessment after the expiration of the time, the tax may be assessed at any time before the expiration of the period agreed upon; however, the period agreed upon may be extended by a subsequent agreement in writing made before the expiration of the period previously agreed upon.

* Sec. 15. AS 43.05.260 is amended by adding a new subsection to read:

(d) For a tax to which the procedures under AS 43.05.246 - 43.05.248 are applicable, the limitation period is four years.

* Sec. 16. COURT RULE CHANGE. AS 43.05.248, added by sec. 12 of this Act, amends Rule 609 of the Alaska Rules of Appellate Procedure by making trial de novo mandatory rather than discretionary in appeals relating to taxes to which AS 43.05.248 is applicable and restricting the claims, counterclaims, and defenses that may be raised.

* Sec. 17. TRANSITIONAL PROVISIONS. (a) AS 43.05.231 - 43.05.239, as added by sec. 7 of this Act, apply to all tax returns and return information for critical taxes, as defined in AS 43.05.239, in the possession of the Department of Revenue on or after the effective date of this Act.

(b) The Department of Revenue shall adopt the regulations required by AS 43.05.238, enacted by sec. 7 of this Act, before the department transfers a tax return or return information to a legislative committee under AS 43.05.231 - 43.05.239. Initial regulations adopted as directed under this subsection to implement or interpret AS 43.05.231 - 43.05.239 may not be adopted as emergency regulations.

(c) The provisions of AS 43.05.248, added by sec. 12 of this Act, apply to any grievance with respect to a tax under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21 that, on the effective date of this Act, has not been appealed to superior court under AS 43.05.240(d).

* Sec. 18. This Act takes effect immediately under AS 01.10.070(c).

S-1449\I
Bannister
4/25/88

SFC Adopted
4/26/88

Original sponsor: Faiks

IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 401 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to disclosure to the legislature of tax returns and return information for certain critical taxes; providing for procedures, penalties, and other safeguards to ensure the continued confidentiality of tax returns and return information; relating to audits, investigations, and inspections for certain taxes; allowing a person to seek administrative review of a denial of a tax refund request; providing for informal, nonadversarial review of an assessment with the taxpayer for certain taxes before the assessment becomes final; providing for departmental review of the policies reflected in assessments or denials of refund requests for certain taxes before those assessments and denials become final administrative actions subject to judicial review; providing for the judicial review of the administrative policy review hearing for certain taxes; amending the statute of limitations period for certain taxes; amending Rule 609 of the Alaska Rules of Appellate Procedure to require de novo review of certain final administrative tax decisions, and restricting the claims, counterclaims, and defenses that may be raised; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature finds that

(1) tax revenue is necessary to enable the state to provide essential services for its citizens and to ensure the public health and welfare;

(2) the great majority of the state's tax revenue is derived from certain critical taxes imposed on taxpayers in the oil and gas industry, including in particular, the production taxes levied under AS 43.55 and AS 43.57, the income tax levied under AS 43.20 when AS 43.20.072 applies, and the income tax levied under former AS 43.21;

(3) the relatively small number of taxpayers of these critical taxes often makes it difficult or impossible for the Department of Revenue to review the administration and operation of these taxes with the legislature without disclosing information that allows a particular taxpayer to be identified;

(4) the legislature must be able to review and oversee the administration and operation of these critical taxes in order to be assured that the state is receiving its proper tax revenue and that these critical tax laws are operating in the manner intended by the legislature;

(5) the legislature must exercise its review authority to ensure that the collection of this critical tax revenue by the Department of Revenue is efficient, fair, prompt, and in the best interest of the state;

(6) tax returns and return information are confidential and often contain information of a proprietary or sensitive business nature;

(7) taxpayers are entitled to protections against public disclosure of their tax returns and return information;

(8) exchange agreements with the Internal Revenue Service prevent certain tax information from being disclosed;

(9) protection of tax returns and return information fosters and allows for full disclosure by taxpayers to taxing authorities and, therefore, promotes effective administration of, and compliance with, tax programs;

(10) legislators and legislative employees who are given access to tax returns and return information and who improperly breach confidentiality by disclosing or allowing the information to be disclosed should be subject to the same sanctions that are imposed for the violations by employees of the executive branch;

(11) because of the natural resource revenue sharing provisions under 43 U.S.C. 1606(i) - (j), disclosure of tax returns or tax information with respect to oil and gas activities by Alaska Native corporations would intrude into the affairs and privacy not only of the Alaska Native regional corporations actually engaging in oil and gas activities, but also of all other Alaska Native regional corporations except the 13th regional corporation, all Alaska Native village corporations, and Alaska Natives who own stock in one of the original 12 regional corporations but not in a village corporation;

(12) the taxes that have been and are being paid under AS 43.20, AS 43.55, AS 43.57, and under former AS 43.21 with respect to oil and gas activities by Alaska Native corporations represent too small a fraction of the total amount of these taxes paid to the state to warrant the degree of intrusion into the affairs and privacy of Alaska Natives and Alaska Native corporations that would be caused by disclosure of tax returns or tax information to the legislature;

(13) the Department of Revenue has issued assessments against approximately two dozen oil and gas taxpayers for additional taxes, penalties, and interest that total more than $2,500,000,000, primarily for oil and gas production taxes under AS 43.55 and AS 43.57 before 1983, for

corporate income taxes under separate accounting under former AS 43.21 during the 1978 - 1981 period, and under modified apportionment, particularly under AS 43.20 and AS 43.20.072, for subsequent periods;

(14) excessive delays have occurred within the Department of Revenue in the handling of administrative appeals regarding these taxes;

(15) the penalties and interest associated with these assessments are, on the average, approximately equal to the amount of additional tax being claimed under the assessments, so that for each dollar's change in the underlying tax claim, there is a change of approximately two dollars in the total figure of $2,500,000,000 for these assessments;

(16) very large assessments regarding these taxes have been made with inadequate prior review within the Department of Revenue and with the taxpayers involved;

(17) the sheer magnitude of these assessments affects the finances and operations of the state government itself, and the collection of the taxes due, plus interest and penalties that may be appropriate, will significantly affect the ability of the state to provide for the public health and welfare of its citizens;

(18) for later tax periods that are still under audit and for tax periods in the future, the best interest of the state and its citizens requires that the audits, the administrative review, and the collection of additional assessed taxes be conducted and completed in a more orderly and expeditious fashion than is currently the case; and

(19) to avoid the risks and delays that could arise from taxpayer challenges to the administrative appeal process within the Department of Revenue on the ground that the department's hearing officers are not disinterested and impartial, Alaska Rule of Appellate Procedure 609 must be changed to provide for mandatory instead of discretionary de novo review by the superior court of disputed factual issues in the department's final

decisions regarding these critical oil and gas taxes.

(b) The purposes of this Act are to ensure that

(1) the public health and welfare of the citizens of the state are provided for through the receipt and expeditious collection of all tax revenue that the state is entitled to receive under its tax laws;

(2) the legislature is able to fulfill effectively its responsibilities to monitor and review the administration of the state's tax laws and to consider changes that may become necessary or desirable from time to time for those laws;

(3) taxpayers are protected from improper disclosure of tax returns and return information;

(4) the exchange agreements with the Internal Revenue Service regarding tax information are not jeopardized;

(5) the tax laws of the state are administered fairly and uniformly; and

(6) the right to privacy is recognized, respected, and properly protected.

* Sec. 2. AS 24.10 is amended by adding a new section to article 2 to read:

Sec. 24.10.070. CONFIDENTIALITY OF INFORMATION. A present or former employee or agent of the legislature may not disclose tax information contained in a report or return filed under AS 43 without the prior consent of the person whose tax information would be disclosed.

* Sec. 3. AS 24.60.060 is amended by adding a new subsection to read:

(b) A person to whom this chapter applies may not disclose or use for personal gain or for the personal gain of another person any confidential tax information contained in a report or a return filed under AS 43 and furnished to the person under AS 43.05.231 -

43.05.239. A violation of this subsection is one of the most serious breaches of the standards of conduct established by this chapter.

* Sec. 4. AS 24.60 is amended by adding a new section to read:

Sec. 24.60.172. SPECIAL PROCEEDINGS BEFORE THE COMMITTEE. (a) If a complaint before the committee involves an allegation that a person to whom this chapter applies has disclosed confidential tax information contained in a report or return filed under AS 43 with the Department of Revenue and furnished to the person under AS 43.05.231 - 43.05.239, the proceedings of the committee under AS 24.60.170 are modified as follows:

(1) the complaint may be initiated and filed at any time within one year of the alleged disclosure;

(2) proceedings on the complaint that are pending before the committee on the 60th day before a state primary or general election are not stayed.

(b) Unless the taxpayer or a third party whose tax information is alleged to have been improperly disclosed consents to the public disclosure of the tax information or of the person's identity, the proceedings of the committee under AS 24.60.170 are further modified as follows:

(1) the hearing may not be held in open session;

(2) before being made public, a transcript containing the information shall be edited to prevent the disclosure of the information and the identity of the taxpayer or the third party;

(3) a decision, if made public, shall be edited to prevent the disclosure of the information and to protect the identity of the taxpayer or the third party; and

(4) a public statement may not contain information identifying the taxpayer, a third party, or the tax information.

(c) A person whose tax information is alleged to have been improperly disclosed may consent to the public disclosure of the person's identity and of certain portions of the information without waiving the right to keep confidential the remainder of the tax information. The release must be in writing unless given orally by the person on the record before the committee. The information released from confidentiality under this subsection may be disclosed in the materials released to the public under (b)(2) - (4) of this section.

* Sec. 5. AS 43.05.230(a) is amended to read:

(a) It is unlawful for a current or former officer, <u>legislator,</u> employee, or agent of the state to divulge the amount of income or the particulars set out or disclosed in a report or return made under this title, except

(1) in connection with official investigations or proceedings of the department, whether judicial or administrative, involving taxes due under this title;

(2) in connection with official investigations or proceedings of the child support enforcement agency, whether judicial or administrative, involving child support obligations imposed or imposable under AS 25 or AS 47;

(3) as provided in AS 38.05.036 pertaining to audit functions; and

(4) as otherwise provided in this section <u>or in AS 43.05.231 - 43.05.239</u>.

* Sec. 6. AS 43.05.230(f) is repealed and reenacted to read:

(f) A person who knowingly violates a provision of this section is guilty of a class C felony. If the negligence of a member or former member of the legislature or a present or former employee or agent of the legislature results in a violation of this section, the

member, employee, or agent of the legislature is subject to a civil penalty of $5,000. The department shall enforce this section and collect the civil penalty established by this subsection. This subsection is not intended to impair, limit, or abolish a right, claim, or cause of action that a person may have whose information is unlawfully disclosed.

* Sec. 7. AS 43.05 is amended by adding new sections to read:

Sec. 43.05.231. LEGISLATIVE REQUEST FOR TAX INFORMATION. Subject to AS 43.05.233, after a legislative committee identifies the scope of an investigation or inquiry relating to taxes, and after adoption by either house of the legislature of a simple resolution giving the committee authority to receive tax information about critical taxes, the committee chair or co-chair may request tax returns and return information relating to critical taxes, and the commissioner of revenue shall provide the requested tax returns or return information under AS 43.05.231 - 43.05.239. The request shall be in writing and may identify a particular taxpayer.

Sec. 43.05.232. COMMISSIONER'S TRANSFER OF UNREQUESTED TAX INFORMATION. (a) Subject to AS 43.05.233, the commissioner may transfer unrequested tax returns or return information regarding critical taxes to a legislative committee after making a written determination that the transfer of the tax returns or return information is in the best interest of the state.

(b) In making a determination under (a) of this section, the commissioner shall consider

(1) if the legislative committee is reviewing the administration of a critical tax, whether the tax returns or return information would demonstrate the application of a critical tax more clearly than a hypothetical example would, and if so, whether the aspects of

tax administration that would be more clearly demonstrated are material and significant to the committee's review;

(2) if the legislative committee is considering adding a new tax or amending an existing tax, how necessary it is to transfer tax returns or return information regarding critical taxes in order to demonstrate the effect on taxpayers of the tax law change being considered;

(3) whether the tax returns or return information would clarify or rectify information provided by a taxpayer to a legislative committee;

(4) the potential harm the taxpayer may suffer if the taxpayer's tax returns or return information is subsequently disclosed illegally;

(5) any other interest of the taxpayer in avoiding the transfer of the tax returns or return information;

(6) if a taxpayer's tax returns or return information is being transferred at the taxpayer's request under AS 43.05.235(e), whether it is necessary or appropriate to supplement the tax returns or return information in order to give the committee a balanced and complete presentation.

Sec. 43.05.233. GENERAL LIMITATIONS ON REQUESTS AND TRANSFERS. (a) Tax returns and return information for critical taxes may be requested by a legislative committee under AS 43.05.231 or transferred to a legislative committee under AS 43.05.232 only if the purpose of the committee's request or transfer is to assist the committee in carrying out its responsibilities to

(1) consider tax legislation; or

(2) oversee the effective and efficient administration of the state's laws regarding critical taxes, including the review of

audits, litigation, or settlements.

(b) A request or transfer may not be made under AS 43.05.231 or 43.05.232 if the purpose of the request or transfer is to direct the executive branch in its audit, litigation, or settlement efforts, or to collect information to embarrass, harass, or discriminate against a taxpayer.

(c) AS 43.05.231 - 43.05.239 do not permit the transfer to a legislative committee of tax returns and return information provided by the Internal Revenue Service under exchange agreements with the department, or the transfer to a legislative committee of tax returns and return information for taxes other than critical taxes.

Sec. 43.05.234. PREPARATION AND TRANSMITTAL OF TAX INFORMATION. (a) Before providing tax returns or return information in response to a legislative request under AS 43.05.231 or under a commissioner's determination made under AS 43.05.232, the commissioner shall review the purpose of the proposed transfer of the tax returns or return information to determine what type of tax return or return information will provide the needed information. If more than one type of tax return or return information will provide the needed information, the commissioner shall choose the return or return information that, in the commissioner's discretion, is the least commercially sensitive. Whenever possible, instead of transactional documents, the commissioner shall transfer summary documents or analyses that have been prepared by the department. In this subsection, "summary documents or analyses" includes audit narratives, informal conference decisions, and formal hearing decisions.

(b) When the period for submitting additional analysis, comment, or information under AS 43.05.235(b) has expired, the commissioner shall transfer to the committee the tax return or return information,

including the additional analysis, comment, or information, if any, received by the commissioner from the taxpayer under AS 43.05.235(b).

(c) If a taxpayer submits analysis, comment, and other written information to a committee under AS 43.05.235(d), the department shall transfer the analysis, comment, or other information to the committee within 24 hours after receiving it and the request.

(d) The commissioner shall transfer all the tax returns and return information requested to be transferred by the taxpayer under AS 43.05.235(e) within 24 hours after receiving the request, except for return information that needs to be extracted or compiled by the department from other materials. Return information that needs to be extracted or compiled by the department shall be transferred within five days after the request. The chair or co-chair of the committee to which the return information is to be transferred may for good cause grant a reasonable extension of time for making the transfer and shall immediately notify the taxpayer of the extension.

(e) The department has exclusive responsibility for duplicating and numbering the copies of tax returns and return information provided to a legislative committee under AS 43.05.231 - 43.05.235.

Sec. 43.05.235. TAXPAYER NOTIFICATION AND SUBMISSION OF TAX INFORMATION. (a) Before transferring a tax return or return information under AS 43.05.231 or 43.05.232, the commissioner shall notify the taxpayer whose tax return or return information is to be transferred of the proposed transfer and the content of the tax return or return information to be transferred, and, if the transfer is under AS 43.05.232, shall provide the taxpayer with a copy of the commissioner's determination.

(b) Within seven days after receiving the notice of a transfer proposed under AS 43.05.231 or the notice and determination of a

transfer proposed under AS 43.05.232, the taxpayer may submit additional analysis, comment, or other information to the department for transfer under AS 43.05.234(b).

(c) A taxpayer may waive the provisions of (a) - (b) of this section by providing the commissioner with a written waiver signed by the taxpayer.

(d) If, in addition to the additional analysis, comment, and other information filed by the taxpayer with the department under (b) of this section, a taxpayer wants to provide the legislative committee with analysis, comment, and other written information regarding the taxpayer's tax return or return information being considered by the committee, the taxpayer shall file the analysis, comment, or other information with the department and request that the department transfer the information to the legislative committee.

(e) A taxpayer may at any time request the commissioner to transfer the taxpayer's tax returns or return information to a legislative committee. The request must be in writing, must state which tax returns or return information is to be transferred, and must state the legislative committee to which the tax returns or return information is to be transferred. The taxpayer shall pay the department the reasonable cost of duplicating the material for the transfer.

(f) A taxpayer's request under (e) of this section is not a waiver of confidentiality, and the tax returns and return information transferred under (e) of this section are subject to the same sanctions and safeguards against disclosure as other tax returns and return information transferred under AS 43.05.231 - 43.05.235.

Sec. 43.05.236. CONSIDERATION OF TAX INFORMATION BY LEGISLATIVE COMMITTEE. (a) A legislative committee shall consider tax returns and return information transferred under AS 43.05.231 - 43.05.235 in

executive session only, unless the taxpayer and any third party whose tax return or return information is being considered in conjunction with the taxpayer's tax return or return information consent in writing to a disclosure in open session. The executive session must be open to all legislators.

(b) The committee chair or co-chair may designate legislative employees and agents to inspect the tax returns and return information, but the chair or co-chair shall limit the number of designated employees and agents to the fewest number necessary that is consistent with the need of the committee and its individual members to analyze and understand the tax return and return information fully. Legislative employees and agents who are not designated under this subsection may not attend the executive session.

(c) If a tax return or return information regarding only one taxpayer is being presented to the committee or is being discussed by it, the chair or co-chair shall allow the taxpayer to attend the portions of the executive session when the taxpayer's tax return or return information is presented or discussed, and the taxpayer shall have a reasonable opportunity to address the committee at the conclusion of the presentation or discussion.

(d) If a tax return or return information regarding more than one taxpayer is being presented to or considered by the committee at one time, a transcript of the executive session shall be prepared and presented to each taxpayer within 48 hours after the executive session. The portions of the transcript pertaining to tax returns and return information of a taxpayer other than the one to whom it is presented shall be blanked out or otherwise deleted while at the same time preserving the coherence of the transcript as much as possible.

(e) At the request of the taxpayer, a taxpayer receiving an

edited transcript under (d) of this section shall be given a reasonable opportunity as soon as practicable to address the committee in executive session about the presentation and discussion of the taxpayer's tax returns and return information.

Sec. 43.05.237. PROHIBITION AGAINST DISCLOSURE. (a) Disclosure contrary to the provisions of AS 43.05.231 - 43.05.239 by a member or former member of the legislature or by a present or former employee or agent of the legislature of all or part of a tax return or return information that is confidential under AS 43.05.230 and transferred to a legislative committee under AS 43.05.231 - 43.05.235 is a violation of AS 43.05.230.

(b) Before receiving or reviewing a return or return information provided by the commissioner under AS 43.05.231 - 43.05.235, a member of the legislature or an employee or agent of the legislature shall, on a form prepared by the commissioner,

(1) acknowledge that the return or return information is confidential and that a disclosure of part or all of the return or return information contrary to the provisions of this section is prohibited by law; and

(2) execute an agreement with the department to keep the return or return information confidential, to abide by regulations adopted by the department under AS 43.05.238, and to return the documents to the department.

Sec. 43.05.238. REGULATIONS. To ensure confidentiality, the commissioner shall adopt regulations governing the transmittal, receipt, safekeeping, removal from storage or filing location, accounting for possession, and return to the department of tax returns and return information transferred under AS 43.05.231 - 43.05.235.

Sec. 43.05.239. DEFINITIONS. In AS 43.05.231 - 43.05.239

(1) "critical tax" means

(A) a tax imposed under AS 43.55 or AS 43.57;

(B) the tax imposed under former AS 43.21, unless the taxpayer is a corporation established under 43 U.S.C. 1606; and

(C) the tax imposed under AS 43.20 if AS 43.20.072 applies when determining the amount of the tax and the taxpayer is not a corporation established under 43 U.S.C. 1606;

(2) "return" has the meaning given in 26 U.S.C. 6103(b)(1), except that "secretary" is read as "department" and "this title" means AS 43;

(3) "return information" has the meaning given in 26 U.S.C. 6103(b)(2)(A), except that "secretary" is read as "department" and "this title" means AS 43; "return information" does not include transactional documents prepared during a tax period that ended within two years of the date of the transfer of the "return information" under AS 43.05.231 - 43.05.235;

(4) "transactional document" means a document that relates to the sale, exchange, or other transfer by a taxpayer of real property or tangible or intangible personal property and that

(A) constitutes all or part of a contract or agreement concerning the sale, exchange, or other transfer, including contract amendments, billings, and invoices; or

(B) summarizes one or more of the terms of the sale, exchange, or other transfer.

* Sec. 8. AS 43.05.240(a) is amended to read:

(a) Except as to a matter for which procedures are provided in AS 43.05.246 - 43.05.248, a [A] person aggrieved by the action of the department in fixing the amount of a tax, [OR] in imposing a penalty, or in denying a request for refund of tax may apply to the department

within 60 days from the date of mailing the notice required to be given to the person by the department, giving notice of the grievance [,] and requesting an informal conference. At the conference the person aggrieved may present arguments and evidence relevant to the grievance [AMOUNT OF TAX OR PENALTY DUE THE STATE]. If the department determines that a correction is warranted, the department shall make the correction.

* Sec. 9. AS 43.05.240(b) is amended to read:

(b) Except as to a matter for which procedures are provided in AS 43.05.246 - 43.05.248, a [A] person aggrieved by the action of the department in fixing the amount of a tax, [OR] in imposing a penalty, or in denying a request for refund of tax may apply to the department and request a formal hearing

(1) in place of the informal conference provided for in (a) of this section, within 60 days from the date of mailing the notice required to be given to the person by the department; or

(2) within 30 days after decision resulting from an informal conference.

* Sec. 10. AS 43.05.240(c) is amended to read:

(c) At the formal hearing the department may subpoena witnesses and may administer oaths and make inquiries necessary to consider and decide the grievance [DETERMINE THE AMOUNT OF THE TAX OR PENALTY DUE THE STATE]. The person aggrieved may present arguments and evidence relevant to the amount of the tax or penalty due the state. If the department determines that a correction is warranted, the department shall make the correction.

* Sec. 11. AS 43.05.245 is amended to read:

Sec. 43.05.245. ASSESSMENT AND COLLECTION OF TAX, PENALTIES, AND INTEREST. If a taxpayer fails to file a return or report required by

this title in the time required by law or regulation, or makes an erroneous or fraudulent return, the department shall proceed to assess the license fees, tax, penalties, or interest and make a return from information which it obtains. A return made and subscribed by the department in accordance with this section is presumed sufficient for all legal purposes. However, nothing prevents a taxpayer from presenting evidence or other information on an appeal under AS 43.05.240 or under procedures provided by AS 43.05.246 - 43.05.248 in order to rebut the presumed sufficiency of a return made and subscribed by the department, nor does the presumption of sufficiency alter the parties' respective burdens of proof once the taxpayer has presented evidence or other material information to rebut that presumption. The assessment of license fees, tax, penalties, or interest under this section occurs when the department issues a notice and demand for payment of the license fees, tax, penalties, or interest, when a notice and demand for payment becomes final under AS 43.05.246(g), or when the department issues a final notice and demand for payment under AS 43.05.247(f). The notice and demand for payment is issued when the notice and demand is delivered to the taxpayer in person or placed in the United States mail, addressed to the last known address of the taxpayer. Penalties and interest assessed under this title shall be collected in the same manner as provided in this title for the collection of tax or license fees.

* Sec. 12. AS 43.05 is amended by adding new sections to read:

Sec. 43.05.246. CLOSING CONFERENCE AND PRELIMINARY ASSESSMENT. (a) The procedures under this section apply to taxes under AS 43.20, AS 43.55, AS 43.57, and former AS 43.21.

(b) Before issuing a notice and demand for payment for a tax described in (a) of this section, the department shall give the

taxpayer a written draft of its preliminary conclusions. The draft of the preliminary conclusions must contain the following:

(1) a draft of any notice and demand for payment that the department preliminarily concludes may be in order;

(2) a draft narrative fully explaining how and why the preliminary assessment of tax or penalty has been determined; and

(3) schedules or worksheets in written or computer-readable format setting out the calculations for the preliminary assessment.

(c) The department shall schedule a closing conference with the taxpayer, to be held not less than 60 nor more than 90 days after the department delivers its preliminary audit conclusions under (b) of this section to the taxpayer in person or places those materials in the United States mail, addressed to the last known address of the taxpayer. The parties may extend the date for the closing conference by agreement.

(d) The purpose of the closing conference is to conclude the audit process and allow the parties to review and discuss the preliminary results and conclusions of that process informally so that any mistaken assumptions, misunderstandings, and other errors or mistakes can be identified and eliminated as much as possible and so that incomplete information and unsubstantiated items can be supplemented and substantiated. Although the interests of the parties are divergent, the closing conference is not an adversarial proceeding. The taxpayer may submit written and oral evidence, materials, and statements, but may not be required to do so. The department's employee in immediate charge of the audit, investigation, or inspection may also submit written and oral evidence, materials, and statements at the closing conference. By agreement, written materials may be submitted at other times before or after the closing conference.

(e) The taxpayer may send one or more representatives to the closing conference. The auditor or other person in immediate charge of the audit, investigation, or inspection upon which the preliminary assessment has been made shall attend the closing conference, and the director of the division proposing the assessment or the director's immediate subordinate designated for this purpose other than the person in immediate charge of the audit, investigation, or inspection shall preside at the closing conference. The department may have additional representatives at the closing conference. The person in immediate charge of the audit, investigation, or inspection may be excused from attending the closing conference with the consent of the taxpayer or because of serious illness or injury, incapacitation, death, or termination of employment with the department.

(f) Not more than 60 days after the conclusion of the closing conference, the presiding officer shall issue a written decision. If the presiding officer determines that additional tax is owed or that a penalty should be assessed, or both, the closing conference decision shall include a proposed notice and demand for payment for the additional tax and interest and any penalty. The proposed notice and demand for payment shall include a written narrative fully explaining how and why the assessment of tax or penalty has been determined, together with schedules or worksheets in written or computer-readable format setting out the calculations for the proposed assessment. If the presiding officer determines that no assessment is in order, the taxpayer shall be given written notice to that effect within this 60-day period. By agreement, the parties may extend the date for issuing a notice of assessment and demand for payment or a notice of no assessment.

(g) Unless the taxpayer requests a policy review hearing under

AS 43.05.247, a proposed notice and demand for payment issued under (f) of this section is final 30 days after its issuance and may not thereafter be made the subject of judicial review.

Sec. 43.05.247. POLICY REVIEW HEARING. (a) A person aggrieved by the action of the department in issuing a closing conference decision under AS 43.05.246(f) or in denying a request for refund of tax under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21 may request a policy review hearing within 30 days after the date of mailing of the notice required to be given under AS 43.05.246(f) or the denial of the request for refund. For purposes of this section, a failure by the department to grant or deny a request for refund within 60 days from the time the request is made shall be considered a denial of that request, unless the parties have extended the period by agreement.

(b) The department shall schedule the policy review hearing to be held within 30 days after the aggrieved person's request for it. The parties may extend the date for the policy review hearing by agreement.

(c) The purpose of the policy review hearing is to allow the commissioner to determine whether the action causing the grievance under (a) of this section reflects and incorporates the correct policies of the department, and if so, whether those policies are being applied correctly to the aggrieved person's circumstances.

(d) The commissioner or an authorized representative of the commissioner other than an employee in the division taking the action causing the grievance shall preside at the policy review hearing. The aggrieved person, acting in person or through one or more authorized representatives, shall have the opportunity to explain the nature of the grievance and the relief sought. If the person is aggrieved by a proposed assessment based on facts that the person believes are

incorrect or incomplete, the person shall present written and oral evidence and materials to correct or complete the facts. After the presentation of the aggrieved person's case, the director of the division taking the action causing the grievance or another authorized representative of the division shall have the opportunity to explain that action and the policies and reasons for it. The division shall have the opportunity to present written and oral evidence and materials to prove facts that it has asserted and that the aggrieved person has challenged as incorrect and to rebut or disprove any supplemental facts that the aggrieved person has sought to establish. The formal rules of evidence do not apply to either party's presentations on factual issues, but the presiding officer may require witnesses for both parties to give their testimony under oath and shall allow each party's witnesses to be examined by the other party. The proceedings of the policy review hearing shall be recorded and made part of the administrative record, together with any materials that may be submitted for the policy review in advance of, or after, the hearing.

(e) Not more than 90 days after the conclusion of the policy review hearing the commissioner shall issue a policy review decision. The policy review decision must

(1) state what relief, if any, is being granted to the aggrieved person, and state which portions, if any, of the department's action giving rise to the grievance are being upheld;

(2) state which additional facts, if any, that the aggrieved person sought to show at the hearing are being recognized and which additional facts are being disregarded;

(3) for each disputed fact when there is a dispute as to one or more facts, state what is being taken as being the actual fact;

and

(4) state, as specifically as possible, which statutory and regulatory provisions are being relied on in granting or denying relief to the aggrieved person, how those provisions are being interpreted and applied, and the specific policy considerations for the particular interpretation and application of these provisions; broad, unspecific policies, such as maximizing the state's tax revenue, are not sufficient for justifying a particular interpretation or application of a statute or regulation.

(f) If the policy review decision concludes that a notice and demand for payment should be made for additional tax and interest, or penalties, if any, a final notice and demand assessing the tax and interest, or penalties, if any, shall be issued at the same time as, and as part of, the policy review decision. The final notice and demand shall include a narrative fully explaining how and why the final assessment of tax and any penalty has been determined, together with schedules or worksheets in written or computer-readable format setting out the calculations for the final assessment. For purposes of AS 43.05.260, a final notice and demand for payment is not considered made until the narrative and the schedules or worksheets setting out the calculations for the final assessment have been served on the aggrieved person.

Sec. 43.05.248. APPEAL. Within 30 days after the issuance of the commissioner's policy review decision under AS 43.05.247, a person aggrieved by the decision may file an action in the superior court in the judicial district where the person resides or conducts business, for a trial de novo of those portions of the policy review decision giving rise to the grievance. Neither party may raise as a claim, counterclaim, or defense any portion or portions of the policy review

decision that are not contested and do not give rise to the grievance. The aggrieved person shall be given access to the files of the department in the matter for preparing the appeal. If the court determines that the assessment or the tax payment was correct, it shall confirm the tax. If the assessment or tax payment was incorrect, the court shall determine the amount of the tax and order the payment of the deficiency or the refund of the excess, as the case may be. The department shall immediately pay any refund due and attach a certified copy of the judgment to the payment.

* Sec. 13. AS 43.05.260(a) is amended to read:

(a) Except as provided in (c) and (d) of this section and AS 43.20.200(b), the amount of a tax imposed by this title must be assessed within three years after the return was filed, whether or not a return was filed on or after the date prescribed by law. If the tax is not assessed before the expiration of the three-year period, a proceeding [NO PROCEEDINGS] may not be instituted in court for the collection of the tax.

* Sec. 14. AS 43.05.260(c) is amended to read:

(c) The following exceptions apply to the limitation periods [PERIOD] in (a) and (d) of this section:

(1) in the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of the tax may be begun without assessment, at any time;

(2) in the case of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time;

(3) if, before the expiration of the time prescribed in this section for the assessment of a tax imposed by this title, both

the department and the taxpayer have consented in writing to the assessment after the expiration of the time, the tax may be assessed at any time before the expiration of the period agreed upon; however, the period agreed upon may be extended by a subsequent agreement in writing made before the expiration of the period previously agreed upon.

* Sec. 15. AS 43.05.260 is amended by adding a new subsection to read:

(d) For a tax to which the procedures under AS 43.05.246 - 43.05.248 are applicable, the limitation period is four years.

* Sec. 16. COURT RULE CHANGE. AS 43.05.248, added by sec. 12 of this Act, amends Rule 609 of the Alaska Rules of Appellate Procedure by making trial de novo mandatory rather than discretionary in appeals relating to taxes to which AS 43.05.248 is applicable and restricting the claims, counterclaims, and defenses that may be raised.

* Sec. 17. TRANSITIONAL PROVISIONS. (a) AS 43.05.231 - 43.05.239, as added by sec. 7 of this Act, apply to all tax returns and return information for critical taxes, as defined in AS 43.05.239, in the possession of the Department of Revenue on or after the effective date of this Act.

(b) The Department of Revenue shall adopt the regulations required by AS 43.05.238, enacted by sec. 7 of this Act, before the department transfers a tax return or return information to a legislative committee under AS 43.05.231 - 43.05.239. Initial regulations adopted as directed under this subsection to implement or interpret AS 43.05.231 - 43.05.239 may not be adopted as emergency regulations.

(c) The provisions of AS 43.05.248, added by sec. 12 of this Act, apply to any grievance with respect to a tax under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21 that, on the effective date of this Act, has not been appealed to superior court under AS 43.05.240(d).

* Sec. 18. This Act takes effect immediately under AS 01.10.070(c).

SFC 4/22/88

5-1449T
Bannister
4/21/88

Original sponsor: Faiks

IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 401 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to disclosure to the legislature of tax returns and return information for certain critical taxes; providing for procedures, penalties, and other safeguards to ensure the continued confidentiality of tax returns and return information; relating to audits, investigations, and inspections for certain taxes; allowing a person to seek administrative review of a denial of a tax refund request; providing for informal, nonadversarial review of an assessment with the taxpayer for certain taxes before the assessment becomes final; providing for departmental review of the policies reflected in assessments or denials of refund requests for certain taxes before those assessments and denials become final administrative actions subject to judicial review; providing for the judicial review of the administrative policy review hearing for certain taxes; amending the statute of limitations period for certain taxes; amending Rule 609 of the Alaska Rules of Appellate Procedure to require de novo review of certain final administrative tax decisions, and restricting the claims, counterclaims, and defenses that may be raised; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature finds that

(1) tax revenue is necessary to enable the state to provide essential services for its citizens and to ensure the public health and welfare;

(2) the great majority of the state's tax revenue is derived from certain critical taxes imposed on taxpayers in the oil and gas industry, including in particular, the production taxes levied under AS 43.55 and AS 43.57, the income tax levied under AS 43.20 when AS 43.20.072 applies, and the income tax levied under former AS 43.21;

(3) the relatively small number of taxpayers of these critical taxes often makes it difficult or impossible for the Department of Revenue to review the administration and operation of these taxes with the legislature without disclosing information that allows a particular taxpayer to be identified;

(4) the legislature must be able to review and oversee the administration and operation of these critical taxes in order to be assured that the state is receiving its proper tax revenue and that these critical tax laws are operating in the manner intended by the legislature;

(5) the legislature must exercise its review authority to ensure that the collection of this critical tax revenue by the Department of Revenue is efficient, fair, prompt, and in the best interest of the state;

(6) tax returns and return information are confidential and often contain information of a proprietary or sensitive business nature;

(7) taxpayers are entitled to protections against public disclosure of their tax returns and return information;

(8) exchange agreements with the Internal Revenue Service prevent certain tax information from being disclosed;

(9) protection of tax returns and return information fosters and allows for full disclosure by taxpayers to taxing authorities and, therefore, promotes effective administration of, and compliance with, tax programs;

(10) legislators and legislative employees who are given access to tax returns and return information and who improperly breach confidentiality by disclosing or allowing the information to be disclosed should be subject to the same sanctions that are imposed for the violations by employees of the executive branch;

(11) because of the natural resource revenue sharing provisions under 43 U.S.C. 1606(i) - (j), disclosure of tax returns or tax information with respect to oil and gas activities by Alaska Native corporations would intrude into the affairs and privacy not only of the Alaska Native regional corporations actually engaging in oil and gas activities, but also of all other Alaska Native regional corporations except the 13th regional corporation, all Alaska Native village corporations, and Alaska Natives who own stock in one of the original 12 regional corporations but not in a village corporation;

(12) the taxes that have been and are being paid under AS 43.20, AS 43.55, AS 43.57, and under former AS 43.21 with respect to oil and gas activities by Alaska Native corporations represent too small a fraction of the total amount of these taxes paid to the state to warrant the degree of intrusion into the affairs and privacy of Alaska Natives and Alaska Native corporations that would be caused by disclosure of tax returns or tax information to the legislature;

(13) the Department of Revenue has issued assessments against approximately two dozen oil and gas taxpayers for additional taxes, penalties, and interest that total more than $2,500,000,000, primarily for oil and gas production taxes under AS 43.55 and AS 43.57 before 1983, for

corporate income taxes under separate accounting under former AS 43.21 during the 1978 - 1981 period, and under modified apportionment, particularly under AS 43.20 and AS 43.20.072, for subsequent periods;

(14) excessive delays have occurred within the Department of Revenue in the handling of administrative appeals regarding these taxes;

(15) the penalties and interest associated with these assessments are, on the average, approximately equal to the amount of additional tax being claimed under the assessments, so that for each dollar's change in the underlying tax claim, there is a change of approximately two dollars in the total figure of $2,500,000,000 for these assessments;

(16) very large assessments regarding these taxes have been made with inadequate prior review within the Department of Revenue and with the taxpayers involved;

(17) the sheer magnitude of these assessments affects the finances and operations of the state government itself, and the collection of the taxes due, plus interest and penalties that may be appropriate, will significantly affect the ability of the state to provide for the public health and welfare of its citizens;

(18) for later tax periods that are still under audit and for tax periods in the future, the best interest of the state and its citizens requires that the audits, the administrative review, and the collection of additional assessed taxes be conducted and completed in a more orderly and expeditious fashion than is currently the case; and

(19) to avoid the risks and delays that could arise from taxpayer challenges to the administrative appeal process within the Department of Revenue on the ground that the department's hearing officers are not disinterested and impartial, Alaska Rule of Appellate Procedure 609 must be changed to provide for mandatory instead of discretionary de novo review by the superior court of disputed factual issues in the department's final

decisions regarding these critical oil and gas taxes.

(b) The purposes of this Act are to ensure that

(1) the public health and welfare of the citizens of the state are provided for through the receipt and expeditious collection of all tax revenue that the state is entitled to receive under its tax laws;

(2) the legislature is able to fulfill effectively its responsibilities to monitor and review the administration of the state's tax laws and to consider changes that may become necessary or desirable from time to time for those laws;

(3) taxpayers are protected from improper disclosure of tax returns and return information;

(4) the exchange agreements with the Internal Revenue Service regarding tax information are not jeopardized;

(5) the tax laws of the state are administered fairly and uniformly; and

(6) the right to privacy is recognized, respected, and properly protected.

* Sec. 2. AS 24.10 is amended by adding a new section to article 2 to read:

Sec. 24.10.070. CONFIDENTIALITY OF INFORMATION. A present or former employee or agent of the legislature may not disclose tax information contained in a report or return filed under AS 43 without the prior consent of the person whose tax information would be disclosed.

* Sec. 3. AS 24.60.060 is amended by adding a new subsection to read:

(b) A person to whom this chapter applies may not disclose or use for personal gain or for the personal gain of another person any confidential tax information contained in a report or a return filed under AS 43 and furnished to the person under AS 43.05.231 -

43.05.239. A violation of this subsection is one of the most serious breaches of the standards of conduct established by this chapter.

* Sec. 4. AS 24.60 is amended by adding a new section to read:

Sec. 24.60.172. SPECIAL PROCEEDINGS BEFORE THE COMMITTEE. (a) If a complaint before the committee involves an allegation that a person to whom this chapter applies has disclosed confidential tax information contained in a report or return filed under AS 43 with the Department of Revenue and furnished to the person under AS 43.05.231 - 43.05.239, the proceedings of the committee under AS 24.60.170 are modified as follows:

(1) the complaint may be initiated and filed at any time within one year of the alleged disclosure;

(2) proceedings on the complaint that are pending before the committee on the 60th day before a state primary or general election are not stayed.

(b) Unless the taxpayer or a third party whose tax information is alleged to have been improperly disclosed consents to the public disclosure of the tax information or of the person's identity, the proceedings of the committee under AS 24.60.170 are further modified as follows:

(1) the hearing may not be held in open session;

(2) before being made public, a transcript containing the information shall be edited to prevent the disclosure of the information and the identity of the taxpayer or the third party;

(3) a decision, if made public, shall be edited to prevent the disclosure of the information and to protect the identity of the taxpayer or the third party; and

(4) a public statement may not contain information identifying the taxpayer, a third party, or the tax information.

(c) A person whose tax information is alleged to have been improperly disclosed may consent to the public disclosure of the person's identity and of certain portions of the information without waiving the right to keep confidential the remainder of the tax information. The release must be in writing unless given orally by the person on the record before the committee. The information released from confidentiality under this subsection may be disclosed in the materials released to the public under (b)(2) - (4) of this section.

* Sec. 5. AS 43.05.230(a) is amended to read:

(a) It is unlawful for a current or former officer, <u>legislator,</u> employee, or agent of the state to divulge the amount of income or the particulars set out or disclosed in a report or return made under this title, except

(1) in connection with official investigations or proceedings of the department, whether judicial or administrative, involving taxes due under this title;

(2) in connection with official investigations or proceedings of the child support enforcement agency, whether judicial or administrative, involving child support obligations imposed or imposable under AS 25 or AS 47;

(3) as provided in AS 38.05.036 pertaining to audit functions; and

(4) as otherwise provided in this section <u>or in AS 43.05.231 - 43.05.239</u>.

* Sec. 6. AS 43.05.230(f) is repealed and reenacted to read:

(f) A person who knowingly violates a provision of this section is guilty of a class C felony. If the negligence of a member or former member of the legislature or a present or former employee or agent of the legislature results in a violation of this section, the

member, employee, or agent of the legislature is subject to a civil penalty of $5,000. The department shall enforce this section and collect the civil penalty established by this subsection. This subsection is not intended to impair, limit, or abolish a right, claim, or cause of action that a person may have whose information is unlawfully disclosed.

* Sec. 7. AS 43.05 is amended by adding new sections to read:

Sec. 43.05.231. LEGISLATIVE REQUEST FOR TAX INFORMATION. Subject to AS 43.05.233, after a legislative committee identifies the scope of an investigation or inquiry relating to taxes, and after adoption by either house of the legislature of a simple resolution giving the committee authority to receive tax information about critical taxes, the committee chair or co-chair may request tax returns and return information relating to critical taxes, and the commissioner of revenue shall provide the requested tax returns or return information under AS 43.05.231 - 43.05.239. The request shall be in writing and may identify a particular taxpayer.

Sec. 43.05.232. COMMISSIONER'S TRANSFER OF UNREQUESTED TAX INFORMATION. (a) Subject to AS 43.05.233, the commissioner may transfer unrequested tax returns or return information regarding critical taxes to a legislative committee after making a written determination that the transfer of the tax returns or return information is in the best interest of the state.

(b) In making a determination under (a) of this section, the commissioner shall consider

(1) if the legislative committee is reviewing the administration of a critical tax, whether the tax returns or return information would demonstrate the application of a critical tax more clearly than a hypothetical example would, and if so, whether the aspects of

tax administration that would be more clearly demonstrated are material and significant to the committee's review;

(2) if the legislative committee is considering adding a new tax or amending an existing tax, how necessary it is to transfer tax returns or return information regarding critical taxes in order to demonstrate the effect on taxpayers of the tax law change being considered;

(3) whether the tax returns or return information would clarify or rectify information provided by a taxpayer to a legislative committee;

(4) the potential harm the taxpayer may suffer if the taxpayer's tax returns or return information is subsequently disclosed illegally;

(5) any other interest of the taxpayer in avoiding the transfer of the tax returns or return information;

(6) if a taxpayer's tax returns or return information is being transferred at the taxpayer's request under AS 43.05.235(e), whether it is necessary or appropriate to supplement the tax returns or return information in order to give the committee a balanced and complete presentation.

Sec. 43.05.233. GENERAL LIMITATIONS ON REQUESTS AND TRANSFERS. (a) Tax returns and return information for critical taxes may be requested by a legislative committee under AS 43.05.231 or transferred to a legislative committee under AS 43.05.232 only if the purpose of the committee's request or transfer is to assist the committee in carrying out its responsibilities to

(1) consider tax legislation; or

(2) oversee the effective and efficient administration of the state's laws regarding critical taxes, including the review of

audits, litigation, or settlements.

(b) A request or transfer may not be made under AS 43.05.231 or 43.05.232 if the purpose of the request or transfer is to direct the executive branch in its audit, litigation, or settlement efforts, or to collect information to embarrass, harass, or discriminate against a taxpayer.

(c) AS 43.05.231 - 43.05.239 do not permit the transfer to a legislative committee of tax returns and return information provided by the Internal Revenue Service under exchange agreements with the department, or the transfer to a legislative committee of tax returns and return information for taxes other than critical taxes.

Sec. 43.05.234. PREPARATION AND TRANSMITTAL OF TAX INFORMATION. (a) Before providing tax returns or return information in response to a legislative request under AS 43.05.231 or under a commissioner's determination made under AS 43.05.232, the commissioner shall review the purpose of the proposed transfer of the tax returns or return information to determine what type of tax return or return information will provide the needed information. If more than one type of tax return or return information will provide the needed information, the commissioner shall choose the return or return information that, in the commissioner's discretion, is the least commercially sensitive. Whenever possible, instead of transactional documents, the commissioner shall transfer summary documents or analyses that have been prepared by the department. In this subsection, "summary documents or analyses" includes audit narratives, informal conference decisions, and formal hearing decisions.

(b) When the period for submitting additional analysis, comment, or information under AS 43.05.235(b) has expired, the commissioner shall transfer to the committee the tax return or return information,

including the additional analysis, comment, or information, if any, received by the commissioner from the taxpayer under AS 43.05.235(b).

(c) If a taxpayer submits analysis, comment, and other written information to a committee under AS 43.05.235(d), the department shall transfer the analysis, comment, or other information to the committee within 24 hours after receiving it and the request.

(d) The commissioner shall transfer all the tax returns and return information requested to be transferred by the taxpayer under AS 43.05.235(e) within 24 hours after receiving the request, except for return information that needs to be extracted or compiled by the department from other materials. Return information that needs to be extracted or compiled by the department shall be transferred within five days after the request. The chair or co-chair of the committee to which the return information is to be transferred may for good cause grant a reasonable extension of time for making the transfer and shall immediately notify the taxpayer of the extension.

(e) The department has exclusive responsibility for duplicating and numbering the copies of tax returns and return information provided to a legislative committee under AS 43.05.231 - 43.05.235.

Sec. 43.05.235. TAXPAYER NOTIFICATION AND SUBMISSION OF TAX INFORMATION. (a) Before transferring a tax return or return information under AS 43.05.231 or 43.05.232, the commissioner shall notify the taxpayer whose tax return or return information is to be transferred of the proposed transfer and the content of the tax return or return information to be transferred, and, if the transfer is under AS 43.05.232, shall provide the taxpayer with a copy of the commissioner's determination.

(b) Within seven days after receiving the notice of a transfer proposed under AS 43.05.231 or the notice and determination of a

transfer proposed under AS 43.05.232, the taxpayer may submit additional analysis, comment, or other information to the department for transfer under AS 43.05.234(b).

(c) A taxpayer may waive the provisions of (a) - (b) of this section by providing the commissioner with a written waiver signed by the taxpayer.

(d) If, in addition to the additional analysis, comment, and other information filed by the taxpayer with the department under (b) of this section, a taxpayer wants to provide the legislative committee with analysis, comment, and other written information regarding the taxpayer's tax return or return information being considered by the committee, the taxpayer shall file the analysis, comment, or other information with the department and request that the department transfer the information to the legislative committee.

(e) A taxpayer may at any time request the commissioner to transfer the taxpayer's tax returns or return information to a legislative committee. The request must be in writing, must state which tax returns or return information is to be transferred, and must state the legislative committee to which the tax returns or return information is to be transferred. The taxpayer shall pay the department the reasonable cost of duplicating the material for the transfer.

(f) A taxpayer's request under (e) of this section is not a waiver of confidentiality, and the tax returns and return information transferred under (e) of this section are subject to the same sanctions and safeguards against disclosure as other tax returns and return information transferred under AS 43.05.231 - 43.05.235.

Sec. 43.05.236. CONSIDERATION OF TAX INFORMATION BY LEGISLATIVE COMMITTEE. (a) A legislative committee shall consider tax returns and return information transferred under AS 43.05.231 - 43.05.235 in

executive session only, unless the taxpayer and any third party whose tax return or return information is being considered in conjunction with the taxpayer's tax return or return information consent in writing to a disclosure in open session. The executive session must be open to all legislators.

(b) The committee chair or co-chair may designate legislative employees and agents to inspect the tax returns and return information, but the chair or co-chair shall limit the number of designated employees and agents to the fewest number necessary that is consistent with the need of the committee and its individual members to analyze and understand the tax return and return information fully. Legislative employees and agents who are not designated under this subsection may not attend the executive session.

(c) If a tax return or return information regarding only one taxpayer is being presented to the committee or is being discussed by it, the chair or co-chair shall allow the taxpayer to attend the portions of the executive session when the taxpayer's tax return or return information is presented or discussed, and the taxpayer shall have a reasonable opportunity to address the committee at the conclusion of the presentation or discussion.

(d) If a tax return or return information regarding more than one taxpayer is being presented to or considered by the committee at one time, a transcript of the executive session shall be prepared and presented to each taxpayer within 48 hours after the executive session. The portions of the transcript pertaining to tax returns and return information of a taxpayer other than the one to whom it is presented shall be blanked out or otherwise deleted while at the same time preserving the coherence of the transcript as much as possible.

(e) At the request of the taxpayer, a taxpayer receiving an

edited transcript under (d) of this section shall be given a reasonable opportunity as soon as practicable to address the committee in executive session about the presentation and discussion of the taxpayer's tax returns and return information.

Sec. 43.05.237. PROHIBITION AGAINST DISCLOSURE. (a) Disclosure contrary to the provisions of AS 43.05.231 - 43.05.239 by a member or former member of the legislature or by a present or former employee or agent of the legislature of all or part of a tax return or return information that is confidential under AS 43.05.230 and transferred to a legislative committee under AS 43.05.231 - 43.05.235 is a violation of AS 43.05.230.

(b) Before receiving or reviewing a return or return information provided by the commissioner under AS 43.05.231 - 43.05.235, a member of the legislature or an employee or agent of the legislature shall, on a form prepared by the commissioner,

(1) acknowledge that the return or return information is confidential and that a disclosure of part or all of the return or return information contrary to the provisions of this section is prohibited by law; and

(2) execute an agreement with the department to keep the return or return information confidential, to abide by regulations adopted by the department under AS 43.05.238, and to return the documents to the department.

Sec. 43.05.238. REGULATIONS. To ensure confidentiality, the commissioner shall adopt regulations governing the transmittal, receipt, safekeeping, removal from storage or filing location, accounting for possession, and return to the department of tax returns and return information transferred under AS 43.05.231 - 43.05.235.

Sec. 43.05.239. DEFINITIONS. In AS 43.05.231 - 43.05.239

(1) "critical tax" means

(A) a tax imposed under AS 43.55 or AS 43.57;

(B) the tax imposed under former AS 43.21, unless the taxpayer is a corporation established under 43 U.S.C. 1606; and

(C) the tax imposed under AS 43.20 if AS 43.20.072 applies when determining the amount of the tax and the taxpayer is not a corporation established under 43 U.S.C. 1606;

(2) "return" has the meaning given in 26 U.S.C. 6103(b)(1), except that "secretary" is read as "department" and "this title" means AS 43;

(3) "return information" has the meaning given in 26 U.S.C. 6103(b)(2)(A), except that "secretary" is read as "department" and "this title" means AS 43; "return information" does not include transactional documents prepared during a tax period that ended within two years of the date of the transfer of the "return information" under AS 43.05.231 - 43.05.235;

(4) "transactional document" means a document that relates to the sale, exchange, or other transfer by a taxpayer of real property or tangible or intangible personal property and that

(A) constitutes all or part of a contract or agreement concerning the sale, exchange, or other transfer, including contract amendments, billings, and invoices; or

(B) summarizes one or more of the terms of the sale, exchange, or other transfer.

* Sec. 8. AS 43.05.240(a) is amended to read:

(a) <u>Except as to a matter for which procedures are provided in AS 43.05.246 - 43.05.248, a</u> [A] person aggrieved by the action of the department in fixing the amount of a tax, [OR] in imposing a penalty, <u>or in denying a request for refund of tax</u> may apply to the department

within 60 days from the date of mailing the notice required to be given to the person by the department, giving notice of the grievance [,] and requesting an informal conference. At the conference the person aggrieved may present arguments and evidence relevant to the grievance [AMOUNT OF TAX OR PENALTY DUE THE STATE]. If the department determines that a correction is warranted, the department shall make the correction.

* Sec. 9. AS 43.05.240(b) is amended to read:

(b) Except as to a matter for which procedures are provided in AS 43.05.246 - 43.05.248, a [A] person aggrieved by the action of the department in fixing the amount of a tax, [OR] in imposing a penalty, or in denying a request for refund of tax may apply to the department and request a formal hearing

(1) in place of the informal conference provided for in (a) of this section, within 60 days from the date of mailing the notice required to be given to the person by the department; or

(2) within 30 days after decision resulting from an informal conference.

* Sec. 10. AS 43.05.240(c) is amended to read:

(c) At the formal hearing the department may subpoena witnesses and may administer oaths and make inquiries necessary to consider and decide the grievance [DETERMINE THE AMOUNT OF THE TAX OR PENALTY DUE THE STATE]. The person aggrieved may present arguments and evidence relevant to the amount of the tax or penalty due the state. If the department determines that a correction is warranted, the department shall make the correction.

* Sec. 11. AS 43.05.245 is amended to read:

Sec. 43.05.245. ASSESSMENT AND COLLECTION OF TAX, PENALTIES, AND INTEREST. If a taxpayer fails to file a return or report required by

this title in the time required by law or regulation, or makes an erroneous or fraudulent return, the department shall proceed to assess the license fees, tax, penalties, or interest and make a return from information which it obtains. A return made and subscribed by the department in accordance with this section is presumed sufficient for all legal purposes. However, nothing prevents a taxpayer from presenting evidence or other information on an appeal under AS 43.05.240 or under procedures provided by AS 43.05.246 - 43.05.248 in order to rebut the presumed sufficiency of a return made and subscribed by the department, nor does the presumption of sufficiency alter the parties' respective burdens of proof once the taxpayer has presented evidence or other material information to rebut that presumption. The assessment of license fees, tax, penalties, or interest under this section occurs when the department issues a notice and demand for payment of the license fees, tax, penalties, or interest, when a notice and demand for payment becomes final under AS 43.05.246(g), or when the department issues a final notice and demand for payment under AS 43.05.247(f). The notice and demand for payment is issued when the notice and demand is delivered to the taxpayer in person or placed in the United States mail, addressed to the last known address of the taxpayer. Penalties and interest assessed under this title shall be collected in the same manner as provided in this title for the collection of tax or license fees.

* Sec. 12. AS 43.05 is amended by adding new sections to read:

Sec. 43.05.246. CLOSING CONFERENCE AND PRELIMINARY ASSESSMENT. (a) The procedures under this section apply to taxes under AS 43.20, AS 43.55, AS 43.57, and former AS 43.21.

(b) Before issuing a notice and demand for payment for a tax described in (a) of this section, the department shall give the

taxpayer a written draft of its preliminary conclusions. The draft of the preliminary conclusions must contain the following:

(1) a draft of any notice and demand for payment that the department preliminarily concludes may be in order;

(2) a draft narrative fully explaining how and why the preliminary assessment of tax or penalty has been determined; and

(3) schedules or worksheets in written or computer-readable format setting out the calculations for the preliminary assessment.

(c) The department shall schedule a closing conference with the taxpayer, to be held not less than 60 nor more than 90 days after the department delivers its preliminary audit conclusions under (b) of this section to the taxpayer in person or places those materials in the United States mail, addressed to the last known address of the taxpayer. The parties may extend the date for the closing conference by agreement.

(d) The purpose of the closing conference is to conclude the audit process and allow the parties to review and discuss the preliminary results and conclusions of that process informally so that any mistaken assumptions, misunderstandings, and other errors or mistakes can be identified and eliminated as much as possible and so that incomplete information and unsubstantiated items can be supplemented and substantiated. Although the interests of the parties are divergent, the closing conference is not an adversarial proceeding. The taxpayer may submit written and oral evidence, materials, and statements, but may not be required to do so. The department's employee in immediate charge of the audit, investigation, or inspection may also submit written and oral evidence, materials, and statements at the closing conference. By agreement, written materials may be submitted at other times before or after the closing conference.

(e) The taxpayer may send one or more representatives to the closing conference. The auditor or other person in immediate charge of the audit, investigation, or inspection upon which the preliminary assessment has been made shall attend the closing conference, and the director of the division proposing the assessment or the director's immediate subordinate designated for this purpose other than the person in immediate charge of the audit, investigation, or inspection shall preside at the closing conference. The department may have additional representatives at the closing conference. The person in immediate charge of the audit, investigation, or inspection may be excused from attending the closing conference with the consent of the taxpayer or because of serious illness or injury, incapacitation, death, or termination of employment with the department.

(f) Not more than 60 days after the conclusion of the closing conference, the presiding officer shall issue a written decision. If the presiding officer determines that additional tax is owed or that a penalty should be assessed, or both, the closing conference decision shall include a proposed notice and demand for payment for the additional tax and interest and any penalty. The proposed notice and demand for payment shall include a written narrative fully explaining how and why the assessment of tax or penalty has been determined, together with schedules or worksheets in written or computer-readable format setting out the calculations for the proposed assessment. If the presiding officer determines that no assessment is in order, the taxpayer shall be given written notice to that effect within this 60-day period. By agreement, the parties may extend the date for issuing a notice of assessment and demand for payment or a notice of no assessment.

(g) Unless the taxpayer requests a policy review hearing under

AS 43.05.247, a proposed notice and demand for payment issued under (f) of this section is final 30 days after its issuance and may not thereafter be made the subject of judicial review.

Sec. 43.05.247. POLICY REVIEW HEARING. (a) A person aggrieved by the action of the department in issuing a closing conference decision under AS 43.05.246(f) or in denying a request for refund of tax under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21 may request a policy review hearing within 30 days after the date of mailing of the notice required to be given under AS 43.05.246(f) or the denial of the request for refund. For purposes of this section, a failure by the department to grant or deny a request for refund within 60 days from the time the request is made shall be considered a denial of that request, unless the parties have extended the period by agreement.

(b) The department shall schedule the policy review hearing to be held within 30 days after the aggrieved person's request for it. The parties may extend the date for the policy review hearing by agreement.

(c) The purpose of the policy review hearing is to allow the commissioner to determine whether the action causing the grievance under (a) of this section reflects and incorporates the correct policies of the department, and if so, whether those policies are being applied correctly to the aggrieved person's circumstances.

(d) The commissioner or an authorized representative of the commissioner other than an employee in the division taking the action causing the grievance shall preside at the policy review hearing. The aggrieved person, acting in person or through one or more authorized representatives, shall have the opportunity to explain the nature of the grievance and the relief sought. If the person is aggrieved by a proposed assessment based on facts that the person believes are

incorrect or incomplete, the person shall present written and oral evidence and materials to correct or complete the facts. After the presentation of the aggrieved person's case, the director of the division taking the action causing the grievance or another authorized representative of the division shall have the opportunity to explain that action and the policies and reasons for it. The division shall have the opportunity to present written and oral evidence and materials to prove facts that it has asserted and that the aggrieved person has challenged as incorrect and to rebut or disprove any supplemental facts that the aggrieved person has sought to establish. The formal rules of evidence do not apply to either party's presentations on factual issues, but the presiding officer may require witnesses for both parties to give their testimony under oath and shall allow each party's witnesses to be examined by the other party. The proceedings of the policy review hearing shall be recorded and made part of the administrative record, together with any materials that may be submitted for the policy review in advance of, or after, the hearing.

(e) Not more than 90 days after the conclusion of the policy review [conference] JF: hearing the commissioner shall issue a policy review decision. The policy review decision must

(1) state what relief, if any, is being granted to the aggrieved person, and state which portions, if any, of the department's action giving rise to the grievance are being upheld;

(2) state which additional facts, if any, that the aggrieved person sought to show at the hearing are being recognized and which additional facts are being disregarded;

(3) for each disputed fact when there is a dispute as to one or more facts, state what is being taken as being the actual fact;

and

(4) state, as specifically as possible, which statutory and regulatory provisions are being relied on in granting or denying relief to the aggrieved person, how those provisions are being interpreted and applied, and the specific policy considerations for the particular interpretation and application of these provisions; broad, unspecific policies, such as maximizing the state's tax revenue, are not sufficient for justifying a particular interpretation or application of a statute or regulation.

(f) If the policy review decision concludes that a notice and demand for payment should be made for additional tax and interest, or penalties, if any, a final notice and demand assessing the tax and interest, or penalties, if any, shall be issued at the same time as, and as part of, the policy review decision. The final notice and demand shall include a narrative fully explaining how and why the final assessment of tax and any penalty has been determined, together with schedules or worksheets in written or computer-readable format setting out the calculations for the final assessment. For purposes of AS 43.05.260, a final notice and demand for payment is not considered made until the narrative and the schedules or worksheets setting out the calculations for the final assessment have been served on the aggrieved person.

Sec. 43.05.248. APPEAL. Within 30 days after the issuance of the commissioner's policy review decision under AS 43.05.247, a person aggrieved by the decision may file an action in the superior court in the judicial district where the person resides or conducts business, for a trial de novo of those portions of the policy review decision giving rise to the grievance. Neither party may raise as a claim, counterclaim, or defense any portion or portions of the policy review

decision that are not contested and do not give rise to the grievance. The aggrieved person shall be given access to the files of the department in the matter for preparing the appeal. If the court determines that the assessment or the tax payment was correct, it shall confirm the tax. If the assessment or tax payment was incorrect, the court shall determine the amount of the tax and order the payment of the deficiency or the refund of the excess, as the case may be. The department shall immediately pay any refund due and attach a certified copy of the judgment to the payment.

* Sec. 13. AS 43.05.260(a) is amended to read:

(a) Except as provided in (c) and (d) of this section and AS 43.20.200(b), the amount of a tax imposed by this title must be assessed within three years after the return was filed, whether or not a return was filed on or after the date prescribed by law. If the tax is not assessed before the expiration of the three-year period, a proceeding [NO PROCEEDINGS] may not be instituted in court for the collection of the tax.

* Sec. 14. AS 43.05.260(c) is amended to read:

(c) The following exceptions apply to the limitation periods [PERIOD] in (a) and (d) of this section:

(1) in the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of the tax may be begun without assessment, at any time;

(2) in the case of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time;

(3) if, before the expiration of the time prescribed in this section for the assessment of a tax imposed by this title, both

the department and the taxpayer have consented in writing to the assessment after the expiration of the time, the tax may be assessed at any time before the expiration of the period agreed upon; however, the period agreed upon may be extended by a subsequent agreement in writing made before the expiration of the period previously agreed upon.

* Sec. 15. AS 43.05.260 is amended by adding a new subsection to read:

(d) For a tax to which the procedures under AS 43.05.246 - 43.05.248 are applicable, the limitation period is four years.

* Sec. 16. COURT RULE CHANGE. AS 43.05.248, added by sec. 12 of this Act, amends Rule 609 of the Alaska Rules of Appellate Procedure by making trial de novo mandatory rather than discretionary in appeals relating to taxes to which AS 43.05.248 is applicable and restricting the claims, counterclaims, and defenses that may be raised.

* Sec. 17. TRANSITIONAL PROVISIONS. (a) AS 43.05.231 - 43.05.239, as added by sec. 7 of this Act, apply to all tax returns and return information for critical taxes, as defined in AS 43.05.239, in the possession of the Department of Revenue on or after the effective date of this Act.

(b) The Department of Revenue shall adopt the regulations required by AS 43.05.238, enacted by sec. 7 of this Act, before the department transfers a tax return or return information to a legislative committee under AS 43.05.231 - 43.05.239. Initial regulations adopted as directed under this subsection to implement or interpret AS 43.05.231 - 43.05.239 may not be adopted as emergency regulations.

(c) The provisions of AS 43.05.248, added by sec. 12 of this Act, apply to any grievance with respect to a tax under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21 that, on the effective date of this Act, has not been appealed to superior court under AS 43.05.240(d).

* Sec. 18. This Act takes effect immediately under AS 01.10.070(c).

Senator Rick Halford

Senate District I
Chugiak, Eagle River, East Anchorage, Fort Richardson

Senate Finance Committee
Co-Chairman

March 14, 1988

MEMORANDUM

TO: Commissioner Hugh Malone
Department of Revenue

FROM: Senator Rick Halford, Co-Chairman
Senate Finance Committee

SUBJECT: Senate Bill 401

Enclosed is a proposed Finance Committee Substitute for Senate Bill 401. This new version of SB 401 has been drafted in order to address the concerns which you have raised regarding this legislation and its potential fiscal impacts upon the Department.

I will be scheduling the bill for further committee work next week. Prior to the meeting, would you please provide me with your written comments following your review of the new draft. Should you have other suggested changes, please provide these as well.

The specific changes made are as follows:

1. Section 1 of SB 401, which related to appeals of the appropriateness of Departmental information requests, has been removed;

2. The statute of limitations has been raised from 3 to 4 years.

3. In order to address your concern that taxpayers might withhold information from the Department until the case reached the Superior Court level, the new version states that the taxpayer shall submit their evidence and supporting materials at the policy review hearing.

If you have any questions or if I can provide further information, please let me know.

cc: Senate Finance Committee members

Post Office Box V, Juneau, Alaska 99811 (907) 465-4958 • Post Office Box 190, Chugiak, Alaska 99567 (907) 694-4958

5-1449P
Chenoweth
3/14/88

Original sponsor: Faiks

IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 401 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to audits, investigations, and inspections for certain taxes; amending provisions relating to administrative and judicial review of decisions relating to taxes, penalties, tax refunds, and assessments in the administration of certain taxes; amending Rule 609 of the Alaska Rules of Appellate Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 43.05.240(a) is amended to read:

(a) Except as to a matter for which procedures are provided in AS 43.05.246 - 43.05.248, a [A] person aggrieved by the action of the department in fixing the amount of a tax, [OR] in imposing a penalty, or in denying a request for refund of tax may apply to the department within 60 days from the date of mailing the notice required to be given to the person by the department, giving notice of the grievance [,] and requesting an informal conference. At the conference the person aggrieved may present arguments and evidence relevant to the grievance [AMOUNT OF TAX OR PENALTY DUE THE STATE]. If the department determines that a correction is warranted, the department shall make the correction.

* Sec. 2. AS 43.05.240(b) is amended to read:

(b) Except as to a matter for which procedures are provided in AS 43.05.246 - 43.05.248, a [A] person aggrieved by the action of the

department in fixing the amount of a tax, [OR] in imposing a penalty, or in denying a request for refund of tax may apply to the department and request a formal hearing

(1) in place of the informal conference provided for in (a) of this section, within 60 days from the date of mailing the notice required to be given to the person by the department; or

(2) within 30 days after decision resulting from an informal conference.

* Sec. 3. AS 43.05.240(c) is amended to read:

(c) At the formal hearing the department may subpoena witnesses and may administer oaths and make inquiries necessary to consider and decide the grievance [DETERMINE THE AMOUNT OF THE TAX OR PENALTY DUE THE STATE]. The person aggrieved may present arguments and evidence relevant to the amount of the tax or penalty due the state. If the department determines that a correction is warranted, the department shall make the correction.

* Sec. 4. AS 43.05.245 is amended to read:

Sec. 43.05.245. ASSESSMENT AND COLLECTION OF TAX, PENALTIES, AND INTEREST. If a taxpayer fails to file a return or report required by this title in the time required by law or regulation, or makes an erroneous or fraudulent return, the department shall proceed to assess the license fees, tax, penalties, or interest and make a return from information which it obtains. A return made and subscribed by the department in accordance with this section is presumed sufficient for all legal purposes. However, nothing prevents a taxpayer from presenting evidence or other information on an appeal under AS 43.05.240 or under procedures provided by AS 43.05.246 - 43.05.248 in order to rebut the presumed sufficiency of a return made and subscribed by the department, nor does the presumption of sufficiency alter the parties'

respective burdens of proof once the taxpayer has presented evidence or other material information to rebut that presumption. The assessment of license fees, tax, penalties, or interest under this section occurs when the department issues a notice and demand for payment of the license fees, tax, penalties, or interest, when a notice and demand for payment becomes final under AS 43.05.246(g), or when the department issues a final notice and demand for payment under AS 43.05.247(f). The notice and demand for payment is issued when the notice and demand is delivered to the taxpayer in person or placed in the United States mail, postage-paid and addressed to the last known address of the taxpayer. Penalties and interest assessed under this title shall be collected in the same manner as provided in this title for the collection of tax or license fees.

* Sec. 5. AS 43.05 is amended by adding new sections to read:

Sec. 43.05.246. CLOSING CONFERENCE AND PRELIMINARY ASSESSMENT. (a) The procedures under this section apply to taxes under AS 43.20, AS 43.55, AS 43.57, and former AS 43.21.

(b) Before issuing a notice and demand for payment for a tax described in (a) of this section, the department shall give the taxpayer a written draft of its preliminary conclusions. The draft of the preliminary conclusions must contain the following:

(1) a draft of any notice and demand for payment that the department preliminarily concludes may be in order;

(2) a draft narrative fully explaining how and why the preliminary assessment of tax or penalty has been determined; and

(3) schedules or worksheets in written or computer-readable format setting out the calculations for the preliminary assessment.

(c) The department shall schedule a closing conference with the taxpayer, to be held not less than 60 nor more than 90 days after the

department delivers its preliminary audit conclusions under (b) of this section to the taxpayer in person or places those materials in the United States mail, postage-paid and addressed to the last known address of the taxpayer. The parties may extend the date for the closing conference by agreement.

(d) The purpose of the closing conference is to conclude the audit process and allow the parties to review and discuss the preliminary results and conclusions of that process informally so that any mistaken assumptions, misunderstandings, and other errors or mistakes can be identified and eliminated as much as possible and so that incomplete information and unsubstantiated items can be supplemented and substantiated. Although the interests of the parties are divergent, the closing conference is not an adversarial proceeding. The taxpayer may submit written and oral evidence, materials, and statements, but may not be required to do so. The department's employee in immediate charge of the audit, investigation, or inspection may also submit written and oral evidence, materials, and statements at the closing conference. By agreement, written materials may be submitted at other times before or after the closing conference.

(e) The taxpayer may send one or more representatives to the closing conference. The auditor or other person in immediate charge of the audit, investigation, or inspection upon which the preliminary assessment has been made shall attend the closing conference, and the director of the division proposing the assessment or the director's immediate subordinate designated for this purpose other than the person in immediate charge of the audit, investigation, or inspection shall preside at the closing conference. The department may have additional representatives at the closing conference. The person in immediate charge of the audit, investigation, or inspection may be

excused from attending the closing conference with the consent of the taxpayer or because of serious illness or injury, incapacitation, death, or termination of employment with the department.

(f) Not more than 60 days after the conclusion of the closing conference, the presiding officer shall issue a written decision. If the presiding officer determines that additional tax is owed or that a penalty should be assessed, or both, the closing conference decision shall include a proposed notice and demand for payment for the additional tax and interest and any penalty. The proposed notice and demand for payment shall include a written narrative fully explaining how and why the assessment of tax or penalty has been determined, together with schedules or worksheets in written or computer-readable format setting out the calculations for the proposed assessment. If the presiding officer determines that no assessment is in order, the taxpayer shall be given written notice to that effect within this 60-day period. By agreement, the parties may extend the date for issuing a notice of assessment and demand for payment or a notice of no assessment.

(g) Unless the taxpayer requests a policy review hearing under AS 43.05.247, a proposed notice and demand for payment issued under (f) of this section is final 30 days after its issuance and may not thereafter be made the subject of judicial review.

Sec. 43.05.247. POLICY REVIEW HEARING. (a) A person aggrieved by the action of the department in issuing a closing conference decision under AS 43.05.246(f) or in denying a request for refund of tax under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21 may request a policy review hearing within 30 days after the date of mailing of the notice required to be given under AS 43.05.246(f) or the denial of the request for refund. For purposes of this section, a failure by the

department to grant or deny a request for refund within 60 days from the time the request is made shall be considered a denial of that request, unless the parties have extended the period by agreement.

(b) The department shall schedule the policy review hearing to be held within 30 days after the aggrieved person's request for it. The parties may extend the date for the policy review hearing by agreement.

(c) The purpose of the policy review hearing is to allow the commissioner to determine whether the action causing the grievance under (a) of this section reflects and incorporates the correct policies of the department, and if so, whether those policies are being applied correctly to the aggrieved person's circumstances.

(d) The commissioner or an authorized representative of the commissioner other than an employee in the division taking the action causing the grievance shall preside at the policy review hearing. The aggrieved person, acting in person or through one or more authorized representatives, shall have the opportunity to explain the nature of the grievance and the relief sought. If the person is aggrieved by a proposed assessment based on facts that the person believes are incorrect or incomplete, the person shall present written and oral evidence and materials to correct or complete the facts. After the presentation of the aggrieved person's case, the director of the division taking the action causing the grievance or another authorized representative of the division shall have the opportunity to explain that action and the policies and reasons for it. The division shall have the opportunity to present written and oral evidence and materials to prove facts that it has asserted and that the aggrieved person has challenged as incorrect and to rebut or disprove any supplemental facts that the aggrieved person has sought to establish. The formal

rules of evidence do not apply to either party's presentations on factual issues, but the presiding officer may require witnesses for both parties to give their testimony under oath and shall allow each party's witnesses to be examined by the other party. The proceedings of the policy review hearing shall be recorded and made part of the administrative record, together with any materials that may be submitted for the policy review in advance of, or after, the hearing.

(e) Not more than 90 days after the conclusion of the policy review conference the commissioner shall issue a policy review decision. The policy review decision must

(1) state what relief, if any, is being granted to the aggrieved person, and state which portions, if any, of the department's action giving rise to the grievance are being upheld;

(2) state which additional facts, if any, that the aggrieved person sought to show at the hearing are being recognized and which additional facts are being disregarded;

(3) for each disputed fact when there is a dispute as to one or more facts, state what is being taken as being the actual fact; and

(4) state, as specifically as possible, which statutory and regulatory provisions are being relied on in granting or denying relief to the aggrieved person, how those provisions are being interpreted and applied, and the specific policy considerations for the particular interpretation and application of these provisions; broad, unspecific policies, such as maximizing the state's tax revenue, are not sufficient for justifying a particular interpretation or application of a statute or regulation.

(f) If the policy review decision concludes that a notice and demand for payment should be made for additional tax and interest, or

penalties, if any, a final notice and demand assessing the tax and interest, or penalties, if any, shall be issued at the same time as, and as part of, the policy review decision. The final notice and demand shall include a narrative fully explaining how and why the final assessment of tax and any penalty has been determined, together with schedules or worksheets in written or computer-readable format setting out the calculations for the final assessment. For purposes of AS 43.05.260, a final notice and demand for payment is not considered made until the narrative and the schedules or worksheets setting out the calculations for the final assessment have been served on the aggrieved person.

Sec. 43.05.248. APPEAL. Within 30 days after the issuance of the commissioner's policy review decision under AS 43.05.247, a person aggrieved by the decision may file an action in the superior court in the judicial district where the person resides or conducts business, for a trial de novo of those portions of the policy review decision giving rise to the grievance. Neither party may raise as a claim, counterclaim, or defense any portion or portions of the policy review decision that are not contested and do not give rise to the grievance. The aggrieved person shall be given access to the files of the department in the matter for preparing the appeal. If the court determines that the assessment or the tax payment was correct, it shall confirm the tax. If the assessment or tax payment was incorrect, the court shall determine the amount of the tax and order the payment of the deficiency or the refund of the excess, as the case may be. The department shall immediately pay any refund due and attach a certified copy of the judgment to the payment.

* Sec. 6. AS 43.05.260(a) is amended to read:

(a) Except as provided in (c) <u>and (d)</u> of this section and

AS 43.20.200(b), the amount of a tax imposed by this title must be assessed within three years after the return was filed, whether or not a return was filed on or after the date prescribed by law. If the tax is not assessed before the expiration of the three-year period, a proceeding [NO PROCEEDINGS] may not be instituted in court for the collection of the tax.

* Sec. 7. AS 43.05.260(c) is amended to read:

(c) The following exceptions apply to the limitation periods [PERIOD] in (a) and (d) of this section:

(1) in the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of the tax may be begun without assessment, at any time;

(2) in the case of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time;

(3) if, before the expiration of the time prescribed in this section for the assessment of a tax imposed by this title, both the department and the taxpayer have consented in writing to the assessment after the expiration of the time, the tax may be assessed at any time before the expiration of the period agreed upon; however, the period agreed upon may be extended by a subsequent agreement in writing made before the expiration of the period previously agreed upon.

* Sec. 8. AS 43.05.260 is amended by adding a new subsection to read:

(d) For a tax to which the procedures under AS 43.05.246-43.05.248 are applicable, the limitation period is four years.

* Sec. 9. COURT RULE CHANGE. AS 43.05.248, added by sec. 5 of this Act, amends Rule 609 of the Alaska Rules of Appellate Procedure by making

trial de novo mandatory rather than discretionary in appeals relating to taxes to which AS 43.05.248 is applicable.

* Sec. 10. TRANSITIONAL PROVISIONS. The provisions of AS 43.05.248, added by sec. 5 of this Act, apply to any grievance with respect to a tax under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21 that, on the effective date of this Act, has not been appealed to superior court under AS 43.05.240(d).

* Sec. 11. This Act takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB 401 (Finance)
PUBLISH DATE: 04/21/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to appeals of information requests...state tax laws
Sponsor: Senator Faiks
Requestor: Senate Finance

Agency Affected: Revenue
BRU: Department combined

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
PERSONAL SERVICES	-	1684.8	3152.8	5014.8	5451.8	5451.8
TRAVEL	-	358.2	544.5	790.9	856.4	856.4
CONTRACTUAL	-	555.7	263.1	291.9	170.7	170.7
SUPPLIES	-	31.9	31.9	41.9	41.9	41.9
EQUIPMENT	-	108.0	171.5	30.3	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	2738.6	4163.8	6169.8	6520.8	6520.8
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	2738.6	4163.8	6169.8	6520.8	6520.8
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-					

POSITIONS:

FULL-TIME	-	32	59	92	97	97
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Steve Kettel, Director
Division: Income and Excise Audit Division
Phone: (907) 465-2300
Date: April 21, 1988

Approved by Commissioner: Hugh Malone
Agency: Department of Revenue
Date: April 21, 1988

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB 401 (Finance)
PUBLISH DATE: 04/21/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to disclosure to the legislature of tax returns....
Sponsor: Senator Faiks
Requestor: Senate Finance

Agency Affected: Revenue
BRU: Income and Excise Audit Division
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
PERSONAL SERVICES	-	259.9	259.9	259.9	259.9	259.9
TRAVEL	-	177.4	177.4	177.4	177.4	177.4
CONTRACTUAL	-	24.7	4.1	4.1	4.1	4.1
SUPPLIES	-	5.9	5.9	5.9	5.9	5.9
EQUIPMENT	-	23.5	-	-	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	491.4	447.3	447.3	447.3	447.3
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	491.4	447.3	447.3	447.3	447.3
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-	491.4	447.3	447.3	447.3	447.3

POSITIONS:

FULL-TIME	-	5.0	5.0	5.0	5.0	5.0
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared By: Steven E. Kettel, Diretor
Division: Income and Excise Audit Division
Phone: (907) 465-2320
Date: April 21 1988

Approved by Commissioner: Hugh Malone
Agency: Department of Revenue
Date: April 21, 1988

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Prepared By: Steven E. Kettel
Income and Excise Audit Division
April 21, 1988

SB 401 ANALYSIS

Appeals Section		Field Audit		
	PERSONAL SERVICES			
Revenue Auditor V	$65.1			
Revenue Auditor IV	$57.8			
Revenue Auditor III	$51.0			
Clerk Typist III	$28.2	Revenue Auditor V	$57.8	
TOTAL:	$202.1	TOTAL:	$57.8	TOTAL: $259.9
	TRAVEL			
Information Requests	$84.8			
Closing Conferences	$33.6			
Policy Review	$25.2			
Court Travel	$ 7.0	Field Audit Travel	$26.8	
TOTAL:	$150.6	TOTAL:	$26.8	TOTAL: $177.4
	CONTRACTUAL			
Telephone	$1.8			
Printing	$1.4			
Office Chairs	$4.9			
Modular Offices	$8.8			
5 Drawer Legal Files	$2.9	Telephone	$.9	
Wang Printer Maintenance	$.5	Wang PC	$3.5	
TOTAL:	$20.3	TOTAL:	$4.4	TOTAL: $ 24.7
	SUPPLIES			
Office Supplies	$4.9	Office Supplies	$1.0	TOTAL: $ 5.9
	EQUIPMENT			
Wang Printer	$7.0			
Wang Computers	$16.5			
TOTAL:	$23.5			TOTAL: $ 23.5

Should this bill be amended to provide for mandatory extensions to the statute of limitation when the taxpayer is appealing a records request or policy decision, the size of this fiscal note would be reduced.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SB 401
PUBLISH DATE: 2/9/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to appeals of information requests...state tax laws
Sponsor: Senator Faiks
Requestor: Senate Finance

Agency Affected: Revenue
BRU: Department combined
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	-	2,953.0	5,472.2	7,554.4	7,554.4	7,554.4
TRAVEL	-	592.8	943.0	1,229.0	1,229.0	1,229.0
CONTRACTUAL	-	837.2	865.4	892.0	658.7	658.7
SUPPLIES	-	53.0	58.0	58.0	58.0	58.0
EQUIPMENT	-	186.8	155.2	150.0	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	4,622.8	7,493.8	9,883.4	9,500.1	9,500.1
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	4,622.8	7,493.8	9,883.4	9,500.1	9,500.1
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-					

POSITIONS:

FULL-TIME	-	53.0	97.0	136	136	136
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Steve Kettel, Director
Division: Income and Excise Audit Division
Phone: (907) 465-2300
Date: March 1, 1988

Approved by Commissioner: Hugh Malone
Agency: Department of Revenue
Date: March 1, 1988

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SB 401
PUBLISH DATE: 2/9/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to appeals of information requests...state tax laws
Sponsor: Faiks
Requestor: Finance

Agency Affected: Revenue
BRU: Income and Excise Audit Division
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
PERSONAL SERVICES	-	433.8	433.8	433.8	433.8	433.8
TRAVEL	-	242.0	242.0	242.0	242.0	242.0
CONTRACTUAL	-	33.4	6.1	6.1	6.1	6.1
SUPPLIES	-	8.0	8.0	8.0	8.0	8.0
EQUIPMENT	-	31.5	-	-	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	748.7	689.9	689.9	689.9	689.9
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	748.7	689.9	689.9	689.9	689.9
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-	748.7	689.9	689.9	689.9	689.9

POSITIONS:

FULL-TIME	-	8.0	8.0	8.0	8.0	8.0
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared By: Steven E. Kettel, Diretor
Division: Income and Excise Audit Division

Phone: (907) 465-2320
Date: March 1, 1988

Approved by Commissioner:
Agency:

Date:

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Prepared By: Steven E. Kettel
Income and Excise Audit Division
March 1, 1988

SB 401 Analysis

	Appeals Section		Field Audit		
Personal Services					
	Revenue Auditor V	$65.1			
	Revenue Auditor V	$65.1			
	Revenue Auditor IV	$57.8			
	Revenue Auditor IV	$57.8			
	Revenue Auditor III	$51.0			
	Revenue Auditor III	$51.0			
	Clerk Typist III	$28.2	Revenue Auditor V	$57.8	
	TOTAL:	$376.0	TOTAL:	$57.8	TOTAL: $433.8
Travel					
	Information Requests	$121.2			
	Closing Conferences	$48.0			
	Policy Review	$36.0			
	Court Travel	$10.0	Field Audit Travel	$26.8	
	TOTAL:	$215.2	TOTAL:	$26.8	TOTAL: $242.0
Contractual					
	Telephone	$2.5			
	Printing	$2.0			
	Office Chairs	$7.0			
	Modular Offices	$12.6			
	5 Drawer Legal Files	$4.2	Telephone	$.9	
	Wang Printer Maintenance	$.7	Wang PC	$3.5	
	TOTAL:	$29.0	TOTAL:	$4.4	TOTAL: $ 33.4
Supplies					
	Office Supplies	$7.0	Office Supplies	$1.0	TOTAL: $ 8.0
Equipment					
	Wang Printer	$7.0			
	Wang Computers	$24.5			
	TOTAL:	$31.5			TOTAL: $ 31.5

Should this bill be amended to provide for mandatory extensions to the statute of limitation when the taxpayer is appealing a records request or policy decision, the size of this fiscal note would be reduced.

STATE OF ALASKA
1986 LEGISLATIVE SESSION

BILL VERSION: SB 401
PUBLISH DATE: 2/9/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to appeals of information requests...state tax laws
Sponsor: Senator Faiks
Requestor: Senate Finance

Agency Affected: Revenue
BRU: Oil and Gas Audit Division

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
PERSONAL SERVICES	-	2,082.2	4,164.4	6,246.6	6,246.6	6,246.6
TRAVEL	-	285.3	570.0	856.0	856.0	856.0
CONTRACTUAL	-	775.0	801.7	828.3	595.0	595.0
SUPPLIES	-	40.0	40.0	40.0	40.0	40.0
EQUIPMENT	-	125.0	125.0	150.0	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	3,307.5	5,701.1	8,120.9	7,737.6	7,737.6
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	3,307.5	5,701.1	8,120.9	7,737.6	7,737.6
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-					

POSITIONS:

FULL-TIME	-	39	78	117	117	117
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

Prepared By: William Floerchinger, Director
Division: Oil and Gas Audit Division
Phone: (907) 277-5627
Date: March 1, 1988

Approved by Commissioner: Hugh Malone
Agency: Department of Revenue
Date: March 1, 1988

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Prepared By: William Floerchinger
Oil and Gas Audit Division
March 1, 1988

SB 401 ANALYSIS

PERSONAL SERVICES (1)	No	Cost	Total
Revenue Auditor Supervisor I	10	$66.0	$ 660.0
Revenue Auditor V	10	$65.1	$ 650.0
Revenue Auditor IV	32	$57.8	$ 1849.6
Revenue Auditor III	55	$51.0	$2,805.0
Clerk Typist III	10	$28.2	$ 282.0
TOTAL:	117	TOTAL:	$6,246.6

TRAVEL		
Information Requests		$ 636.0
Closing Conferences		$ 75.0
Policy Review		$ 55.0
Court Travel		$ 90.0
	TOTAL:	$ 856.0

CONTRACTUAL		
Telephone		$ 50.0
Printing		$ 40.0
Furniture (2)		$ 700.0
Space (3)		$ 425.0
Computer Maintenance		$ 80.0
	TOTAL:	$1,295.0

SUPPLIES		
Office Supplies	TOTAL:	$ 40.0

EQUIPMENT		
Computers (4)	TOTAL:	$ 400.0

(1) Should this bill pass the large increase no number of additional staff would cause training and implementation problems requiring a phase in over three years.

(2) The furniture would be purchased as needed over three year period.

(3) The space costs would be picked up in the revenue budget the first year after that the Department of Administration would bear the cost.

(4) The computers would be phased in along with the additional staff.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SB 401
PUBLISH DATE: 2/9/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to appeals of information requests...state tax laws
Sponsor: Senator Faiks
Requestor: Senate Finance

Agency Affected: Revenue
BRU: Commissioner's Office

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
PERSONAL SERVICES	-	437.0	874.0	874.0	874.0	874.0
TRAVEL	-	65.5	131.0	131.0	131.0	131.0
CONTRACTUAL	-	28.8	57.6	57.6	57.6	57.6
SUPPLIES	-	5.0	10.0	10.0	10.0	10.0
EQUIPMENT	-	30.3	30.2		-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	566.6	1,102.8	1,072.6	1,072.6	1 072.6
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	566.6	1,102.8	1,072.6	1,072.6	1,072.6
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-					

POSITIONS:

FULL-TIME	-	6	11	11	11	11
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Deborah Vogt, Senior Hearing Officer
Division: Commissioner's Office
Phone: (907) 465-2300
Date: March 1, 1988

Approved by Commissioner: Hugh Malone
Agency: Department of Revenue
Date: March 1, 1988

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

SB 401 Analysis

Hearing Officer Section

Personal Services		
Revenue Hearing Officer (Anch)	86.9	
Revenue Hearing Officer (Anch)	86.9	
Revenue Hearing Officer (Anch)	86.9	
Revenue Hearing Officer (Juneau)	86.9	
Clerk IV (Juneau)	34.9	
Accounting Clerk III (Juneau)	34.9	
Law Clerk (Juneau)	80.0	
Law Clerk (Anch)	84.9	
Law Clerk (Anch)	84.9	
Law Clerk (Anch)	84.9	
Accounting Clerk III (Anch)	34.9	
Clerk Typist III (Juneau)	29.0	
Clerk Typist III (Anch)	29.0	
Clerk Typist III (Anch)	29.0	
		Total $874.0
Travel		
Income & Excise Hearings	$36.0	
Oil & Gas Hearings	55.0	
Court/Income & Excise	10.0	
Court/Oil & Gas	30.0	
		Total $131.0
Contractual		
Research	$18.0	
Space Costs	35.6	
Telephone	10.0	
Printing	5.0	
Maintenance	7.0	
		Total $75.6
Supplies		Total $10.0
Equipment		
Office Chairs/Equipment	$22.0	
Computer Terminals/Printers	38.5	
		Total $60.5

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: CS SB 401 (Finance)
Publish Date:

Revision Date: 04/25/88
Title: An act relating to ... the administration of state tax laws
Sponsor: Faiks
Requestor: Senate Finance

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services		581.2	798.5	798.5	581.2	581.2
Travel						
Contractual		20.0	30.0	30.0	20.0	20.0
Supplies		3.0	5.0	5.0	3.0	3.0
Equipment		29.5	10.0			
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	633.7	843.5	833.5	604.2	604.2
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)						
General Funds	0.0	633.7	843.5	833.5	604.2	604.2
Federal Funds						
Other						
TOTAL	0.0	633.7	843.5	833.5	604.2	604.2
POSITIONS:						
Full-time		10.0	16.0	16.0	10.0	10.0
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

FY89
Reduce by 1/2

Prepared by: Jan Stranahan, General Counsel Phone: 264-8228
Division: Alaska Court System Date: 04/25/88

Approved by: Arthur H. Snowden, II, Administrative Director Date: 04/25/88
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)
Senate Secretary

ALASKA COURT SYSTEM

Fiscal Impact CS SB 401 (Finance)

	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services:					
2 Superior Court Judge, PFT, Anchorage	300,834	300,834	300,834	300,834	300,834
2 In-Court Clerk, Range 12B, PFT, Anchorage	71,332	71,332	71,332	71,332	71,332
2 Secretary, Range 12B, PFT, Anchorage	71,332	71,332	71,332	71,332	71,332
2 Law Clerk, Range 13A, PFT, Anchorage	73,438	73,438	73,438	73,438	73,438
2 Court Clerk II, Range 10B, PFT, Anchorage	64,254	64,254	64,254	64,254	64,254
2 Pro Tem Superior Court Judge, PFT, Anchorage		81,682	81,682		
2 In-Court Clerk, Range 12B, PFT, Anchorage		71,332	71,332		
2 Court Clerk II, Range 10B, PFT, Anchorage		64,254	64,254		
Subtotal Personal Services	581,190	798,458	798,458	581,190	581,190
Contractual:					
Telephones, postage, copier rental, legal reference materials	20,000	30,000	30,000	20,000	20,000
Supplies:					
Forms, file folders, copier paper, desk supplies, etc.	3,000	5,000	5,000	3,000	3,000
Equipment: (one-time costs)					
Desk, chair, filing cabinets, typewriter, statutes, courtroom recording equipment, etc.	29,500	10,000	0	0	0
Total Costs	633,690	843,458	833,458	604,190	604,190

ALASKA COURT SYSTEM

FISCAL ANALYSIS FOR CS SENATE BILL 401

This bill would provide for trials de novo in superior court of assessments for corporate income taxes (AS 43.20), production taxes (AS 43.55), the former separate accounting income taxes (AS 43.21), and conservation taxes (AS 43.57). Assuming that one-half of the Department of Revenue's present informal and formal hearing caseload for these tax assessments would enter the court system for court-tried trials de novo, the court system would expect to receive approximately 107 cases, the majority of which would be expected in FY's 90 and 91. The caseload would be expected to continue at approximately 25 cases per year thereafter. These estimates are based on statistics provided by the Department of Revenue. See attached correspondence from Department of Revenue.

According to former Attorney General Wilson Condon, major oil and gas cases can be expected to take between four and eight weeks of trial time. Given an estimated five weeks of trial per case, each superior court judge assigned to these cases would be able to hear approximately 7-1/2 cases per year. Thus, four judges could be expected to try an average of 30 of these cases each year. The court system expects to handle this workload with a combination of permanent judicial staff and temporary pro tem judges.

The court system would need two permanent full-time judicial units composed of two superior court judges, two in-court deputies, two secretaries, four court clerks and two law clerks. Also, a complement of two pro tem judges and two in-court deputies would be hired for a two-year period in FY's 90 and 91, during which time the caseload would be monitored to determine whether there would be a continued need for this complement. If the cases are resolved more swiftly than anticipated, the pro tem complement could be reduced or terminated within the two-year period.

RECEIVED MAR 2 1988

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: _____
PUBLISH DATE: 2/9/88

FISCAL NOTE

REQUEST:

Revision Date: 3/1/88
Title: An Act relating to ... the administration of state tax laws
Sponsor: Faiks
Requestor: Senate Finance

Agency Affected: Alaska Court System
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		798.5	798.5	645.5	645.5	645.5
TRAVEL						
CONTRACTUAL		30.0	30.0	30.0	30.0	30.0
SUPPLIES		5.0	5.0	5.0	5.0	5.0
EQUIPMENT		39.5	0.0	0.0	0.0	0.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		873.0	833.5	680.5	680.5	680.5
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		873.0	833.5	680.5	680.5	680.5
FEDERAL FUNDS						
OTHER						
TOTAL		873.0	833.5	680.5	680.5	680.5

POSITIONS:

FULL-TIME		16	16	12	12	12
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Revised + reduced by SFC 4/26/88

Prepared by: Jan Strandberg, Staff Counsel — Phone: 264-8228
Division: Alaska Court System — Date: 3/2/88
Approved by: Administrative Director: [signature] Date: 3-2-88
Agency: Ak. Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

ALASKA COURT SYSTEM

Fiscal Impact - SB 401

Personal Services:

2 Superior Court Judge, PFT, Anchorage	$300,834
2 In-Court Clerk, Range 12B, PFT, Anchorage	71,332
2 Secretary, Range 12B, PFT, Anchorage	71,332
2 Law Clerk I, Range 13A, PFT, Anchorage	73,438
2 Court Clerk II, Range 10B, PFT, Anchorage	64,254
2 Pro Tem Superior Court Judge, PFT, Anchorage	81,682
2 In-Court Clerk, Range 12B, PFT, Anchorage	71,332
2 Court Clerk II, Range 10B, PFT, Anchorage	64,254
Total Personal Services	798,458

Contractual:

Telephones, postage, copier, legal reference materials, equipment rental, etc.	30,000

Supplies:

Forms, file folders, copier paper, desk supplies, etc.	5,000

Equipment: (one-time costs)

Desk, chair, filing cabinets, typewriter, statutes, courtroom recording equipment, etc.	39,500
Total First Year Cost	$872,958

ALASKA COURT SYSTEM

FISCAL ANALYSIS FOR SENATE BILL 401

This bill would provide for trials de novo in superior court of assessments for corporate income taxes (AS 43.20), production taxes (AS 43.55), the former separate accounting income taxes (AS 43.21), and conservation taxes (AS 43.57). Assuming that one-half of the Department of Revenue's present informal and formal hearing caseload for these tax assessments would enter the court system for trial de novo, the court system would expect to receive approximately 107 cases and would expect the caseload to continue at approximately 25 cases per year thereafter. These estimates are based on statistics provided by the Department of Revenue. See attached correspondence from Department of Revenue.

According to former Attorney General Wilson Condon, major oil and gas cases can be expected to take between four and eight weeks of trial time. Given an estimated five weeks of trial per case, each superior court judge assigned to these cases would be able to hear approximately 7-1/2 cases per year. Thus, four judges could be expected to try an average of 30 of these cases each year. The court system expects to handle this workload with a combination of permanent judicial staff and temporary pro tem judges. The court system would need two permanent full-time judicial units composed of two superior court judges, two in-court deputies, two secretaries, four court clerks and two law clerks. Also, a complement of two pro tem judges and two in-court deputies would be hired for a two-year period during which time the caseload would be monitored to determine whether there would be a continued need for this complement. If the cases are resolved more swiftly than anticipated, the pro tem complement could be reduced or terminated within the two-year period.

This bill also provides for the taxpayers' right to appeal information requests. The court system expects to handle these appeals with existing resources.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF REVENUE

OIL AND GAS AUDIT DIVISION

550 WEST 7TH AVENUE
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-1383

February 8, 1988

Jan Strandberg
Staff Counsel
Alaska Court System
303 K Street
Anchorage, Alaska 99501

Re: Administrative Appeal Statistics-
Sen. Faiks Proposal for Tax Appeals

Dear Ms. Strandberg:

You have asked that I provide to you the number of cases that we would anticipate being appealed to the Tax Division.

In reviewing Mr. Meyer's letter to you, I noticed that he has listed each tax period as an individual case. The income tax return under AS 43.21 is filed for each year while the production tax return for oil or gas under AS 43.55 is filed monthly.

The Oil and Gas Audit Division currently has the following cases pending:

AS 43.21	Cases	Tax Periods
Formal Hearing Level	10	14
Informal Conference Level	13	23
AS 43.55		
Formal Hearing Level	19	406
Informal Conference Level	15	572
Total	57	1,015

It is anticipated that the following cases will have completed the audit process with the assessment being issued, and be ready to start the appeal process by June, 1988:

AS 43.21	Cases	Tax Periods
	8	12
AS 43.55	16	468
Total	24	480

The current inventory of the Department in non-oil and gas cases is as follows:

	INFORMAL CONFERENCE		FORMAL HEARING		TOTAL	
	Cases	Tax Periods	Cases	Tax Periods	Cases	Tax Periods
Corporation Tax (Chapter 20)	90	234	43	89	133	323
All Other Tax	139	325	18	33	157	358
Totals	229	559	61	122	290	681

I have not made any attempt to quantify the Chapter 21 and 55 Oil and Gas cases. Generally, there are as many cases as there are producers and tax periods. The statistics really begin to add up since oil and gas production is on a monthly tax period. In summary form for the oil and gas cases, we have 1615 tax periods at informal conference and 95 at formal hearing.

Commissioner Malone's letter of December 31, 1987 to Art Snowden estimates what cases might be expected to go to the court system. Our statistics tend to prove the administrative appeal process has been efficient in resolving a great percentage of the cases. This corresponds with the finding of the United States General Accounting Office regarding resolution of federal tax disputes in their report of July 1986 to the Acting Commissioner of the Internal Revenue Service. I have enclosed a copy of the report for your review.

In addition to the number of cases the court system would receive from taxpayers who elect to bypass the administrative appeal process, the current version of the bill apparently would also allow a taxpayer to proceed first through the administrative appeal process and then to file a de novo action in the court system. This would give taxpayers more leverage, harden taxpayer positions at all phases, and generally result in fewer administrative resolutions of tax disputes. The result of that would be more cases entering the court system.

I hope you find the information useful for your purposes. Please let us know if we can be of any further assistance.

Sincerely,

Carl A. Meyer

Carl A. Meyer
Chief of Appeals
Division of Income & Excise Audit
(907) 465-2302

Encl.

STATE OF ALASKA

DEPARTMENT OF REVENUE

STEVE COWPER, GOVERNOR

STATE OFFICE BUILDING
P.O. BOX SA
JUNEAU, ALASKA 99811-0400

January 20, 1988

Jan Strandberg
Staff Counsel
Alaska Court System
303 K Street
Anchorage, Alaska 99501

Re: Administrative Appeal Statistics-
Sen. Faiks Proposal for Tax Appeals

Dear Ms. Strandberg:

Statistics concerning the administrative appeal process are shown in the table below. The numbers do not include any oil and gas cases arising under AS 43.21 (former separate accounting) or AS 43.55 (production tax). The references to oil and gas cases concern those arising under AS 43.20.

ADMINISTRATIVE APPEALS

	INFORMAL CONFERENCE TAX DECISIONS		FORMAL HEARING DECISIONS*	CASES APPEALED TO SUPERIOR COURT*
FYTD 88**	106		2(0)	0(0)
FY 87	314***		8(2)	0(0)
FY 86	338		9(0)	5(1)
FY 85	183		20(0)	3(0)
FY 84	387		26(6)	6(3)
FY 83	573		43(5)	10(3)
FY 82	499		55(4)	14(1)
Totals	2294		161(17)	38(8)
Average	382.3	100%	26.8 7.01%	6.3 1.6%
Average	-		26.8 100%	6.3 23.5%

*Calendar Year Statistics-Does not include Permanent Fund Dividend or Child Support Enforcement Agency Decisions issued by the Department.

**Not Included In Averages.

***628 Accounts Estimated As 314 Cases.

( ) Denotes Pre-1978 Oil and Gas Income Tax Cases Included In Total. Oil and Gas Informal Conference Cases Have Not Been Identified.

The length of time for a case to proceed through the appeal's process is hard to determine. As an example, one case which involves 4 years of income tax under AS 43.21 by the time the formal hearing is completed will have required 3 years of work with 20 plus attorneys working full time on it. It is estimated that it will take 8 weeks at a minimum for both parties to present the case at formal hearing. Their are several cases like this one included in the above listing.

I hope you find the information useful for your purposes. Please let me know if I can be of any further assistance.

Sincerely,

Ronald H. Bitzer
Appeals Officer
Oil & Gas Audit Division

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SB 401
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to information requests ... state tax laws ..."
Sponsor: Senator Faiks
Requestor: Senate Finance

Agency Affected: Department of Law
BRU: Oil & Gas Spl. Litigation Appropriation and Oil & Gas Spl. Proj. BRU
Components: Oil & Gas Spl. Litigation Appropriation and Oil & Gas Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		274.2	282.4	290.9	151.3	155.8
TRAVEL		9.6	9.9	10.2	5.3	5.5
CONTRACTUAL		31.8	32.8	33.8	20.4	21.0
SUPPLIES		21.3	21.9	22.6	13.4	13.8
EQUIPMENT		35.6	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	372.5	347.0	357.5	190.4	196.1
Oil & Gas Special Litigation	-0-	1,372.5	4,347.0	4,357.5	2,190.4	2,196.1
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	1,372.5	4,347.0	4,357.5	2,190.4	2,196.1
FEDERAL FUNDS						
OTHER	-0-	372.5	347.0	375.5	190.4	196.1
TOTAL						

POSITIONS:

FULL-TIME	-0-	5	5	5	3	3
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services — Date: March 1, 1988

Richard I. Pegues /AR/

Approved by Commissioner: Grace Berg Schaible, Atty. Gen. — Date: March 1, 1988
Agency: Department of Law

Distribution (by preparer): Revised by SFC 4/25/88
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

It is difficult for the Department of Law to estimate with any exactitude the resources required to implement SB 401 as it is currently drafted. However, we can identify areas we expect will require substantial additional legal services.

Section 1 creates a two-step appeal process for any taxpayer who believes that a request for information or materials during the course of an audit, investigation, or inspection is unreasonable. This section dramatically expands the circumstances under which a taxpayer could refuse to provide access to documents (and thereby impede the audit, investigation, or inspection). Currently the Department of Revenue may issue an administrative summons. When a taxpayer fails to produce the necessary documents the department may go to court immediately for a judicial determination. The proposal in section one creates an unnecessary administrative step which will only delay the ultimate court decision.

Given this department's experience in other oil and gas litigation respecting production of documents, we believe that enactment of this section would require one full-time attorney and a paralegal.

Under Section 7, the new procedures in the bill would apply to audits, investigations, or inspections that are pending as well as grievances, that have "not been fully heard" as of the effective date of the bill. This section raises serious statute of limitation problems as well as practical ones for all current cases. Issues include whether the statute of limitations, which would have run in June 1988, for example, is tolled for a case that is (a) awaiting the commissioner's decision, (b) in hearing (c) in conference at the division level, or (d) recently assessed or whether a case that is at any given stage at the time of this bill's effective date must begin anew if the taxpayer so desires. We believe that litigation over this section will be particularly intense because its effect could be to eliminate or substantially reduce every taxpayer's ultimate tax exposure. The total at stake in the tax cases that are in some stage of administrative appeal exceeds $2.5 billion.

We believe that enactment of this section would require two full-time attorneys over a period of three years. Combined with the impact of section one of the bill, we would also require one full-time secretary.

The timelines and appellate scheme in the remainder of the bill will also dramatically affect the Department of Law. Currently, the Department of Law handles only a very limited number of tax cases. The litigation model both the Department of Revenue and the Department of Law have been working toward is one in which oil and gas tax cases would not require significant attorney representation at the administrative level within the Department of Revenue. This bill, which places the trial in the court system, will require attorneys for all tax cases because only attorneys are allowed to represent the state in Alaska's superior courts.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 401

We believe that these tax cases must be litigated in the same manner as our current oil and gas litigation, in which we use a combination of outside counsel and experts with state personnel. There are three reasons for this:

1. There are millions of dollars at stake in each of the cases -- the industry will continue to devote the best legal resources available to these cases;

2. Adverse precedent in one case could seriously harm the state in other cases; and

3. The Department of Revenue, rather than the court system has a corps of decision-makers with expertise in the field of oil and gas taxation. Such a radical change of forum, in the earliest cases at least, could place the state at greater risk in attempting to recover its properly due taxes.

The following table shows the level of expenditure for the two proceedings that are most analogous to the cases that would be generated under this bill; a current tax proceeding and the Amerada Hess royalty case which involves many of the same issues presented in the major tax cases.

Amerada Hess

	Total Expended	Annual Expended
6/30/84	1,722,340.51	1,722,340.51
6/30/85	3,598,666.50	1,876,375.91
6/30/86	6,909,832.82	3,401,166.32
6/30/87	11,478,296.44	4,478,463.57
6/30/88 (Est.)		5,620,000.00
Total		17,098,346.41
Avg All		3,419,669.28
Avg last 3 yrs		4,499,876.66

Production, Oil Income Tax

	Total Expended	Annual Expended
6/30/84	191,041.75	191,041.75
6/30/85	695,356.71	504,314.96
6/30/86	1,568,254.63	872,897.92
6/30/87	2,922,618.52	1,354,363.92
6/30/88 (Est.)		3,975,000.00
Total		6,847,618.55
Avg All		1,369,523.71
Avg last 3 yrs		2,050,753.95

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 401

The bill could effectively require the Department Law to litigate simultaneously several trial level cases, while appeals are being argued in the Alaska Supreme Court. Looking at our experience in the tax cases and in Amerada Hess we regard the current expenditure level of $4 million annually as our base for revenue tax cases. There are several other cases that justify an effort paralleling the current tax case because of the amount at stake. There will also be numerous cases that each involve tens of millions of dollars. In FY 89 we have requested $1 million above our base. This amount reflects our belief that cases under this bill will not be ready for Department of Law prosecution until mid-year. For FY 90 and FY 91 we believe that in order to effectively prosecute an additional four to six cases per year at the trial court level we would require an additional $4 million. After that period the amount required should be reduced substantially because of court precedent established through the earlier cases, elimination of backlog, and new cases with substantially less at stake. Accordingly, we believe that in FY 92 and 93 our trial level expenditures could be reduced to $2 million above base for each year and in FY 94 to our base. Additionally, we have requested $372,500 in FY 89 for the five new staff positions described above. The impact of Section 1 and Section 7 will be felt on our staff as soon as the bill goes into effect. Two of the five positions will be deleted in FY 92 when work from the transitional period should be completed. We note that extensive litigation will be ongoing even after that fiscal year as audits and tax laws for the years after 1981 are challenged.

Appeals to the Supreme Court would occur under either the current or proposed framework. Accordingly we have not included costs for appeal.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 401

SB 401 Fiscal Analysis

Department of Law Staff Costs

	Section 1 Costs		Section 7 Costs			
	Atty III	Paralegal Asst. II	Atty IV	Atty III	Leg Sec I	TOTAL
Per. Svcs.	63.7	43.3	72.0	63.7	31.5	274.2
Travel	2.4	2.4	2.4	2.4	-0-	9.6
Contractual	6.6	6.6	6.6	6.6	5.4	31.8
Supplies	4.5	4.5	4.5	4.5	3.3	21.3
Equipment	6.8	6.8	6.8	6.8	8.4	35.6
Total	84.0	63.6	92.3	84.0	48.6	372.5

Position and associated costs beyond FY 89 include a 3% annual inflation factor, less one-time items. The two attorneys required for Section 7 transitional ligitation are deleted after FY 91. The costs for these new positions will occur in the Oil & Gas BRU as interagency funded. However, general funds must also be included in the annual separate appropriation for oil and gas special litigation to offset these costs.

Position Title	No. of Positions	Range/Step	Barg. Unit
Attorney III	1	22A	PX

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	49,140	
Benefits	14,597	
Premium Pay		
Other		
Total Personal Services		63,738
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		84,038

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	84,038

Justification

This position is required to overcome challenges for reasonableness that are expected to arise during the course of oil and gas tax audits, if the provisions of Section 1 of SB 401 become law. There are literally hundreds of thousands of documents that are subject to inspection and examination during an audit of oil and gas production and income tax records. This section of the bill dramatically expands the circumstances under which a taxpayer could refuse to provide access to financial transaction documents, and without which an audit could not effectively proceed. Allocation of the position one grade lower than the full journey level of Attorney IV is appropriate for this work because it mainly addresses procedural issues rather than substantive legal issues.

Request For New Position

Agency: Department of Law

BRU: Oil & Gas Special Projects

Component: Operations

Revised Date

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Paralegal Assistant II	1	16A	GGU

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	32.424	
Benefits	10,901	
Premium Pay		
Other		
Total Personal Services		43,325
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		63,625

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	63,625

Justification

This position is needed to overcome challenges for reasonableness that are expected to arise during the course of oil and tax audits, if the provisions of Section 1 of SB 401 become law. There are literally hundreds of thousands of documents that are subject to inspection and examination during an audit of oil and gas production and income tax records. This section of the bill dramatically expands the circumstances under which a taxpayer could refuse to provide access to financial transaction documents, and without which a tax audit could not effectively proceed. This position would be responsible for tracking the multitude of responses and challenges to tax auditor requests for information. This work is ideally suited to the Paralegal Assistant II job class.

Request For New Position

Agency Department of Law

BRU Oil & Gas Special Projects

Component Operations

Revised Date

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Attorney IV	1	24A	PX

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	56,244	
Benefits	15,713	
Premium Pay		
Other		
Total Personal Services		71,957
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		92,257

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	92,257

Justification

This is one of three positions that will be needed to handle litigation that is expected to arise from the transitional provisions of SB 401, if Section 7 is adopted and becomes law. This section raises serious statute of limitation problems as well as practical ones for all current oil and gas cases. Litigation over this section will be particularly intense because its effect could be to entirely eliminate or substantially reduce every taxpayer's ultimate tax exposure. The total at stake in the oil and gas income and production tax cases that are in some state of administrative appeal, and which would be subject to the bill's transitional provisions, exceed $2.5 billion. Allocation to the Attorney IV level is recommended because of the substantive legal issues involved in this aspect of the bill.

Request For New Position

Agency Department of Law

BRU Oil & Gas Special Projects

Component Operations

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Attorney III	1	22A	PX

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	49,140	
Benefits	14,597	
Premium Pay		
Other		
Total Personal Services		63,738
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		84,038

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	84,038

Justification

This is the second of three positions that will be needed to handle litigation that is expected to arise from the transitional provisions of SB 401, if Section 7 is adopted and becomes law. This section raises serious statute of limitation problems as well as practical ones for all current oil and gas cases. Litigation over this section will be particularly intense because its effect could be to entirely eliminate or substantially reduce every taxpayer's ultimate tax exposure. The total at stake in the oil and gas income and production tax cases that are in some state of administrative appeal, and which would be subject to the bill's transitional provisions, exceed $2.5 billion. This position will assist the Attorney IV responsible for statute of limitation problems in the conduct of extensive and complex litigation raised by the bill's transitional provisions.

Request For New Position

Agency Department of Law

BRU Oil & Gas Special Projects

Component Operations

Revised Date

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Legal Secretary I	1	10B	GGU

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	22,716	
Benefits	8,749	
Premium Pay		
Other		
Total Personal Services		31,465
Travel		-0-
Contractual		5,400
Commodities		3,300
Equipment		8,400
Other		
Total Cost		48,565

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	48,565

Justification

This is the third of three positions that will be needed to handle litigation that is expected to arise from the transitional provisions of SB 401, if Section 7 is adopted and becomes law. The position will provide law office support for the two attorneys required by Section 7, and the position will also provide office support for the attorney and the paralegal required by the two-step appeals provisions of Section 1. Consequently, the position will provide full-spectrum law office clerical services, and allocation to Legal Secretary I is therefore recommended.

Request For New Position

Agency: Department of Law

BRU: Oil & Gas Special Projects

Component: Operations

Revised Date

FY 89

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 401 (Fin.)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: April 25, 1988
Title: "An Act relating to information requests ... state tax laws ..."
Sponsor: Senator Faiks
Requestor: Senate Finance

Agency Affected: Department of Law
BRU: Oil & Gas Spl. Litigation Appropriation and Oil & Gas Spl. Proj. BRU
Components: Oil & Gas Spl. Litigation Appropriation and Oil & Gas Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		274.2	282.4	290.9	151.3	155.8
TRAVEL		9.6	9.9	10.2	5.3	5.5
CONTRACTUAL		31.8	32.8	33.8	20.4	21.0
SUPPLIES		21.3	21.9	22.6	13.4	13.8
EQUIPMENT		35.6	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	372.5	347.0	357.5	190.4	196.1
Oil & Gas Special Litigation	-0-	1,372.5	4,374.0	4,357.5	2,190.4	2,196.1
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	1,372.5	4,347.0	4,357.5	2,190.4	2,196.1
FEDERAL FUNDS						
OTHER	-0-	372.5	347.0	375.5	190.4	196.1
TOTAL						

POSITIONS:

FULL-TIME	-0-	5	5	5	3	3
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services — Date: April 25, 1988

Richard L. Pegues /FOR/
Approved by Commissioner: Grace Berg Schaible, Atty. Gen. — Date: April 25, 1988
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 401 (Jud.)

This fiscal note supercedes the note of March 1, 1988. Nevertheless, observations made in that note continue to be relevent.

The addition of HB 58 provisions in section 7, particularly with respect to transfer review (AS 43.05.234(a)), edited transcripts (AS 43.05.236), and drafting regulations (AS 43.05.238) creates a substantially increased legal workload. Of these, the editing of transcripts is the most highly speculative. If legislative committees undertake major tax policy review, this function will be especially critical. We note, however, that section 1 of the original SB 401 has been deleted, thus offsetting what we believe to be a reasonable estimate of resources required under new section 7.

Under section 12, the new procedures in the bill would apply to grievances, that have not been appealed to the superior court as of the effective date of the bill. This section raises serious statute of limitation problems as well a practical ones for all current cases. Issues include whether the statute of limitations, which would have run in June 1988, for example, is tolled for a case that is (a) awaiting the commissioner's decision, (b) in hearing, (c) in conference at the division level, or (d) recently assessed or whether a case that is at any given stage at the time of this bill's effective date must begin anew if the taxpayer so desires. We believe that litigation over this section will be particularly intense because its effect could be to eliminate or substantially reduce every taxpayer's ultimate tax exposure. The total at stake in the tax cases that are in some stage of administrative appeal exceeds $2.5 billion.

We believe that enactment of this section would require two full-time attorneys over a period of three years. Combined with the impact of section seven of the bill, we would also require one full-time secretary.

The timelines and appellate scheme in proposed AS 43.05.248 will also dramatically affect the Deaprtment of Law. Currently, the Department of Law handles only a very limited number of tax cases. The litigaiton model both the Department of Revenue and the Department of Law have been working toward is one in which oil and gas tax cases would not require significant attorney representation at the administrative level within the Department of Revenue. This bill, which places the trial in the court system, will require attorneys for all tax cases because only attorneys are allowed to represent the state in Alaska's superior courts.

We believe that these tax cases must be litigated in the same manner as our current oil and gas litigation, in which we use a combination of outside counsel and experts with state personnel. There are three reasons for this:

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 401 (Jud.)

1. There are millions of dollars at stake in each of the cases -- the industry will continue to devote the best legal resources available to these cases;

2. Adverse precedent in one case could seriously harm the state in other cases; and

3. The Department of Revenue, rather than the court system has a corps of decision-makers with expertise in the field of oil and gas taxation. Such a radical change of forum, in the earliest cases at least, could place the state at greater risk in attempting to recover its properly due taxes..

The following table shows the level of expenditure for the two proceedings that are most analogous to the cases that would be generated under this bill; a current tax proceeding and the Amerada Hess royalty case which involves many of the same issues presented in the major tax cases.

Amerada Hess

	Total Expended	Annual Expended
6/30/84	1,722,340.51	1,722,340.51
6/30/85	3,598,666.50	1,876,375.91
6/30/86	6,909,832.82	3,401,166.32
6/30/87	11,478,296.44	4,478,463.57
6/30/88 (Est.)		5,620,000.00
Total		17,098,346.41
Avg All		3,419,669.28
Avg last 3 yrs		4,499,876.66

Production, Oil Income Tax

	Total Expended	Annual Expended
6/30/84	191,041.75	191,041.75
6/30/85	695,356.71	504,314.96
6/30/86	1,568,254.63	872,897.92
6/30/87	2,922,618.52	1,354,363.92
6/30/88 (Est.)		3,975,000.00
Total		6,847,618.55
Avg All		1,369,523.71
Avg last 3 yrs		2,050,753.95

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 401 (Jud.)

The bill could effectively require the Department Law to litigate simultaneously several trial level cases, while appeals are being argued in the Alaska Supreme Court. Looking at our experience in the tax cases and in Amerada Hess we regard the current expenditure level of $4 million annually as our base for revenue tax cases. There are several other cases that justify an effort paralleling the current tax case because of the amount at stake. There will also be numerous cases that each involve tens of millions of dollars. In FY 89 we have requested $1 million above our base. This amount reflects our belief that cases under this bill will not be ready for Department of Law prosecution until mid-year. For FY 90 and FY 91 we believe that in order to effectively prosecute an additional four to six cases per year at the trial court level we would require an additional $4 million. After that period the amount required should be reduced substantially because of court precedent established through the earlier cases, elimination of backlog, and new cases with substantially less at stake. Accordingly, we believe that in FY 92 and 93 our trial level expenditures could be reduced to $2 million above base for each year and in FY 94 to our base. Additionally, we have requested $372,500 in FY 89 for the five new staff positions described above. The impact of Section 1 and Section 7 will be felt on our staff as soon as the bill goes into effect. Two of the five positions will be deleted in FY 92 when work from the transitional period should be completed. We note that extensive litigation will be ongoing even after that fiscal year as audits and tax laws for the years after 1981 are challenged.

Appeals to the Supreme Court would occur under either the current or proposed framework. Accordingly we have not included costs for appeal.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 401 (Jud.)

CSSB 401 Fiscal Analysis

Department of Law Staff Costs

	Section 7 Costs		Section 12 Costs			
	Atty III	Paralegal Asst. II	Atty IV	Atty III	Leg Sec I	TOTAL
Per. Svcs.	63.7	43.3	72.0	63.7	31.5	274.2
Travel	2.4	2.4	2.4	2.4	-0-	9.6
Contractual	6.6	6.6	6.6	6.6	5.4	31.8
Supplies	4.5	4.5	4.5	4.5	3.3	21.3
Equipment	6.8	6.8	6.8	6.8	8.4	35.6
Total	84.0	63.6	92.3	84.0	48.6	372.5

Position and associated costs beyond FY 89 include a 3% annual inflation factor, less one-time items. The two attorneys required for Section 7 transitional ligitation are deleted after FY 91. The costs for these new positions will occur in the Oil & Gas BRU as interagency funded. However, general funds must also be included in the annual separate appropriation for oil and gas special litigation to offset these costs.

Position Title	No. of Positions	Range/Step	Barg. Unit
Attorney III	1	22A	PX

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	49,140	
Benefits	14,597	
Premium Pay		
Other		
Total Personal Services		63,738
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		84,038

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	84,038

Justification

This position is required to review legislative reports of critical tax information to insure confidentiality, if the provisions of Section 7 of CSSB 401 become law. There are literally thousands of documents that are subject to inspection and examination during a legislative oversight review of the tax assessments and taxpayer records of oil and gas production and income taxes. A review of any oversight reports issued by the legislature must be conducted carefully to insure taxpayer confidentiality as required by this section, as well as the U.S. Tax Code. Substantial coordination between the Departments of Law and Revenue, and the legislative oversight committee will be required. Allocation of the position one grade lower than the full journey level of Attorney IV is appropriate for this work because it mainly addresses procedural issues rather than substantive legal issues.

Request For New Position

Agency Department of Law

BRU Oil & Gas Special Projects

Component Operations

Revised Date

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Paralegal Assistant II	1	16A	GGU

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	32,424	
Benefits	10,901	
Premium Pay		
Other		
Total Personal Services		43,325
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		63,625

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	63,625
GF Program Receipts 1005	
Other	

Justification

This position is needed to monitor and control tax documents transferred to the legislature, if the provisions of Section 7 of CSSB 401 become law. There are literally thousands of documents that are subject to inspection and examination during a legislative oversight review of tax assessments and taxpayer records of oil and gas production and income taxes. Careful review and scrutiny of any reports issued to insure taxpayer confidentiality are essential under the proposed statute as well as the U.S. Tax Code. This Paralegal Assistant II position is ideally suited to assist the attorney responsible for review of reports in monitoring and controlling tax report documents.

Request For New Position

Agency: Department of Law

BRU: Oil & Gas Special Projects

Component: Operations

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Attorney IV	1	24A	PX

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	56,244	
Benefits	15,713	
Premium Pay		
Other		
Total Personal Services		71,957
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		92,257

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	92,257

Justification

This is one of three positions that will be needed to handle litigation that is expected to arise from the transitional provisions of CSSB 401, if Section 12 is adopted and becomes law. This section raises serious statute of limitation problems as well as practical ones for all current oil and gas cases. Litigation over this section will be particularly intense because its effect could be to entirely eliminate or substantially reduce every taxpayer's ultimate tax exposure. The total at stake in the oil and gas income and production tax cases that are in some state of administrative appeal, and which would be subject to the bill's transitional provisions, exceed $2.5 billion. Allocation to the Attorney IV level is recommended because of the substantive legal issues involved in this aspect of the bill.

Request For New Position

Agency: Department of Law

BRU: Oil & Gas Special Projects

Component: Operations

Revised Date

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Attorney III	1	22A	PX

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	49,140	
Benefits	14,597	
Premium Pay		
Other		
Total Personal Services		63,738
Travel		2,400
Contractual		6,600
Commodities		4,500
Equipment		6,800
Other		
Total Cost		84,038

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	84,038

Justification

This is the second of three positions that will be needed to handle litigation that is expected to arise from the transitional provisions of CSSB 401, if Section 12 is adopted and becomes law. This section raises serious statute of limitation problems as well as practical ones for all current oil and gas cases. Litigation over this section will be particularly intense because its effect could be to entirely eliminate or substantially reduce every taxpayer's ultimate tax exposure. The total at stake in the oil and gas income and production tax cases that are in some state of administrative appeal, and which would be subject to the bill's transitional provisions, exceed $2.5 billion. This position will assist the Attorney IV responsible for statute of limitation problems in the conduct of extensive and complex litigation raised by the bill's transitional provisions.

Request For New Position

Agency: Department of Law

BRU: Oil & Gas Special Projects

Component: Operations

Revised Date

FY 89

Position Title	No. of Positions	Range/Step	Barg. Unit
Legal Secretary I	1	10B	GGU

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	8

Type of Expenditure		Amount
1	2	3
Salary	22,716	
Benefits	8,749	
Premium Pay		
Other		
Total Personal Services		31,465
Travel		-0-
Contractual		5,400
Commodities		3,300
Equipment		8,400
Other		
Total Cost		48,565

Funding Source for Total Cost	
Federal Receipts 1002	
G. F. Match 1003	
General Fund 1004	
GF Program Receipts 1005	
Other /Interagency Receipts 1007	48,565

Justification

This is the third of three positions that will be needed to handle litigation that is expected to arise from the transitional provisions of CSSB 401, if Section 12 is adopted and becomes law. The position will provide law office support for the two attorneys required by Section 12, and the position will also provide office support for the attorney and the paralegal required by the two-step appeals provisions of Section 7. Consequently, the position will provide full-spectrum law office clerical services, and allocation to Legal Secretary I is therefore recommended.

Request For New Position

Agency: Department of Law

BRU: Oil & Gas Special Projects

Component: Operations

FY 89

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB 401 (Finance)
PUBLISH DATE: 04/21/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to disclosure to the legislature of tax returns....
Sponsor: Senator Faiks
Requestor: Senate Finance

Agency Affected: Revenue
BRU: Oil and Gas Audit Division

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
PERSONAL SERVICES	-	1424.9	2892.9	4317.9	4317.9	4317.9
TRAVEL	-	180.8	367.1	548.0	548.0	548.0
CONTRACTUAL	-	531.0	259.0	259.0	109.0	109.0
SUPPLIES	-	26.0	26.0	26.0	26.0	26.0
EQUIPMENT	-	84.5	171.5	-	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	2247.2	3716.5	5150.9	5000.9	5000.9
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	2247.2	3716.5	5150.9	5000.9	5000.9
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-					

POSITIONS:

FULL-TIME	-	27	54	81	81	81
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

Prepared By: William Floerchinger, Director
Division: Oil and Gas Audit Division

Phone: (907) 277-5627
Date: April 21, 1988

Approved by Commissioner: Hugh Malone
Agency: Department of Revenue

Date: April 21, 1988

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Revised & reduced by SFC 4/25/88

Prepared by: William Floerchinger
Oil and Gas Audit Division
April 21, 1988

CS SB 401 ANALYSIS (FINANCE)

PERSONAL SERVICES (1)	No	Cost	Total
Revenue Auditor Supervisor I	7	$66.0	$ 462.0
Revenue Auditor V	7	$65.1	$ 455.7
Revenue Auditor IV	21	$57.8	$1213.8
Revenue Auditor III	39	$51.0	$1989.0
Clerk Typist III	7	$28.2	$ 197.4
TOTAL	81	TOTAL:	$4317.9

TRAVEL		
Information Requests		$ 407.0
Closing Conferences		$ 48.0
Policy Review		$ 35.0
Court Travel		$ 58.0
	TOTAL:	$ 548.0

CONTRACTUAL		
Telephone		$ 32.0
Printing		$ 26.0
Furniture (2)		$ 448.0
Space (3)		$ 272.0
Computer Maintenance		$ 51.0
	TOTAL:	$ 829.0

SUPPLIES		
Office Supplies	TOTAL:	$ 26.0

EQUIPMENT		
Computers (4)	TOTAL:	$ 256.0

(1) Should this bill pass the large increase in number of additional staff would cause training and implementation problems requiring a phase in over three years.

(2) The furniture would be purchased as needed over three year period.

(3) The space costs would be picked up in the revenue budget the first year. After that the Department of Admininstration would bear the cost.

(4) The computers would be phased in along with the additional staff.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB 401 (Finance)
PUBLISH DATE: 04/21/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to appeals of information requests...state tax laws
Sponsor: Senator Faiks
Requestor: Senate Finance

Agency Affected: Revenue
BRU: Commissioner's Office

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
PERSONAL SERVICES	-	-	-	437.0	874.0	874.0
TRAVEL	-	-	-	65.5	131.0	131.0
CONTRACTUAL	-	-	-	28.8	57.6	57.6
SUPPLIES	-	-	-	5.0	10.0	10.0
EQUIPMENT	-	-	-	30.3	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	-	-	566.6	1,072.6	1,072.6
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	-	-	566.6	1,072.6	1,072.6
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-					

POSITIONS:

FULL-TIME	-	-	-	6	11	11
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Deborah Vogt, Senior Hearing Officer
Phone: (907) 465-2300
Division: Commissioner's Office
Date: April 21, 1988

Approved by Commissioner: hugh Malone
Date: April 21, 1988
Agency: Department of Revenue

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

SB 401 Analysis

Hearing Officer Section

Personal Services		
Revenue Hearing Officer (Anch)	86.9	
Revenue Hearing Officer (Anch)	86.9	
Revenue Hearing Officer (Anch)	86.9	
Revenue Hearing Officer (Juneau)	86.9	
Clerk IV (Juneau)	34.9	
Accounting Clerk III (Juneau)	34.9	
Law Clerk (Juneau)	80.0	
Law Clerk (Anch)	84.9	
Law Clerk (Anch)	84.9	
Law Clerk (Anch)	84.9	
Accounting Clerk III (Anch)	34.9	
Clerk Typist III (Juneau)	29.0	
Clerk Typist III (Anch)	29.0	
Clerk Typist III (Anch)	29.0	
		Total $874.0
Travel		
Income & Excise Hearings	$36.0	
Oil & Gas Hearings	55.0	
Court/Income & Excise	10.0	
Court/Oil & Gas	30.0	
		Total $131.0
Contractual		
Research	$18.0	
Space Costs	35.6	
Telephone	10.0	
Printing	5.0	
Maintenance	7.0	
		Total $75.6
Supplies		Total $10.0
Equipment		
Office Chairs/Equipment	$22.0	
Computer Terminals/Printers	38.5	
		Total $60.5

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB 401 (Finance)
PUBLISH DATE: 04/21/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to disclosure to the legislature of tax returns....
Sponsor: Senator Faiks
Requestor: Senate Finance

Agency Affected: Revenue
BRU: Income and Excise Audit Division

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
PERSONAL SERVICES	-	259.9	259.9	259.9	259.9	259.9
TRAVEL	-	177.4	177.4	177.4	177.4	177.4
CONTRACTUAL	-	24.7	4.1	4.1	4.1	4.1
SUPPLIES	-	5.9	5.9	5.9	5.9	5.9
EQUIPMENT	-	23.5	-	-	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	491.4	447.3	447.3	447.3	447.3
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	491.4	447.3	447.3	447.3	447.3
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-	491.4	447.3	447.3	447.3	447.3

POSITIONS:

FULL-TIME	-	5.0	5.0	5.0	5.0	5.0
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

See Attached Revised Reduced by SFC 4/25/88

Prepared By: Steven E. Kettel, Diretor Phone: (907) 465-2320
Division: Income and Excise Audit Division Date: April 21 1988

Approved by Commissioner: Hugh Malone Date: April 21, 1988
Agency: Department of Revenue

RECEIVED
APR 26 1988
LEGISLATIVE FINANCE

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Prepared By: Steven E. Kettel
Income and Excise Audit Division
April 21, 1988

SB 401 ANALYSIS

Appeals Section		Field Audit		
PERSONAL SERVICES				
Revenue Auditor V	$65.1			
Revenue Auditor IV	$57.8			
Revenue Auditor III	$51.0			
Clerk Typist III	$28.2	Revenue Auditor V	$57.8	
TOTAL:	$202.1	TOTAL:	$57.8	TOTAL: $259.9
TRAVEL				
Information Requests	$84.8			
Closing Conferences	$33.6			
Policy Review	$25.2			
Court Travel	$ 7.0	Field Audit Travel	$26.8	
TOTAL:	$150.6	TOTAL:	$26.8	TOTAL: $177.4
CONTRACTUAL				
Telephone	$1.8			
Printing	$1.4			
Office Chairs	$4.9			
Modular Offices	$8.8			
5 Drawer Legal Files	$2.9	Telephone	$.9	
Wang Printer Maintenance	$.5	Wang PC	$3.5	
TOTAL:	$20.3	TOTAL:	$4.4	TOTAL: $ 24.7
SUPPLIES				
Office Supplies	$4.9	Office Supplies	$1.0	TOTAL: $ 5.9
EQUIPMENT				
Wang Printer	$7.0			
Wang Computers	$16.5			
TOTAL:	$23.5			TOTAL: $ 23.5

Should this bill be amended to provide for mandatory extensions to the statute of limitation when the taxpayer is appealing a records request or policy decision, the size of this fiscal note would be reduced.

4/22/88
Hugh Malone
DOR

STANDARDS FOR REVIEW OF DECISIONS AT SCHEDULE

DRAFT
4/22/88

The new SB 401 presents an irony. Half the bill is an admission that the legislature does not have the necessary information to review and oversee the administration and operation of these critical taxes, and the other half would drastically revise the tax assessment process for oil and gas taxes.

In view of the fact that the legislature has not reviewed this information, the findings that the department is (issuing unwarranted tax assessments, or) excessively delaying taxes appeals, or that the department hearing procedures are unfair, are merely unfounded assertions.

SB 401 is not designed to collect taxes. It is designed to cripple the state's ability to collect the revenues that the legislature intended. At best, it is founded in ignorance.

The department opposes SB 401. It is unfortunate if the Senate does not act separately on the disclosure provisions which are contained in HB 58. But the combined bill does not help, it hurts. It does not hurt the Department of Revenue. It hurts the people of Alaska.

~~SPECIFIC COMMENTS~~

~~CS SB 401 (Finance) 4/19/88 work draft~~

The new draft combines the substance of HB 58 providing rules for disclosure of tax information to the legislature with the provisions of SB 401, that puts the superior court in the business of administering the oil and gas tax laws.

SB 401 does this by substituting a de novo court trial in place of a administrative hearing by the department. To require that judges (or jurors) substitute their judgment for that of tax experts in the department would mean there are as many revenue commissioners as their are judges (or juries) assigned to the cases. This will greatly weaken our revenue program.

One spurious argument made for the bill is that the department is "judge, jury, and executioner" and cannot make a fair determination. This view is contrary to the actual development of administrative law decisions in this state and this country, which has provided a reasonable, fair, and efficient alternative to having every disagreement taken to court.

Administrative hearings are required to be conducted by the rules of evidence and due process. Our present law provides for judicial review if a person does not agree with the departmental decision. That guarantees fairness.

The same fatal problems still exist with the audit and appeal procedures as in earlier drafts of SB 401.

STATUTE OF LIM

1. There are still no provisions linking the time frames for the procedures adopted under SB 401 with the running of the statute of limitations. These provisions are stacked against the State, and revenue losses will be the result.

90/5

The ball remains in the department's court

2. The taxpayer has no incentive to present all the information and arguments necessary to complete a determination of tax liability. Instead, the incentive is to play "keep-away" and wait until court to address the issues, since the whole matter is then focused.

PROVISION THAT NO NEW FACTUAL INFO MAY BE PRESENTED W/O COURT

3. Retention of the trial de novo provisions virtually ensures that the case resolution process will take longer than under the current system.

STATUTE OF LIMITATION
ISSUE / 3YRS NOW / 4 YRS

These are new procedures

The section of the bill taken from HB 58 would set out the rules under which the legislature would oversee the administrative of "critical taxes" (oil and gas taxes only). I note these provisions have become very cumbersome in the Senate committee substitutes for the bill.

While the department supports the concept of legislative oversight, the proposed oversight rules are now combined with the provisions of SB 401, which are not supported.

TO NEXT PAGE

The main disclosure provisions are:

1. How the transfer to the Legislature of confidential tax information on "critical taxes" (oil and gas tax type) will be handled. The transfer can be initiated by a legislative committee, the Commissioner or the taxpayer(s).

1 2. Amendments to the legislative ethics code and to title AS 43 were made to insure against inappropriate disclosure and the handling of violations - penalties have also been included.

3. A taxpayer, whose tax information is under review by the legislature, will have a right to be present at such a meeting, as well as the right to address the committee.

4. The Department of Revenue will have the responsibility of establishing, through regulations, the procedures for transferring, duplicating and safekeeping these materials.

(PARAGRAPH FROM P. 3.)

As the current Chamber of Commerce advertisement says, lets get the revenue flowing into the State Treasury. This, I believe, is the objective all of us share. This can be accomplished by:

1. Abandoning SB 401.

SEPERATELY

2. Adopting HB 58 (legislative oversight of tax matters).

3. Fully funding the requested oil and gas tax budget.

4. Requiring "critical taxpayers" to pay taxes due after a formal administrative hearing and before extended litigation in the court (prepayment of taxes).

4/22/88

SENATE FINANCE COMMITTEE PRESENTATION

Committee Substitute for Senate Bill 401

The Finance Committee Substitute for Senate Bill 401 which you have before you today is a very significant piece of legislation. The new version incorporates the "CONFIDENTIALITY" provisions from House Bill 58.

The result is a bill which establishes a new system for collecting these disputed tax assessments in a TIMELY AND EFFICIENT MANNER, and allows the Legislature to review the taxpayer returns in the future in order to oversee how this process is working.

The Committee has been provided with a sectional analysis of the C.S. In addition to the sectional analysis, there are two other documents which you have been provided with this morning relating to the bill.

CHENOWITH MEMO:

Corey —
Copy of Faiks
testimony on
SB 401 4/22/88
Pleg "

The first document is a Memorandum dated April 8, from Jack Chenowith, Legislative Counsel with the Division of Legal Services.

I requested this memo in order to answer several questions which arose in the Department of Revenue's testimony and comments on the bill. The Department has repeatedly complained that when they request documents from the taxpayers it is like "peeling an onion".

They have also stated that under the provisions of this bill they will be unable to make taxpayers produce all of the relevant evidence and supporting documentation necessary for the Department to do their job. Now the Chenowith Memo lists for you all of the tools available to the Department. THIS BILL DOES NOT MAKE ANY CHANGES TO THESE TOOLS, and page 2 of the Memo lists the penalty provisions for violation.

Now refer to page 3 of the Memo. The first paragraph states:

> "NOTHING IN SB 401 MAKES IT MORE DIFFICULT FOR THE DEPARTMENT TO GET THE NECESSARY INFORMATION FROM THE TAXPAYER.

With regard to the new requirement in the bill which adds the requirement that the taxpayer "shall present" Mr. Chenowith states that:

> "The requirement that the taxpayer "shall present" DOES PUT THE BURDEN ON THE TAXPAYER TO BRING FORWARD THE EVIDENCE THE TAXPAYER BELIEVES NECESSARY TO CORRECT OR COMPLETE THE FACTS THAT FORM THE BASIS OF THE DEPARTMENT'S PROPOSED ASSESSMENT."

At the bottom of page 3 the Memo concludes:

> "IF THE DEPARTMENT IS CONFRONTED WITH NEW EVIDENCE THAT IT HAS NOT HAD AN EARLIER OPPORTUNITY TO CONSIDER, ITS PERSONNEL WHO EXAMINE THE TAX RETURNS AND RELATED DOCUMENTS HAVE NOT DONE THEIR JOBS."

CHANGES MADE TO ACCOMMODATE THE DEPARTMENT OF REVENUE:

You have also been provided with a summary of the changes which have been made in the new bill in response to concerns raised by the Department of Revenue with regard to earlier versions of House Bill 58 and Senate Bill 401.

All 10 of them are listed right there for you. This new version of the bill has incorporated every reasonable concern they have raised.

CONCLUSION:

Mr. Chairman, the time has come when we need to ask whether the Department of Revenue can really act as AUDITOR, PROSECUTOR, JUDGE, AND JURY with regard to these cases.

Something is wrong when 5 to 10 years go by and the Department of Revenue still has not concluded the audit process for these crucial revenue sources.

Something is wrong when a taxpayer can request a hearing on its tax liability and the Department takes 2, 3, or even 4 years AND MORE before even holding a hearing.

Something is wrong when the Department of Revenue issues assessments for tens, or even hundreds, of millions of dollars without first making sure that taxpayers in similar situations are treated similarly, and without first making sure that the assessments reflect the Department's policies and its own regulations.

Something is wrong when the Department of Revenue can issue gigantic assessments for additional tax (with penalties and interest) and be unable to get those assessments through its own administrative review and into court.

Something is wrong when matters have remained in this uncertain state for so long that now the interest is nearly as great as the underlying claim for additional tax.

Something is wrong when the stakes get so high that a hearing officer cannot remain truly impartial.

The bill which you have before you attacks from two directions the ongoing problems regarding the huge amounts of claimed and unresolved oil and gas taxes. It corrects present lack of meaningful legislative review of the most important taxes for this state.

First, the earlier provisions from SB 401 will take some of the pressure off the Department of Revenue as it makes its administrative rulings. And more importantly, the provisions from SB 401 should go a long way toward preventing a recurrence of the present situation where some $2.6 billion in tax, interest and penalties have been

assessed without thorough review within the department.

Second, legislative committees will be able to review actual tax information and documents as part of the Legislature's oversight of the administration of the most important tax laws. This oversight will allow the Legislature in the future to make appropriate changes in the tax laws, if necessary or advisable, in order to prevent matters from getting out of hand again in the future.

CORRECT ERROR:

(E) PAGE (21) — LINE (16) —

POLICY REVIEW "CONF." SHOULD BE HEARING.

Alaska State Legislature

SENATE

Office of the President

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3755

SECTIONAL ANALYSIS

SENATE BILL 401

Section 1: Enacts a new section, AS 43.05.055, providing for appeals of requests by the Department of Revenue (DOR) for information or materials requested with respect to an audit, investigation or inspection relating to the four major state taxes imposed on the oil and gas industry. Those taxes are the corporate income tax (AS 43.20), the production tax (AS 43.55), the conservation tax (AS 43.57) and the former separate accounting income tax (AS 43.21).

Because the DOR also conducts audits of oil and gas royalties and net profits for the Department of Natural Resources (DNR), DOR can seek and use information obtained in the course of a royalty or net profits audit to determine a person's liability under one or more of these four principal taxes. This section grants the right to appeal an audit request made in the course of a royalty or net profits audit under AS 38.05 in order to avoid any circumvention of a person's right to appeal an unreasonable audit request by characterizing the audit as a royalty or net profits audit instead of a tax audit.

Section 2: The current procedures for administrative appeals within DOR are set out in AS 43.05.240. This second section of the bill amends AS 43.05.240(a). The new language being added at the beginning of the statute reflects the fact that the new procedures are being enacted for the four principal taxes on the oil and gas industry (corporate income tax, production tax, conservation tax and the former separate accounting income tax). The ad valorem property tax, AS 43.56, is not included because the special procedures for it, which allow the the involvement of affected municipalities and boroughs, have not led to the problems which have resulted from the administration of the four principal taxes.

For all other taxes, the present procedures are not being materially changed. Section 2 also creates a new ground for appeal by a person aggrieved by an action of the DOR in

denying the person's request for a tax refund. Currently this right exists only through the Department's regulations and does not have an explicit statutory basis. Section 2 also amends AS 43.05.240(a) to reflect the new right of appeal of information requests that is being enacted as AS 43.05.055 under section 1 of this bill.

Section 3: This section makes the same changes to AS 43.05.240(b) as Section 2 makes to subsection (a) of that statute.

Section 4: This section amends AS 43.05.240(c) to reflect the fact that a formal hearing before the DOR will no longer be limited solely to questions involving the amount of tax or penalty due the state. The present language reflecting this narrow scope of appeal is replaced with more general language that speaks in terms of considering and deciding the appellant's grievance.

Section 5: This section amends the present law regarding tax assessments, AS 43.05.245. The first insertion of new language reflects the enactment of new procedures for the four principal taxes on the oil and gas industry by making it clear that nothing in AS 43.05.245 will prevent a person from presenting evidence or other information under those new procedures. The second insertion of new language reflects the fact that, under the new procedures for oil and gas taxes, tax assessments will become final under either of two specific rules set out in those new procedures.

Section 6: This section enacts new procedures for the issuance and administrative review of tax assessments for the four principal taxes. Under the present procedures, multimillion-dollar oil and gas tax assessments are issued by the audit staff without any prior discussion with the taxpayer and without any review by the Commissioner to see that they are consistent with other assessments and correctly apply the Department's policies. Under the new procedures, both the discussion with the taxpayer and the Commissioner's review will occur before an assessment becomes final (except in one situation, discussed below).

New section AS 43.05.246 provides for a closing conference to close out the audit process. 60 to 90 days before the conference, the Department is to give the taxpayer a draft of its preliminary audit conclusions. If the preliminary

conclusion is that a penalty or additional tax and interest are due, the taxpayer is given a draft of a preliminary assessment notice to that effect, together with a written narrative and supporting worksheets or schedules to show how and why the preliminary assessment has been determined.

The closing conference is not an adversarial proceeding, but rather an opportunity to correct mistaken assumptions, misunderstanding and other errors of mistakes. Incomplete information can be supplemented, and unsubstantiated items can be substantiated. The auditor in charge of the audit is required to attend unless excused by the taxpayer or for good cause. The director of the division, or the director's designee, presides at the closing conference. The director may not designate the auditor in charge of the audit as the presiding officer.

Within 60 days of the conclusion of the closing conference, the presiding officer issues a written decision. If he or she determines that no assessment should be made, the taxpayer is given written notice to that effect. On the other hand, if he or she determines that additional tax is owed or a penalty should be assessed, or both, then the written decision is to include a proposed notice and demand for payment, together with a written narrative and supporting schedules or worksheets explaining how and why the proposed assessment has been determined. If the taxpayer does not request a policy review hearing within 30 days after the proposed assessment is issued, the assessment becomes final the the taxpayer pays the assessment.

New section AS 43.05.247 provides for the policy review hearing. Such a hearing may be sought to review a proposed assessment or to review a denial of a taxpayer's request for refund of tax under AS 43.20, AS 43.55, AS 43.57 or former AS 43.21. The Department's failure to act within 60 days on a request for refund is a denial for the purposes of being able to request a policy review hearing.

The policy review hearing is to be held within 30 days of the taxpayer's request for it. As with the other deadlines under these procedures, the time may be extended by mutual agreement.

The policy review hearing allows the Commissioner, or his or her authorized representative, to review the matter to ensure that the proper policies of the Department are being applied, and the they are being applied correctly to the taxpayer's particular circumstances. The taxpayer has an opportunity to explain the nature of the grievance and the relief being sought. Although the taxpayer and the division

may present evidence in support of its position, the policy review hearing is not a trial of the facts and the formal rules of evidence do not apply.

Within 90 days after the policy review hearing, the Commissioner issues the policy review decision, stating what relief is being granted and which portions of the Department's actions are being upheld. If evidence was presented at the hearing, the decision must state which additional facts are being recognized and which are being disregarded, as well as which version of the facts is being accepted when there is conflicting evidence. The decision is also to state which provisions of the statutes and regulations are being applied, as well as the specific policy considerations for the particular interpretation and application of those provisions. This is to allow any reviewing court to understand the Department's rationale for its actions, rather than having to guess at it, so that departmental policy can be applied to the facts as finally determined by trial before the Superior Court. If the Commissioner determines that additional tax or penalties are in order, the decision shall include a final notice and demand for payment assessing the tax, with interest, and any penalties. The assessment notice must include a narrative and supporting schedules or worksheets showing why and how it was determined. Such a notice is not final for purposes of the statute of limitations, AS 43.05.260, until the narrative and supporting materials have been served on the taxpayer.

New section AS 43.05.248 provides for appeal to the Superior Court from the Commissioner's policy review decision. The procedure is similar to that under the present law, except that there is a trial de novo before the court on the disputed portions of the Commissioner's decision. Trial de novo allows an independent person (the judge), instead of a highly paid employee who serves at the pleasure of the Commissioner, to judge the facts and decide which evidence to believe and which to disbelieve or give less weight to.

Section 7: This contains the transitional rules. Under subsection (a), the right to appeal an unreasonable request for information or materials is extended to such audit requests that are pending when the bill becomes law.

Under subsection (b), taxpayers who, on the effective date, have not completed the formal hearing in their appeals under the present procedures are given the option of having a closing conference under the new procedures and then following the new procedures from that point on. The option must be exercised within 60 days of enactment.

Subsection (c) extends the right to trial de novo to all appeals of these four taxes that have not reached the Superior Court as of the date of the bill's enactment. Thus, even if a taxpayer elects not to use the new procedures and continues instead under the existing procedures, the taxpayer will have the right to have the facts tried before an independent party instead of an employee of the Department.

Section 8: This section provides for an immediate effective date.

4/22/88 am

Alaska State Legislature

SENATE

Office of the President

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SECTIONAL ANALYSIS
OF
SENATE FINANCE CS FOR SENATE BILL NO. 401

The present Senate Finance CS for SB 401 incorporates the substance of the previous proposed Finance CS this bill and combines it with the portions of the Senate State Affairs CS for CS for House Bill No. 58 relating to legislative access to tax returns and return information. The combination of these bills will attack from two directions the present problems regarding the huge amounts of claimed and unresolved oil and gas taxes from the past, and the present lack of meaningful legislative review of the most important taxes for this state. First, the earlier provisions of SB 401 will take some of the pressure off the Department of Revenue as it makes its administrative rulings, by letting an independent agency -- the courts -- decide any disputed facts in a tax case. More importantly, the provisions from SB 401 should go a long way toward preventing a recurrence of the present situation where over $2.5 billion in tax, interest and penalties have been assessed without thorough review within the Department.

The second approach to solving the present tax problems is to allow legislative committees to review actual tax information and documents as part of the Legislature's oversight of the administration of the most important tax laws. This requires a balancing between the rights of taxpayers to privacy and confidentiality of their information on the one hand, and, on the other, the Legislature's need to oversee the workings of the tax laws as they apply to a very limited number of oil and gas taxpayers. Such oversight will allow the Legislature in the future to make appropriate changes in the tax laws, if necessary or advisable, in order to prevent matters from getting so greatly out of hand as they are now.

As with the Senate State Affairs CS for CSHB 58, the present Finance CS limits the scope of direct legislative access to tax information so that only certain taxes and taxpayers are affected, instead of all taxpayers. For most other taxes there are

more than enough taxpayers so that, even if actual taxpayer information were presented to the Legislature, it would be extremely unlikely that anyone other than that taxpayer would recognize whose information it is. Also, no other tax is nearly so vital to the State in terms of the tax revenue it generates.

The following summarizes the individual sections of the Finance CS for SB 401.

Section 1. This section states the legislative findings and purposes for the legislation. Findings (1) - (12) in subsection (a) set out grounds as to why tax information for only certain taxpayers should be accessible to the Legislature through its committees. Findings (13) - (19) set out reasons why the procedures for assessing and appealing certain oil and gas taxes need to be changed. Subsection (b) sets out the purposes that this legislation will advance.

Section 2. Adds AS 24.10.070 to the provisions regarding legislative employees and agents, forbidding them from disclosing tax information without the prior consent of the person whose information would be disclosed.

Section 3. Adds a new subsection (b) to AS 24.60.060 in the standards for legislators' conduct, forbidding them from disclosing tax information or using it for their own gain or that of another. It declares such a disclosure or misuse of tax information to be one of the most serious breaches of the standards of conduct.

Section 4. Adds AS 24.60.172 to the provisions regarding the legislative ethics committee, modifying the committee's procedures for cases involving allegations that a legislator has improperly disclosed or misused tax information. Subsection 172(a) allows a complaint to be initiated at any time within a year of the alleged violation and allows the committee to continue its proceedings on the complaint, regardless of whether a primary or general election is upcoming or not.

Subsection 172(b) further modifies the committee's proceedings in order to protect a person's identity and confidential information from disclosure, unless the person consents to disclosure. When the person agrees to releasing some or all of the information, subsection 172(c) allows that information to be included in the public record of the committee's proceedings.

Section 5. Amends AS 43.05.230(a) by making it unlawful for current or former legislators -- in addition to current and former officers, employees and agents of the State -- to divulge or disclose tax information except as otherwise provided in the new statutes (AS 43.05.231 - 43.05.239) governing the disclosure of tax information to legislative committees.

Section 6. Amends the present criminal penalty in AS 43.-05.230(f) for knowingly violating the confidentiality of tax information, by making it a class C felony instead of a class A misdemeanor. It also adds a civil penalty of $5,000 for a violation, which the Department of Revenue enforces and collects. It also makes clear that, for a person confidentiality has been violated, the person's rights to sue the violator are not affected because of these criminal and civil penalties.

Section 7. Enacts new statutes to govern the disclosure of tax information to legislative committees. These are the heart, substantively, of the provisions for legislative review and oversight of these taxes.

AS 43.05.231 -- Allows a legislative committee to request tax information from the Department of Revenue, after the committee has identified the scope of its inquiry or investigation and after a simple resolution has been passed authorizing that committee to receive tax information.

AS 43.05.232 -- Allows the Commissioner of Revenue to initiate a transfer of tax information to a legislative committee without a request from the committee. Such a transfer may be made only after the Commissioner considers a number of specific factors and determines that the transfer is in the State's best interest.

AS 43.05.233 -- Places certain limits on legislative requests and Commissioner-initiated transfers. The request or transfer must be either to assist the committee as it considers tax legislation or as it oversees the administration of the State's "critical" tax laws. Tax information may not be disclosed to a legislative committee if the purpose is to direct the Executive Branch in its audit, litigation or settlement efforts, or if the purpose is to embarrass, harass or discriminate against a taxpayer. To enable the Department of Revenue to continue exchanging information with the IRS, no information provided by the IRS under such exchange agreements may be disclosed to a legislative committee. Also, no information may be disclosed for taxes other than the specified "critical" taxes.

AS 43.05.234 -- Relates to the types of materials to be made available to a legislative committee. Subsection (a) requires the Commissioner to see whether there is more than one type of tax return or return information that would provide the needed information for the committee, and if so, to choose the least commercially sensitive material. "Transactional documents" (as defined in AS 43.05.239) are not to be transferred if "summary documents" (e.g., audit narratives, informal conference decisions and formal hearing decisions) would suffice. Subsections (b) and (c) require the Commissioner to transfer materials provided by the taxpayer, and subsection (d) requires the transfer of materials or information requested by a taxpayer under AS

43.05.235(e). Subsection (e) vests the Department of Revenue with exclusive responsibility for duplicating and numbering the copies of tax materials furnished to a legislative committee.

AS 43.05.235 -- Entitles a taxpayer to receive advance notice that its tax information or material is about to be transferred to a legislative committee, and gives the taxpayer seven days before the transfer in order to submit additional material for transfer with the other information and material. The taxpayer may waive these requirements.

Subsection (e) allows a taxpayer to initiate the transfer of its tax information to a legislative committee. The taxpayer may designate the particular materials or information it wants transferred, but the Commissioner may, under AS 43.05.-232(b)(6), supplement that material or information in order to give the committee a balanced and complete presentation.

AS 43.05.236 -- Establishes procedures for a committee receiving tax information. Under 236(a), the committee may discuss and consider the information in executive session only, unless the party whose information is being considered consents in writing to an open session. All legislators may attend the executive session.

Under 236(b), the committee chair or co-chair may designate legislative staff to attend the executive session, but no more than are needed for the committee and its members to be able to analyze and understand the tax material fully. No other legislative staff may attend the executive session.

Subsection 236(c) entitles a taxpayer to attend the executive session for those portions of it when only that taxpayer's information is before the committee. The taxpayer has a reasonable opportunity to address the committee in executive session after the discussion or presentation of its tax materials.

When information regarding more than one taxpayer is being presented or discussed at the same time, it is not possible for all those taxpayers to attend the executive session without letting each of them discover tax information pertaining to the others. Subsection 236(d) provides for the preparation of a written or tape transcript of the executive session, and each taxpayer is entitled to receive an edited version of it with all the other taxpayers' information and identities deleted or blanked out. Subsection 236(e) gives taxpayers a reasonable opportunity to address the committee in executive session after they have received their edited transcripts of the proceedings of the original executive session.

AS 43.05.237 -- Forbids disclosures by current and former legislators and legislative employees and agents, of part or all of a tax return or return information furnished to a legisla-

tive committee under AS 43.05.231 - 45.05.239. It specifically makes such a disclosure a violation of AS 43.05.230 (AS 43.05.-230(f) provides for criminal and civil penalties for violations of that section). Subsection 237(b) requires each legislator and legislative employee or agent to execute a document before receiving or reviewing any tax information or materials, in which that person acknowledges the confidentiality of the tax information to be received and agrees to maintain its confidentiality and return the materials to the Department of Revenue.

AS 43.05.238 -- Requires the Department of Revenue to adopt regulations governing the transmittal, receipt, safekeeping, removal from storage or filing location, accounting for possession, and return to the Department of all tax returns and materials transferred under AS 43.05.231 - 43.05.239.

AS 43.05.239 -- Defines certain terms used in AS 43.-05.231 - 43.05.239. The term "critical tax" defines and limits the kinds of taxes for which information may be disclosed to legislative committees, and it is therefore especially important. As in the Senate State Affairs CS for HB 58, a "critical tax" is a production tax under AS 43.55 or 43.57, the income tax under AS 43.20 when the apportionment formula is modified under AS 43.20.-072, and the income tax under former AS 43.21 (separate accounting). "Critical tax" does not include income tax under AS 43.20 or former AS 43.21 when the taxpayer is an Alaska Native corporation because of the interrelation among Native corporations' affairs under sections 7(i) and 7(j) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606(i) and (j). See findings (11) and (12) in Section 1 of the bill.

Section 8. This is the first of the sections in the Finance CS that arise from the original version of SB 401. It amends AS 43.05.240(a) to conform to the fact that new provisions for administrative review and appeal (AS 43.05.246 - 43.05.248) will be added under Section 12 of the bill. It also specifically makes the denial of a tax refund request a basis for seeking an administrative appeal under the "regular" procedures of AS 43.05.240.

Section 9. Makes changes to AS 43.05.230(b) parallel to those made to AS 43.05.230(a) by Section 8 of the bill.

Section 10. Makes a technical conforming change to AS 43.-05.240(c) to reflect the fact that an administrative appeal before the Department could involve a claim that money is owed to the taxpayer; currently 240(c) reads as if appeals could only involve money claimed to be owed to the State.

Section 11. Makes technical conforming changes to AS 43.-05.245 to reflect the different procedures for certain taxes under AS 43.05.246 - 43.05.248.

Section 12. Enacts AS 43.05.246 - 43.05.248, which set out the new procedures for administrative review and appeals for certain oil and gas taxes. Substantively, these are the central provisions from the earlier versions of SB 401. All deadlines for action in these statutes may be extended by mutual agreement between the Department and the taxpayer.

AS 43.05.246 -- For production taxes under AS 43.55 and 43.57 and income taxes under AS 43.20 and former AS 43.21, this section requires the Department of Revenue to take certain actions before closing out an audit of a taxpayer. First, it must provide the taxpayer with a written draft of its preliminary audit conclusions, including (1) any "notice and demand" for payment that the Department is considering, (2) a narrative fully explaining the preliminary conclusion to issue an assessment and how the Department is calculating the amount for the assessment, and (3) written or computer-readable worksheets setting out the calculations. Then, 60 to 90 days after providing the taxpayer with this draft, the Department must hold an informal, non-adversarial closing conference with the taxpayer to review and discuss the preliminary audit conclusions. The closing conference is at the "division level" of the Department and constitutes the conclusion of the audit process. Within 60 after the closing conference, the Department must issue a written decision on the preliminary audit conclusions. If the decision upholds or modifies a preliminary conclusion that an assessment should be issued, it must include a proposed "notice and demand," audit narrative and supporting worksheets similar to those given to the taxpayer before the closing conference. If the taxpayer does not request a policy review at the "Commissioner level" of the Department, the closing conference decision becomes a final assessment after 30 days and cannot thereafter be appealed to court.

AS 43.05.247 -- Provides for a policy review hearing regarding either a closing conference decision under AS 43.05.246 or a denial of a request for a refund of tax paid under AS 43.20, 43.55, 43.57 or former 43.21. For purposes of seeking a policy review hearing, a refund request is deemed denied if the Department fails to act on it within 60 days.

The policy review hearing must be held within 30 days after it is requested. Its purpose is to allow the Commissioner (or someone who has been designated by the Commissioner and who does not work in the division that issued the closing conference decision or denied the refund request) to determine whether the action causing the taxpayer's grievance reflects and incorporates the correct policies of the Department and, if so, whether they are being applied correctly to the taxpayer's particular situation.

The taxpayer is entitled to a reasonable opportunity at the hearing to explain the grievance and must present evidence to prove any facts which the taxpayer believes are incorrect or

incomplete in a proposed assessment. The division allegedly causing the grievance then has an opportunity to explain its action and to rebut any evidence presented by the taxpayer. The formal rules of evidence do not apply to either side. The presiding officer may require the witnesses to testify under oath and must allow each side to ask questions of the other side's witnesses. Nothing in AS 43.05.247 limits the Commissioner's powers and authority under AS 43.05.010. The hearing must be recorded and becomes part of the administrative record.

Not more than 90 days after the hearing, the Commissioner must issue a decision stating what relief, if any, is being granted to the taxpayer and what portions, if any, of the Department's actions giving rise to the grievance are being upheld. The Commissioner must also set out what facts are being relied upon in rendering the decision. If the decision is to issue an assessment, the final "notice and demand" for payment must be issued with the decision, together with a narrative and supporting worksheets explaining and documenting the calculation on which the assessment is based. For purposes of the statute of limitations, the "notice and demand" (i.e., the assessment) is not issued until the narrative and supporting worksheets are served on the taxpayer.

AS 43.05.248 -- provides for appeals of the Commissioner's policy review decision to the Superior Court. The appeal must be filed within 30 days of the issuance of the decision. The contested portions of the decision are tried de novo by the court; any liability with respect to unconstested portions would, of course, be paid by the taxpayer. Only the contested portions of a decision may be litigated before the court; the uncontested portions are closed and may not be raised in court as a claim, counterclaim or defense. As with the present law, a taxpayer must be given access to the files of the Department to prepare the appeal. The court either confirms the tax, or else determines the correct amount of tax and orders payment of the deficiency or refund of the excess, as the case may be. Any refund must be made immediately.

Section 13. This is the first of three sections amending AS 43.05.260, the statute of limitations for taxes. The effect of these amendments is to increase the limitations period from three years to four in order to compensate for the 300 days of time that will be needed under AS 43.05.246 - 43.05.248 for the Department of Revenue to review its preliminary audit conclusions before issuing a final assessment. The first change is to AS 43.05.260(a) to conform to the fact that a new subsection (d) is being added to the statute. Also, there is a technical change to reflect the current legislative drafting style.

Section 14. Makes two minor, technical changes to AS 43.-05.260(c) to reflect the addition of a new subsection (d) to the

statute, providing for a four-year limitations period for certain taxes.

Section 15. This is the substantive amendment to the statute of limitations. It adds subsection (d) to AS 43.05.260, making the limitations period four years for taxes to which the procedures under AS 43.05.246 - 43.05.248 are applicable.

Section 16. This section states that AS 43.05.248, as added by Section 12 of the bill, amends Rule 609 of the Alaska Rules of Appellate Procedure by making trial de novo mandatory rather than discretionary in appeals relating to taxes to which AS 43.05.248 is applicable, and restricting the claims, counterclaims and defenses that may be raised in such appeals so that uncontested portions of the Commissioner of Revenue's policy review decision are not reopened on appeal to the court.

Section 17. Sets out transitional provisions. Subsection (a) makes the provisions of AS 43.05.231 - 43.05.239 (for legislative review of tax returns and information) applicable to all returns and return information pertaining to "critical taxes" that is in the possession of the Department of Revenue on or before the effective date of the Act.

Subsection (b) requires the Department of Revenue to adopt regulations under AS 43.05.238 before transferring any tax return or return information to a legislative committee under AS 43.05.-231 - 43.05.239. It also prohibits the Department from adopting its initial regulations as emergency regulations. Persons interested in or affected by AS 43.05.231 - 43.05.239 are entitled to make their views known about how to protect confidential tax information from public disclosure, before the Department adopts these important regulations and starts making confidential information available to the Legislature.

Subsection (c) makes AS 43.05.248 (providing for trial de novo and barring claims, counterclaims and defenses based on uncontested portions of a policy review decision) applicable to any grievance regarding AS 43.20, 43.55, 43.57 or former 43.21 that is not appealed to Superior Court when the Act takes effect.

Section 18. Provides for an immediate effective date under AS 01.10.070(c).

4/22/88 am

Alaska State Legislature

SENATE

Committee on Finance

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

April 21, 1988

MEMORANDUM

TO: Senate Finance Committee Members

FROM: Senator Rick Halford, Co-Chairman
Senate Finance Committee

Rick Halford

SUBJECT: Finance Committee Bill Introduction

As you recall, the committee has discussed the issue of future disposition of settlements from tax and other legal disputes. In an effort to address the issue, attached are two draft bills and a memorandum from Tam Cook.

Bill draft #1 provides that interest on certain revenue designated for deposit into the Permanent Fund earned before the revenue is received be deposited into the budget reserve fund.

In addition to this language, draft #2 addresses the issue raised in Ms. Cook's memo regarding "dedicated fund". As a result, I offer both drafts for the committee's consideration.

It is my intent for the committee to discuss the language at Friday's committee meeting.

Thank you.

STATE OF ALASKA
THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM April 14, 1988

SUBJECT: Interest earned on certain state revenue (W.O. 5-2158)

TO: Senator Jan Faiks

FROM: Tamara Brandt Cook
Director
Division of Legal Services

Here is a draft of a bill you requested that would provide that interest on certain revenue designated for deposit into the permanent fund earned before the revenue is received by the state be deposited into the budget reserve fund. This provision is subject to challenge under Article IX, section 7 of the state constitution which, with some specific exceptions that do not apply in this situation, prohibits the dedication of state revenue "to any special purpose". (State, N.S.E. Regional Aquaculture Association v. Alex, 646 P.2d 203 (Alaska 1982))

A possible way to achieve your goal, at least partly, and to avoid the "dedicated fund" problem would be to establish a mechanism providing for appropriation of the interest into the budget reserve fund. The following language added as a new subsection to AS 37.13.010 would accomplish this.

> The Department of Revenue shall separately account for interest on revenue from sources listed under (a)(1) and (2) of this section earned while the revenue is held in trust, escrow, or otherwise before receipt of the revenue by the state. Each fiscal year, the department shall notify the legislature of the amount of interest accounted for under this subsection, and the legislature may appropriate that amount to the budget reserve fund (AS 37.05.156).

Enclosure

TBC:gc
WKG2:115

5-2158A
Cook
4/14/88

IN THE SENATE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to interest earned on certain state revenue."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 37.13.010 is amended by adding a new subsection to read:

(d) Interest on revenue from sources listed under (a)(1) and (2) of this section earned while the revenue is held in trust, escrow, or otherwise before receipt of the revenue by the state shall be deposited into the budget reserve fund established under AS 37.05.156.

Draft #1

5-2168A
Cook
4/19/88

IN THE SENATE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to interest earned on certain state revenue."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 37.13.010 is amended by adding a new subsection to read:

(d) The Department of Revenue shall separately account for interest on revenue from sources listed under (a)(1) and (2) of this section earned while the revenue is held in trust, escrow, or otherwise before receipt of the revenue by the state. Each fiscal year the department shall notify the legislature of the amount of interest accounted for under this subsection, and the legislature may appropriate that amount to the budget reserve fund (AS 37.05.156).

Draft #2

4/22/88 am

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM April 8, 1988

SUBJECT: Questions regarding administration of state revenue and taxation laws

TO: Senator Jan Faiks
President of the Senate

FROM: Jack Chenoweth
Legislative Counsel

I

The principal enforcement tools available to the Department of Revenue are these:

Conducting hearings and investigations necessary for administration of tax and revenue laws (AS 43.-05.010(8));

Conducting an official examination of records and inspection of business premises (AS 43.05.040(a));

Compelling the production of necessary records in conjunction with examinations (AS 43.05.040(a) and (b)) and at hearings (AS 43.05.010(10));

Compelling the attendance of witnesses (AS 43.05.-010(10));

Compelling persons to answer interrogatories under oath (AS 43.05.040(b));

Taking depositions under oath (AS 43.05.010(11) and (12));

These powers are not unlike those granted any revenue-collection and enforcement agency. In addition, the Department enjoys authority to "make [a] return from the information it obtains" for a taxpayer that fails to timely file a return or that makes a false or fraudulent return (AS 43.05.050).

Applicable department regulations (15 AAC 05 and 15 AAC 10) make more specific the statutory provisions.

II

The penal provisions are summarized in AS 43.05.290. In summary:

> Wilfully attempting to evade payment of tax is a class C felony;
>
> Wilful failure to account for and pay over tax in a timely manner is a class C felony;
>
> Wilful failure to pay a tax, make a return, keep records, or supply information is a class A misdemeanor;
>
> Wilful subscription of a return made under penalty of perjury that the maker of the return "does not believe to be true and correct as to every material matter" is a [class C] felony with specific punishment prescribed;
>
> Wilful assistance in preparation of a fraudulent return or other affidavit "which is fraudulent or is false as to a material matter" is a [class C] felony with specific punishment prescribed; and
>
> Wilful delivery or disclosure of a document "known by the person to be fraudulent or to be false as to a material matter" is a class A misdemeanor.

Generally, a lesser penalty is applicable for disclosure or failure to disclose in comparison to those involving remission of tax or subscription of a return in violation of one's oath.

One other provision, AS 43.05.120, makes it a misdemeanor, punishable by imprisonment, by a fine of not more than $5000, or by both, for concealing from the department evidence applicable to compromise of a tax or penalty under AS 43.05.070 or in connection with a negotiated closing agreement relating to the taxpayer's liability under AS 43.-05.060.

III

In my judgment, nothing in SB 401 "[makes] it more difficult for the Department to get the necessary information from the taxpayer." The requirement that a taxpayer "shall present" does put the burden on the taxpayer to bring forward the evidence the taxpayer believes necessary to "correct or complete" facts that form the basis of the department's proposed assessment.

IV

In its first paragraph, your memo notes that "[t]he department is afraid that under the bill the taxpayers will withhold key information until after appeals get out of the administrative process, and then present [the information] when the case reaches the Superior Court." This bill contains a provision that appeals from the policy review decision are to be heard "de novo." The usual definition of "de novo" means that the proceeding involves "a trial or retrial in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below." Under normal circumstances, a de novo proceeding would permit the taxpayer to prepare a new record, bringing forth evidence previously not considered by the department.

SB 401 sets a limitation [page 8, lines 17 - 19] on what the parties may contest in a de novo proceeding, but nowhere states that evidence that the court may consider in the de novo proceeding is limited to evidence made a part of the record in the administrative proceeding. If the bill did limit the record to consideration of evidence obtained in the earlier administrative proceeding(s), then, of course, the judicial review would not, by definition, be a de novo proceeding.

I am reminded, however, of a statement by former Revenue Commissioner Tom Williams with reference to this legislation: if, in the latter appellate stages, or in the event of a judicial review, the department is confronted with new evidence that it has not had an earlier opportunity to consider, its personnel who examine the tax returns and related documents probably have not done their jobs.

JBC:bb
b4/105

4/22/88 am

Alaska State Legislature

SENATE

Office of the President

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3755

CHANGES MADE TO SB 401 TO ACCOMMODATE THE DEPARTMENT OF REVENUE:

In order to address concerns raised by the department with regard to the original version of the bill, the following changes were made in the CS for SB 401 dated 3/14/88:

1. In response to the department' concern that the bill "adds approximately 300 days of procedures . . . that must be accomplished within the current 3 year statute of limitations," and that these new procedures will "shorten unrealistically the amount of time available to complete audits," the statute of limitations for these taxes was raised from 3 years to 4.

2. In response to the department's concern that the procedure for allowing taxpayers to appeal the appropriateness of information requests would add delays to the process, Section 1 of the original version of the bill was removed.

3. In response to the department's concern that taxpayers might withhold information from the department until cases reached the Superior Court level, the bill now states that the taxpayer "SHALL" submit their evidence and supporting materials at the policy review hearing. This bill does not attempt to limit the powers and authority of the department under AS 43.05.010 to hold hearings, receive evidence, and take testimony.

The Department of Revenue also expressed concern over changes made in the SCS CSHB 58. The following of their concerns have been addressed in the language from House Bill 58 which has been added to SB 401:

4. The department stated that the word "confidential" had been unnecessarily inserted at various places throughout the SCS CSHB 58, and that it should be deleted. In response to the department's concern, these deletions have been made.

5. In the purposes section, the department felt that the words "production and severance" do not accurately describe the taxes levied under AS 43.55 and AS 43.57." The reference to "Severance" has been deleted.

6. Also in the purposes section, the department said the words "supervise" and "supervisory" should be changed to "oversee", "monitor" or "review". This has been done in findings (3) and (4).

7. The department suggested that the word publicly in finding 8 should be deleted. This deletion has been made.

8. Two new findings -- (11) and (12) have been added in response to the department's concerns about the treatment of Alaska Native corporations under the bill.

9. The department suggested that AS 24.60.172(a), which is being enacted by Section 4 of the bill, should be rewritten to make it clear that the modified procedures of the Legislative Ethics Committee would also apply, as appropriate, when a person does consent to public disclosure of their identity or tax information. AS 24.60.172(a) has been rewritten and a new AS 24.60.172(b) has been added to reflect this suggestion.

10. In the section on taxpayer notification and submission of tax information, which allows the taxpayer to request at any time that the department transfer the taxpayer's confidential tax returns to a legislative committee, the department suggested an amendment that "the taxpayer must pay the department the cost of duplicating material for transfer." This change has been made.

SFC-88 #17
3/3/88

TESTIMONY OF

GERALD SERENA

FOR

EXXON COMPANY, U.S.A.

BEFORE THE

SENATE FINANCE COMMITTEE

SB No. 401

MARCH 2, 1988

GOOD MORNING, CHAIRMAN HALFORD, CHAIRMAN BINKLEY, MEMBERS OF THE COMMITTEE.

MY NAME IS GERALD SERENA, I AM A TAX LAWYER WITH EXXON COMPANY, U.S.A., AND I AM BASED IN ANCHORAGE.

EXXON APPRECIATES THE OPPORTUNITY TO COMMENT ON SB No. 401, A BILL DESIGNED TO IMPROVE THE EFFICIENCY OF THE ADMINISTRATIVE REVIEW OF TAX CONTROVERSIES BY THE DEPARTMENT OF REVENUE, AND TO INTRODUCE A MEASURE OF FAIRNESS AND DUE PROCESS WHICH WE BELIEVE IS ABSENT UNDER THE PRESENT SYSTEM.

AS YOU KNOW, EXXON IS A MAJOR PARTICIPANT IN NORTH SLOPE OIL PRODUCTION. AS SUCH, WE ARE FAMILIAR WITH THE PROCEDURES FOR FILING INCOME AND PRODUCTION TAX RETURNS, AND ALSO WITH THE AUDITING OF THESE RETURNS BY THE DEPARTMENT OF REVENUE. NO EXXON INCOME TAX YEARS AFTER 1977 AND NO EXXON OIL PRODUCTION TAX YEARS AFTER 1978 HAVE BEEN FINALIZED BY THE DEPARTMENT OF REVENUE. IN OTHER WORDS, EXXON'S TAX LIABILITIES FOR ABOUT THE LAST TEN YEARS ARE STILL OPEN ISSUES. EXXON MANAGEMENT IS INTENSELY INTERESTED IN RESOLVING THESE OPEN YEARS AND CLOSING THEM OUT.

TO ILLUSTRATE THE KIND OF PROBLEMS EXXON HAS EXPERIENCED IN ITS EFFORTS TO FINALIZE OPEN TAX YEARS, I HAVE ATTACHED TO THE COPY OF MY TESTIMONY SUBMITTED TO THE COMMITTEE A SUMMARY OF THE ADMINISTRATIVE PROCEEDINGS FOR OUR 1978 INCOME TAX YEAR, AND I ASK THAT THIS BE ENTERED INTO THE RECORD OF THESE PROCEEDINGS. THIS SUMMARY DEMONSTRATES THE SEEMINGLY ENDLESS NATURE OF ADMINISTRATIVE REVIEW OF A TAX CONTROVERSY BEFORE THE DEPARTMENT OF REVENUE.

dignucci

THE OBVIOUS QUESTIONS ARE HOW HAS THIS DELAY IN TAX DISPUTE RESOLUTION HAPPENED, AND HOW CAN THE PROBLEM BE SOLVED.

WE BELIEVE THAT THE PRIMARY EXPLANATION FOR THE CURRENT IMPASSE LIES IN THE ADMINISTRATION OF THE AUDIT AND REVIEW FUNCTION BY THE DEPARTMENT OF REVENUE. THE PROBLEM, AS WE SEE IT, IS WITH THE PROCEDURES THAT HAVE BEEN FOLLOWED DURING THE AUDIT AND REVIEW PROCESS ITSELF. THE FACT OF THE MATTER IS THAT UNDER CURRENT PROCEDURES, THE ASSESSMENT OCCURS PRIOR TO ANY CLARIFYING DISCUSSIONS BETWEEN THE DEPARTMENT OF REVENUE AND THE TAXPAYER. AS A RESULT, THE ASSESSMENT IS FOLLOWED BY A LONG, PROTRACTED REVIEW PROCESS.

UNDER SB No. 401, THE ASSESSMENT WOULD TAKE PLACE ONLY AFTER INTERACTION WITH THE TAXPAYER, THAT IS, AFTER THE CLOSING CONFERENCE AND THE POLICY REVIEW HEARING. THIS GIVES AN OPPORTUNITY FOR MEANINGFUL DIALOGUE BETWEEN THE DEPARTMENT AND THE TAXPAYER TO LIMIT ANY ULTIMATE ASSESSMENT TO ISSUES OVER WHICH THERE IS A GENUINE CONTROVERSY. DELAYS ARE AVOIDED BY HAVING SPECIFIC TIME LIMITATIONS AND DEADLINES FOR THESE PROCEEDINGS BETWEEN THE DEPARTMENT AND THE TAXPAYER, SO THAT THE OBJECTIVE OF FINAL ADMINISTRATIVE ACTION WITHIN THE THREE YEAR STATUTE OF LIMITATIONS PERIOD IS REALIZABLE. OF COURSE, PRACTICAL PROBLEMS MAY ARISE DURING THIS PERIOD AND PROVISION IS MADE FOR EXTENSION OF THE TIME LIMITATIONS BY MUTUAL AGREEMENT. SB No. 401 ESTABLISHES A REASONABLE SYSTEM FOR FINALIZING ACCURATE DEPARTMENT OF REVENUE ACTION IN A TIMELY FASHION.

THE TRIAL DE NOVO FEATURE IN SB No. 401 IS CRITICAL TO THE OVERALL FAIRNESS AND EFFECTIVENESS OF THE SYSTEM. CURRENTLY, THE DEPARTMENT NOT ONLY REPRESENTS THE STATE OF ALASKA IN TAX CONTROVERSIES BUT ALSO IS THE DECISION MAKER. THE HEARING OFFICERS WHO MAKE THE FINAL ADMINISTRATIVE DECISIONS ARE EMPLOYEES OF THE DEPARTMENT AND REPORT ULTIMATELY TO THE COMMISSIONER OF REVENUE. THIS DUAL ROLE AT THE ADMINISTRATIVE LEVEL OF INTERESTED PARTY AND DECISION MAKER, COUPLED WITH THE LIMITED SCOPE OF JUDICIAL REVIEW, CONSTITUTES A LACK OF FAIRNESS AND DUE PROCESS.

IF THE TAXPAYER IS DISSATISFIED WITH THE DEPARTMENT'S DECISION, IT MAY APPEAL TO SUPERIOR COURT, BUT THE COURT MUST UPHOLD THE DEPARTMENT'S POSITION UNLESS IT IS CONTRARY TO THE SUBSTANTIAL WEIGHT OF THE EVIDENCE IN THE RECORD OF THE ADMINISTRATIVE PROCEEDINGS BEFORE THE DEPARTMENT. THIS FACTOR HAS A NEGATIVE EFFECT ON THE TAXPAYER'S PRACTICAL ABILITY TO CHALLENGE DEPARTMENT POSITIONS.

THE PRESCRIBED REMEDY FOR THIS PROBLEM OF LACK OF FAIRNESS IS THE INTRODUCTION OF REVIEW BY AN INDEPENDENT DECISION MAKER, THAT IS, ONE OUTSIDE OF THE DEPARTMENT OF REVENUE. UNDER SB No. 401, THE JUDICIAL REVIEW OF FINAL DEPARTMENT ACTION WILL BE BY TRIAL DE NOVO. IN SIMPLE TERMS, THIS MEANS THAT THE COURT WILL WEIGH ALL EVIDENCE AND BASE ITS DECISION ON THE WEIGHT OF THE EVIDENCE. DEFERENCE WOULD STILL BE GIVEN TO THE DEPARTMENT OF REVENUE WHERE IT HAS EXPERTISE, AND THE TAXPAYER WOULD STILL HAVE THE BURDEN OF PROVING ITS CASE.

SB No. 401 WILL NOT RESOLVE THE CURRENT LOGJAM OF UNRESOLVED TAX CONTROVERSIES BY ITSELF. IT MUST BE SUPPLEMENTED BY A GOOD FAITH EFFORT ON THE PART OF THE DEPARTMENT OF REVENUE TO FINALIZE PENDING CASES. OUR DISCUSSIONS WITH DEPARTMENT OFFICIALS INDICATE TO US THAT SUCH AN EFFORT IS UNDERWAY, AND WE SUPPORT THE RECENT MOVES TO REORGANIZE THE OIL AND GAS AUDIT DIVISION. HOWEVER, WE ARE CONVINCED THAT SUCH EFFORTS MUST BE

SUPPLEMENTED BY THE STATUTORY CHANGES CONTAINED IN SB No. 401 IF MEANINGFUL REFORM IS TO BE ACHIEVED.

THE PURPOSE OF SB No. 401 IS TO HELP FINALIZE TAX DISPUTES IN A FAIR AND EXPEDITIOUS MANNER. WE AT EXXON ARE COMMITTED TO TRY TO RESOLVE OUR DIFFERENCES WITH THE DEPARTMENT AT THE ADMINISTRATIVE LEVEL. FOR THOSE DIFFERENCES WHICH CANNOT BE RESOLVED, WE WANT TO FINALIZE THE ADMINISTRATIVE REVIEW AT THE EARLIEST POSSIBLE TIME, AND MOVE ON TO A FAIR AND IMPARTIAL JUDICIAL REVIEW. THIS IS IN OUR BEST INTEREST; WE BELIEVE IT IS IN THE BEST INTEREST OF THE STATE OF ALASKA AS WELL.

THANK YOU FOR THE OPPORTUNITY TO PRESENT OUR VIEWS ON SB No. 401.

1978 ALASKA SEPARATE ACCOUNTING INCOME TAX
CHRONOLOGY OF EXXON'S AUDIT AND REVIEW EXPERIENCE

Aug. 1979: Assessment is issued.

Sep. 1979: Assessment is amended.

Jul. 1980: Second amendment is issued.

Sep. 1980: Taxpayer protests and requests informal conference.

Feb. 1981: Informal conference is held.

Apr. 1981: Informal conference decision is issued, resolving all but one of the issues under protest.

May 1981: Taxpayer requests formal hearing on remaining issue.

Oct. 1983: Without acting on the request for a formal hearing, the Department issues a third amendment which raises additional claims for the first time.

Dec. 1983: Taxpayer protests the third amendment and requests an informal conference.

Apr. 1984: Second informal conference is held.

Jul. 1984: Informal conference decision is issued.

Aug. 1984: Taxpayer makes second request for a formal hearing.

Oct. 1986: The Department holds a "pre-hearing conference" to discuss procedures and schedule for formal hearing.

Dec. 1986: The Department issues a fourth amendment to the assessment, making additional claims for tax.

Jan. 1987: Pre-hearing conference held, briefing schedule agreed to and formal hearing scheduled for Aug. 12, 1987.

Taxpayer protests Dec. 1986 amended assessment.

May 1987: Taxpayer's opening brief filed. 14 days later, the Department suspended all hearings.

Feb. 1988: Two pre-hearing telephone conferences held to discuss briefing schedule and date for formal hearing. Awaiting Order from Revenue Hearing Examiner to set dates for briefing schedule and formal hearing(s).

During second telephone conference, Department advised that they planned to issue fifth amendment to the assessment.

SFC-88
3/3/88

TESTIMONY OF THOMAS K. WILLIAMS
FOR STANDARD ALASKA PRODUCTION COMPANY
BEFORE THE SENATE FINANCE COMMITTEE
ON SENATE BILL NO. 401

March 2, 1988

GOOD MORNING. MY NAME IS THOMAS K. WILLIAMS AND I AM THE MANAGER OF TAX PLANNING FOR STANDARD ALASKA PRODUCTION COMPANY (SAPC). ON BEHALF OF THE COMPANY AND FOR MYSELF, THANK YOU FOR THIS OPPORTUNITY TO TESTIFY ABOUT SENATE BILL NO. 401.

SAPC SUPPORTS AND ENCOURAGES THE REFORMS WHICH THIS LEGISLATION WOULD MAKE IN THE PRESENT PROCEDURES FOR ADMINISTRATIVE REVIEW AND APPEALS OF TAX CASES. IT IS OBVIOUS THAT SOMETHING HAS GONE TERRIBLY WRONG WITH THE PRESENT PROCEDURES. ACCORDING TO THE DEPARTMENT OF REVENUE'S OWN FIGURES, AS OF FEBRUARY 1, 1988, OVER $2.5 BILLION HAS BEEN CLAIMED AS ADDITIONAL TAXES, INCLUDING INTEREST AND PENALTIES. NOTICE THAT I SAID "CLAIMED" -- NOT "BACK TAXES" OR "ACCOUNTS RECEIVABLE." THIS REFLECTS THE FACT THAT THE MERITS OF THE TAX ASSESSMENTS HAVE NOT YET BEEN REVIEWED OR ADJUDICATED. I WILL TALK MORE ABOUT THIS SITUATION A LITTLE LATER.

SLIGHTLY OVER HALF OF THESE TAX CLAIMS ARE FOR OIL AND GAS PRODUCTION TAXES, GOING BACK AT LEAST TO 1978. YET, OF THE $1.3 BILLION IN PRODUCTION TAX CLAIMS, LESS THAN $.4 MILLION OF THE TOTAL -- NOT EVEN THREE HUNDREDTHS OF ONE PERCENT -- HAS GOTTEN THROUGH THE DEPARTMENT'S ADMINISTRATIVE PROCESS. ONLY O 1% OF THE TOTAL CLAIMS HAS EVEN REACHED THE FORMAL HEARING STAGE BEFORE THE DEPARTMENT. OVER 99.8% OF THE MONEY CLAIMED IS STILL AT THE EARLIEST STAGES OF

ADMINISTRATIVE APPEAL, EVEN THOUGH THE PRODUCTION TAXES IN QUESTION NEARLY ALL RELATE TO TAX PERIODS FIVE TO TEN YEARS AGO.

THE SITUATION IS NO BETTER IN THE INCOME TAX AREA. THIS IS NOW THE SEVENTH YEAR SINCE SEPARATE ACCOUNTING WAS REPEALED, BUT NOT ONE CENT OF THE OVER $1 BILLION IN CLAIMS ARISING FROM THIS TAX HAS MADE IT INTO COURT SO FAR. FOR ONE OF THE MAJOR TAXPAYERS, THREE OF THE FOUR TAX YEARS WHEN SEPARATE ACCOUNTING WAS USED ARE STILL UNDER AUDIT, AND SO THE TAX APPEAL PROCESS HAS NOT EVEN BEGUN.

SO, WHAT HAS GONE WRONG? FIRST OF ALL, THERE ARE NO TIME LIMITS ON THE DEPARTMENT WHENEVER THE BALL IS IN ITS COURT. A TAXPAYER HAS 60 DAYS AFTER AN ASSESSMENT TO REQUEST EITHER AN INFORMAL CONFERENCE DECISION IN WHICH TO REQUEST A FORMAL HEARING. BUT THE DEPARTMENT CAN TAKE YEARS BEFORE GETTING AROUND TO HOLDING IT. EVEN AFTER THE HEARING HAS BEEN HELD, THERE IS NO LIMIT ON HOW LONG IT TAKES THE DEPARTMENT TO ISSUE ITS DECISION.

SECOND, EVEN AFTER THE DEPARTMENT HAS ISSUED A SUPPOSEDLY "FINAL" ASSESSMENT, IT CONTINUES ITS AUDIT PROCESS. SO-CALLED "AMENDMENTS" TO THE ASSESSMENT ARE ISSUED YEARS AFTER THE ORIGINAL ASSESSMENT AND AFTER THE STATUTE OF LIMITATIONS SHOULD HAVE RUN OUT. THESE AMENDED ASSESSMENTS FORCE THE TAXPAYER TO GO BACK TO THE BEGINNING OF THE ADMINISTRATIVE APPEALS PROCESS. MATERIALS PRESENTED TO THE JOINT ECONOMIC RECOVERY COMMITTEE ILLUSTRATE THE PLIGHT OF ONE ACTUAL TAXPAYER. AN INFORMAL CONFERENCE WAS REQUESTED AND HELD IN 1981 AFTER AN ASSESSMENT WAS MADE ON ITS SEPARATE ACCOUNTING LIABILITY FOR 1978. THE CONFERENCE DECISION RESOLVED ALL OF THE ISSUES BUT ONE, ON WHICH

THE TAXPAYER, IN MAY 1981, REQUESTED A FORMAL HEARING. OVER TWO YEARS LATER, IN OCTOBER 1983, THE DEPARTMENT AMENDED THE ASSESSMENT RAISING ISSUES THAT HAD NOT BEEN RAISED BEFORE. BEAR IN MIND, THAT THE THREE YEARS UNDER THE STATUTE OF LIMITATIONS SHOULD HAVE RUN OUT BY THE END OF 1982. THE TAXPAYER REQUESTED AN INFORMAL CONFERENCE ON THE 1983 AMENDMENT TO THE ASSESSMENT, AND THE CONFERENCE DECISION WAS ISSUED IN JULY 1984. THE TAXPAYER AGAIN REQUESTED A FORMAL HEARING. TWO MORE YEARS WENT BY, AND THEN IN DECEMBER 1986 THE DEPARTMENT ISSUED ANOTHER AMENDMENT TO THE ASSESSMENT. THE ASSESSMENT SHOULD BE THE CULMINATION OF THE AUDIT PROCESS, NOT MERELY A MILEPOST ALONG THE WAY.

A THIRD PROBLEM IS THAT IN TAX CASES THE TRIER OF FACT -- THE PARTY WHO DECIDES THE FACTUAL ISSUES -- IS A REVENUE EMPLOYEE. LET ME EXPLAIN WHAT IT MEANS TO BE THE TRIER OF FACT. SUPPOSE YOU ARE DRIVING YOUR CAR, AND AS YOU DRIVE THROUGH AN INTERSECTION WITH A TRAFFIC LIGHT, A CAR COMING ON THE OTHER STREET RUNS INTO YOU. YOU END UP SUING THE OTHER DRIVER FOR YOUR DAMAGES. AT TRIAL, YOU TESTIFY THAT THE LIGHT WAS GREEN WHEN YOU DROVE INTO THE INTERSECTION. BUT THE OTHER DRIVER THEN GETS ON THE WITNESS STAND AND SWEARS THAT HE HAD THE GREEN LIGHT. WHAT'S MORE, HIS WIFE SAYS SHE WAS IN THE CAR AND SAW THAT THE LIGHT WAS GREEN. NOW YOU HAVE A QUESTION OF FACT -- WHO ACTUALLY HAD THE GREEN LIGHT?

THE TRIER OF FACT DECIDES WHICH STORY TO BELIEVE. BECAUSE THE TRIER OF FACT ACTUALLY SEES AND HEARS THE WITNESSES AND CAN FORM AN OPINION ABOUT THEIR CREDIBILITY FROM THEIR BEHAVIOR, AN APPELLATE COURT WILL GENERALLY NOT SECOND-GUESS THE TRIER OF FACT WITH RESPECT

TO THE FACTS THAT ARE FOUND. THIS IS BECAUSE, ON APPEAL, THERE IS MERELY THE TRANSCRIPT, WITH NO INFLECTIONS OR TONE OF VOICE OF OTHER BEHAVIOR AFFECTING WHAT WAS SAID, WHAT WAS MEANT AND WHICH STATEMENTS SEEM MORE CREDIBLE THAN OTHERS. ON APPEAL THE FINDINGS ARE UPHELD UNLESS THEY ARE WHOLLY UNSUPPORTED OR RUN AGAINST THE SUBSTANTIAL WEIGHT OF THE EVIDENCE.

IN CONTRAST, IF THE TRIER OF FACT DECIDES THAT YOU HAD THE GREEN LIGHT BUT THE OTHER DRIVER IS NOT LIABLE BECAUSE PEOPLE WHO RUN RED LIGHTS ARE NOT NEGLIGENT, THE COURT WOULD HAVE NO TROUBLE OVERTURNING THIS DECISION. THIS IS BECAUSE THE QUESTION OF WHETHER RUNNING A RED LIGHT CONSTITUTES NEGLIGENCE OR NOT IS A QUESTION OF LAW. THE COURTS DECIDE QUESTIONS OF LAW AND DO NOT HESITATE TO DO SO ON APPEAL.

UNDER THE PRESENT TAX APPEAL PROCEDURES, THE TRIER OF FACT IS THE FORMAL HEARING OFFICER, WHO IS EITHER THE COMMISSIONER HIMSELF OR A PARTIALLY EXEMPT EMPLOYEE OF THE DEPARTMENT UNDER THE COMMISSIONER'S SUPERVISION. THE TRIER OF FACT SHOULD NOT HAVE A PERSONAL INTEREST IN THE DECISION. GOING BACK TO MY EXAMPLE WITH THE TRAFFIC ACCIDENT, HOW WOULD YOU FEEL IF THE JURY HEARING YOUR CASE WERE ALL EMPLOYEES OF THE DRIVER OF THE OTHER CAR?

A FINAL PROBLEM WITH THE PRESENT PROCEDURES IS THAT THERE HAS BEEN NO OPPORTUNITY BEFORE OR AFTER AN ASSESSMENT FOR THE TAXPAYER AND THE DEPARTMENT TO SIT DOWN TOGETHER INFORMALLY AND DISCUSS AN ASSESSMENT. SOMETIMES AN AUDITOR MAY MISUNDERSTAND THE INFORMATION HE OR SHE HAS BEEN PROVIDED. SOMETIMES THE INFORMATION IS INCOMPLETE, OR THERE IS OTHER INFORMATION WHICH WAS NOT REQUESTED BUT WHICH BEARS ON

THE AUDIT. SOMETIMES AN AUDITOR IS UNABLE TO SUBSTANTIATE THE INFORMATION THAT HAS BEEN PROVIDED. THESE THINGS CAN CAUSE AN ASSESSMENT TO BE SIGNIFICANTLY OUT OF LINE.

BECAUSE A CORRECTION OF EVEN A FEW CENTS PER BARREL CAN CHANGE AN ASSESSMENT BY MILLIONS OF DOLLARS, THE ASSESSMENTS BECOME DIFFICULT TO CORRECT ONCE THEY HAVE BEEN ISSUED. THIS IS BECAUSE THE ASSESSMENT GOES INTO THE "ACCOUNTS RECEIVABLE" CATEGORY AND BECOME PART OF THE PUBLIC TOTAL FOR "BACK TAXES." THE LARGE DOLLAR AMOUNTS THAT CAN BE INVOLVED IN MAKING SUCH A CORRECTION MAY MAKE IT MORE EXPEDIENT POLITICALLY TO WAIT FOR THE COURTS TO MAKE THE CORRECTION, RATHER THAN DO IT WITHIN THE DEPARTMENT AND THEN EXPLAIN TO THE LEGISLATURE AND THE PUBLIC WHY THE $2.5 BIL ON FIGURE FOR "BACK-TAXES" HAS CHANGED. IN MAKING THIS CRITICISM, WE MUST ALSO ACKNOWLEDGE AND COMMEND RECENT EFFORTS OF THE DEPARTMENT OF REVENUE TO RE-ESTABLISH LINES OF COMMUNICATION WITH THE TAXPAYERS. IN THE PAST, EVEN THE "INFORMAL" CONFERENCE OFTEN TURNED OUT TO BE AN EXERCISE IN DISCOVERY IN PREPARATION FOR THE "TRIAL" AT THE FORMAL HEARING. BUT EVEN THOUGH GOOD COMMUNICATION IS AN ESSENTIAL STEP IN MOVING THE ASSESSMENTS FORWARD IN THE PROCESS, IT REMAINS TO BE SEEN HOW MUCH SUBSTANTIVE CORRECTION WILL ACTUALLY BE ALLOWED OR TOLERATED.

SENATE BILL 401 SEEKS TO REFORM THESE PROBLEMS AT THEIR ROOTS.

IT IMPOSES TIGHT DEADLINES FOR ACTION BY THE DEPARTMENT AS WELL AS THE TAXPAYER, YET IT IS FLEXIBLE ENOUGH TO ALLOW THE SCHEDULE TO BE EXTENDED BY MUTUAL AGREEMENT.

IT ALLOWS FOR DEPARTMENTAL REVIEW OF AUDITS FOR CONSISTENCY AND POLICY CONTENT BEFORE THEY ARE ISSUED. THIS ALLOWS FOR CORRECTIONS TO BE MADE BEFORE THE DEPARTMENT GETS LOCKED INTO A PUBLIC "BACK TAXES" FIGURE.

Page 11 #18

IT PROVIDES FOR THE TRIER OF FACTS TO BE A DISINTERESTED PARTY -- THE COURTS -- RATHER THAN A REVENUE EMPLOYEE. THIS NOT ONLY IMPROVES THE APPEARANCE OF FAIRNESS, BUT IT ALSO ALLOWS THE COMMISSIONER GREATER LATITUDE TO DIRECT HIS AUDITORS WITHOUT NECESSARILY SEEMING TO PRE-JUDC . A MATTER.

AND IT CLOSES THE AUDIT PROCESS WITH THE CLOSING CONFERENCE AND PREVENTS NIGHTMARES FROM OCCURRING IN WHICH A TAXPAYER IS REPEATEDLY FORCED BACK TO THE BEGINNING OF THE APPEAL PROCESS BECAUSE AN AUDITOR HAS COME UP WITH A NEW THEORY FOR INCREASING THE TAXPAYER'S LIABILITY.

FOR THESE REASONS, WE SUPPORT THIS LEGISLATION AND RESPECTFULLY URGE THE COMMITTEE TO ACT FAVORABLY ON IT. THANK YOU AGAIN FOR THIS OPPORTUNITY TO TESTIFY. I WOULD BE PLEASED TO ANSWER ANY QUESTIONS THAT THE CHAIRMAN OR THE MEMBERS OF THE COMMITTEE MAY HAVE.

STATE OF ALASKA

DEPARTMENT OF REVENUE

STEVE COWPER, GOVERNOR

STATE OFFICE BUILDING
P.O. BOX SA
JUNEAU, ALASKA 99811-0400

April 6, 1988

The Honorable Rick Halford
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Senator Halford:

Wednesday, March 23, 1988 in a hearing before your committee on SB 401, I briefly described the difficulties my audit staff was having in closing an audit of a taxpayer's 1982-1985 corporate income tax returns. I indicated we were in the process of putting together a complete chronology of events and would make it available to the Finance Committee when finished. I am enclosing the chronology for Company X. This calendar of events represents an actual case history. I have removed all identifying facts and remarks which might disclose the name of the taxpayer.

If I can provide you with additional information concerning this case, please let me know.

Sincerely,

Steven E. Kettel

Steven E. Kettel
Director
Income and Excise Audit Division

SEK:sp
88-96

Enclosure

04-D4LH

Prepared by: Steven E. Kettel
Director, Income & Excise Audit
Department of Revenue
April 6, 1988

Company X Audit Case History Tax Years 1982 - 1985

Calendar of Events

10/15/83 Taxpayer files original 1982 tax return.

3/21/84 Seattle based auditor requests return from Juneau.

10/15/84 Taxpayer files original 1983 tax return.

10/26/84 Auditor requests 1983 tax return from Juneau.

2/14/85 Auditor calls company to schedule audit of 1982 and 1983 tax returns.

2/26/85 Auditor sends appointment letter to taxpayer requesting pertinent audit information be available. Audit scheduled for 6/17/85.

3/13/85 Auditor writes letter to foreign parent overseas requesting additional information on foreign operations.

4/04/85 Telephone call received by auditor from U.S. Subsidiary tax manager. No foreign information will be made available to the auditor as it is not available to the tax manager.

6/17/85 Field audit begins at taxpayer's U.S. domestic headquarters.
(A) Taxpayer refuses to give photocopies of necessary and essential workpapers which would allow auditor to compute domestic combination.
(B) Taxpayer again states that no foreign information is available upon which auditor can base a worldwide combination.
(C) Alternative: Auditor determines that summons, a time consuming affair will not be utilized at this point.

6/25/85 Auditor left taxpayer with a list of information to send to the auditor. Auditor discussed several issues that were open with the taxpayer, especially the issue of determining worldwide net income and gaining information on worldwide unitary companies.

6/27/85 Taxpayer provides letter to auditor which agrees that the company is unitary on a domestic basis only which would relieve auditor of substantial amount of audit work with respect to U.S. companies only. Taxpayer, however, will give no photocopies of domestic or foreign board minutes.

7/09/85 Auditor writes letter to taxpayer stating he is estimating worldwide net income from information available to auditor.

7/11/85 Taxpayer calls upon receipt of letter and expresses to auditor the difficulty he will have in using the worldwide numbers in his files. Taxpayer suggests that using those numbers will result in merely a guess at what the taxpayer's worldwide net income is.

7/19/85 Taxpayer writes to Director of Audit Division requesting an explanation of the statutory authority the Department uses to require a worldwide combined tax return.

8/14/85 Director sends letter of response to taxpayer's 7/19/85 letter.

9/30/85 Auditor calls taxpayer to request the information previously requested on 6/25/85 and to understand why it is late. Taxpayer agrees information is late but is unable to put the numbers together at this time.

11/13/85 Auditor calls taxpayer again requesting the information. Taxpayer indicates that they plan to send the information within one week.

12/04/85 Auditor receives partial information from the taxpayer but many items have not been sent. Auditor calls taxpayer and requests audit appointment for 1984 tax year.

4/30/86 Auditor sends letter acknowledging establishment of 1984 and 1985 tax audit and requests certain information to be available at the start of the audit.

5/12/86-
5/16/86 Auditor conducts field audit of taxpayer's 1984 and 1985 tax returns. At this audit some information previously requested is received for the 1982 and 1983 audit. Auditor again discusses with the taxpayer the issue of worldwide combination and the department's position.

5/13/86 Auditor communicates with taxpayer concerning auditor's decision to use worldwide book income numbers for computation of taxable income. Auditor also asks additional questions concerning the relationship between U.S. and foreign companies. At this time the auditor presents the taxpayer with a business operations questionnaire. This questionnaire when completed by the taxpayer will assist the auditor in determining which subsidiaries should be included in the unitary group and will assist in the computation of the Alaska taxable income.

7/23/86 Taxpayer states no information will be coming until September with respect to the business operations questionnaire. Taxpayer agrees to complete the questionnaire but its response will be limited to information on hand at the U.S. headquarters. The U.S. subsidiary will not ask the foreign parent or any foreign subsidiary for information relative to their operations.

7/24/86 Taxpayer promises to send draft numbers in response to business operations questionnaire and other outstanding requests for 1982 and 1983 tax return years by October 15, 1986 (these figures were never received).

12/08/86 Taxpayer writes a letter to the Director of Audit requesting a meeting to discuss audit information requests and division's policy on worldwide combination.

12/30/86 Director prepares response that there is no need for the meeting until the taxpayer provides the requested information.

2/17/87 Taxpayer submits letter to the auditor. The letter indicates the taxpayer will comply with the business operations questionnaire and will provide detailed schedules on a worldwide basis by June 15, 1987.

5/29/87 Auditor receives from taxpayer some, but not all information describing the relationship of U.S. and foreign subsidiaries.

9/02/87 Auditor called taxpayer. Taxpayer states that they will be making a presentation to the state of California concerning similar issues with that state on how inventories, depreciation and currency translation items will be handled. Taxpayer asks for postponement on schedule of delivering information to auditor until after that presentation.

9/03/87 Audit supervisor receives memorandum from auditor detailing reasons that audit has drug on and has not been closed. In response, audit supervisor writes letter to Director of Audit requesting a tolerance level be set for pushing cases with worldwide unitary issues in them. Director verbally responds to the letter.

11/17/87 Auditor calls taxpayer after the California presentation. Taxpayer would now like to make an Alaska presentation in early 1988.

1/15/88 Auditor calls taxpayer. Taxpayer states they are not prepared to make a presentation similar to the one they made in California and requests that Alaska just go ahead and make an audit assessment based on the best information available to them and that they would "shoot holes" in it. Auditor agreed to prepare the assessment during the month of February.

1/18/88 Taxpayer acknowledges they will send remaining items of information requested by the auditor for all tax periods by 2/15/88.

1/26/88 Taxpayer sends more relationship information and intercompany transaction numbers but no other meaningful data upon which to calculate Alaska's tax.

2/02/88 Auditor sends proposed audit assessment to the taxpayer and asks for comments.

3/10/88 Taxpayer visits auditor in Seattle and discusses the audit workpapers and issues at that time.

Extension of Waiver on Statute of Limitations

3/05/86 Auditor requests taxpayer to extend 1982 return.

3/10/86 Taxpayer extends expiration to 12/31/86.

5/08/86 Taxpayer grants waiver extension of 1982 return to 6/30/87.

3/04/87 Taxpayer grants extension of 1982 to 12/31/87 and grants 1983 extension to 12/31/87.

8/12/87 Taxpayer grants extension of 1982 to 6/30/88 and extension of 1983 to 6/30/88.

2/5/88 Auditor requests taxpayer grant extension on 1982 and 1983 to 12/31/88. Taxpayer presently has not agreed to this request.

STATE OF ALASKA

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

P.O. BOX S
JUNEAU, ALASKA 99811-0400
PHONE: (907) 465-2300

March 22, 1988

The Honorable Rick Halford, Co-Chairman
Senate Finance Committee
P.O. Box V
Juneau, AK 99811

Dear Senator Halford:

The Department of Revenue has received a proposed committee substitute for Senate Bill 401.

The changes proposed take some steps in the right direction; however, they do not address the fundamental difficulties with the legislation. Specifically:

1. There is still no provision linking the time frames for the procedures adopted in S.B. 401 (that is, the times set out for the proposed assessment, the "closing conference" and the "policy review hearing") with the running of the statute of limitations. It is true that the bill provides that the procedural time limits can be extended by mutual agreement, and current law permits the extension of the limitation period with the taxpayer's consent. However, the statute of limitations runs against the state, not against the taxpayer. If the taxpayer needs an extension to meet a procedural deadline, the state may condition its consent to the extension upon an agreement to extend the statute. In this case, the state has "leverage." However, if it is the state that needs the extension, the taxpayer has no incentive whatsoever to "condition" agreement upon extending the statute. It is to the taxpayer's benefit to let the statute run. These provisions are stacked against the state, and revenue losses will be the result.

2. There is still no incentive or requirement for the taxpayer to provide the information and arguments necessary to a complete determination of tax liability. The proposed committee substitute does not adequately deal with this difficulty. The CS adds new language in the closing conference provision making it explicit that the taxpayer is not required to provide information at that stage. The CS adds the words "but may not be required to do so" after language permitting the taxpayer to present written and oral evidence, materials and statements. At the "policy review hearing" the word "may" is changed three times to read "shall have the opportunity to." This language is hardly mandatory. The only requirement added by the CS is to present evidence to rebut a fact upon which the department's assessment is based. Since the taxpayer is not required to present information at the closing conference, it is difficult to see how the department will find facts for the taxpayer to rebut.

3/23/88

The de novo provision remains unchanged in the proposed committee substitute. It is this provision, above all, that guarantees that a taxpayer will not make its case before the department, but rather will wait until the superior court. Senator Faiks, in her response to this department's criticisms, claims that the court will remand "if the appellant failed to bring a material matter to the agency's attention." That is certainly a judicial option under the current law pertaining to appeals of agency decisions. See, AS 44.62.570(d). However, SB 401 would change this law for revenue matters, and require the court to hold a trial de novo. De novo review means the court will start over again in trying facts. The review would not be limited to the record. Under a mandate to hold a trial de novo, a court would never remand when new evidence was presented; it would simply accept the evidence. As pointed out in our earlier comments, the particular type of de novo review required in the bill permits the taxpayer, but not the department, to define the scope of the trial. These provisions are stacked against the state, and revenue losses will be the result.

3. The proposed committee substitute removes the transition provision that would have applied the new procedures to matters currently pending before the department. This change does solve the insurmountable difficulty of applying those procedures "retroactively." Under the proposed CS, the only provisions that would apply to current or past tax periods are those dealing will trial de novo. While this change is a substatnial improvement, it reveals the legislation for what it is: an attempt to get a new referee now that the game is almost over. Under the CS, the disputes over current and past taxes would certainly be lengthened. The department procedures would remain the same, but the taxpayer would start over again in court with a trial de novo. The trial in court would certainly take longer -- perhaps years longer -- than would an appeal under current law. Supporters of the legislation cannot argue that the CS will speed or streamline the resolution of the billions of dollars of currently disputed taxes; the CS would surely lengthen that process. The only difference for old taxes is that the taxpayer would get two trials: one in front of the department that didn't count and a new one in court.

It should be noted that if this legislation were enacted, Alaska would be the only state in the union that did not use a specialized body to resolve tax disputes. States use a variety of mechanisms to resolve tax disputes. In about half of the states, disputes are resolved as here in Alaska, by the taxing agency, with appeal to court. About twenty states have administrative law judges specializing in tax matters that are outside the revenue agency. The remaining five states have specialized tax courts. No state sends its tax determinations off, in the first instance, to the unspecialized court of general jurisdiction.

Obviously, states have unanimously chosen specialized bodies to resolve tax disputes for very good reason. Tax laws are complex, and a body of expertise aids both the state in collecting the revenue due it, and the taxpayer who is assured of uniform and knowledgeable applciation of the law.

Sincerely,

Hugh Malone
Commissioner

HM:mkw
88-83

cc: Senate Finance Committee Members

STATE OF ALASKA
DEPARTMENT OF REVENUE
OIL & GAS AUDIT DIVISION

M E M O R A N D U M

TO: Hugh Malone
Commissioner

FROM: William Floerchinger
Director

DATE: March 23, 1988

SUBJECT: Senate Bill 401-An example of factual occurrences during the normal audit process for a typical taxpayer.

Example:

Facts: 1981 - 1982 production tax audit started January 11, 1985. In spite of significant delays caused by the taxpayer - this major audit endeavor covering 24 monthly tax periods was assessed by the audit staff within 22 months of initiation of the audit based upon information received at that time. A subsequent amended assessment was made seven months later within a mutually agreed upon statute extension period. At the time the audit assessment was made, significant pricing and transportation information requested from the company had not been received. The assessment was amended after receipt of the information.

This particular example covers pertinent pricing information needed by the auditors in determining compliance with AS 43.55 and 15 AAC 55.150-170.

1/11/85
Audit originated. Multipart pricing information request consisting of a request for accounting and pricing documents, related to valuation and consideration received, sent to company.

2/4/85
Basic accounting summary documents relating to booked numbers received for 1 year. (Consisted of 7 items out of 17 requested.)

2/8/85
Documents received for second year consisted of summary accounting records also. Complaint by company regarding photocopy requirement of all documents. Auditors requested to review documents and return them to the company while on travel status at company premises.

3/23/88

2/8/85

Complaint made by Audit Staff management to DOR officials about non receipt of pricing information needed to value company's sales transactions. Agreement to identify specific documents during Commissioner's field visitation at end of February.

2/26/85

Commissioner of Revenue met with the taxpayer at their offices and, based upon 12/14/84 request, made a review of pricing information and interviewed sales operation personnel of the company, something previously denied to the audit staff. Letters of confidentiality beyond normal AS 43.05.230 restrictions had to be issued by the Department of Law before the company agreed to the production of certain pricing documents.

4/22/85

Pursuant to the review, specific documents felt pertinent were identified and a Summons for a significant amount of information previously requested 1-11-85 was issued to the company. This information was requested for previous audit period 1979-1980 a year earlier and was never received.

5/6/85

Timetable set up for submission of various parts of the request with completion dates set of May 7, 1985 - July 7, 1985. A final clearance letter (notification that the summons was complied with) to be delivered to DOR at end of 90 day period.

5/16/85

Notified by Company tax representative that he couldn't work on it for at least 3 weeks due to other audits and vacation. His 1 assistant could not work on it due to assignment to Federal audit. Next available audit date to return to Company premises was November 10, 1985.

6/6/85

Received several categories of miscellaneous pricing information along with promise to comply with remainder of summons time table.

8/1/85

Auditor prepared memo to file regarding non production of summoned documents specifically identified by auditors and marked for copying. The documents had been redacted before receipt on 6/6/85.

8/2/85

Letter to company regarding status of the Summons production with comments on what DOR felt was lacking. Extensions had been granted to allow company more time to search for trader files due to month long vacation by tax department representative.

8/12/85

Telephone call to company requesting update. Representative still reviewing documents submitted to Royalty case attorneys. Rep apologized since they were held up due to moving into a new building and tax management conference.

10/9/85

Telephone call from company tax rep. He feels they have looked at everything but doesn't feel they are required to issue clearance letter. He suggested I write a request and he will respond with informal clearance. He said formal letter had been prepared but was held up in their attorney's office for finalizing (might take a week to a year).

10/22/85

Letter written to company requesting clearance letter that should have been received by July 8, 1985. Set deadline of November 6 for reply.

12/16/85

Phone call to company regarding non receipt of clearance letter. Found that previous company representative had been replaced. Request by new rep to go slow while he acquainted himself with new position. He was totally unfamiliar with summons request.

2/18/86

Audit staff contacted new tax rep. He had himself drafted a final letter and head of department was reviewing it. He was notified by Audit Staff that several items had not been provided yet.

Further notified tax rep that similar pricing information, previously undisclosed to the Audit staff, would be summoned for past years (1979-1980) for which the statute was still open.

2/28/86

Commissioner of Revenue letter to chief tax counsel requesting response to outstanding information requests due to delays in past receipt of information and offer of company's upper management assistance. Audit level moved up a few notches and deadline set for April to comply with rest of summons and other audit requests.

4/18/86

Meeting with company reps and DOR attorneys present. Letter of certification left with company legal department for assurance of compliance. Audit staff listed shortcomings of material received and why summons response incomplete.

4/22/86

Audit Staff allows company another 90 days to respond since additional summary material had been requested for prior years. Certification letter stating that all material had been given to the Audit Staff was agreed to be issued at end of 90 day period.

5/8/86

Telephone call from company tax rep. A trip had been scheduled to jointly review pricing files. He called to cancel. He had been informed to start over at square 1 and re-review documents in addition to looking at some additional files.

6/15/86

Received 1979-1980 pricing information. No additional information for 1981-1982 was received.

10/86

Audit Staff, as requested by management, made assessment for 4 year period rather than await further information needed to fully value transactions. Company changed tax rep again.

1/87

Notified by new tax rep that a significant amount of pricing material had been located and had been reviewed several times by counsel. It was ready to be sent back in September, 1986 but was held up due to issuance of the assessment in October.

3/10/87

Letter to tax department manager from Audit Staff requesting the additional material.

3/24/87

Reply received from company tax counsel denying audit staff access to the material since assessment already made.

6/30/87

Amended assessment issued to cover potential loss of revenue to the State, since large dollar value issues not originally assessed pending receipt of pricing information.

11/87

As a part of an agreement to jointly resolve factual disagreements contained in the audit, Audit Staff was provided additional pricing information promised in 1986.

Introduced: 2/9/88
Referred: Finance

5-1449N

IN THE SENATE BY FAIKS

SENATE BILL NO. 401

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to appeals of information requests in the administration of state tax laws; to audits, investigations, and inspections for certain taxes and for oil- and gas-related royalties and net profits; amending provisions relating to administrative and judicial review of decisions relating to taxes, penalties, tax refunds, and assessments in the administration of state tax laws; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 43.05 is amended by adding a new section to read:

Sec. 43.05.055. APPEAL OF REQUEST TO PROVIDE INFORMATION. (a) The provisions of this section apply with respect to an audit, investigation, or inspection under AS 43.05.010, 43.05.040, or AS 43.55.040 in connection with

(1) determination of a tax, penalty, tax refund, or assessment under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21, to ascertain the correctness of a return filed or to determine whether a tax payment or tax refund is due; and

(2) tax matters under AS 38.05 or a matter relating to oil and gas royalty or net profits under contracts, agreements, or leases under AS 38.05.

(b) If in the course of an audit, investigation, or inspection to which this section applies, the department requests a taxpayer or

another person to provide information or materials to the department or to make the information or materials available for inspection by the department, the person of whom the request is made may appeal the reasonableness of the request under AS 43.05.240 as a person aggrieved by the action or the department in making the request.

* Sec. 2. AS 43.05.240(a) is amended to read:

(a) Except as to a matter for which procedures are provided in AS 43.05.246 - 43.05.248, a [A] person aggrieved by the action of the department in fixing the amount of a tax, [OR] in imposing a penalty, in denying a request for refund of tax, or in requesting information or materials subject to AS 43.05.055 may apply to the department within 60 days from the date of mailing the notice required to be given to the person by the department, giving notice of the grievance [,] and requesting an informal conference. At the conference the person aggrieved may present arguments and evidence relevant to the grievance [AMOUNT OF TAX OR PENALTY DUE THE STATE]. If the department determines that a correction is warranted, the department shall make the correction.

* Sec. 3. AS 43.05.240(b) is amended to read:

(b) Except as to a matter for which procedures are provided in AS 43.05.246 - 43.05.248, a [A] person aggrieved by the action of the department in fixing the amount of a tax, [OR] in imposing a penalty, in denying a request for refund of tax, or in requesting information or materials subject to AS 43.05.055 may apply to the department and request a formal hearing

(1) in place of the informal conference provided for in (a) of this section, within 60 days from the date of mailing the notice required to be given to the person by the department; or

(2) within 30 days after decision resulting from an

informal conference.

* Sec. 4. AS 43.05.240(c) is amended to read:

(c) At the formal hearing the department may subpoena witnesses and may administer oaths and make inquiries necessary to consider and decide the grievance [DETERMINE THE AMOUNT OF THE TAX OR PENALTY DUE THE STATE]. The person aggrieved may present arguments and evidence relevant to the amount of the tax or penalty due the state. If the department determines that a correction is warranted, the department shall make the correction.

* Sec. 5. AS 43.05.245 is amended to read:

Sec. 43.05.245. ASSESSMENT AND COLLECTION OF TAX, PENALTIES, AND INTEREST. If a taxpayer fails to file a return or report required by this title in the time required by law or regulation, or makes an erroneous or fraudulent return, the department shall proceed to assess the license fees, tax, penalties, or interest and make a return from information which it obtains. A return made and subscribed by the department in accordance with this section is presumed sufficient for all legal purposes. However, nothing prevents a taxpayer from presenting evidence or other information on an appeal under AS 43.05.240 or under procedures provided by AS 43.05.246 - 43.05.248 in order to rebut the presumed sufficiency of a return made and subscribed by the department, nor does the presumption of sufficiency alter the parties' respective burdens of proof once the taxpayer has presented evidence or other material information to rebut that presumption. The assessment of license fees, tax, penalties, or interest under this section occurs when the department issues a notice and demand for payment of the license fees, tax, penalties, or interest, when a notice and demand for payment becomes final under AS 43.05.246(g), or when the department issues a final notice and demand for payment under

AS 43.05.247(f). The notice and demand for payment is issued when the notice and demand is delivered to the taxpayer in person or placed in the United States mail, postage-paid and addressed to the last known address of the taxpayer. Penalties and interest assessed under this title shall be collected in the same manner as provided in this title for the collection of tax or license fees.

* Sec. 6. AS 43.05 is amended by adding new sections to read:

Sec. 43.05.246. CLOSING CONFERENCE AND PRELIMINARY ASSESSMENT. (a) The procedures under this section apply to taxes under AS 43.20, AS 43.55, AS 43.57, and former AS 43.21.

(b) Before issuing a notice and demand for payment for a tax described in (a) of this section, the department shall give the taxpayer a written draft of its preliminary conclusions. The draft of the preliminary conclusions must contain the following:

(1) a draft of any notice and demand for payment that the department preliminarily concludes may be in order;

(2) a draft narrative fully explaining how and why the preliminary assessment of tax or penalty has been determined; and

(3) schedules or worksheets in written or computer-readable format setting out the calculations for the preliminary assessment.

(c) The department shall schedule a closing conference with the taxpayer, to be held not less than 60 nor more than 90 days after the department delivers its preliminary audit conclusions under (b) of this section to the taxpayer in person or places those materials in the United States mail, postage-paid and addressed to the last known address of the taxpayer. The parties may extend the date for the closing conference by mutual agreement.

(d) The purpose of the closing conference is to conclude the audit process and allow the parties to review and discuss the

preliminary results and conclusions of that process informally so that any mistaken assumptions, misunderstandings, and other errors or mistakes can be identified and eliminated as much as possible and so that incomplete information and unsubstantiated items can be supplemented and substantiated. Although the interests of the parties are divergent, the closing conference is not an adversarial proceeding. At the closing conference, the taxpayer may submit written and oral evidence, materials, and statements. The department's employee in immediate charge of the audit, investigation, or inspection may also submit written and oral evidence, materials, and statements at the closing conference. By agreement, written materials may be submitted at other times before or after the closing conference.

(e) The taxpayer may send one or more representatives to the closing conference. The auditor or other person in immediate charge of the audit, investigation, or inspection upon which the preliminary assessment has been made shall attend the closing conference, and the director of the division proposing the assessment or the director's immediate subordinate designated for this purpose other than the person in immediate charge of the audit, investigation, or inspection shall preside at the closing conference. The department may have additional representatives at the closing conference. The person in immediate charge of the audit, investigation, or inspection may be excused from attending the closing conference with the consent of the taxpayer or because of serious illness or injury, incapacitation, death, or termination of employment with the department.

(f) Not more than 60 days after the conclusion of the closing conference, the presiding officer shall issue a written decision. If the presiding officer determines that additional tax is owed or that a

penalty should be assessed, or both, the closing conference decision shall include a proposed notice and demand for payment for the additional tax and interest and any penalty. The proposed notice and demand for payment shall include a written narrative fully explaining how and why the assessment of tax or penalty has been determined, together with schedules or worksheets in written or computer-readable format setting out the calculations for the proposed assessment. If the presiding officer determines that no assessment is in order, the taxpayer shall be given written notice to that effect within this 60-day period. By agreement, the parties may extend the date for issuing a notice of assessment and demand for payment or a notice of no assessment.

(g) A proposed notice and demand for payment issued under (f) of this section is final 30 days after its issuance unless the taxpayer requests a policy review hearing under AS 43.05.247.

Sec. 43.05.247. POLICY REVIEW HEARING. (a) A person aggrieved by the action of the department in issuing a closing conference decision under AS 43.05.246(f) or in denying a request for refund of tax under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21 may request a policy review hearing within 30 days after the date of mailing of the notice required to be given under AS 43.05.246(f) or the denial of the request for refund. For purposes of this section, a failure by the department to grant or deny a request for refund within 60 days from the time the request is made shall be considered a denial of that request unless the parties have extended the period by agreement.

(b) The department shall schedule the policy review hearing to be held within 30 days after the aggrieved person's request for it. The parties may extend the date for the policy review hearing by agreement.

(c) The purpose of the policy review hearing is to allow the commissioner to determine whether the action causing the grievance under (a) of this section reflects and incorporates the correct policies of the department, and if so, whether those policies are being applied correctly to the aggrieved person's circumstances.

(d) The commissioner or an authorized representative of the commissioner other than an employee in the division taking the action causing the grievance shall preside at the policy review hearing. The aggrieved person, acting in person or through one or more authorized representatives, may explain the nature of the grievance and the relief sought. If the person is aggrieved by a proposed assessment based on facts that the person believes are incorrect or incomplete, the person may present written and oral evidence and materials to correct or complete the facts. After the presentation of the aggrieved person's case, the director of the division taking the action causing the grievance or another authorized representative of the division may explain that action and the policies and reasons for it. The division may present written and oral evidence and materials to prove facts that it has asserted and that the aggrieved person has challenged as incorrect and to rebut or disprove any supplemental facts that the aggrieved person has sought to establish. The formal rules of evidence do not apply to either party's presentations on factual issues, but the presiding officer may require witnesses for both parties to give their testimony under oath and shall allow each party's witnesses to be examined by the other party. The proceedings of the policy review hearing shall be recorded and made part of the administrative record, together with any materials that may be submitted for the policy review in advance of, or after, the hearing.

(e) Not more than 90 days after the conclusion of the policy

review conference the commissioner shall issue a policy review decision. The policy review decision must

(1) state what relief, if any, is being granted to the aggrieved person, and state which portions, if any, of the department's action giving rise to the grievance are being upheld;

(2) state which additional facts, if any, that the aggrieved person sought to show at the hearing are being recognized and which additional facts are being disregarded;

(3) for each disputed fact when there is a dispute as to one or more facts, state what is being taken as being the actual fact; and

(4) state, as specifically as possible, which statutory and regulatory provisions are being relied on in granting or denying relief to the aggrieved person, how those provisions are being interpreted and applied, and the specific policy considerations for the particular interpretation and application of these provisions; broad, unspecific policies, such as maximizing the state's tax revenue, are not sufficient for justifying a particular interpretation or application of a statute or regulation.

(f) If the policy review decision concludes that a notice and demand for payment should be made for additional tax and interest, or penalties, if any, a final notice and demand assessing the tax and interest, or penalties, if any, shall be issued at the same time as, and as part of, the policy review decision. The final notice and demand shall include a narrative fully explaining how and why the final assessment of tax and any penalty has been determined, together with schedules or worksheets in written or computer-readable format setting out the calculations for the final assessment. For purposes of AS 43.05.260, a final notice and demand for payment is not

considered made until the narrative and the schedules or worksheets setting out the calculations for the final assessment have been served on the aggrieved person.

Sec. 43.05.248. APPEAL. Within 30 days after the issuance of the commissioner's policy review decision under AS 43.05.247, a person aggrieved by the decision may file an action in the superior court in the judicial district where the person resides or conducts business, for a trial de novo of those portions of the policy review decision giving rise to the grievance. A party may not raise as a claim, counterclaim, or defense any portion or portions of the policy review decision that are not contested and do not give rise to the grievance. The aggrieved person shall be given access to the files of the department in the matter for preparing the appeal. If the court determines that the assessment or the tax payment was correct, it shall confirm the tax. If the assessment or tax payment was incorrect, the court shall determine the amount of the tax and order the payment of the deficiency or the refund of the excess, as the case may be. The department shall immediately pay any refund due and attach a certified copy of the judgment to the payment.

* Sec. 7. TRANSITIONAL PROVISIONS. (a) The provisions of AS 43.05.055, added by sec. 1 of this Act, apply to all requests to provide information with respect to an audit, investigation, or inspection of a matter specified in that section that are pending as of the effective date of this Act.

(b) A person aggrieved by an action of the department with respect to a tax under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21 whose grievance, as of the effective date of this Act, has not been fully heard in a formal hearing under AS 43.05.240(b) may, within 60 days after the effective date of this Act, elect to have a closing conference under

AS 43.05.246, added by sec. 6 of this Act. If the person requesting a closing conference is aggrieved by the closing conference decision, the person may invoke the appropriate procedures provided for under the provisions of AS 43.05.247 - 43.05.248, added by sec. 6 of this Act.

(c) The provisions of AS 43.05.248, added by sec. 6 of this Act, apply to any grievance with respect to a tax under AS 43.20, AS 43.55, AS 43.57, or former AS 43.21 that, on the effective date of this Act, has not been appealed to superior court under AS 43.05.240(d).

* Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

MEMORANDUM

State of Alaska
Department of Law

TO: Hugh Malone
Commissioner
Department of Revenue

DATE: March 18, 1988

FILE NO.:

TEL. NO.: 465-3600

SUBJECT: SB 401

FROM: Bruce M. Botelho
Assistant Attorney General
Oil, Gas and Mining-Juneau

On March 2, 1988, Gerald Serena testified for Exxon Company, U.S.A. before the Senate Finance Committee on SB 401.

Serena attached a summary of the administrative proceedings for Exxon's 1978 income tax year, purporting to show "the seemingly endless nature of administrative review of a tax controversy before the Department of Revenue." The summary sets forth a chronology of proceedings beginning in August 1979 and running through February 1988. While not directly asserting it, Serena's testimony implies that the department is responsible for the delay in bringing the matter to hearing. The following may provide a slightly different perspective:

Exxon filed its 1978 return in June 1979. The Exxon chronology of assessments, beginning in August 1979, is correct. By letter dated October 12, 1979 Exxon requested that the department defer any hearings for the 1978 year "until after the Arco litigation [Atlantic Richfield Co. v. State of Alaska, Super. Ct. No. 3AN-79-1903] is resolved." On September 29, 1980, Exxon made a similar request as a result of State of Alaska v. Exxon Corp., et al., Super. Ct. No. 3AN-80-1542. On December 20, 1983 Exxon again requested that further action be delayed until after final resolution of the two cases above. In each case, the request for deferral was the result of actions taken by the department to bring the case closer to resolution.

The two cases, considered on appeal, were not resolved until January 1986 when the United States Supreme Court dismissed for lack of a substantial federal question. The Alaska Supreme Court's decision in the matter is found at Atlantic Richfield Co. v. State, 705 P.2d 418 (Alaska 1985).

Because Exxon has disclosed the existence of the proceeding and because the information contained in this memorandum does not constitute particulars of a return or report under AS 43.05.230, that information may be disclosed to the legislature.

BMB:jf

03-002

3/23/88

Alaska State Legislature

SENATE

Office of the President

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3755

ATTACHMENT 1

RESPONSE TO

DEPARTMENT OF REVENUE COMMENTS

ON SENATE BILL 401

OVERVIEW

The heart of SB 401 is a reform in the present tax appeal procedures.

Something is wrong when five to 10 years go by and the Department of Revenue still has not concluded the audit process for these crucial revenue sources.

Something is wrong when a taxpayer can request a hearing on its tax liability and the Department takes two, three or even four years and more before it holds that hearing.

Something is wrong when the Department of Revenue issues assessments for tens, or even hundreds, of millions of dollars without first discussing them with the taxpayers, without first making sure that taxpayers in similar situations are treated similarly, and without first making sure that the assessments reflect the department's policies and its own regulations. In one case, which was later corrected, the department issued an assessment seeking millions of dollars in non-filing penalties against a party for time periods before that party had acquired any interest in producing oil and gas leases and which, in some

instances, actually went back to times before the party had even come into existence.

Something is wrong when the Department of Revenue can issue gigantic assessments for additional tax (with penalties and interest) and be unable to get those assessments through its own administrative review and into court. Less than 3/100 of one percent of the $1.3 billion assessed for production taxes has made it into court. None of the $1.0 billion for separate-accounting income tax has made it into court, even though that tax was repealed in 1981.

Something is wrong when matters have remained in this uncertain state for so long that now the interest is nearly as great as the underlying claim for additional tax. Every dollar adjustment in the tax liability represents a $2 change in the total assessment.

Something is wrong when the stakes get so high that a hearing officer cannot remain truly impartial. The total assessments for oil and gas taxes exceed the total revenues to the General Fund in an entire fiscal year, yet they fall on only two dozen or so taxpayers. The implications of each decision can run into hundreds of millions of dollars. A decision one way or the other can alter the very finances of the state and change its ability to meet the needs of its citizens. In no other administrative context can a hearing officer's decisions so profoundly affect the ongoing operations not only of the agency itself, but of the entire government. The hearing officers serve at the pleasure of the Commissioner

of Revenue. If a hearing officer reaches a conclusion different from the one asserted by the auditors making an assessment, the Commissioner will ultimately have to decide which of his employees -- the auditors or the hearing officers -- were in the wrong. The pressure is so overwhelming that it is unreasonable to expect the hearing officers to remain truly disinterested and impartial in their decisions.

PERSPECTIVE ON SB 401

Contrary to assertions by the Department of Revenue, SB 401 is not intended to make drastic changes in the way the tax laws are administered. Following are the criticisms that the Department of Revenue has made about SB 401, together with responses showing how the department has exaggerated or misstated its concerns.

Revenue Criticism No. 1:

> "The bill adds approximately 300 days of procedures -- from the issuance of the preliminary audit conclusions through the policy review decision -- that must be accomplished within the existing three year statute of limitations. These new procedures will shorten unrealistically the amount of time available to audit complex multinational taxpayers."

Response: The Department of Revenue has been unable to complete its audits even within the present 3-year period

under the statute of limitations. Only now is it beginning to audit the taxes for 1983 - 1985. The reason the first two years under this newest audit cycle are not already closed under the statute of limitations is because the department has obtained agreements from taxpayers to extend the limitations period pursuant to AS 43.05.260(c)(3). One taxpayer has agreed to more than 20 such extensions for production tax alone.

SB 401 does not change the present law allowing the statute of limitations to be extended by mutual consent. While there are stages under the new procedures when the Department of Revenue would probably want to extend the prescribed deadline, there are similar stages when the taxpayer is going to want an extension, too. For example, the taxpayer has only 60 to 90 days in which to analyze a tentative assessment and prepare for the closing conference. It has not been uncommon for an audit narrative to address dozens of issues in the course of 100 pages or more. The taxpayer will need extra time to digest so much material. Similarly, the policy review hearing is to be held within 30 days of the taxpayer's request for it. During that time the taxpayer will have to prepare its arguments regarding the proposed assessment, including arranging to have any witnesses testify at the hearing. To prepare adequately, the taxpayer almost certainly will want extra time. In both cases, the department can agree to grant the extra time only if the taxpayer agrees in return

to extend the statute of limitations. The department will have ample "leverage" on the taxpayer to obtain such an agreement.

Moreover, if the 300 days represent such a serious problem for the Department of Revenue, why not simply make the limitations period four years instead of three for these particular taxes?

Revenue Criticism No. 2:

> "SB 401 would restrict the department's access to information necessary to produce an accurate review of [a] return and determine whether taxes (or a refund) were due. The bill would virtually eliminate the incentive for an affected taxpayer to produce information for an administrative determination on the amount of tax due.
>
> "A combination of provisions in the bill would result in the department being unable to base its tax assessments on the best information. First, the bill allows the taxpayer to appeal the reasonableness of a departmental request for information. . . . Second, the subpoena and inquiry provisions of AS 43.05.240(c) applicable to other types of taxpayers would not apply to hearings on oil and gas taxes. Third, if information arises during, for example, the closing conference, the department won't have the time (under the bill's schedule" to pursue it. Finally, the type of de novo court review in the bill would permit the taxpayer to introduce factual material in court that has not been presented to the agency."

Response: First, taxpayers should be able to appeal unreasonable information requests by the department. SB 401 would allow them to appeal to the department first, instead of going straight to court. The department, however, apparently wants to have direct judicial review of its auditors' information requests. If the department

wants to defer to the courts on such questions, it can be accommodated by deleting section 1 from SB 401.

Second, the subpoena and inquiry provisions of AS 43-.05.240(c) merely repeat certain powers and authority vested in the Commissioner of Revenue under AS 43.05.010(8) - (13). While SB 401 does not explicitly make AS 43.05.240(c) applicable to the policy review hearing, it in no way impairs the Commissioner's authority and powers under AS 43.05.010.

Third, if the auditors have done their job during the three years they are auditing a taxpayer, there should be nothing about the taxpayer which would arise at the closing conference that the department didn't already know. It is rare in tax cases for there to be disputes about what the taxpayer did, and such disputes are unlikely to arise in Alaska's oil and gas tax cases. Instead, the major factual disputes are likely to be about the "value" of the oil and gas, and whether the department can require tax to be paid on the basis of that "value" instead of the taxpayer's sales price.

Fourth, de novo review does not mean the taxpayer won't present evidence to the department on disputed factual issues. De novo review simply means that the court gets to hear and judge the evidence for itself. Right now, the hearing officer, who serves at the pleasure of the commissioner, decides which evidence to believe on a disputed factual issue -- the department's evidence or the

taxpayer's. The hearing officer's findings of fact state which version of the facts he or she believed. When a tax appeal gets to court, there is a presumption that these findings of fact are correct. This presumption is rebutted only by showing that there is no evidence to support the findings or they run against the "substantial" weight of the evidence taken as a whole. The problem with this is that the size of the taxes in dispute and the resulting pressure on the hearing officer make it impossible for the hearing officer to be truly disinterested and impartial. Due Process entitles the taxpayer at least to a trial before an unbiased party. Unlike the hearing officer, the judge will not be working for the Commissioner of Revenue.

Revenue Criticism No.3:

> "SB 401 would give the specially treated taxpayers the right to a de novo review in the court on issues of their choosing even on issues/facts that were not raised previously by the taxpayer."

Response: First, these taxpayers are "specially treated" under SB 401 because the Department of Revenue has been unwilling or unable to get its job done with respect to them. If, instead of oil companies, these were dentists or fish processors whose tax appeals had been dragging on and on and on for years within the department, SB 401 would address those particular procedural problems.

Second, the department's criticism on this point ignores completely the fact that for those issues in

the assessment that are not disputed, the taxpayers will be paying the tax. If they choose not to fight an issue in court, then they pay up immediately on it. What is wrong with such a victory for the state?

Third, if a taxpayer feels that a proposed assessment was wrong or mistaken, does the department really believe that the taxpayer won't present the facts and use every argument it can think of to talk the department out of it within the administrative appeals process?

Finally, it is common practice for the courts in Alaska and every other jurisdiction in America to remand a case back to an agency like the Department of Revenue if an appellant failed to bring a material matter to the agency's attention when the matter was being considered by that agency. They simply wouldn't let a taxpayer get away with the kind of ploy that the department is worried about.

Revenue Criticism No. 4:

> "The transition provisions of the bill are completely unworkable."

Response: No bill is going to be very workable if the agency administering it is so opposed to it. If it wanted to, the department could surely develop regulations to make the transition rule work in a way that seems logical to the department. But rather than wrestle with the department trying to come up with transition rules that it apparently doesn't want to implement in the first place, there is

another way to deal with the backlog of tax cases. Let the department continue to operate under the present procedures. The department has said that 40% of the $2.5 billion in assessments will either be resolved or in court by the end of this calendar year, and 90% by the end of 1989. We could take the department at its word and give it an opportunity to achieve that which it has been completely unable to do in the past.

However, under the present procedures the taxpayers will be able to argue that the departmental hearing officers, who serve at the pleasure of the commissioner, are not impartial in finding the facts and rendering their decision. Such a claim challenges the entire procedure, not merely its results. Consequently, this argument, if successful, could jeopardize all of the assessments, including any portions that the state might otherwise be legally entitled to. To protect against this possibility and forestall such claims from being made, the provisions for de novo review should be extended under a transition rule to all pending tax appeals which have not gone to court when SB 401 becomes law.

Revenue Criticism No. 5:

> "SB 401 will result in additional delays before tax cases are finally resolved."

Response: In Exxon's case, a formal hearing on its 1978 separate accounting income tax was requested in May of

1981. Today, nearly seven years later, the Department of Revenue still has not held that formal hearing. It is apparent that Exxon's situation is not too unusual, given the fact that over 99.8% of the production tax assessments have not gotten to formal hearing even though the tax periods involved are mostly all before 1983. While the court system sometimes may not be as fast as one might like, it is not usually as slow as the department has been. Under the present procedures judicial review will still have to occur, once the department finally finishes with these appeals. The department needs to have some clear, but not totally inflexible, deadlines imposed on it so the Legislature will know how much these "back taxes" really are and can get on to other business.

CONCLUSION

SB 401 seeks to reform the current tax procedures in three ways. First, it would provide procedures under which the department would issue assessments only after they have been fully reviewed internally and with the taxpayer. Second, it would allow the factual issues to be decided by the courts instead of Revenue employees who appear to have personal interests in the outcome of their decisions. Policy-making responsibilities would remain with the department as they have always been. Third, SB

401 will impose sorely needed discipline on the Department of Revenue in terms of conducting and completing the administrative review of its tax assessments in a timely fashion -- something it has proven to be totally incapable of doing under the current process.

DEPARTMENT OF REVENUE COMMENTS

SENATE BILL 401

O V E R V I E W

The heart of SB 401 is a drastic change in the dispute - resolution mechanism for selected taxes. The bill takes the responsibility for resolving these disputes from the Department of Revenue and places it with the court.

The bill appears to be based on the assumption that -- at least in the limited circumstances covered by the bill -- an administrative agency cannot "fairly" resolve a dispute within its area of responsibility. This assumption is directly contrary to Alaska's basic system of government, which relies heavily on administrative agencies to resolve disputes. It is also contrary to the specific provisions governing hearing procedures within the department of revenue, and court oversight of those procedures.. The current system guarantees a taxpayer a fair hearing of his case.

Our current tax system begins with an audit followed, if necessary, by an assessment. If a taxpayer disagrees with the assessment, it may request an informal conference. If the taxpayer is still not satisfied, it may request a formal hearing. The formal hearing provides a full opportunity for the taxpayer to present the

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facts and arguments relevant to its tax determination. These are the key elements of due process. The hearing decision, made on the record, is the department's final determination of the tax. If the taxpayer is still dissatisfied it may (but the department may not) appeal to superior court for review.

This court review is the way our system guarantees fairness and due process. The superior court will apply certain standards in reviewing the agency decision. The court will examine whether or not the agency has provided a fair hearing. If it has not, the court can grant de novo review. It will make sure that the agency has correctly applied the law, and will reverse the agency if it did not. It will make sure that the agency's determination is supported by its findings, and that the findings are supported by the evidence. In Alaska, the court may exercise its independent judgment on the evidence. It may set aside factual findings if they are not supported by the weight of the evidence as a whole. If appropriate, the reviewing court will augment the record.

The department of revenue applies, administratively, the tax laws that the legislature has passed. This administrative procedure is just like that of a great many other administrative agencies within Alaska, in other states, and in the federal system. Most states choose the administrative procedure for tax matters, instead of the courts. They do so in order to reduce the burden on the court system and to provide the taxpayer with a forum less formal and costly than the courts. The administrative procedure also provides the taxpayer with a forum that has first hand experience and expertise in the tax laws.

The bill would restructure this basic dispute-resolution mechanism, but only for certain types of taxpayers for certain types of taxes. It would change the administrative procedure from one in which a dispute is resolved by the agency, with an appeal to the court available, to one in which the administrative procedure only finalizes the agency's position. The dispute then would be resolved by the court instead of the agency.

These changes are accomplished in the bill by two provisions. First, the internal agency review procedures are changed. Currently, these procedures (informal and formal conferences) review the correctness of an assessment. The bill would use these procedures only to establish an assessment. Second, the bill provides for a trial de novo of any part of the department's final assessment with which the taxpayer does not agree. Under current law, the court review is an appeal rather than a trial.

These changes make the bill inconsistent with the basic duties of the department, as outlined in AS 43.05.010. Paragraph (9) of that section provides that the commissioner of revenue shall "hear and determine appeals involving ... taxes ... and enter orders on the appeals which are final unless reversed or modified by the courts." The changes would also probably require an amendment to the court rules, which currently govern all appeals from all administrative agencies. Those rules presently give the court the discretion to grant a trial de novo. SB 401 would remove that discretion. Specific comments on several aspects of the bill are attached.

PERSPECTIVE ON SB 401

SB 401 drastically changes the administration of our tax law. A combination of provisions in the bill, outlined and discussed in detail below, will result in the severe reduction of the state's ability to pay for needed government services.

I. SB 401 would disrupt the scheduling of major tax issues now in the administrative appeal process. SB 401 unrealistically shortens the amount of time available to the state to review and audit a tax filing.

The bill adds approximately 300 days of procedures -- from the issuance of the preliminary audit conclusions through the policy review decision -- that must be accomplished within the existing three year statute of limitations. These new procedures will shorten unrealistically the amount of time available to audit complex multinational taxpayers.

II. SB 401 would restrict the department's access to information necessary to produce an accurate review of return and determine whether taxes (or a refund) were due. The bill would virtually eliminate the incentive for an affected taxpayer to produce information for an administrative determination on the amount of tax due.

A number of provisions in the bill combine to limit the department's access to information necessary for accurate audits: (1) The taxpayer may appeal, through the existing administrative appeal procedures and then in court, any request for information that the taxpayer believes is unreasonable; (2) the subpoena and inquiry provisions in the current hearing procedures are removed; (3) there are no time provisions for pursuing information that arises in the audit process; and (4) the taxpayer may present new information in court never presented to the agency, and thus has no incentive to present information to the agency.

III. SB 401 would give the specially treated taxpayers the right to a de novo review in the court on issues of their choosing even on issues/facts that were not raised previously by the taxpayer.

The heart of the bill is to establish the court, rather than the department, as the place where tax disputes are resolved. However, the de novo review set out in the bill gives the taxpayer complete control over the scope of the court action, and permits the taxpayer to present to the court information not presented to the department.

IV. The transition provisions of the bill are completely unworkable.

The bill completely restructures the internal procedures of the department, and applies its new provisions to pending matters. However, the bill fails to explain how these new procedures could apply to the approximately $2.5 billion in outstanding assessments, or to tax periods for which the statute of limitations will run in the near future. Literal application of the bill to pending matters could jeopardize outstanding and future assessments.

V. S.B. 401 will result in additional delays before tax cases are finally resolved.

S.B. 401 is apparently aimed at speeding resolution of tax matters. However, by accellerating cases prematurely into court, where procedures are more formal and delays are inevitable, the final resolution of these disputes will be delayed.

In summary, SB 401 will reduce the states ability to collect taxes and royalties. It would weaken the present audit programs resulting in even greater likelihood of non-compliance.

I. SB 401 would disrupt the scheduling of major tax issues now in the administrative appeal process. SB 401 unrealistically shortens the amount of time available to the state to review and audit a tax filing.

This legislation effectively reduces by almost one-third the current three year period in which the State can audit corporate income tax and oil and gas properties production tax. The production tax on oil and gas provides almost half of the tax revenue earned by the State. It is, in addition, one of the most complex taxes administered by the State.

The timing requirements of the closing conference and policy review hearing would add up to 300 days to the audit process which is already subject to the three year statute of limitations:

Pre-closing conference period	90 days
Post-conference rewrite period	60
Request for policy review hearing	30
Pre-hearing period	30
Post-hearing rewrite period	90
	300 days

The actual time available for the gathering and analyzing of pertinent information would be cut by almost 30 percent. At best, a production tax audit takes between two and a half and three years to complete. Field trips (two to five per audit depending on the size and complexity of the particular taxpayer) need to be planned well in advance, and data gathered during such trips may require up to six months to properly analyze. Such analysis will likely generate additional questions which will require additional information to be gathered and analyzed. And since the monthly production tax returns are audited in groups of twelve (auditing for less than a one year period would not be expedient), the audit of a January 1985 return, for example, will not even begin until the December 1985 return has been filed on January 20, 1986.

Although there are provision for extensions of the time periods itemized above, an extension would not necessarily affect the overall statute of limitations. Any extensions would be granted only if mutually agreed upon, so could not be relied on to overcome the State's lack of sufficient audit time if the taxpayer preferred otherwise.

II. SB 401 would restrict the department's access to information necessary to produce an accurate review of return and determine whether taxes (or a refund) were due. The bill would virtually eliminate the incentive for an affected taxpayer to produce information for an administrative determination on the amount of tax due.

A combination of provisions in the bill would result in the department being unable to base its tax assessments on the best information. First, the bill allows the taxpayer to appeal the reasonableness of a departmental request for information.

Under current law if a taxpayer refuses to comply with an audit request for information, the State can issue a summons which the taxpayer can appeal through the court system. Under SB 401, a taxpayer could appeal the request itself (without waiting for a summons) but would be required to go through a lengthy administrative appeals process prior to appealing to the court.

SB 401 does not change the current three-year statute of limitations provision is in place to allow for the tolling of the statute of limitations during this appeal process, taxpayers appealing information requests could bring the audit process to a halt while the time allowed for the audit rant out. This provision could allow taxpayers to undermine the entire audit process by using up necessary audit time in unnecessary appeals.

Second, the subpoena and inquiry provisions of AS 43.05.240(c)) applicable to other types of taxpayers would not apply to hearings on oil and gas taxes. Third, if information arises during, for example, the closing conference, the department won't have the time (under the bill's schedule) to pursue it. Finally, the type of de novo court review in the bill would permit the taxpayer to introduce factual material in court that has not been presented to the agency. The combined effect of these provisions is that the department would be forced to assess on insufficient information. It is therefore not inconceivable that under this legislation a taxpayer could force the State to make a legitimate assessment based on unsubstantiated evidence which assessment would then be thrown out for being unsubstantiated.

III. SB 401 would give the specially treated taxpayers the right to a de novo review in the court on issues of their choosing even on issues/facts that were not raised previously by the taxpayer.

The bill provides for a trial de novo only of "those portions" of the department's tax bill that the taxpayer disputes. This gives the taxpayer the exclusive power to define the scope of the court proceeding. No counterclaim can be raised by the state. But tax matters can often be intertwined. Suppose, for example, that the department had found that a certain expense could not be deducted as a cost, but rather had to be capitalized and depreciated. The taxpayer conceivably could appeal the department's determination that the expense could not be deducted. But the department would be bound by its determination that the expense should be capitalized. The taxpayer might end up both deducting and depreciating the same expense.

An important part of our current statutory framework is that the taxpayer must present all his tax information to the department. The taxpayer cannot wait until the case gets to court and then present information. The court will admit new information only if it was unreasonably excluded by the agency or if it could not have been produced earlier. AS 44.62.570(d). This provision ensures that the department can make the best determination regarding a taxpayer's tax liability.

As explained above, the bill allows the taxpayer to withhold information from the department, resulting in unsubstantiated assessments. By allowing the taxpayer to carefully define the scope of the "de novo" review, the bill ensures that, whenever a gap in information works to the taxpayer's advantage, the gap will not be filled at the court level. However, when the gap can be filled to the taxpayer's advantage, the bill would permit him to fill it.

IV. The transition provisions of the bill are completely unworkable.

The bill drastically restructures internal agency provisions. The transition section applies these new procedures to pending matters without any explanation as to how this could be done. The bill requires nearly a year of procedures that have to be finished before the three year statute of limitations runs. But it does not explain how to apply those provisions if, for example, the statute will run next month. The bill does not explain what happens if the assessment has already been issued. Under the bill, an assessment is not final for purposes of the statute of limitations until a policy review narrative and schedules or worksheets are provided to the taxpayer. Since these new steps have not happened in old assessments, it could be argued that the currently outstanding assessments are not valid. The statute of limitations has run

on those assessments. The transition provision allows any taxpayer, on any pending matter, to request a closing conference within 60 days. The department would be unable to process all of the matters simultaneously. The resulting revenue loss is estimated at about $1.2 billion.

V. S.B. 401 will result in additional delays before tax cases are finally resolved.

The main thrust of the bill is to get the case into the courts with very little action by the department. Because of the very limited time under audit most of the issues will be exhaustively studied by the court and therefore final resolution will be substantially delayed beyond even today's standards. This is primarily due to existing court procedures.

DIVISION OF OIL AND GAS
COMMENTS ON CSSB 401
RESPONSE TO SENATOR HALFORD

March 22, 1988

BACKGROUND

One of the most basic concepts of American taxation is the self assessment system. The taxpayers compute their tax and file a tax return using their own numbers. It is the government's right and responsibility to verify those numbers using the taxpayer's records.

The Department of Revenue is charged by statute to audit the books and records of oil and gas taxpayers. They administer production taxes (AS 43.55), income taxes (AS 43.20 and 43.21) and royalty obligations (AS 38.05). Self or voluntary compliance with this body of law is the essence of our taxing system.

The oil and gas tax types which we administer are new by any standard. The production tax, even though enacted in 1955, was radically modified in 1977 to conform with the advent of production from the North Slope; and, the separate accounting income tax while enacted in 1978 has also seen subsequent major modifications prior to its repeal effective January 1, 1982. By comparison, other bodies of law like the Internal Revenue Code have been in place for 75 years and there is a wealth of case law that interprets these statutes and regulations lending guidance to taxpayers and administrators alike. At this time, there is no body of case law that interprets the Alaskan statutes relating to AS 43.55 and 43.21.

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PRESENT SITUATION

Since enactment and amendment of the production and income taxes, the major oil and gas companies and the Division have been placed in a position of interpreting and applying applicable statutes and regulations. We have both been involved in a learning process; defining policies and positions consistent with law.

We both realized early on that the issues with which we were dealing were intricate and infinitely complicated in nature. The major oil and gas players in Alaska are the same companies that comprise the majority of the top ten on the Fortune 500 list. These companies, while situated in Alaska, are global in operations. They define the concept of multinational. They exchange millions of barrels of North Slope crude with millions of barrels of Saudi Arabian Light crude with millions of barrels of North Sea Brent crude with as much ease as an Alaskan purchases a pack of cigarettes at Safeway. And that is only the beginning of the process . . . for how do you value that barrel of Alaskan North Slope crude for purposes of Alaska's income and production tax? Certainly, the value of the cigarettes conforms closely to the price paid for them.

Oil companies, however, assert their own value to the Alaska North Slope crude . . . which many times does not conform with the manner in which the State sees as the substance of the transaction; valuation methods come into play that each party argues is most appropriate in the

circumstance. Each party is also aware of whose interest they are charged to protect, so the outcome of the transaction often results in disagreement over the manner in which this particular transaction is to be valued.

But there are a myriad of issues that come to the fore in oil and gas tax administration. Valuation is only one issue that can subsume at least fifty other issues. And while issues are often complex, they can also be quite mundane, like substantiation issues. The problem of substantiation pervades almost all other issues. Requests for information and documents from a multinational organizations are very difficult at best to achieve. As in any large organization the bureaucracy tends to be overprotective. In the past this has caused many months delay in obtaining the verification of the tax returns. But there then enters the concept of the statute of limitations, which requires that the Division audit and assess, if necessary, a liability against the taxpayer within a very specific time period. But what do we do if the time frame for assessment is approaching and no substantiation is forthcoming for an issue? The Division must protect the State's interest and finds itself forced to assess based on lack of documentation. The taxpayer may come forth during the administrative hearing process and produce documentation substantiating the claimed deduction . . . but the immediate effect is that this unsubstantiated issue is reflected as "disputed taxes."

To portray the current situation as a stalemate, however, does not give deference the body of knowledge and expertise that the State has developed in administering oil and gas law. Administration of tax law is a process. It is an undertaking done in concert with the involved players. Policies have been formalized. Plans of action have been developed. The means of implementation of the plans of action are in motion. We monitor and audit. But overall, we and the taxpayers have developed insights into areas of the law upon which we can now focus. We know where we are heading, and the taxpayer knows where they are heading. For many of the issues, it is that simple. These issues a.e now ripe for hearing. But they have gotten to the present stage only because of the concerted efforts of the State and the taxpayers.

STRATEGY

The current statutes and regulations provide for a systematic method for assessment of the tax and taxpayer appeal of the assessment. This same system functions effectively in many states at the present time. It allows the taxpayer due process to contest the law, regulations, and department policies and also establish precedents for other taxpayers to follow.

Short Term Our plan for reducing the number of cases in appeals status includes consolidation of several audit cycles into one case. We will reduce the number of issues in cases going to formal hearing by partial agreement with the taxpayers. We are establishing case priorities so

that precedent setting issues are quickly brought to decision to reduce the number of cases in appeals. We are providing more support to the appeals officers to move the cases more rapidly through the system.

Mid Term In an attempt to bring the audit cycle more current, we are studying ways to utilize the information and documents accumulated in the Amerada Hess et. al. royalty case. We believe we can substantially reduce both the applied and elapsed time during the audit cycle using this source of taxpayer data.

Long Term We currently have under study a procedure for determining an Alaska Tax Value" (ATV) for both royalty and production tax purposes. The proposed system will establish a defensible value within one year following the close of a taxable period. This procedure would provide an audited value giving the State and the oil companies a reliable figure for budgeting and planning purposes. It will substantially speed up the flow of revenues into the Treasury.

COMMITTEE SUBSTITUTE FOR SENATE BILL 401

The specific changes made to Senate Bill 401 by virtue of this substitute do not change the central problem inherent in this bill. The main thrust of this legislation and the result of its enactment will essentially move the audit process out of the Department of Revenue and into the court system. How is this accomplished, and what will be the ultimate result?

How Is This Accomplished?

SB 401 purports to better define the Department's audit process while effectively inhibiting its ability to gather and analyze taxpayer information. The taxpayer has all information pertinent to its tax liability. All the information the Department needs in order to perform its audit must come from the taxpayer. Without the proper and complete information the Department cannot make a determination as to the validity of the tax liability reported by the taxpayer. Further, the information is highly complex and requires considerable time to compile and analyze. In order for the Department to complete an audit, it must have access to that information and sufficient time to analyze it, and in order to guarantee the Department that access and thus safeguard the State's revenues, there must be no way in which a taxpayer, wittingly or unwittingly, can force the Department to go into court with an incomplete case.

Under the current system, if a taxpayer refuses to submit information, the Department can assess additional taxes based on lack of substantiation, and the taxpayer will be required to submit the pertinent documents at the Formal Hearing. If the additional information requires it, the Formal Hearing Officer can remand the case back for additional audit work. There is no arbitrary statutory time limit within which the Officer must submit his decision. The system is set up to allow sufficient time to complete the factual record prior to an appeal to court. Each side has thus had an opportunity to see all the information that will be part of a potential lawsuit.

Under SB 401, absent a summons, the taxpayer has no reason to submit any information prior to the Policy Review Hearing. The Department must then within 90 days compile and analyze any new information, write its decision and issue the final assessment. This 90 days applies equally to a $250 and a $250,000,000 assessment.

Under SB 401, the State's ability to obtain and analyze taxpayer documentation doesn't really exist until the trial de novo. What Will Be the Ultimate Result? The results of moving the audit process out of the Department and into the court system are various, but speedy resolution of audit issues is not one of them. Indeed, under SB 401 the entire audit process will begin anew within the court. Since the Department will have been inhibited from properly developing issues, the whole process of obtaining and analyzing taxpayer information will start from scratch. And along with all the additional time needed will come the additional cost. All taxpayers will be affected--small as well as large. Cases will take longer to resolve, and the State will spend more on their resolutions.

But beyond the additional time and cost is the complete rearrangement of responsibilities necessitated by this legislation. In the process of fact gathering the Department of Revenue (under the Commissioner) is empowered by the legislature to develop and direct tax policy. Under SB 401 the administration of tax laws and regulations and the development and monitoring of tax law policy will have effectively been moved from the Department of Revenue into the court system. It is in the court that

issues will be developed and policy made. The Department will find itself unable to do the job it has been mandated to do.

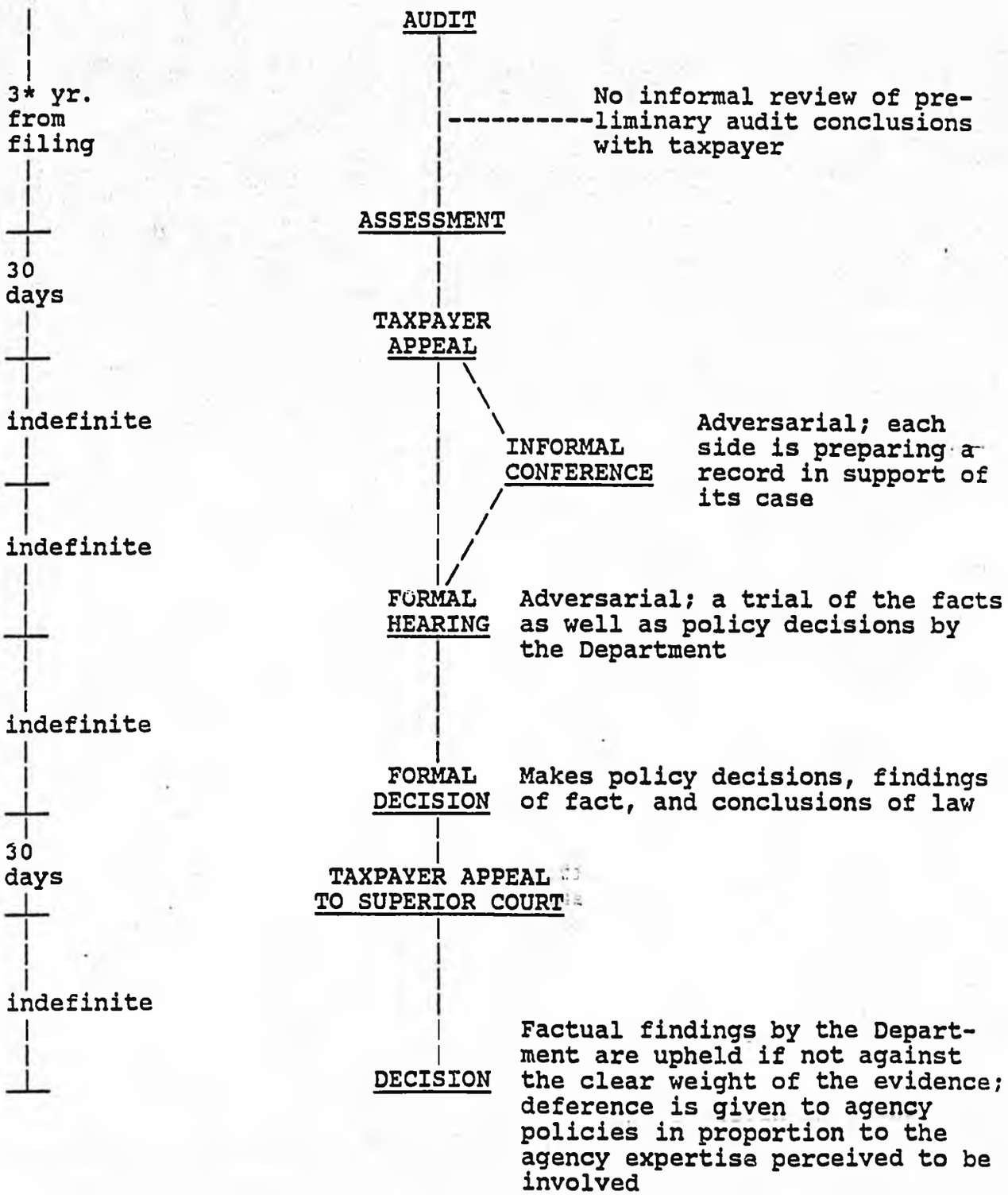
Transitional Rules

The Finance Committee Substitute does not solve the problem relating to old audit years. By allowing a trial de novo for current assessments, SB 401 allows the taxpayer to simply walk through the informal and formal hearing process and wait for the court to start the entire audit process anew. Further, since the application of Section 5 of the bill would apply to all audit years that have not been assessed as of its adoption, the limited time frames would effectively inhibit the Department from auditing any cases for which the statute of limitations will expire in less than the time needed to satisfy those specific timing requirements. Under the Finance Committee Substitute for SB 401 at least four years of production taxes will go unaudited.

Conclusion

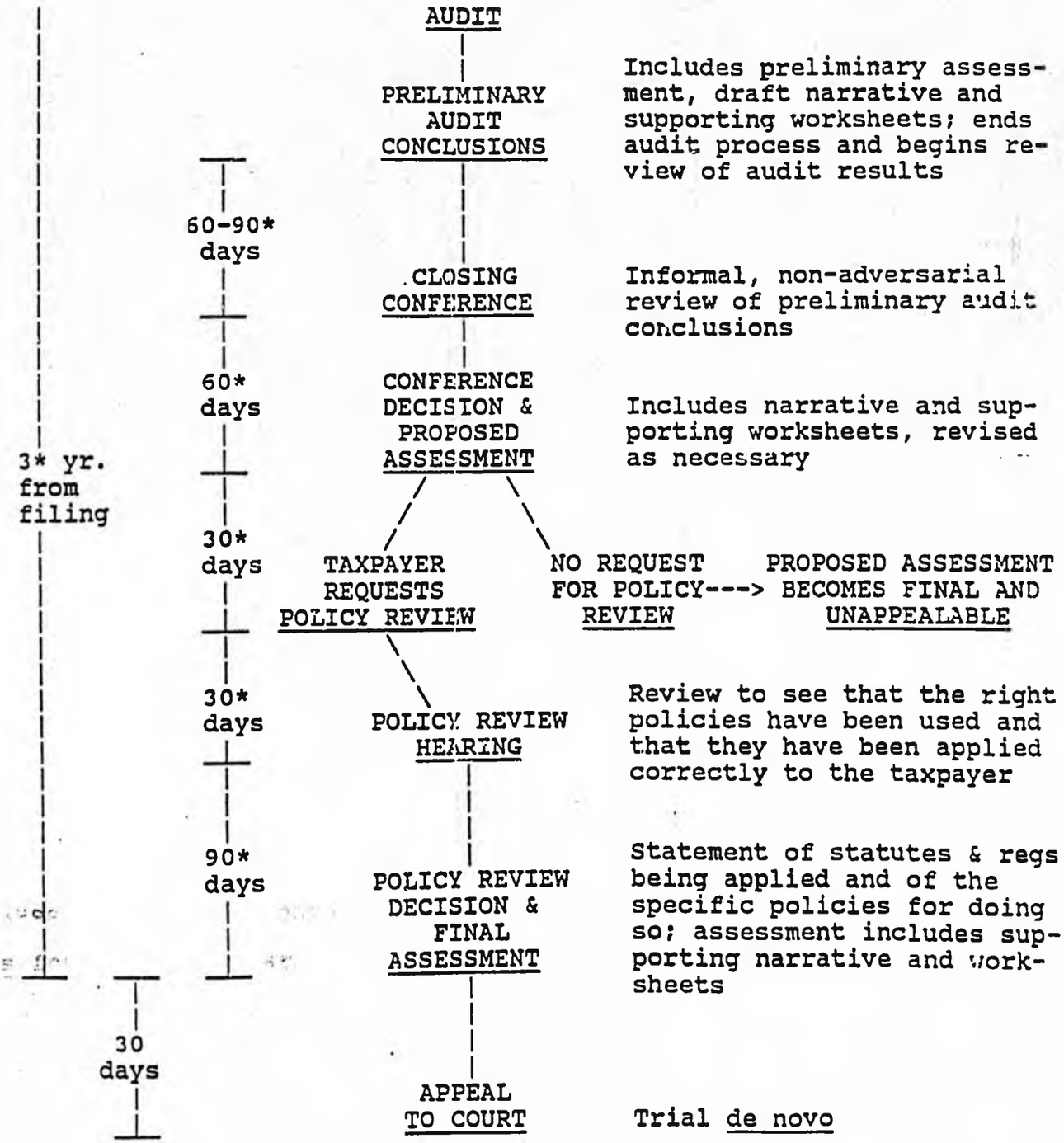
Senate Bill 401 removes from the Department of Revenue its legally mandated responsibility to develop and implement tax policy and in so doing creates a new audit process that will take longer and cost more than the system currently in place.

ALASKA'S PRESENT TAX APPEALS PROCESS



* Time may be extended by mutual agreement.

PROPOSED PROCEDURE



* Time may be extended by mutual agreement.

PRESENT STATUS OF THE "SEPARATE ACCOUNTING" INCOME TAX FOR THREE MAJOR TAXPAYERS

Separate accounting was in effect for only four tax years: 1978, 1979, 1980 and 1981.

Status for the 1978 Tax Year.

Taxpayer X. Informal conference has been held, but no formal hearing.

Taxpayer Y. No informal conference or formal hearing has been held, nor is one scheduled.

Taxpayer Z. Formal hearing has been scheduled for later in 1988.

Status for 1979 Tax Year

Taxpayer X. Audit still pending.

Taxpayer Y. No informal conference or formal hearing has been held, nor is one scheduled.

Taxpayer Z. Formal hearing has been scheduled for later in 1988.

Status for 1980 Tax Year

Taxpayer X. Audit still pending.

Taxpayer Y. No informal conference or formal hearing has been held, nor is one scheduled.

Taxpayer Z. Formal hearing has been scheduled for later in 1988.

Status for 1981 Tax Year

Taxpayer X. Audit still pending.

Taxpayer Y. Audit still pending.

Taxpayer Z. Formal hearing has been scheduled for later in 1988.

ONE TAXPAYER'S EXPERIENCE WITH THE PRESENT TAX APPEAL PROCEDURES

Tax Involved: Separate Accounting Income Tax (AS 43.21)

Tax Period Involved: 1978

Tax Billing Date: August 15, 1979

Normal Statute of Limitations Deadline: August 15, 1982

Experience:

Aug. 1979:	Assessment is issued.
Sep. 1979:	Assessment is amended.
Jul. 1980:	Second amendment is issued.
Sep. 1980:	Taxpayer protests and requests informal conference.
Feb. 1981:	Informal conference is held.
Apr. 1981:	Informal conference decision is issued, resolving all but one of the issues under protest.
May 1981:	Taxpayer requests formal hearing on one remaining issue.
Oct. 1983:	Without having acted on the taxpayer's request for a formal hearing, the Department issues a third amendment which raises additional claims for the first time.
Dec. 1983:	Taxpayer protests the third amendment and requests an informal conference.
Apr. 1984:	Second informal conference is held.
Jul. 1984:	Informal conference decision is issued.
Aug. 1984:	Taxpayer makes second request for a formal hearing.
Oct. 1986:	The Department holds a "prehearing conference" to discuss procedures and schedule for formal hearing.
Dec. 1986:	The Department issues a fourth amendment to the assessment, making additional claims for tax.
Today:	No formal hearing has been held, nor is one scheduled.

ATTACHMENT #1

COMMON SENSE FOR ALASKA, INC.

REVENUE TASK FORCE

February 1987

REPORT ON A REVIEW OF SELECTED DEPARTMENT OF REVENUE OPERATIONS

As many Alaskan businesses are currently doing, the Task Force has attempted to evaluate the Department's budget on the basis of cost-efficiency. The initial focus was on the audit function which employs a staff of approximately 80 and has the responsibility for compliance audits of the various tax programs. Given the history of taxation in the State, it was believed that the audit function had gone through the greatest amount of change over the past 5 to 10 years. The shift of the tax emphasis from individual to petroleum related activities necessitated a dramatic revision to the organization and the type of staff employed. At the outset, it may not have been clear that the petroleum related tax issues were ones that were not easily resolved. The Department was faced with the need to attract and train highly skilled personnel with expertise in a very complex and technical industry. The objective of both the taxpayer and the taxing authority is that of fair and equitable taxation, with prompt settlement in areas of dispute. This report deals primarily with clarification of these issues, and makes recommendations designed to expedite the audit/settlement functions.

Committee Members

Richard G. Carson, Chairman
Jan Bomhoff
B. Lynn Shaver
Mary Bettis
Mary Whitmore

It must be pointed out that our efforts were hampered by the lack of consistent operations and systems, through the period of our evaluation (1980-1985). During this time, systems, organizations and emphasis were modified. Without a detail knowledge of the Department's Budget and Expenditure activity one can not track the charges in spending activities. Accordingly, the Task Force focused on general trends that could be identified and evaluated.

As a general comment, one that could be made of government in general, the best way to develop a cost-effective budget is to "start over". The State uses what could be called an "incremental" budget which simply takes into account known changes (plus or minus) without reconsideration of the underlying cost base. This assumes that the cost base is appropriate. We believe that the Department of Revenue's current budget and structure has evolved out of many years of such incremental budgeting.

We have attempted to evaluate the Department's budget, as many Alaskan businesses are currently doing, on the basis of cost-efficiency. As mentioned earlier, this evaluation was complicated by the lack of reliable consistent data. Accordingly, there may be information that when made available will have an impact on our observations and comments.

Our initial focus was on the audit function which employs a staff of approximately 80 and has the responsibility for compliance audits of the various tax programs. Given the history of taxation in the State, it was believed that the audit function had gone through the greatest amount of change over the past 5 to 10 years.

The shift of the tax emphasis from individual to petroleum related activities necessitated a dramatic revision to the organization and the type of staff employed. The Department was faced with the need to attract and train highly skilled personnel with expertise in a very complex and technical industry. Given the complexity greater emphasis would be required to identify the issues and develop a plan to address these issues.

At the outset, it may not have been clear that the petroleum related tax issues were ones that were not easily resolved. In addition, it was not clear what kind of effort was needed to perform the audits.

Our efforts were concentrated on the audit function with the hope of developing recommendations to assist in making the audit process more effective and cost-efficient. The objective of both the taxpayer and the taxing authority is that of fair and equitable taxation. In the present economic environment, this should be done in a cost-efficient manner.

Additionally, the task force reviewed other aspects of DOR's activities with the goal of cost-efficient government in mind.

SUMMARY OF OBJECTIVES

OBJECTIVES

I. Make the Department of Revenue (DOR) audit function more effective and efficient.

II. Expedite settlement of the $1.5 billion reported outstanding assessments and implement procedures to facilitate prompt settlement of such assessments in future years.

III. Reduce the cost of the enforcement function.

IV. Reduce the administrative cost of distributing the Permanent Fund Dividends, and other similar programs.

p.5

Objective:

I. Make the Department of Revenue (DOR) audit function more effective and efficient.

Background:

The Department of Revenue is charged with the responsibility to collect and deposit all taxes rightfully due. The Audit function is required to determine tax compliance. The Department's stated goal is to "maintain a fair and equitable taxing system in the State" and to "achieve an acceptable level of oil and gas producer compliance...". To meet these goals and objectives the Department must establish clear policy and procedure for compliance auditing. Our review and discussion with professionals inside and out of the Department shows that neither exist.

This absence of clear policy and procedure results in auditors developing individual interpretations of tax policy and specific audit objectives which lead to significant tax disputes. At present, disputed taxes of $1.5 billion from as far back as 1978, are still unresolved. These efforts, which can consume years, are expended without consideration of the cost involved.

WE NEED AN AUDIT FUNCTION BUT WE NEED AN EFFECTIVE AND EFFICIENT ONE.

Recommendations:

1. Clarify audit policy/procedures so that DOR auditors and taxpayers have a better idea of the compliance requirements and expectations. Consideration should be given to the federal policy and procedure as a starting point, "piggybacking" where appropriate.

2. Develop an audit procedures and guidelines manual. Ensure that all auditors are knowledgeable of theses guidelines and the objectives of the audit process.

3. Establish a timeframe during which audits must be performed or discontinue the use of the statute of limitation waiver. At present, there is no incentive to perform prompt audits of returns. Returns for 1980-81 are currently under review.

4. Re-evaluate allocation of audit resources. Reconsider the need for the vast majority of nonpetroleum auditors. Consider consolidation of minor tax programs (ie. fish tax, gas tax, etc.) with other activities.

5. Develop a plan to resolve the major recurring tax issues outstanding. This plan should involve the cooperation of DOR and the Department of Law and the taxpayers.

6. Provide more specific guidance to auditors toward more realistic tax assessments. Institute accountability so that the auditor can be evaluated on the collection of taxes assessed, not merely the assessments levied.

Objective:

II. Expedite settlement of the reported $1.5 billion outstanding disputed tax assessments and implement procedures to facilitate prompt settlement of such assessments in future years.

Background:

The $1.5 billion of reported outstanding assessments arises from audits of returns as far back as 1978 including returns filed on the basis of tax law which has since been repealed. Based on our review, some believe that the $1.5 billion is fully collectible. We suspect and suggest that it is not.

Many issues have yet to be resolved on these open returns. Absent such resolution there is no way anyone can conclude that these assessments are realistic and valid. With the emphasis of the audit function being the generation of assessments, there is a strong possibility that these assessments are actually inflated.

Taxpayer disputes with tax assessments are currently heard in conference, formal, and appeal forums that are controlled by representatives of the Department of Revenue. As such, these forums may not be unbiased ones, denying the taxpayer "due process." In fact, our review showed that administrative hearings most often result in increased assessments. These circumstances reduce the taxpayers' incentive to settle.

In addition, with the absence of a time-frame within which these disputes must be settled, the State has had no real incentive to settle either.

Recommendations:

1. Establish a formal plan to resolve all outstanding assessments starting with those related to prior law.

2. Establish a timetable to resolve disputed assessments promptly. The result will be the availability of tax assessment monies at a much earlier date.

3. Consider the establishment of an independent/outside forum (Tax Court) within which the taxpayer can be heard, thereby truly providing "due process". Reference is made to federal tax hearing procedures.

4. Provide more specific guidance to auditors toward more realistic tax assessments. Institute accountability so that the auditor can be evaluated on the collection of taxes assessed not merely the assessments levied.

5. Establish an incentive to get the State and the taxpayer to settle disputed tax assessments on a prompt and equitable basis. Consideration should be given to financial incentive such as suspension of interest on unpaid assessments (State) or prepayment or graduated interest rates after a specified passage of time (taxpayer). Such incentives seem necessary to bring these matters to a much more prompt resolution.

Objective:

III. Reduce the cost of the enforcement function.

Background:

The Enforcement Division of Revenue Operations previously had the responsibility for collection of delinquent personal income taxes; its emphasis was shifted to review and follow-up on questionable Permanent Fund dividend applications. In light of the $10 million of delinquent individual income taxes (repealed in 1981) still outstanding, it is unclear whether there are clear guidelines for collection. It would appear these efforts are expended with relatively little return.

An Enforcement function is necessary but it must be based on determined need in light DOR's overall plan. The cost of maintaining this function should be evaluated against the benefits derived.

Recommendations:

1. Establish definitive collection procedures to be followed by the Enforcement Division. Establish procedures to determine uncollectible accounts that should be written off.

2. Re-evaluate the level of enforcement with respect to minor tax programs (ie. fish tax, gas tax, etc.). With the reallocation of audit efforts as discussed in Objective I, recommendation 4, the Enforcement may be discontinued.

3. Consideration should be given to privatization of the collection function. In light of the $25 million of delinquent and assigned taxes still outstanding, the current collection efforts appear ineffective.

Objective:

IV. Reduce the administrative cost of distributing the Permanent Fund Dividends.

Background:

The Permanent Fund Dividend Program Administration costs have increased to $3.3 million (FY 1985 revised) a year. The costs to process annual applications and payments are outside the Permanent Fund Trust Committee purview and are funded from the dividend pool. The majority of this work is performed by approximately 50 people from April to October. Their duties and responsibilities the rest of the year are unclear.

In addition to the Permanent Fund Dividend Program, there are several very similar programs such as occupational licensing, student loan program, etc.

Recommendations:

1. Inventory and critically evaluate the year-round responsibilities of personnel assigned to process the annual Permanent Fund distribution, both administrative and enforcement.

2. Inventory and re-evaluate the procedures used in administering the Dividend program to identify unnecessary paper handling and follow-up.

3. Contract out the Dividend distribution work to a local concern with the custodial and computer capabilities, such as a major bank. A private concern would have sufficient incentive to perform with even one-third of the costs being incurred by the State ($1 million).

4. Contract out the administration of fee assessment and collection for occupational licensing, the student loan program, and other similar programs.

5. For business licenses, consideration should be given to biennial renewal. This renewal could also be on a staggered basis resulting in lower administrative costs.

STATE OF NEW YORK

LEGISLATIVE COMMISSION ON THE MODERNIZATION
AND SIMPLIFICATION OF TAX ADMINISTRATION
AND THE TAX LAW

THE NEW YORK STATE TAX APPEALS SYSTEM

April 23, 1984

This document is a working paper prepared by the Staff of the Legislative Commission on the Modernization and Simplification of Tax Administration and the Tax Law. The contents herein represent the preliminary analysis of the Staff and have not been approved or endorsed by the Commission.

3/23/88

In preparing this Report, the Staff has greatly benefited from discussions with Mark Friedlander, State Tax Commissioner, Paul Coburn, Secretary to the State Tax Commission, John Sollecito, Director of the Tax Appeals Bureau, and Thomas Lynch, former State Tax Commissioner.

In addition, the Staff greatly appreciates the thoughtful and perceptive comments provided by Paul Comeau, Esq., Sidney Glaser, Esq., Professor Michael J. McIntyre, Joseph Murphy, Esq., Professor Oliver Oldman, Arthur Rosen, Esq., Jack Wong, C.P.A.; and by Peter L. Faber, Esq., and Ralph O. Winger, Esq., members of the Commission's Policy Advisory Group.

The Staff also wishes to acknowledge the important contribution of the Legislative Drafting Research Fund of Columbia University Law School and its Director, Professor Frank P. Grad. The Legislative Drafting Research Fund was responsible for much of the background research for this Report and especially for the material contained in Appendix I.

Finally, Professor Richard Kay of the University of Connecticut Law School played a vital role in helping to formulate the Staff's treatment of certain key issues and is largely responsible for the work contained in Appendix II of this Report.

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EXECUTIVE SUMMARY

The New York tax appeals system has been the subject of repeated criticisms, focusing on the inefficiency of the process, the quality of the decisions rendered, and, above all, the fundamental unfairness of the procedural framework used for the hearing and resolution of disputes. This Report describes the existing New York system in detail, evaluates the criticisms, and offers a range of policy options as alternatives to the current scheme.

Among the major findings of the Report are:

--The close organizational relationship between the State Tax Commission, which rules upon contested tax matters, and the Department of Taxation and Finance, which assesses and collects taxes, violates the doctrine of "separation of powers," fuels perceptions of possible unfairness, and creates the risk of actual bias in the adjudication of tax disputes.

--The President of the State Tax Commission is also the Commissioner of Taxation and Finance and in that role is directly responsible for the administration of that Department. The Department is always one of the parties in the contested tax matters upon which the Commission rules. The President of the Commission is thus required to sit in judgment of the very acts for which he and his subordinates are responsible.

--Other than undocumented reports, no factual evidence supports specific instances of bias in the current system. But arguments regarding the lack of independence of the Tax Commission and the resulting risk of unfairness ought not to turn on the presence or absence of such proof. The best method to assure fair determinations is to establish structures and procedures that are most likely to produce the desired results. Approaches that avoid the appearance of injustice do more than simply that; they also represent the best means of achieving the reality of justice.

--The institutional arrangements that create the risk of bias and perceptions of unfairness in the tax appeals system are not unusual in administrative agencies. Nonetheless, in the case of tax appeals, the arguments offered in favor of agency control of the adjudicatory process do not justify any departure from the fundamental principle that adjudicators ought to be

completely independent from the parties that argue before them.

--The tax appeals process could be made more efficient without undermining concerns for fairness if the Department were allowed to consider the hazards of litigation in negotiating settlements. This change should be considered regardless of what other reforms are undertaken.

--Under the current system, the Tax Commission does not hear live testimony; hearing officers are used instead. An appeals system in which the actual decisionmaker heard live cases could well enhance the fairness and efficiency of the tax appeals process.

--The President of the Tax Commission already has a full-time job in administering the Department of Taxation and Finance. It is unfair to impose upon him the additional full-time job of adjudicating tax disputes, although in an earlier era both roles might have been manageable.

--While the efficiency of the current system has improved in recent years, problems still remain.

--A variety of policy options exist as possible responses to existing problems. These might include statutory and procedural changes clarifying and narrowing the role of the State Tax Commission; removing the Commissioner of Taxation and Finance from the Tax Commission; removing the Commission's regulatory function; creating an independent tax tribunal; and creating a judicial tax court.

--The creation of an independent tax tribunal that would not be part of the judiciary would correct the fundamental weaknesses in the current system, allow for a rapid, inexpensive hearing process, and avoid some of the difficulties that might accompany an attempt to create a judicial tax court. The relative efficiency of such a tribunal compared to the current tax appeals system is difficult to assess, however.

--The creation of a judicial tax court has both advantages and disadvantages. Such a court would most clearly guarantee an independent decisionmaker and is likely to attract highly qualified individuals to sit as judges. The creation of a tax court, however, would entail a constitutional amendment.

INTRODUCTION

Taxpayers, tax lawyers,[1] and accountants have strongly attacked the existing procedures for contesting determinations of the New York State Department of Taxation and Finance. Critical comment has also come from other, disinterested quarters. A 1975 report by the Governor's Task Force on Court Reform concluded that "the power to adjudicate tax disputes now given the State Tax Commission should be withdrawn from it."[2] The 1979 Governor's Temporary Commission to Review the Sales & Use Tax Laws also recommended ". . . that serious consideration be given to creation of [an independent tax appeals board], particularly because it would establish a review group whose impartiality would at least be enhanced in the public view by its independence from the State Tax Commission."[3] Most recently, a 1984 report by the Office of the State Comptroller identified major deficiencies in the processing and resolution of tax controversies.[4] Criticisms have focused on a number of claimed defects, including the inefficiency of the appeals process, the quality of the decisions rendered and, above all, the unfairness of the procedural structure used for hearing and resolving disputes. This Report evaluates these complaints and explores alternatives to the present system.

Chapter I describes the existing New York tax appeals system in some detail. Chapter II surveys the tax appeals procedures of other jurisdictions and examines more closely those of selected states and of the federal government. Chapter III reviews and evaluates the complaints made against the New York system. Chapter IV sets forth a range of policy options which are alternatives to the current scheme.

I. THE NEW YORK STATE TAX APPEALS SYSTEM

The New York State Tax Commission is the head of the Division of Taxation of the New York State Department of Taxation and Finance (Department).[5] The President of the three-member Commission is also the Commissioner of Taxation and Finance--the chief executive officer of the Department of Taxation and Finance. The President serves at the pleasure of the Governor; the other two Commissioners serve for fixed terms of six years. The Commission is granted broad powers; in practice, however, most of these powers are executed by the Department.[6] All three members of the State Tax Commission review regulations, which are proposed by the Department.[7] The three-member Board is also the administrative body that rules upon contested tax matters. The Commission has promulgated Rules of Practice and Procedure governing proceedings before it.[8]

The Tax Appeals Bureau is the administrative adjudicatory arm of the State Tax Commission. The Bureau processes and reviews petitions for the redetermination of a tax deficiency or refund. A taxpayer generally has 90 days after a notice of deficiency[9] is mailed in which to file a petition for redetermination.[10]

Once a petition is filed, the review begins in most cases with an informal prehearing conference which is conducted by a Tax Appeals Bureau conferee.[11] Conferences are available at every district office of the Department and are scheduled at the taxpayer's convenience. Conferees are typically auditors and accountants with 10 to 15 years of experience with the Department. Their role in the conference proceeding is that of an arbiter; the Department is

represented at the conference by a member of the audit staff. In situations where taxpayers appear without professional representation, the conferee will insure that they have the opportunity to present their case.[12]

A dispute that is considered in conference may be resolved if the taxpayer and the Department can arrive at an agreement. The conferee can propose a settlement which, if accepted by the taxpayer, is binding on the Department.[13] The conferee acts with the delegated authority of the Commission in resolving cases. The Commission may revoke such authority as it sees fit, although it does so infrequently.

One constraint upon the conference settlement mechanism is that neither the Department nor the conferee may consider the hazards of litigation faced by the Department in considering a settlement. This policy is based upon the Commission's interpretation of the statutory law under which it operates.[14] The ramifications of this policy are discussed in detail in Chapter III, Section C, infra.

A taxpayer that is dissatisfied with the outcome of the conference may perfect a petition for a hearing. Small claims hearings are available for matters up to $10,000 of sales tax per year or up to $3,000 of income or unincorporated business tax per year, exclusive of all penalties and interest.[15] Formal hearings are available for New York State and local sales and income taxes in excess of the small claims limits. In addition, the formal hearings unit handles all other cases concerning state and local taxes under the purview of the State Tax Commission, including corporate

franchise tax; stock transfer tax; mortgage recording tax; truck mileage tax; cigarette tax; motor fuel tax; gift tax; and license revocations for cigarette vendors. The formal hearings unit also manages pre-decision warrants.[16]

Hearings are held in New York City and at various upstate locations. The travel schedule for the circuit-riding hearing officers is set 12 months in advance; a taxpayer's actual hearing date is set 60-90 days in advance. A transcript of the record is made in formal hearings. In small claims hearings, the proceedings are recorded on tape but usually are not transcribed.[17]

The hearing is conducted by a hearing officer, who is an employee of the Tax Appeals Bureau. Qualifications for hearing officers are established by the Commission. The Commission has initiated a four-year formal hearing officer trainee program for recent law school graduates.[18]

The hearing officer has the authority to administer oaths; to regulate the course of the hearing; to set the time and place for continuances and for filing legal documents; and to issue subpoenas, which are available upon the taxpayer's request, requiring the production of witnesses and documents.[19] Parties are encouraged to stipulate all relevant, unprivileged facts to the extent possible. During the hearing, parties may examine and cross-examine witnesses, introduce exhibits, rebut evidence, and impeach any witness. Section 306 of the New York State Administrative Procedure Act contains a provision that states "All evidence, including records and documents in the possession of the agency of which it desires to avail itself shall be offered and made a part of the rec-

on;

record. . . ." The hearing officer may clarify an ambiguous record by asking questions of the parties or witnesses.

The burden of proof generally rests upon the taxpayer. The Commission bears the burden, however, regarding whether the taxpayer is guilty of fraud with intent to evade tax; liable as the transferee of a taxpayer's property; or liable for any increase in a deficiency, where the increase is asserted for the first time after a petition for redetermination of deficiency was filed.[20]

After the proceedings, the hearing officer reviews the evidence and makes written findings of law and fact for the Commission. These recommendations are reviewed by the post-hearing review unit,[21] which reports its findings to the Director of the Tax Appeals Bureau. The Director can write a dissent if he disagrees with a hearing officer's recommendation, but may not alter the opinion. If the hearing officer wishes, he may write a justification in response to the Director's dissent. The opinion, dissent, and justification are forwarded to the Commission for its final decision. If the case was heard in a formal hearing, the entire record, including a stenographic transcript of the proceedings, is also sent to the Commission.[22]

In small claims cases, the Commission must render its final decision within 90 days of the submission of written arguments or the completion of the hearing. For formal hearings, the decision is due within 9 months after the submission of briefs or the completion of the hearing. The 9-month period may be extended to 12 months for good cause. If the Commission fails to render a timely

decision, the taxpayer may institute a mandamus proceeding under Article 78 of the New York Civil Practice Law and Rules.[23]

The full Commission reviews all recommendations for the quality of the writing and the soundness of the legal reasoning. The Commission also reviews the reasonableness and application of any regulations at issue (including those issued by the Commission itself). The Commission is assisted by an initial review performed by the Secretary to the Commission, who is appointed by vote of the Commission. If a Commissioner has a question concerning the facts of a case, he may examine the record or contact the Tax Appeals Bureau.[24] In the rare cases where a specific, procedural point is unclear, the Commission may contact the Department of Taxation and Finance.[25]

Commission decisions are provided immediately to both the taxpayer and the Department. Subsequently, the Department's Division of Taxpayer Services publishes and disseminates Commission decisions with an annotation stating whether or not the decision conforms with Departmental policy. An annotation indicating nonconformity with audit policy requires the express approval of the Commission, under a procedure outlined in a Departmental Executive Memorandum.[26] Such annotations are relatively rare. All other Commission decisions become official Departmental policy. Commission decisions are available to all persons on the State Tax Commission mailing list and are reproduced as headnotes, excerpts and occasionally in full by two privately published tax law services, Commerce Clearing House and Prentice Hall.[27]

The Department has no right to appeal an adverse decision of the Commission; only the taxpayer may do so. Review of the

Commission's decision is accomplished by bringing an Article 78 proceeding, the standard procedure in New York for contesting the determination of a State agency. This review is initiated in the Supreme Court of Albany County, from which it may be transferred to the Appellate Division Third Department in Albany.

Article 78 authorizes reversal of an agency decision if "affected by an error of law."[28] The standard of review used for factual determinations is much less clear. One section of the law[29] states that reversal of an agency decision will turn on "whether a determination was . . . arbitrary and capricious . . . ." but another section[30] provides for reversal unless "a determination made as a result of a hearing . . . is, on the entire record, supported by substantial evidence." Judicial decisions reviewing determinations of the State Tax Commission have not tracked the statutory standards. These decisions have ignored the "substantial evidence" rule and have applied instead a deferential but ill-defined standard of review.[31]

II. OTHER TAX ADJUDICATION SYSTEMS

The federal government and each of the 50 states have established mechanisms for the adjudication of tax disputes. These tax appeals systems fall into three broad categories. The first category consists of tax courts. Three states and the District of Columbia have full-fledged tax courts, which are established either as separate courts or as divisions of the lower courts of general jurisdiction. A second category consists of independent review agencies. These may occasionally be referred to as courts, as in the case of the United States Tax Court, but are in fact located in the legislative or executive branch rather than in the judicial branch of government. These independent agencies exist wholly outside of the tax department. A third large category of tax appeals systems, which includes that of New York, consists of internal review mechanisms. In these systems, the taxpayer's dispute is heard by the same agency that is responsible for the administration and collection of taxes.

Apart from their structural frameworks, tax appeals systems differ in a number of ways that can affect either or both the fairness and efficiency of the process. They vary with respect to the formality of the proceedings, the qualifications of those who hear cases, the mechanisms for prehearing settlement, and so forth. This Chapter describes the structures and procedures of the various appeals systems in general, and several in particular, in order to examine how the policy concerns that must be addressed in New York have been resolved elsewhere. Appendix I provides a survey of the

tax appeals procedures of the other 49 states and the District of Columbia.

A. Tax Courts

Three states--Oregon, Hawaii, New Jersey--and the District of Columbia have judicial tax courts. In 1978, New Jersey became the most recent state to establish a tax court[32] and can serve as a case study.

The New Jersey Tax Court is a full-fledged judicial court, hearing both state tax and local property tax cases. The Court replaced the State Division of Tax Appeals, a quasi-judicial body within the State Division of the Treasury.

The New Jersey Tax Court is an inferior court of limited jurisdiction. Its judges are appointed by the Governor and confirmed by the Senate. The enabling legislation provides for 6 to 12 judges; 8 have been appointed at present. Judges must have special expertise in tax law and must have been admitted to the New Jersey bar for at least 10 years. Terms are for 7 years with lifetime tenure upon reappointment. The Tax Court bench is intended to be bipartisan; by statute, appointments are to be made so that the two major political parties are represented in equal numbers.[33]

The judges of the Tax Court receive the same salary, pension rights, and other privileges of judges of the New Jersey Superior Court (the equivalent of the New York Supreme Court). The Chief Justice of the Superior Court may assign Superior Court judges to the Tax Court, and Tax Court judges are assigned to hear Superior Court cases from time to time.

The Tax Court is a court of record. Individual judges hear and determine all issues of fact and law de novo. The Court is empowered to grant legal and equitable relief and has jurisdiction to hear and decide federal and state constitutional questions that may arise. The Tax Court's rules of procedure incorporate the rules of the Superior Court wherever possible. Variation occurs only where required by the Tax Court enabling statute, other tax statutes, or by the special nature of tax cases and the desire of the Court to achieve speedy dispositions.[34] Only attorneys may practice before the court except in small claims matters.

Judges are not required to write formal opinions in each case and do so only in cases considered sufficiently significant or novel. In certain instances, judges will rule from the bench. In most other cases, decisions are disposed of in letter opinions. Formal opinions are reported in a bound volume of New Jersey Tax Court decisions.

The Presiding Judge attempts in two ways to assure substantial uniformity in the decisions that are rendered. First, at monthly meetings, the judges discuss issues and review opinions that have been prepared for publication. Second, the Presiding Judge can assign to a single judge a number of cases involving a particular issue. This judge's decisions can then provide future guidance to the others.[35] Ultimately, of course, appellate review may be necessary to resolve differences in particularly knotty issues.

The judges conduct pre-trial and settlement conferences, and a large majority of the cases that come before them are resolved prior to trial. During the year ending August 31, 1982, the Court

received 6,736 cases and disposed of 12,288.[36] Ninety-three percent of these cases were property tax cases. Eighty-nine percent of property tax cases and 83 percent of state tax cases were resolved prior to trial.

The Court maintains six permanent locations and travels circuit to hear cases in other locations. Each judge's courtroom staff is limited to a single clerk. Hearings are recorded on sound equipment, obviating the need for additional courtroom personnel. The Court has a small claims division for cases involving refunds or additional tax assessments of $2,000 or less, exclusive of interest and penalties. Small claims hearings are informal; the judge hears testimony and receives such evidence as is deemed necessary or desirable for a just determination. Tax Court decisions, including those of the small claims division, may be appealed to the Appellate Division of the Superior Court.

B. Independent Review Boards

1. Overview

Independent review boards are quasi-judicial agencies, which are attached organizationally to either the executive or legislative branches but are separate from the tax department. Generally, independent boards have jurisdiction to review all rulings related to major taxes, including property tax valuations. Almost invariably, members of the review board are appointed by the Governor, with Senate confirmation required in about one-half of the states. The number of members ranges from two to eleven, with three to five being most common. Most states have some criteria for choosing

members, such as political party affiliation, expertise in tax matters, and residency.

Procedures before review boards vary widely, with approximately one-third providing both formal and informal hearings, one-third only formal hearings, and one-third primarily informal hearings. Testimony is either tape-recorded or recorded by a stenographer. Strict rules of evidence rarely apply. Very few review boards have separate small claims proceedings.

Judicial review of the review board's decision is always available, but may be lodged in an inferior court, or, in some cases, in the state's highest court. Ordinarily, review is limited in scope; it may be limited to the record, to questions of law, or to the record and any evidence specially admitted for good cause.

Taxpayers generally begin an appeal in such a review agency by filing a petition and paying a fee ranging from $2 to $40. While they need not be represented by counsel, few taxpayers appear pro se for formal hearings. Taxpayers generally may be represented either by an attorney or an accountant.

2. The United States Tax Court

The United States Tax Court provides a principal forum for contested federal tax claims.[37] Despite its name, the Tax Court is not part of the federal judiciary but is a legislative court, subject to Congressional appropriation and oversight.[38] In many aspects, however, it resembles the federal district courts.

Tax court judges are appointed for 15-year terms. Salaries are identical to those of federal district court judges. The rules of practice are generally similar to those used for nonjury trials

in the federal district courts, including similar evidentiary rules. Facts are usually stipulated by the IRS and the taxpayer prior to trial. Streamlined procedures are available for hearing cases involving less than $5,000; under these procedures there are no formal rules of evidence, no formal opinion, and no right of appeal.

The Tax Court judges sit primarily in Washington, D.C. although each judge travels 15 to 20 weeks a year. Cases are heard in about 100 cities and judges sit in each city for about two weeks at a time. Until recently, opinions were forwarded to the Chief Judge for review. As of March 1, 1983, Tax Court judges are authorized to issue bench opinions, which are not subject to review. While it is too early to assess the impact of this new power, judges expect it to be used primarily to expedite decisions in small claims cases.[39]

Uniformity in decisionmaking is insured through conferences among the judges. A judge's decision becomes final 30 days after it is rendered unless the Chief Judge directs that it be reviewed in conference. Generally that is done only when there is a conflicting opinion, when a case raises a significant issue of law that has not yet been decided, or when a judge seeks to overturn an earlier decision of the court.

Attorneys must apply and be accepted to practice before the Court. All others, including certified public accountants, must pass an examination before they are allowed to practice.[40]

3. Wisconsin

The Wisconsin Tax Appeals Commission provides a final example of an independent review board.[41] The Commission consists of five

part-time members, appointed for six-year terms by the Governor with the advice and consent of the Senate. The Commission handles all state taxes. It also reviews the assessment of property taxes on manufacturing property; these assessments are done by the State Department of Revenue on behalf of local governments. A taxpayer first meets with one of 11 conferees within the Department of Revenue for an informal conference. Afterwards, the conferee sends a formal notice denying, granting, or offering a compromise. A dissatisfied taxpayer may then appeal to the independent Tax Appeals Commission. Generally, one commissioner presides at a hearing, with the commissioners traveling to designated central locations around the state. Commissioners may give oral opinions, but generally do so only in small claims cases that do not involve significant questions of law or fact. The Commission usually issues written opinions that are circulated among the five members and signed by all five members. The members meet approximately once a month to discuss cases and to help achieve uniformity of outcomes.[42]

Attorneys, accountants and taxpayers may practice before the Tax Appeals Commission. The evidentiary standard is strict, generally following the Wisconsin Circuit Court rules.

Taxpayers who seek judicial review take their cases to the Circuit Court, then to the Wisconsin Court of Appeals. Final judicial review rests with the Wisconsin Supreme Court.

C. Internal Review Mechanisms

The detailed description in Chapter I, supra, of New York's current procedures provides a representative example of an internal

review system. For a brief description of other similar systems, for example, the States of Connecticut, Florida, Illinois, and Virginia, see Appendix I.

III. CRITICISMS OF THE NEW YORK TAX APPEALS SYSTEM

Numerous features of the existing State tax appeals system have come under sharp criticism. The complaints have taken several forms, but most involve either the fairness or efficiency of the process. Both of these qualities are obviously desirable in any public agency that determines the legal rights and liabilities of citizens. This Chapter examines and evaluates these criticisms.

A. Lack of Independence

As an internal review mechanism, the Tax Appeals Bureau operates within the Department of Taxation and Finance, which also oversees the administration and collection of taxes. This institutional linkage provides the basis for what has, over the years, been a persistent assertion about the New York system--its lack of independence and consequent bias in favor of the Department. The 1975 Governor's Task Force on Court Reform also highlighted the perceived unfairness of the system.[43]

This perception of unfairness in the determination of contested cases stems from the commonly believed tendency of human beings to favor themselves or their associates, a tendency that underlies the ancient common law maxim that no person should sit in judgment of his or her own case. Our governmental arrangements have typically insisted on a separation of powers which specifically includes the independence of the judiciary. An adjudicator who, because of personal or institutional associations, is perceived as favoring one side or another will not be trusted to determine im-

partially the facts and law that should determine the outcome of a controversy. Because tax appeals in New York are decided by an agency that is organizationally related to one of the parties in the dispute, perceptions and fears of bias are frequently asserted by taxpayers or their representatives.

To be sure, the structure of the Department of Taxation and Finance described in Chapter I should allay some fears. The Tax Appeals Bureau is separately organized and operated from the rest of the Department. Other institutional links, however, maintain the risk of bias and fuel perceptions of possible unfairness.

First, the findings of fact and conclusions of law by the Tax Appeals Bureau are mere recommendations to the Commission; final authority rests with the Commission. The President of the Tax Commission is also the Commissioner of Taxation and Finance. He is directly charged with the administration of that Department, which is the revenue collection agent for the State. Because the Department of Taxation and Finance is always one of the parties in the contested matters upon which the Commission ultimately rules, the President is required to sit in judgment of the very acts for which he and his subordinates are responsible. Moreover, the perception exists that his performance as Commissioner of Taxation may be evaluated by the amount of revenue (or the increase in revenue) collected under his tenure. While this criterion is an improper basis upon which to measure his performance, nonetheless a fear is that it may exert subtle, perhaps subconscious pressure.

Second, the Commissioner of Taxation is directly involved in the promulgation of regulations.[44] As President of the Commission,

he is then asked to apply these rules neutrally in cases before him. This confusion and melding of legislative and adjudicative functions increase the risk that the strict application of pre-existing regulations will be subordinated to broader policy considerations. While these policy considerations are properly his concern when he acts as a legislator in promulgating rules, they ought not influence him as a judge.

The two other Commission members also serve multiple roles. They, too, not only sit in judgment of tax cases, but also are responsible for the promulgation of regulations. Additionally, they "perform such other duties in the department as the commissioner of taxation and finance may prescribe."[45]

Third, risks of bias are inherent in the existing structure even apart from the double role of the Commissioner-President. Although the Tax Appeals Bureau is separately organized, it remains a component of the Department. Such influences as common institutional identity, transfers of personnel between divisions, mere physical proximity, and budgetary links provide opportunities for the development of bias and an institutional mindset.[46]

The perception of bias is further underscored by current institutional procedures that attach the Commission's name, and not the Department's, to official actions that are actually taken by the Department. These actions include, among others, the issuance of advisory opinions and warrants.[47] In addition, hearings in Albany and Rochester are held at offices located within the Department of Taxation and Finance. In New York City, hearings are held at offices next to the Department's.[48] It is hardly surprising

that under these circumstances any distinction between the Tax Commission and the Department becomes blurred to a taxpayer.

A final perceived bias grows out of the Department's inability to appeal from an adverse decision of the Commission, which makes some sense in the current structural scheme where the roles of "judge" and "prosecutor" are intertwined. The Department's inability to appeal reinforces taxpayers' perceptions that the Tax Commission is viewed as an arm of the Department, rather than being independent. If the Commission were truly independent, little reason would exist for denying the Department a right of appeal. Furthermore, although the Department's inability to appeal adverse decisions would superficially appear to favor taxpayers, exactly the opposite result is said to occur. Some persons assert that because the Department has no right of appeal, the Commission has a tendency to rule against taxpayers in close cases. This perceived source of bias, coupled with the limited review afforded by the courts, discussed infra, represents another area of taxpayer resentment.

To be sure, other than undocumented reports, no factual evidence supports specific instances of bias.[49] But the validity of the argument regarding the lack of independence of the Tax Commission and the resulting risk of unfairness ought not to turn on the presence or absence of such proof. Improper influences cannot be expected to manifest themselves in easily apparent or visible ways. Nor can the behavior of past and current Commissioners, hearing officers, and Tax Appeals Bureau Directors, no matter how impeccable, assure similar behavior by their successors. The best method--

indeed, the only method available to assure fair and sound determinations is to establish structures and procedures that are most likely to produce the desired results. Structures and procedures that avoid the appearance of injustice do more than simply that; they also represent the best means of achieving the reality of justice.[50]

Admittedly, the institutional arrangements that give rise to these problems regarding tax appeals are not unusual in administrative agencies, notwithstanding that such arrangements have been criticized since the creation of these agencies.[51] The New York tax appeals system follows the approaches of the State and the Federal Administrative Procedures Acts,[52] which require a separation within the agency of persons responsible for initiating, investigating, and prosecuting cases, from persons responsible for adjudicating them. Agency heads, however, retain final control of all aspects of the agencies' work, including administrative adjudication. This framework has been held to be consistent with the federal constitutional requirement of due process.[53]

Standing alone, however, the prevalence of this kind of administrative agency adjudication elsewhere cannot justify its retention in the context of New York tax appeals. Indeed, consideration of the reasons for the usual administrative arrangements and the inapplicability of those reasons in the context of the tax appeals system lead to exactly the opposite conclusion. This argument is developed in detail in Appendix II of this Report and is summarized as follows.

For the reasons stated earlier, the norm for all adjudication in our legal tradition includes an independent decisionmaker. In other words, the presumption is that no person should sit in judgment of him or herself. Departures from that norm require special justification. That justification has been found in the special need of some administrative agencies to maintain complete control over all aspects of administrative policymaking, including that policymaking which can emerge from administration adjudication. In this context, the most persuasive argument on behalf of a departure from the norm of an independent decisionmaker is that the separation of functions would unduly impair administrative responsibility and effectiveness.[54]

The validity of this argument, however, depends to a considerable degree on the nature of the functions of the particular administrative agency. The justification for deviating from the presumption in favor of the separation of powers is probably strongest in the case of an action-oriented administrative agency that was created to achieve broadly defined legislative goals,[55] such as discouraging unfair and deceptive practices, or "to insure the safe and sound conduct of the [banking] business . . . and . . . to maintain public confidence in such business and protect the public interest . . . ."[56] Under these circumstances, the agency's mission requires that new policy decisions be continuously made within the broad perimeters set forth by the governing legislation. If these policymaking powers cannot be effective if confined to executive decisions, adjudication should be under the control of the policymaker--the head of the agency.[57]

These arguments in favor of utilizing agency adjudication as a tool for policy implementation rely on important assumptions about the kind of policy which the agency should make and on the various tools it has available. As early as 1942, another State Commission[58] that looked at the issue of administrative adjudication throughout State government concluded that

> [this] argument is not applicable to the field of taxation. The administrative process in taxation is clearly separable from the adjudicative process; the former will have ended before the latter begins. Audit, assessment and related steps result in the controverted case, in a conclusion which is challenged by the taxpayers. Such controversies involve typical, justifiable issues of fact and law, and lend themselves peculiarly to adjudication of the ordinary type.[59]

As more fully developed in Appendix II, in the case of tax appeals the arguments offered in favor of agency control of the adjudicatory process do not justify any departure from the fundamental principle that adjudicators ought to be completely independent of and separated from the parties that argue before them. The values of fair and impartial adjudication outweigh any needs of the Department to the contrary and justify modifying existing administrative structures in order to create a more independent mechanism for deciding tax appeals.

Another factor in favor of an independent adjudicator involves the criteria by which a Commissioner of Taxation might be measured. The heads of other departments--motor vehicles, banking, health--are unlikely to have their performance measured by the outcome of any litigation they oversee. The Commissioner of Motor Vehicles, for example, is unlikely to be judged by the number of licenses that are revoked. By contrast, the Commissioner of Taxation

might be evaluated by the increase in revenue collected under his tenure, especially when a priority is rightfully placed on collecting taxes that already exist before entertaining the imposition of new ones. Accordingly, the Commissioner of Taxation may have a more personal stake in the outcome of litigation than is true in the case of his counterparts in other departments.

The sheer volume of contested tax matters is a further argument on behalf of the principle of an independent decisionmaker. Deviations from this principle are more tolerable when the number of affected individuals is small. Creating a separate and independent adjudicatory body may not become compelling until a certain minimum number of controversies can be predicted to occur from year-to-year. Creating an independent body will entail, at the least, transitional costs that may not be justified for other departments that do not experience the same level of litigation as does Taxation and Finance.

Finally, every citizen has an interest in the quality of the State's tax administration. In this respect, the tax system is more akin to the criminal justice system--part of the fabric that holds us together as a society--and is thus quantitatively and qualitatively different from other administrative agencies, which oversee more specialized areas of activity. Tax appeals demand a more exacting standard of impartiality and independence than that demanded of other agency adjudications, especially when voluntary compliance is the bedrock of the tax system.

The New Jersey and federal tax appeals systems, described in Chapter II, supra, originally resembled New York's internal review

mechanism in structure and were the subject of much of the same criticism now levelled against the New York system. Both were subsequently reformed after legislative investigations[60] in order to provide for a fully independent review of contested tax matters. New Jersey created a judicial tax court; the United States in 1924 created the U.S. Board of Tax Appeals, which eventually was transformed into the current legislative U.S. Tax Court.[61]

A brief history of the federal legislation is instructive because of the similarities with New York. The Tax Simplification Board, created by statute in 1921 to investigate the administration of the federal internal revenue laws, criticized the internal review mechanism then used for the adjudication of contested tax matters. It identified the lack of independence of the decision-making body from the revenue department as a fundamental weakness in the system. In its 1923 report, the Board stated:

> . . . it would never be possible to give to the taxpayer the fair and independent review to which he is of right entitled as long as the appellate tribunal is directly under, and its recommendations subject to the approval of, the officer whose duty it is to administer the law and collect the tax. As long as the appellate tribunal is part and parcel of the collecting machinery it can hardly maintain the attitude essential to a judicial tribunal.[62]

The parallels between New York's current situation and the federal situation at that time are noteworthy. A former Commissioner of Taxation and Finance, testifying in support of a New York tax court, stated in 1975 that "as a result of our present rate structure and the large number of taxpaying citizens on our rolls, New York has come to about the point which the Federal Government had reached in 1924"[63] (the year the U.S. Board of Tax Appeals was created).

Parallels in other states exist as well. In 1979, the Commission on California State Government Organization and Economy issued a report on the tax appeals system in California. Their report stated:

> Most tax appeals are adjudicated by boards which are directly or closely connected with the agencies which administer the taxes and the members of most of these boards are not necessarily required to possess expertise in tax matters. These and other features of the State's tax appeals system leave it susceptible (in theory, if not in actuality) to influences of untoward biases and incompetence. In addition, the appellate system is widely perceived to be lacking impartial and technically expert adjudicators.
>
> As a means of eliminating weaknesses in the present structure of the appeals system and improving taxpayer confidence in the fairness of the appellate process, the Commission recommends that a new system be established for adjudicating taxpayer challenges to assigned tax liabilities.
>
> The new system should incorporate these characteristics:
>
> Impartiality. The appellate body should be completely independent of those agencies and officials responsible for collecting taxes or administering tax laws.[84]

B. Inefficiency

Practicality requires that tax appeal procedures be measured not only against the principles of fairness, but also against the need for efficiency. Any realistic procedural framework must meet both these concerns.

Ideally, an efficient tax appeal system would be simple, rapid, and inexpensive. Such a system would resolve controversies within a reasonable period of time, minimize the use of time-consuming and costly formal procedures, and encourage the settlement of disputes. These attributes need not be inconsistent with fairness. For example, informal procedures may not only dispose of

simple cases more rapidly, but they can also reduce the need for professional representation, allowing taxpayers to pursue their rights even in cases where limited sums of money are at stake.

In other instances, however, fairness and efficiency may be in conflict. The desire to protect individual rights may result in procedures that are more complex and time-consuming than efficiency concerns would dictate. Conversely, efficiency considerations may suggest that significant deviations from the judicial model of adjudication with its often elaborate rules (juries, strict rules of evidence, etc.) are proper.

The New York tax appeals system has been criticized in the past for being inefficient. The following passage is from a 1974 report:

> There are extreme time delays throughout the conference and hearings process for all taxes, and the worst delays occur in the income tax area where cases which travel through the entire system remain unresolved for an average of over 10 years. The audit and protest follow-up process in the Income Tax Bureau takes an average of four years . . . . Once cases reach the formal hearing unit, they wait an average of three years before a hearing is held and it takes an additional 16 months--on average--before a determination is issued by the State Tax Commission.[65]

In 1975, the tax appeals system was revamped, partially in response to criticisms of inefficiency.[66] In recent years, such criticism has abated and some would argue that the system has achieved a reasonable measure of efficiency. In 1981, for example, the Commission closed 4,242[67] cases, while receiving 3,696 new matters. It reduced its case inventory by 8.4 percent--from 6,441 to 5,895.

Two recent studies of the Tax Appeals Bureau suggest, however, that serious problems of inefficiency persist. A recent report by the Office of the State Comptroller concluded that:[68]

> One of the goals of the tax appeals process is to provide a rapid resolution to taxpayer controversies with the Department. However, our review showed extensive delays occurring with the processing of protest through the pre-hearing conference and small claims and formal hearing processes . . . the resolution of the controversies showed that long periods of time elapse until tax matters are resolved: pre-hearing conferences require more than a year to close and Small Claims and Formal Hearings take more than five years to close.

The second study, a review of sales tax cases decided between June 1982 and April 1983, indicated that the average elapsed time between the notice of deficiency and hearing for these cases was 35 months and that the average elapsed time between hearing and decision was approximately 20 months[69]--a total of 55 months, close to five years.

The New York system does meet many of the criteria required for an efficient system. Most importantly, it begins with an informal conference mechanism that is designed to encourage the early, expeditious resolution of most disputes. It then provides increasingly formal procedures--hearings and Article 78 judicial review--to deal with disputes that cannot be otherwise resolved. Further, cases destined for hearing are sorted into formal and small claims hearings and less formal procedures are appropriately utilized in trying small claim matters. Nonetheless, several aspects of the current system may be inefficient and could be corrected, either in the course of other significant structural changes, or in some cases without any major changes in the basic framework at all.

All four of the topics discussed in Sections C, D, E and F, infra, bear on both the efficiency and the fairness of the tax appeals system. Sections C and D raise the most serious issues,

however, regarding the efficiency of the current system and that of alternative schemes.

C. Obstacles to Settlements

Settlements are essential to the efficient operation of a tax appeals system. A system that does not resolve a substantial majority of its disputes at an early stage is likely to be inordinately expensive, agonizingly slow, or both. Nor do settlements necessarily reduce the fairness of the system in any way; to the contrary, they may well enhance the uniformity with which taxpayers with legitimate legal claims are treated.[70] Expeditious settlements may also permit the State to collect revenues in disputed cases in a more timely fashion.

The value of procedures that facilitate settlements is predicated on the notion that not all tax disputes are, from the perspective of the State, equally worthy of full litigation. Certain disputes are neither essential to the tax department's litigation policy nor capable of clarifying the law in any meaningful way. Litigation of these cases may be time-consuming and expensive without having any sufficiently redeeming attributes.[71]

A tax department gains little from this type of litigation other than protecting the revenue at stake in the individual dispute. The value of the State's interest prior to litigation is no greater than the amount of the assessment discounted by the probability of prevailing should the dispute be litigated, less any costs that would be incurred. The value of the taxpayer's interest should be evaluated similarly. In this light, it is sensible for the system to be satisfied with a result that generally conformed

with the parties' valuation of their interests, which would take into account the hazards of litigation (that is, the probability of prevailing in court). Settlements achieved in this manner may well produce more uniformity among taxpayers than would the attempt to decide such cases entirely for one side or the other. The ability to settle cases based on a realistic appraisal of the litigation hazards faced by both a tax department and a taxpayer facilitates bilateral agreements at the administrative level, greatly enhancing the efficiency of the appeals process while preserving its general fairness.[72]

The power to settle cases on the basis of hazards of litigation is sometimes criticized as being susceptible to undue influence or unprincipled decisionmaking, although similar fears can also be raised about the conference mechanism. The experience of the IRS, however, which exercises precisely this power, indicates that appropriate procedural safeguards can be incorporated to prevent abuse. First, the IRS places authority for approving settlements within a small group of relatively high-level staff, who have no direct contact with the taxpayer and who review all proposed settlements based on only the paper record. Second, settlements actually approved are subject to further review in order to gauge the overall quality of the actions taken. This post-review may occur within the IRS District office or within the Regional or National offices.

The New York Department of Taxation and Finance has interpreted State law as prohibiting the agency from entering into settlements based on hazards of litigation.[73] In effect, the Department asks a taxpayer to pay voluntarily 100 percent of an assessment

notwithstanding that the taxpayer has a realistic chance of prevailing in litigation. A well-represented taxpayer will not be likely to make such a concession. The administrative process cannot efficiently dispose of these kinds of disputes if the Department cannot offer a realistic compromise prior to litigation based on an evaluation of its probability of success.[74]

As a matter of practice, cases involving factual disputes may sometimes be resolved in a manner that approaches a compromise based on hazards of litigation. In these cases, the Department will offer a resolution of factual issues that reflects the merits of each side's case. Legal issues, however, are never the subject of compromise.

At present, over 70 percent of disputes are resolved at the conference stage. In addition to those cases which involve factual disputes that are truly compromised, cases may also be resolved because of new factual material presented by the taxpayer, better communication of the law by the Department to the taxpayer, the disposal of cases in which auditors failed to follow established Departmental policy, or the fear by the taxpayer that an appeal to the Commission would not receive fair consideration because of perceived bias. In cases where only legal issues are in controversy, cases may be assigned for a hearing without a conference. The settlement process could be substantially improved if the Department were allowed to consider the hazards of litigation in negotiating settlements where legal issues in addition to factual issues are disputed.

Some taxpayers assert that another obstacle to settlement stems from what they perceive to be the lack of an independent Tax Commission. In the absence of such an independent forum, these taxpayers argue that the Tax Department may not be compelled to examine each dispute with the necessary degree of objectivity and impartiality to reach fair settlements. If, however, the Department were faced with the prospect of a full hearing before an independent agency, it would be more likely to take a detached look at a case, weigh its chances for success in that forum, and, if given the authority, offer the taxpayer a settlement based on a calculation of its relative chance to prevail.[75]

If the conference mechanism fails to resolve a matter, it is unlikely that it will be resolved before or during the hearing. Approximately 25 percent of cases that are not resolved in conference are disposed of prior to hearing. This figure, however, includes cancellations and withdrawals, as well as settlements.[76] This experience differs greatly from that of certain other jurisdictions, where a majority of cases which have not been settled at the conference level (or its equivalent) are settled before or during the hearing stage (or its equivalent).[77] The inability of the Department to be able to offer a settlement based on the hazards of litigation no doubt contributes to this difference.

Additionally, the use of hearing officers in New York decreases the opportunity for reaching a settlement. Once a case is scheduled for hearing in New York, a strong likelihood exists that it will, in fact, be tried. The system does not really afford another fertile opportunity for settlement at the hearing stage.

Hearing officers do not schedule pretrial or settlement conferences and do not view the attempted resolution of cases prior to hearing as their major role. Evidence from other jurisdictions, however, indicates that additional settlement efforts at the hearing stage produce significant results.[78] Finally, hearing officers, even if interested in achieving prehearing settlements, may lack the stature or leverage necessary to persuade the parties to consider compromise.

D. The Use of Hearing Officers

In the New Jersey Tax Court, the U.S. Tax Court, the Wisconsin Tax Appeals Commission, as well as in some other states, individual judges or board members actually hear cases. In New York, hearing officers take testimony and write recommended findings of fact and conclusions of law; these are forwarded to the Commission which alone has the statutory power to render a decision.

In the abstract, it would seem clearly preferable to have the final decisionmaker actually hear as well as rule on cases. First, from both a theoretical and practical viewpoint, it is better for a decisionmaker to see and hear live testimony rather than merely review a record (or a tape recording) and the recommendations of a third party who did see and hear the testimony. Second, "taxpayer confidence" is likely to be increased because litigants would confront the decisionmaker directly. Taxpayers are thus more likely to come away with the sense that they have had their "day in court." Finally, because judges or commissioners are likely to be highly-skilled, experienced, and well-paid tax experts, the quality of

decisionmaking should be better than in the case of even well-trained hearing officers.

The hearing officer format, on the other hand, does facilitate uniformity in the decisionmaking process. Because the New York State Tax Commission as a whole ultimately rules on every case, it speaks with a single voice. In other jurisdictions, individual judges may rule differently under similar fact patterns, until some higher court ultimately resolves an issue one way or another. As was discussed in Chapter II, supra, most jurisdictions have mechanisms to minimize the possible lack of uniformity.

The use of hearing officers has been defended on efficiency grounds. Their use does reduce the number of highly paid personnel in the system, but other aspects of the system are costly. In New York, a case is heard by a hearing officer, who must write up recommended findings of fact and conclusions of law in every case. This recommended decision is then reviewed by the formal (or small claims) supervising hearing officer, the post-hearing review unit[79] and, in some cases, by the Director of the Tax Appeals Bureau. The Director may write a dissent to accompany the hearing officer's recommendation to the Commission. These are then reviewed by the Secretary to the Commission and next by the Commissioners themselves, who may also need to consult the record. The hearing officer's opinion may then be sent back for redrafting.[80]

Under other formats, a single judge can hear a case and rule on it. A formal written opinion may or may not be required in all instances. The presiding judge can require the Court (Board) to sit en banc for cases of unusual importance. Additionally, he can

establish a system to review all opinions or just those which deal with novel or complex cases. Both New Jersey and the U.S. Tax Court use tools of this kind to achieve uniformity and to categorize and sort cases according to their significance. In New Jersey, for example, decisions in only a small percentage of cases are accompanied by full-blown written opinions; in other cases, letter opinions are deemed sufficient.

Questions have been raised regarding the ability of a reasonable number of judges (board members) to handle the Commission's current caseload efficiently if they were to hear individually each case. Currently, the Tax Appeals Bureau has five attorneys conducting formal hearings, three small claims hearing officers, and seven individuals in its post-hearing review unit. There is no apparent reason why an independent board consisting of five members that heard cases individually and which used other staff to hear and decide small claims cases could not handle the Commission's current case load.

Further, as discussed above, the use of judges rather than hearing officers may also significantly improve the probabilities for settlement at the hearing stage. In New Jersey, over 80 percent of state tax cases are settled after filing with the Court but prior to hearing. The New Jersey Tax Court judges take an active role in the settlement of cases and their stature and leverage no doubt facilitate the negotiations. Overall, a system that relied on individual judges to hear cases could well enhance both the efficiency and fairness of the tax appeals process.

E. Unclear Standards of Judicial Review

The actual standard of review of decisions of the Tax Commission employed by the Appellate Division is a matter of some confusion. Article 78 authorizes reversal of an agency decision if "affected by an error of law."[81] Thus, apart from the ordinary and reasonable deference a court should give to the interpretation of a statute or rule by the administering agency, all questions of law are open to review with no presumption in favor of the Commission's decision.[82]

With regard to questions of fact, New York courts seem to have sometimes abstained from reversing Commission conclusions unless "arbitrary and capricious."[83] This standard of review, however, seems to be at odds with the statutory scheme. The requirement that an agency decision be arbitrary and capricious before it may be judicially reversed is based on subsection (3) of the New York Civil Practice Law Section 7803. Conventional usage in administrative law employs the term "arbitrary and capricious" as a standard for the propriety of a decision committed to an agency's discretion.[84] In those cases, an arbitrary and capricious exercise of discretion is itself illegal and cause for reversal. But the kinds of determinations in most of the cases at issue here, those applying the law to facts developed on an administrative record, are typically judged under the substantial evidence test embodied in Subsection (4) of Section 7803. This subsection permits reversal unless "a determination made as a result of a hearing . . . is, on the entire record, supported by substantial evidence." Because all of the determinations of the Commission are decisions on a record,

they are evidently covered by that subsection. Therefore, a decision that is not "arbitrary and capricious," but one unsupported by substantial evidence on the whole record, is still subject to reversal. Nevertheless, judicial decisions reviewing determinations of the State Tax Commission have failed to maintain this distinction. Instead, the courts have developed a vague, but deferential standard of review.[85]

The "substantial evidence" test, when properly followed, is the correct standard of review, particularly if the decision being reviewed is that of an independent tax tribunal. A court should accord considerable deference to the factual findings of such a body. In addition to the advantages an administrative tribunal has in its first-hand observation of the presentation of evidence, the decisionmakers have the added benefit of their experience and expertise in considering questions of taxation. Moreover, the courts have no special competency in the area of taxation that justifies a more liberal standard of review than that ordinarily used to review administrative agencies. Therefore, while some statutory clarification might be in order to assure its faithful application, the "substantial evidence test" seems appropriate.

F. Absence of Accessible Precedents

A final aspect of the current system is its failure to provide taxpayers with a coherent and conveniently accessible body of decisions and opinions. A body of well-indexed cases helps assure predictability, uniformity, and fairness in the decisionmaking process and helps assure taxpayers of a principled and unbiased hearing.

It may also improve the efficiency of the system over time by serving to reduce the number of cases filed.

All Commission decisions are now published and distributed by the Department's Taxpayer Services Division to persons requesting them. The State has been unable, however, to obtain full publication of opinions by private publishing companies. If these companies are unwilling to publish Commission opinions in full, the State might consider publishing a volume of its own decisions that it would sell at cost.

IV. OPTIONS FOR CHANGE

Chapter III identified and analyzed a number of weaknesses in the existing system for resolving tax disputes. This Chapter sets forth seven policy options that represent possible responses to these problems. These options are not intended to be exhaustive. Clearly, the existing structure could be modified in countless ways. The options presented, however, generally focus on basic thematic issues and serve to identify various stages along a continuum of possible changes. The options are presented in the order of the magnitude of the structural changes that would be required in existing procedures, and range from preserving the status quo to the creation of a judicial tax court.

A. Option One - Preserve the Status Quo

The first option would be to preserve the status quo. As stated, there is little, if any, evidence of actual rather than perceived bias in the current system. While there have been isolated incidents cited by the tax bar and others that purport to show actual bias in the decisionmaking process,[86] it is clear that no one has been willing or able to identify any pattern of ongoing or systematic bias. Moreover, over recent years, the efficiency of the system has improved.

This option, however, would be unresponsive to taxpayers' fears of bias attributable to the absence of an independent forum. In effect, Option One would state that the present system ought to remain unchanged because there is no hard evidence that it produces unfair results despite its structure. In addition, Option

One would fail to address the increased efficiency that would likely result from granting the Department the clear authority to settle cases based on hazards of litigation.

B. Option Two - Statutory and Cosmetic Changes

Even if the State decides not to alter the structure of the appeals process, certain statutory and operating changes could be made to eliminate some characteristics of the current system which needlessly underscore taxpayers' perceptions of bias.

This process should begin with changes in the tax law to allocate appropriately responsibilities between the Commission and the Department. The current statutory framework makes the Commission both the tax assessor and collector--roles it no longer plays in any meaningful way. The Commission should give up all vestiges of these responsibilities and the statute should be amended accordingly. The Commission would issue regulations and decide contested tax matters--and nothing else. The Commission's name would be removed from advisory opinions and warrants. Another improvement in this same direction would be to hold hearings at offices not associated with the Department of Taxation and Finance. In addition, the Tax Commission, rather than the Department's Division of Taxpayer Services, should disseminate and publish all decisions. While these changes would not address more fundamental problems, they would mitigate at least some of the confusion over the roles of the Tax Commission which reinforces taxpayers' fears of unfairness in the appeals process.

C. Option Three - Settlement Authority Based on Hazards of Litigation

Even if all other features of the existing system remain unchanged, the State should consider granting the Department the clear authority to settle cases based on the hazards of litigation. Procedural safeguards similar to those used by the IRS would be required to prevent against abuse of discretion. This change is not mutually exclusive with the other options outlined in this Chapter and should therefore be considered regardless of whatever other changes might be made in the existing structure or procedures.

* * * *

The following proposals discuss changes that would eliminate the combination of functions now imposed on the Commissioner of Taxation and Finance, who is also the President of the Tax Commission. A wide range of proposals are available to achieve this result. The simplest of these alternatives--Option Four--would be to remove the Commissioner of Taxation from the Commission. The most sweeping change--Option Seven--would be to create a full-fledged judicial tax court. Options Five and Six present alternatives that would fall within these two cases.

D. Option Four - Remove the Commissioner of Taxation and Finance from the Tax Commission

The least disruptive change to the existing system would be to remove the Commissioner of Taxation and Finance from the Tax Commission and to replace him with a third person.

This proposal has a number of advantages. First, this change would remove some of the actual and perceived risks of bias in the adjudicatory process.

Second, the changes required would be relatively few and easy to implement and the increased cost would be small--the additional salary for a new Commissioner.

Third, it may well be that very different sets of skills are required to run a large revenue collection agency from those needed to rule on contested tax matters. There is no particular reason why an excellent Commissioner of Taxation and Finance should necessarily make an excellent "judge," or vice versa, and it may be unfair to impose both sets of responsibilities on the same person.

Fourth, this proposal would remove a significant and time-consuming burden from the Commissioner of Taxation, who must review transcripts and decide contested cases in addition to his other considerable administrative duties. Administering the Department of Taxation and Finance is obviously a full-time commitment and so is the adjudication of tax disputes. In an earlier age of less litigation and simpler tax laws, the Commissioner of Taxation might have been expected both to administer the Department and to rule on cases; today, however, these duties impose a heavy burden on the same person, no matter how hardworking or talented the Commissioner may be. Perhaps because of this concern the Tax Commission uses a procedure under which the other two members review all cases before they are sent to the Commissioner of Taxation and Finance. If these two agree, and they take pains to do so,[87] the Commissioner of Taxation does not have to spend time in a thorough review of the case; the temptation is to accede to the decision reached by the other Commissioners. The result could be that a taxpayer's case will receive full consideration by only two Commissioners. To the

extent that one of these persons might be a tax expert while the other is not, a taxpayer's case may receive a complete and thorough review by only one Commissioner.

Under Option Four, the Commission would maintain its rulemaking as well as its adjudicatory function. While this would perpetuate the present mix of judicial and legislative functions, there is an argument that the benefits of this overlap outweigh the drawbacks. The Commissioners, who would not be responsible for the collection of revenue, would review potential regulations from a "neutral" or even "pro-taxpayer" perspective. The Commission could thus insure additional outside input into the regulatory process and perhaps temper the occasional "overzealousness" of the Department.[88]

The greatest drawback of Option Four is that it would fail to achieve a complete separation of the Commission from the rest of the Department and would continue the mix of rulemaking and adjudicatory functions. The Commissioners, for example, might be asked to judge the validity of regulations that they had promulgated. Additionally, the Tax Commission and the Department of Taxation and Finance would remain two components of a single organization. Many of the subtle opportunities for the development of bias and an institutional mindset would continue. A taxpayer pursuing a claim through the administrative process might still perceive that the same entity is both a party in the dispute as well as the judge that will hear and rule upon the contested matter.

E. Option Five - Remove the Regulatory Functions from the Commission

A variation of Option Four would be both to replace the Commissioner of Taxation and Finance with a third-party and to remove the Commission from the regulatory process. This option would, by taking away the rulemaking role from the Commission, respond better than Option Four to concerns regarding violations of the doctrine of separation of powers. Under this proposal, tax regulations would be the sole responsibility of the Commissioner of Taxation, with a continuation of the present opportunities for public input into the process.

One variation of Option Five might require the State Tax Commission to have its own budget separate from that of the Department of Taxation and Finance. An independent budget would remove another possible source of control or leverage over the Commission and would achieve a further separation of the adjudicatory body from the rest of the Department. A more complete separation would be accomplished if the Commission were to be housed in a separate physical structure from the Department, a change that would entail additional expense.

These variations of Option Five constitute almost a complete separation of the Commission from the Department. Nonetheless, a weakness in Option Five is that taxpayers might still perceive the revamped Commission as a continuation of the past without fully appreciating the extent of change. Once at this stage along the continuum of possible changes, it may be sensible to take the next step and restructure the entire adjudicatory process rather than to make patchwork changes. Our tax system asks a good deal of its

taxpayers. For one, it relies heavily upon voluntary compliance. Such compliance requires a certain shared sense that the system "works"--which among other things means that it operates--and is perceived to operate--fairly. The tax appeals system can further this sense by providing a forum for disputes that is perceived to be unquestionably independent and impartial. Additionally, a restructuring of the process--Options Six and Seven--could involve other significant improvements, such as the replacement of hearing officers by "judges."

F. Option Six - An Independent Tribunal

At the core of this option is the creation of an independent tribunal located not in the judiciary, but rather in the legislative or executive branch. This independent forum would thus resemble the U.S. Tax Court or the Wisconsin Tax Appeals Commission in character. See Chapter II(B), supra. As a natural consequence of this proposal, the State Tax Commission would be abolished. The Department of Taxation and Finance would continue to be headed by a Commissioner, appointed by the Governor and serving at his pleasure. The Department, through the Commissioner, would continue to be responsible for the promulgation of regulations.

Once this basic structural framework has been postulated, a host of other issues remain to be decided. As discussed in Chapter II(B), supra, independent review boards can differ from one another in a variety of ways, including the formality of the proceedings, the qualifications of those who hear cases, the standards for appellate review, and so forth.

Some of these issues are discussed below. The creation of an independent tribunal does not necessarily require some, or all, of the additional changes that are discussed, but does provide an opportunity to address or re-think these issues.

1. Tribunal Membership, Appointment, Tenure, Etc.

The independent tribunal might consist of from five to seven individuals, appointed by the Governor with the advice and consent of the Senate. The exact number would obviously depend on the tribunal's expected workload. Each member of the tribunal should be required to be an attorney who has practiced law for at least ten years, and who possesses special expertise in tax matters. Organizations representing lawyers and accountants might be required to certify a candidate's expertise or at the least, to have the opportunity to provide some comment and evaluation.

Appointments would be for a term of years, say six years. In order to increase the prestige and status of the tribunal, the salaries and other benefits of its members should be equivalent to those received by judges of the New York State Supreme Court.

2. Tribunal Procedures

The tribunal would have a presiding member, designated by the Governor, who would bear primary responsibility for its administration. The tribunal would hear all case de novo, with full opportunity for the examination and cross-examination of witnesses. Ordinarily, the members of the tribunal would hear cases individually and would not rely on hearing officers. The presiding judge, however, could schedule cases of particular importance to be heard en

banc. Additionally, the presiding judge could require a case that was heard by one of the judges to be reviewed on the record by the tribunal as a whole. Tribunal members should conduct prehearing and settlement conferences to maximize the resolution of cases prior to hearing.

Tribunal members should not be required to render formal written opinions in all cases. Instead, formal opinions might be issued only in cases of some importance. In other cases, letter opinions would suffice. The presiding tribunal member could have the power to review formal opinions and the members might meet relatively often to discuss issues of mutual concern. Tribunal members would maintain both permanent locations and ride circuit as well, using available court room space to house them. Proceedings would be recorded on tape; stenographers would not be used. Tribunal members could then travel with only a single clerk to hear cases.

The presiding member would have the authority to appoint members of the bar with experience in tax matters to hear and rule on small claims cases. The taxpayer would have the right to choose the small claims forum if the dispute were within established jurisdictional limits. The rules and proceedings for small claims should be simple and designed to expedite cases; otherwise, a taxpayer would have no incentive to choose this forum. The choice of the small claims forum would constitute a waiver of the right to judicial appeal, but there could be an appeal to the tribunal in egregious cases.

The rules of practice and evidence would be adopted by the tribunal itself. The rules should provide the safeguards embodied in the State's Administrative Procedures Act, but they need not be as complex as the CPLR. The rules should be designed to encourage the simple, inexpensive, and rapid disposition of cases, while preserving fundamental requirements of fairness. Accountants as well as lawyers should be allowed to represent clients before the tribunal.

3. The Continuation of an Administrative Forum Within the Tax Department

It is essential that a forum for settlement continues to exist within the Department of Taxation and Finance itself, and the current conference format is well-designed to accomplish this end. The conference proceeding is a valuable tool of efficient management for the Department and a simple and inexpensive forum for taxpayers to air grievances, resolve certain factual issues, and reach settlements. Aggrieved taxpayers would first pursue their claims at conference. If a resolution could not be reached, the taxpayer would then file a petition with the independent tribunal.

One argument raised against an independent tribunal is that it would be less efficient than the current system. Because the Department would no longer be responsible for managing the hearing process, it would have no stake, as it does now, in seeing that a large percentage of cases were resolved in conference. The Department, with no interest in settlement, might force too many taxpayers to pursue their claims to the independent tribunal, overloading the system.

This argument, however, improperly characterizes the Department's interest in resolving disputes prior to hearing. Faced with the prospect of defending its position before an independent tribunal, with the manpower required, the Department should in fact have a real interest in disposing of cases at the conference level. The experiences of the federal government and other jurisdictions with independent tribunals indicate that revenue departments do in fact resolve a majority of cases through their internal, informal conference mechanisms. Nonetheless, if the Department does not, for whatever reason, facilitate the resolution of cases at the conference level, the independent tribunal will face an increased workload that could hamper its efficiency, a situation that might necessitate other changes to encourage more settlements. For example, the Department could be made liable for a certain percentage of a successful taxpayer's costs of litigation.

4. Right to Appeal

As noted earlier, the Department has no right to appeal an adverse decision, which makes some sense under the current system where the judge (the Commission) and the prosecutor (the Department) are components of a single agency. If a new independent tribunal were created, no compelling reason would exist to deny the Department the right to appeal decisions of the tribunal to the courts.

The inability to appeal an adverse decision is cited by the Department as a benefit of the current system which would be lost to taxpayers. There is some feeling among tax lawyers and accountants, however, that the Commission rules against taxpayers in

close cases for the very reason that the Department has no right of appeal. The relatively narrow scope of judicial review of Commission decisions might also encourage this practice because a case is unlikely to be overturned on appeal. Whatever the reality, characterizing the argument in this manner obfuscates a more fundamental point. It is preferable to afford both sides the right to appeal from a system that is structurally designed to increase the likelihood of fair and unbiased results, whether actual or perceived, rather than to speculate at who gains from the ramifications of the present system.

Under Option Six, the standard of appellate review, which perhaps needs statutory clarification, would be the current "substantial evidence" rule. For a full discussion of this issue, see Chapter III(E), supra.

5. Publication of Tax Appeals Decisions

The decision and opinions of the tax tribunal should be regularly published in full, in an easily accessible form, and suitably indexed. A tax tribunal that issued formal opinions in only selected, noteworthy cases might influence a private publisher to publish a volume of New York tax cases. If not, the State should do so and sell the publication at cost.

* * * *

Option Six would completely satisfy the requirements for a fully independent and impartial decisionmaking body. Moreover, the use of individual judges to hear cases would be an improvement over the current structure. Some of the additional features outlined could also enhance the overall quality and fairness of the system.

Whether Option Six would improve the efficiency of the current system is difficult to assess. The grant to the Department of full settlement authority along with the active participation of judges in the settlement process and the full publication of a coherent and accessible body of precedent should promote the goal of efficiency. In addition, as noted above, the Comptroller has recently criticized the overall efficiency of the current system. It seems clear that the existing system cannot be defended on efficiency grounds. Nonetheless, considerations of efficiency should not be allowed to divert attention from the more fundamental issue of fairness.

G. Option Seven - A Judicial Tax Court

The most far-reaching reform would be the establishment of a New York Tax Court. Such a court would be entirely separate from the Tax Department and would be located in the judicial branch of the government. This option would achieve in the most unambiguous and resolute fashion an independent and impartial forum for hearing tax disputes. A judicial tax court would avoid the charge that might be made against an independent tax tribunal--because such a tribunal would be located within either the legislative or executive branch of the government, it might still be viewed as sensitive to revenue raising considerations.

A tax court would be likely to bring other advantages, although many of these could be achieved under Option Six as well. The position of a judge, with the prestige that it implies, would be likely to attract highly talented and experienced individuals, promoting the quality of the entire process. A tax court would

likely operate so that judges would actually hear testimony rather than relying on hearing officers. The potential benefits of such a system over current New York practice have been addressed in Chapter III(D), supra. Additionally, a tax court would be more likely to develop a body of published precedents, which encourages fairness and efficiency. Finally, because the court would be within the judicial system, its operations would be subject to the scrutiny of the State Office of Court Administration. An office would therefore exist which was specifically charged with the task of reviewing the efficiency and effectiveness of the court's operations.

A tax court proposal poses some significant problems, however. Foremost is that its creation would entail a revision of the Judiciary Article of the State Constitution.[89] The adoption of a constitutional amendment and implementing legislation would be a cumbersome and lengthy process.

Moreover, a proposal for a full judicial court would also raise concerns regarding the wisdom of adding one more specialized court to the New York court system. Advocates of broad court reform generally view these specialized courts with disfavor. Further, there is opposition in some quarters to the use of full judicial courts to resolve disputes where less formal, less expensive, and less time-consuming forums are suitable alternatives.

These concerns are not easy to assess. Almost certainly, however, the pressure to adopt the rather complex CPLR or rules modeled on the CPLR would be substantial if a new tribunal were proposed in the form of a judicial court. For similar reasons, client representation by accountants, now common, might well be prohibited

in a tax court. For example, the New Jersey Tax Court allows accountants to represent clients only in its small claims division, where relatively small sums are involved.[90]

Because of these drawbacks the tax court alternative probably has less to recommend it than do other approaches. The experience of the U.S. Tax Court would seem to indicate that a court which is not part of the judiciary can nonetheless achieve both the perception and reality of a fully independent forum. In light of this experience, the disadvantages in pursuing a judicial court arguably outweigh the possible benefits that such a court might offer over and above a tribunal of the kind outlined in Option 6. Compared with a judicial tax court, the changes discussed under Option Six would correct the fundamental weaknesses in the current system, provide for decisionmakers who actually hear live testimony, and allow for a rapid, inexpensive hearing process, while avoiding the disruption and difficult ancilliary issues[91] that would be likely to arise in the creation of a judicial tax court.

H. Costs of Implementation

The additional costs, if any, imposed by each of the various options above are difficult to quantify accurately. An accurate estimate cannot be made until the details of a particular option are formulated with specificity, especially in the case of Options 6 and 7. Some generalizations are possible, however.

Options 2 and 3 would involve trivial costs to implement. Option 4 would involve the cost of an additional commissioner's salary, currently $51,200. Option 5 would probably not impose any costs over those imposed by Option 4.

Options 6 and 7 would also result in additional costs. Compared with the existing structure, certain economies of scale will be unavailable under Options 6 and 7. For example, expenses for services such as mailroom, personnel processing, secretarial support, library and housing--now incurred by the Department--would be borne by a new independent tribunal. While the Department would save some of these costs, it savings would likely be less than the costs incurred by the new tribunal.

It should be noted, however, that the State Tax Commission's appropriation for the 1984-1985 fiscal year is $2.56 million. While not all of these funds can be attributed solely to the Commission's adjudication function, certainly some of the existing appropriation could be re-allocated to an independent tribunal and would not represent "new money." Moreover, a new, independent body would almost certainly charge a filing fee. The revenues from these fees would help offset the tribunal's costs. Furthermore, if a new independent tribunal settled cases faster, and perhaps was more efficient generally, State revenues would be enhanced. Finally, increased revenue might result if the Department were given the right to appeal. These potential sources of revenue, however, would be offset to some extent if taxpayers were encouraged to litigate issues that they now concede. Additional costs might also result if the Department, because it would no longer be responsible for managing the hearing process, had less incentive to settle cases and thereby forced more taxpayers to pursue their claims than at present.

V. SUMMARY AND CONCLUSION

The current system of tax appeals fails to satisfy certain fundamental principles concerning the independence of decision-makers. This failure to comply fully with the precept of "separation of powers" fuels taxpayer perceptions of possible unfairness and creates inherent risks of actual bias in the adjudication of tax disputes.

This Report has not attempted to document any specific instances of actual bias. The validity of the argument regarding the lack of independence of the Tax Commission and the resulting risk of unfairness ought not to turn on the presence of such proof. The best method to assure fair determinations is to establish procedures that are most likely to produce the desired results. Such procedures not only improve perceptions of fairness; they are the best means of achieving actual fairness.

Other administrative agencies are marked by the same institutional arrangement that has been criticized in the case of tax appeals. Nonetheless, the arguments offered in favor of the Department's involvement in the adjudicatory process are outweighed by other principles and policy concerns.

The efficiency of competing systems is difficult to assess. The current system can be criticized on efficiency grounds; other systems, however, will not necessarily prove more efficient. The central issue, however, is one of fairness and taxpayers' perceptions of fairness; attention should not be inappropriately diverted from that issue.

A range of possible options exists to address the problems that characterize the current system. These options vary from relatively minor and cosmetic changes to more fundamental reforms of the procedural framework to meet fully the concern for a completely independent forum for the adjudication of tax disputes.

NOTES

1. The Tax Section of the New York State Bar has been the most vocal critic of the New York tax appeals system; this criticism dates back many years. See e.g., New York State Bar Association, Tax Section, Special Report on a New York Tax Court Proposal (March 11, 1975), and Statement of Martin D. Ginsburg, Chairman of the Tax Section, New York State Bar Association, before the Select Tax Force on Court Reorganization on Senate Bill 6760 and Assembly Bill 7802, November 20, 1975. More recently, see Comeau & Rosen, The Need for an Independent Tax Tribunal, 2 J. of State Tax. 259 (1983).

2. The Integration and Unification of the New York State Trial Courts: A Report by the Governor's Task Force on Court Reform 2 (1975). The Committee was chaired by Cyrus Vance. Among its distinguished members was the then Secretary of State, Mario M. Cuomo.

   In 1975, changes were made in the procedures for adjudicating tax disputes (see footnote 66 infra) but as discussed in Chapter III(A), infra, taxpayers still perceive the resulting system as unfair. Taxpayer perceptions of unfairness were one of the points noted in the Task Force's Report. See id. at 10.

3. Final Report of the Governor's Temporary Commission to Review the Sales and Use Tax Laws, p. 77 (1979).

4. Office of the State Comptroller, Report 84-S-104, Department of Taxation and Finance, Tax Appeals Bureau.

5. Among the various powers and duties of the Commission set forth in §171 of the Tax Law are the following:

   First. Make such reasonable rules and regulations, not inconsistent with law, as may be necessary for the exercise of its powers and the performance of its duties under this chapter.

   Second. Assess, determine, revise, readjust and impose the corporation taxes under articles nine and nine-a of this chapter, and on and after July first, nineteen hundred and twenty-one, have the power and perform the duties of the state comptroller in the collection of such taxes and the crediting of such taxes erroneously paid, as jurisdiction thereof is vested in such commission by section one hundred and seventy-six of this chapter.

   Third. On and after July first, nineteen hundred and twenty-one, have the powers and perform the duties of the state comptroller in relation to the assessment, determination and collection of the tax on transfers of property, as jurisdiction thereof is vested in such commission by section one hundred and seventy-six of this chapter.

   Fourth. On and after July first, nineteen hundred and twenty-one, have the powers and perform the duties of the state comptroller in the collection of the tax on transfers of stock under article twelve of this chapter, as jurisdiction thereof is vested in such commission by section one hundred and seventy-six of this chapter.

   Fifth. On and after July first, nineteen hundred and twenty-one, have the power and perform the duties of the state comptroller in the assessment, determination, review, readjustment and collection of taxes upon and with respect to personal

income, as jurisdiction thereof is vested in such commission by section one hundred and seventy-six of this chapter.

Sixth. Administer, supervise and enforce the tax on mortgages as provided in article eleven of this chapter.

Eleventh. Compile and publish statistics relating to state and local taxation.

Twelfth. Make investigations of the general system of state taxation from time to time.

Thirteenth. Inquire into the provisions of the laws of other states and jurisdictions; to confer with tax commissioners of other states regarding the most effectual and equitable methods of taxation, and particularly regarding the best methods of avoiding conflicts and duplication of taxation, and to recommend to the legislature such measures as will bring about uniformity of methods, harmony and cooperation between the different states and jurisdictions in matters of taxation.

Fifteenth. Have authority to compromise any taxes or warrant or judgment for taxes imposed by this chapter, and the penalties and interest in connection therewith, if the tax debtor has been discharged in bankruptcy, or is shown by proofs submitted to be insolvent, but the amount payable in compromise shall in no event be less than the amount, if any, recoverable through legal proceedings, and provided that here the amount owing for taxes, penalties and interest or the warrant or judgment is more than twenty-five thousand dollars, such compromise shall be effective only when approved by a justice of the supreme court.

Sixteenth. Have authority to compromise any taxes or any warrant or judgment for taxes imposed by this chapter and the penalites and interest in connection therewith of a tax debtor which is a domestic railroad corporation, or its trustee or trustees in bankruptcy, (1) in connection with its qualification as a railroad redevelopment corporation or the acquisition of its facilities by a railroad redevelopment corporation or (2) if said domestic railroad corporation is principally engaged in the transportation of passengers and at the time of said compromise it is the debtor in a reorganization proceeding pursuant to the United States bankruptcy act and said compromise is approved by the bankruptcy court.

Seventeenth. Have authority to release any real property or chattels real from the lien of any warrant for unpaid taxes upon such conditions as it may exact, if it finds that the interests of the state will not thereby be jeopardized. Such release may be recorded in the office of any recording officer in which such warrant has been filed.

Eighteenth. Have authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect of any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law or article two-e of the general city law, which agreement shall be final and conclusive, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact: (a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of this state, and (b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded. As used in this paragraph the term "person" includes an individual, trust, estate, partnership and corporation.

Nineteenth. Have authority to provide by regulation (1) that in any determination, assessment, collection, refund or credit under this chapter, a fractional part of a dollar may be disregarded unless it amounts to fifty cents or more, in which case it shall be increased to one dollar, and (2) that any person making a return, report or other statement required to be filed with it under this chapter may elect with respect to any amount required to be shown thereon, if such amount is other than a whole dollar amount, either to disregard the fractional part of a dollar or to disregard the fractional part of a dollar unless it amounts to fifty cents or more, in which case the amount (determined without regard to the fractional part of a dollar) shall be increased by one dollar provided, however, that such election shall not be applicable to items which must be taken into account in making the computations necessary to determine the amount required to be shown on any such return, report or other statement but shall be applicable only the final amount required to be shown thereon.

Twentieth. Have authority, of its own option, to abate any small unpaid balance of an assessment of tax, or any liability in respect thereof, under articles twelve-a, eighteen, twenty or twenty-one, if the tax commission determines under uniform rules prescribed by it that the administration and collection costs involved would not warrant collection of the amount due. It may also abate, of its own motion, the unpaid portion of the assessment of any of such taxes, or any liability in respect thereof which is excessive in amount, or is assessed after the expiration of the period of limitation properly applicable thereto, or is erroneously or illegally assessed. No claim for abatement under this subdivision shall be filed for any of such taxes

Twenty-first. Provide a hearing, as a matter of right, to any taxpayer upon such taxpayer's request, pursuant to such rules, regulations, forms and instructions as the tax commission may prescribe unless a right to a hearing is specifically provided for, modified or denied by another provision of this chapter. Where the request for a hearing is made by a person seeking review of any taxes determined or claimed to be due under this chapter, the liability of such person shall become finally and irrevocably fixed unless such person, within ninety days from the time such liability is assessed, shall petition the tax commission for a hearing to review such liability. After such hearing, the tax commission shall give notice of its decision to such person. The decision of the tax commission shall be reviewable by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made within four months after the giving of such decision.

Twenty-second. Be required to render a determination after a hearing, within nine months after submission of briefs subsequent to completion of such a hearing or, if such briefs are not submitted, then within nine months after completion of such a hearing. Such nine month period may be extended by the tax commission, for good cause shown, to no more than three additional months. If the tax commission fails to render a decision or determination within such nine month period (or such period as extended pursuant to this subdivision), the applicant for such hearing may institute a proceeding under article seventy-eight of the civil practice law and rules to compel the issuance of such decision or determination.

Twenty-third. Be required to publish and make available to the public all decisions and determinations of the tax commission rendered after a hearing. The tax commission may charge a reasonable fee for a copy of such a decision or determination.

Twenty-fourth. Be required to render advisory opinions with respect to taxes administered by the tax commission within ninety days of the receipt of a petition for such an opinion. Such ninety day period may be extended by the tax commission, for good cause shown, to no more than thirty additional days. Such advisory opinion shall be rendered to any person subject to a tax or liability under this chapter or claiming exemption from such tax or liability. Such advisory opinions, which shall be published and made available to the public, shall not be binding upon the tax commission except with respect to the person to whom such opinion is rendered provided, however, that a subsequent tax commission modification of such an advisory opinion shall operate prospectively only. A petition for an advisory opinion shall contain a specific set of facts and be submitted in such form as may be prescribed by the tax commission and subject to such rules and regulations as the tax commission may promulgate with respect to the procedures for submission of such a petition. Nothing herein shall be construed to limit or otherwise alter the rights of any applicant for a declaratory ruling pursuant to section two hundred four of the state administrative procedure act.

6. For the powers of the Commission, see id. The issuance of advisory opinions illustrates the dichotomy between what the statute requires and what happens in practice. Statutorily, the Commission is charged with the rendering of advisory opinions; in practice, the Commission is rarely, if ever involved, notwithstanding that all advisory opinions carry the name of the Tax Commission.

7. As chief executive officer of the Department, the Commissioner is responsible for every aspect of the Department's activities. The Commissioner is not necessarily involved in the early stages of the regulatory process. Initial drafts of the regulations are prepared by the Technical Services Bureau of the Department and are then reviewed by the Law Bureau and placed in final form. The Commissioner of Taxation and Finance may see a proposed regulation for the first time only shortly before it is to be considered for approval at a meeting of the Tax Commission.

8. 20 N.Y.C.R.R. §601.

9. While 90 days is the usual time period there are exceptions--Articles 12 (Stock Transfer Tax), 12-A (Gasoline Tax) and 21 (Highway Use Tax) provide for a 30 day period. In the case of some taxes, for example, the sales tax, a notice of determinaton and demand is issued rather than a notice of deficiency.

10. A taxpayer may obtain review of a refund application if a timely refund claim was previously filed, if the taxpayer did not previously file a petition for redetermination of a deficiency for the same taxable year, and if either six months have expired since the claim was filed or the Tax Commission has disallowed the claim in whole or part. The petition for review of a refund application must be filed within two years after the notice of disallowance was mailed, unless the taxpayer obtains a written extension from the Commission during those two years. A request for a refund may be made in a petition for redetermination of a deficiency for the same taxable year(s).

11. If a case raises only questions of law, and no questions of fact, under certain circumstances the case may be assigned for a hearing without a conference.

12. Conversation with John Sollecito, Director, Tax Appeals Bureau, August 5, 1982. Mr. Sollecito described the conferee's role in these circumstances as "acting as the taxpayer's counsel, but not his advocate."

13. Some members of the State Bar have indicated, however, that in practice the conferee usually defers to the auditor. See Comeau & Rosen, note 1 supra at 260. The Department, however, indicates that the reverse is true and that auditors will frequently not propose a resolution on their own initiative but will concur with one proposed by a conferee.

14. Subsections 15 and 16 of section §171 of the New York State Tax Law, note 3 supra, grant the Commission the authority to compromise taxes under certain narrowly defined circumstances. By inference, these sections would seem to deny the power to do so generally. Subsection 18, however, grants the Commission broad powers to enter into agreements with taxpayers relating to their liability. This section has not been interpreted by the Commission, however, as a grant of any type of settlement authority. Rather this section protects taxpayers from having an agreement or determination of the Commission reopened in the future, except under very limited conditions.

    Conversation with Saul Heckelman, Special Counsel to the Department of Taxation and Finance, December 8, 1983.

15. 20 N.Y.C.R.R. §601.8(b).

16. Letter from John Sollecito, Director, Tax Appeals Bureau, to the Legislative Drafting Research Fund of the Columbia University School of Law, 1982.

17. Small claims hearings are transcribed in cases where the taxpayer requests a transcript (a fee of $1/page is charged) or when an Article 78 proceeding for judicial review is taken from the Commission's decision.

18. This training program is overseen by the Department of Civil Service. Hearing officers are appointed to the program from a Civil Service list that results from an open competitive examination. Appointees are all attorneys, but with varying degrees of legal experience. More experienced lawyers face a somewhat shorter training program. Letter from Paul Coburn, Secretary to the State Tax Commission, February 14, 1984.

    Small claims hearing officers need not be attorneys. Qualifications include strong experience in accounting and auditing and a background in the technical and legal aspects of a particular tax.

19. 20 N.Y.C.R.R. §§601.9(c), 601.11(c).

20. N.Y. Tax Law §§689(e), 1089(e).

21. The post-hearing review unit consists of two supervisors, one in charge of sales and one in charge of income tax, and five technicians. They review decisions for technical accuracy, conformity with precedent, and general form.

22. 20 N.Y.C.R.R. §601.9(e).

23. N.Y. State Tax Law §171(22).

24. The Commissioners usually open the record only to check a fact or if there is a novel issue or large sum of money at stake. Conversations with Mark Friedlander, Commissioner, and Thomas Lynch, former Commissioner, New York State Tax Commission, August 24, 1982.

25. Commissioner Mark Friedlander states that this occurs in maybe one case out of a hundred, although there are no procedural barriers to more extensive contact. As an example, he mentions that on one occasion he needed to know whether Audit Division procedures would permit an entirely fresh audit of the matter in issue. Id. In about 15% of the cases, the Commission sends the decision back to the hearing officer for a rewrite. The hearing officer must rewrite the decision in accordance with the Commission's directions. Id.

26. N.Y. State Department of Taxation and Finance, Executive Memorandum E-130.

27. The complete texts of decisions of the State Tax Commission dating back to 1978 will soon be available through LEXIS, a computerized legal research service. Conversation with Paul Coburn, Secretary to the State Tax Commission, December 1983.

28. N.Y. CPLR §7803.

29. Id. §7803(3).

30. Id. §7803(4).

31. See, e.g., People ex rel Hull v. Graves, 289 N.Y. 173, 45 N.E. 2d 161 (1942); Grace v. N.Y. State Tax Commission, 37 N.Y. 2d 193, 371 N.Y.S. 2d 715, 332 N.E. 2d 886 (1975).

32. N.J. P.L. 1978, C. 33 N.J. S.A. 2A:3A-1 to 2A:3A-29, approved June 13, 1978.

33. N.J.S.A. 2A:3A-12.

34. See Lasser, Lawrence L., "Year One: New Jersey's Tax Court," New Jersey Lawyer, August 1980, p. 11.

35. Conversation with Lawrence L. Lasser, Presiding Judge of the New Jersey Tax Court, July 1983.

36. Annual Report of the Presiding Judge of the Tax Court of New Jersey for the Court Year Ending August 31, 1982.

37. Tax disputes can also be litigated in the district courts or in the Claims Court.

38. 26 U.S.C. §§7441 et seq.

39. Conversation with Charles S. Casazza, Clerk of the U.S. Tax Court, June 28, 1983.

40. 26 U.S.C. §7452.

41. Wisconsin Statutes Annotated §§73.01 et seq.

42. Conversations with Clayton Seth, Director of the Appellate Division, Department of Revenue, Wisconsin, and Joe Ziesel, Administrative Assistant to the Wisconsin Tax Appeals Commission, June 1983.

43. See note 2 supra.

44. See note 7 supra and accompanying text.

45. N.Y. Tax Law §170(5).

46. Currently all formal hearing officers, including the supervising tax hearing officer, have come to the Tax Appeals Bureau from outside the Department, although there is no requirement that they do so. This is not true of small claims hearing officers or those individuals in post-hearing review.

47. Statutorily, the Commission is responsible for issuing advisory opinions; in practice, however, the Commission rarely plays any role in their issuance.

48. In New York City, taxpayers arriving for a hearing confront a floor directory that lists "conferees" under the Department of Taxation and Finance, which further adds to perceptions about the tax appeals bureau's lack of independence.

49. Members of the State Bar have asserted that "in some cases the Commission has received unilateral input from the Law Bureau, without the taxpayer being notified of such input or being given the opportunity to respond." Comeau & Rosen, note 1 supra at 261-262. See also id. at 235. Arthur R. Rosen has also indicated that "several individuals are willing to disclose specific examples [of bias] in an appropriate forum." Letter from Arthur R. Rosen to Robert D. Plattner, Counsel to the Legislative Tax Study Commission, February 7, 1984.

    One explanation that has been offered for the lack of documented instances of bias is that taxpayers and their representatives are unwilling to come forward with specific allegations for fear that such complaints might lead to retaliation at some future time.

50. Statistics can be compiled to indicate what percentage of cases tried before the Commission are favorable, either in whole or in part, to the taxpayer. Such statistics, however, are not terribly meaningful unless they can be compared with the percentage of cases which should have been won by the taxpayer. This, of course, is an extremely difficult percentage to ascertain. Moreover, a high percentage of cases won by taxpayers is ambiguous and may merely reflect the Department's inability to settle cases based on hazards of litigation, see Chapter III(C) infra, or the failure to weed out cases that should not be tried. Alternatively, a high percentage of cases favorable to the Department would not necessarily be probative of bias.

51. See B. SCHWARTZ, ADMINISTRATIVE LAW 316 (1976); Hector, Problems of the CAB and the Independent Regulatory Agencies, in PERSPECTIVES ON THE ADMINISTRATIVE PROCESS 208 (R. Rabin ed. 1979).

52. N.Y. State Administrative Procedures Act §307(2); 5 U.S.C. §554.

53. See, e.g., Withrow v. Larkin, 421 U.S. 35 (1975). See also Oatman v. State Tax Commission, 50 A.D. 2d 1015, 377 N.Y.S. 2d 659, appeal dismissed, 429 U.S. 1067 (1975).

54. See J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS IN AMERICAN GOVERNMENT 172-76 (1978); R. LORCH, DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW 47-49 (1969); Auerbach, Some Thoughts on the Hector Memorandum, in PERSPECTIVES ON THE ADMINISTRATIVE PROCESS

234, 236-37 (R. Rabin, ed.); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev., 1667, 1678 (1974); 1 ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 44-71 (1942).

55. See, e.g., Stewart, note 54 supra at 1699.

56. N.Y. Banking Law §10.

57. The classic statement of the need to make policy through adjudication is found in S.E.C. v. Cheney Corp., 332 U.S. 194, 202-3 (1947). See also Diver, Policy Making Paradigms in Administrative Law, 95 Harv. L. Rev. 393, 400, 431-33 (1981); Cohen & Rabin, Broker Dealer Selling Standards: The Importance of Administrative Adjudication in Their Development, 29 Law and Contemp. Prob. 725 (1964).

58. The Commission was established on March 3, 1939 under Section 8 of the State's Executive Law to study the exercise of quasi-judicial functions by various entities of the State. Robert M. Benjamin served as Commissioner. The Report of the Commission is entitled Administrative Adjudication in the State of New York (1942).

59. Id. 270 (1942).

60. See, e.g., Tax Appeals in New Jersey: A Critique and Program for Legislative Action, Report of the Special Committee on Tax Appeals Procedure of the Senate of New Jersey, June 26, 1977; Report of Tax Simplification Board, H.R. Doc. No. 103, 68th Congress, 1st Session (1923).

61. The Board of Tax Appeals was created as an entirely independent agency in the Executive branch of the government. In 1942, its name was changed to Tax Court of the United States and in 1969, the Court was moved to the Legislative branch. For a detailed history of the U.S. Tax Court see Dubroff, The U.S. Tax Court: An Historical Analysis, 40 Alb. L. Rev. 7 (1975); see also Comeau & Rosen, note 1 supra at 267.

62. Report of Tax Simplification Board, H.R. Doc. No. 103, 68th Cong. 1st Sess. 4 (1923).

63. Statement of Joseph H. Murphy, President of the New York State Bar Association, before the New York State Legislature's Select Task Force on Judicial Reorganization, October 2, 1975.

64. "The Tax Appeals System in California," Commission on California State Government Organization and Economy, Summary (May 1979) (emphasis in original). Other current issues in New York also have parallels elsewhere. The Congress, for example, in creating the Board of Tax Appeals, was concerned about the lack of published precedents of the prior tax appeals system. See Section F, infra. The California report speaks to issues of expertise and timeliness as well as the issue of independence. Each of the policy issues faced by New York has been addressed by the federal government, New Jersey, California, and other jurisdictions that have examined their tax appeals procedures. See, e.g., Dubroff, note 61 supra.

65. Administrative Management and Systems Group, Organization and Management Unit, Division of the Budget, Study of Tax Department Conference and Hearing System (June 1974.) (emphasis in original); for other criticism, see Creating a New

York State Tax Court, statement of Martin D. Ginsburg, Chairman of the Tax Section of the New York State Bar Association, before the Select Task Force on Court Reorganization on Senate Bill 6760 and Assembly Bill 7802, November 20, 1975.

66. Prior to 1975, a case was handled by the same bureau of the Department of Taxation and Finance that originally assessed the tax (e.g., appeals in personal income tax cases were heard by the Income Tax Bureau). The 1975 changes established the Tax Appeals Bureau, initiated the prehearing conference, created a small claims procedure, and significantly increased the number of hearing officers.

67. 2,917 of these cases were resolved in conference, including 441 defaults; 1,325 were decided by the Commission.

68. Office of the State Comptroller, Report 84-S-104, Department of Taxation and Finance, Tax Appeals Bureau, pp. 5, MS-1. For the Department's responses to the report, see id. at A-3 to A-14.

69. This review was undertaken by Kenneth Gold, formerly of the staff of the New York Assembly Ways and Means Committee.

70. See generally L. Wright et al., COMPARATIVE CONFLICT RESOLUTION PROCEDURES IN TAXATION 1-101 (1968).

71. Id. at 11, 86-90.

72. Id.

73. See note 14 supra.

74. See Wright, note 70 supra at 87-88.

75. See id. at 70-101.

76. Conversation with John Sollecito, Director, Tax Appeals Bureau, December 1983.

77. See, e.g., the Annual Report of the Presiding Judge of the Tax Court of New Jersey for the Court Year Ended August 31, 1982. The Clerk of the U.S. Tax Court, Charles S. Casazza, indicated that 28,945 cases were closed by the Court in the 12 month period ending September 30, 1983. 22,899 of these cases were closed as the result of settlement between the parties. 2,524 were disposed of through trial and opinion. The remainder of cases closed consisted largely of dismissals. Conversation with Charles S. Casazza, Clerk of the U.S. Tax Court, December 1983.

78. Id.

79. The recent Comptroller's report on the Tax Appeals Bureau is critical of the role of Post Hearing Review in this multi-layered process:

"The reviewer is required to examine the entire Bureau file, including the hearing transcript or tapes, applicable briefs and evidence submitted by the taxpayer and the Department, and the recommended decisions of the hearing officers. The decisions are reviewed for format, to determine whether conclusions are supported by findings, and to determine consistency with past decisions, applicable laws, and

court rulings. The reviewer also proofreads the decision to ensure dates, dollar amounts, assessment numbers, tax years, and decision references are cited properly and to correct for grammatical errors. When the reviewer disagrees with a hearing officer's decision, he prepares a memo citing the differences for supervisory review. The review of small claims hearing requires about a day while formal hearing cases require three to four days. Additionally, all cases are reviewed by the unit supervisors and may also be reviewed by the Bureau's managers.

The Post Hearing review duplicates the work of the hearing officers as well as that of the supervisors of the Small Claims and Formal Hearing Units and the Bureau's managers. Although there may be a need for a review function, such reviews could be done on a test basis, focusing on items such as specific issues or certain hearing officers. With a supervisory review already in place, complete reviews of all cases does not seem be [sic] warranted. The existing post-hearing review staff could then be used in assisting the hearing units prepare decisions, or conduct hearings, especially since these units have significant backlogs.

Department officials disagreed that this function duplicates the responsibilities of others. Management considers the Post Hearing Review function vital to assure that decisions are informative, correct and consistent and that it offers an objective review by someone independent of the hearing process." Report 84-S-104, Department of Taxation and Finance, Tax Appeals Bureau, pp. 13-14.

80. Hearing officers' opinions are sent back for redrafting in a relatively small percentage of cases. Conversation with Paul Coburn, Secretary to the State Tax Commission, November 1983.

81. N.Y. CPLR §7803.

82. See N.Y. Jur. 2d, Article 78 and Related Proceedings, §15 (1980); Schwartz, note 51 supra at 596.

83. Grace v. New York State Tax Commission 37 N.Y. 2d 193, 371 N.Y.S. 2d 715, 332 N.E. 2d (1975).

84. "The arbitrary and capricious test is apparently regarded as more restrictive [with respect to the reviewing power of the court] than the substantial evidence rule; that is, something less than substantial evidence can support a determination as not being arbitrary or capricious. The difference in approach seems to be that the arbitrary or capricious rule is applied where there is no right to a hearing. It is said that the substantial evidence rule and the arbitrary or capricious rule are but two different expressions of the judicial power and duty to check administrative abuses, the former applicable where evidence is required and the latter applicable where there is no requirement of evidence. Thus where there is neither a statutory nor a constitutional right to a hearing, the determination is a matter of judgment or discretion confined by the legislative to the administrative agency and the aim of judicial review is to determine whether its action was arbitrary or capricious." 5 N.Y. Jur. 2d Article 78 and Related Proceedings, §31 at 393, 394 (1980) (citations omitted); see also Schwartz, note 51 supra at 605-06.

85. See note 31 supra.

86. See note 49 supra.

87. Conversation with Mark Friedlander, State Tax Commissioner, October 27, 1983.

88. Id.

89. New York Constitution, Article 6, §7.

90. N.J.S.A. 2A:3A-5 to 2A:3A-8.

91. A proposal for a judicial tax court would be likely to become entangled in the debate concerning other knotty, highly publicized issues involving the judiciary which are now before the Legislature, thus creating additional obstacles to its full consideration.

APPENDIX I

Survey of State Tax Appeal Procedures (Including the District of Columbia)

Alabama

The Department of Revenue mails a notice to the taxpayer stating the amount of tax due. The notice states a date for hearing any protest by the taxpayer. The hearing date cannot be less than 15 days from the date of the notice. After the hearing or the taxpayer's default, the Department assesses the tax and notifies the taxpayer by certified or registered mail.

Either the State or the taxpayer may appeal from the Department's final assessment. The circuit court of Montgomery County or the circuit court of the county in which the taxpayer resides has jurisdiction to hear the appeal in a de novo proceeding. The taxpayer bears the burden of proof. The taxpayer may appeal directly to the Supreme Court within 42 days from the entry of judgment.[1]

Alaska

The taxpayer may initiate the administrative appeal process by requesting either an informal conference or a formal hearing. The taxpayer has 60 days from the date of the mailing of the notice of assessment to apply for the informal hearing. If the Department of Revenue fails to make the requested change following the informal conference, the taxpayer may obtain a formal hearing by making request within 30 days from the date of the Deparment's decision.

Instead of the informal conference, the taxpayer may request a formal hearing within the same 60-day period. Following the formal hearing, the taxpayer has 30 days from the date of the decision to

appeal to the Superior Court in the county in which the taxpayer resides. The taxes must be paid within the 30-day period, even though an appeal is pending in the Superior Court.[2]

Arizona

Arizona has an independent board of tax appeals. The State Board of Tax Appeals has jurisdiction over all appeals from decisions of the Department of Revenue as well as over appeals involving property tax valuations. The Board is composed of six members appointed by the Governor. The members are selected on the basis of tax expertise.

The taxpayer has 90 days from the date of the notice of assessment to request a hearing within the Department. The Department must hold a hearing within six months. The hearing is informal although testimony is taken. The taxpayer has 30 days from the date of the Department's decision to appeal to the Board. The Board adheres to the rules of evidence followed by the courts.

The taxpayer has 30 days to appeal decisions of the Board to the Superior Court. Review is de novo. Deficiency assessments may be challenged without paying the disputed tax.[3]

Arkansas

A taxpayer seeking relief from a proposed assessment may elect to have the Commissioner of Revenue consider the case solely upon written documents furnished by the taxpayer or upon written documents and other evidence produced by the taxpayer at a hearing. The period for exercising either of these options runs for 30 days after the service of the notice of the proposed assessment. The

taxpayer initiates the appeal by filing a written protest under oath.

The Commissioner appoints a hearing officer to review all written protests, hold all hearings, and make written findings regarding the applicability of the proposed assessment. Decisions of the hearing officer are final unless revised by the Commissioner. The taxpayer has 20 days from the date of the mailing of the hearing officer's decision to request the Commissioner to revise the determination.

In order to pursue an appeal in the courts, the taxpayer must either pay the tax under protest and file suit within one year or post a bond and file suit within 30 days after posting such bond. Jurisdiction for the appeal lies in the Pulaski County Chancery Court or the Chancery Court of the county in which the taxpayer resides or has his principal place of business. The trial is de novo. Appeals are taken from the Chancery Court to the Supreme Court of Arkansas.[4]

California

The Franchise Tax Board administers the individual and corporate income taxes. Assessments regarding these taxes may be appealed to the California Board of Equalization. In addition to its review responsibility, the Board of Equalization administers the property tax laws and numerous other State taxes. The Board of Equalization is composed of five members, four of whom are elected from equalization districts in the State. The fifth member is the State Comptroller who serves in an ex officio capacity.

An assessment becomes final 60 days from the date of the assessment unless the taxpayer files a protest. The Franchise Board will grant an oral hearing at the taxpayer's request. An appeal from the Franchise Board's decision must be made within 30 days of the decision. The Board of Equalization's determination becomes final in 30 days unless the taxpayer or the Franchise Tax Board files a petition for rehearing.

To obtain judicial review, the taxpayer must pay the tax and sue for a refund. The taxpayer need not apply for a hearing but the taxpayer's claim for a refund claim must have been disallowed. A suit for refund may be maintained within one year from the date the tax was paid, within four years from the last date prescribed for filing the return, or within 90 days after notice of agency action disallowing the claim, whichever period is longest. If the Franchise Tax Board fails to mail notice of action on any refund claim within six months after the claim was filed, the taxpayer may consider the claim disallowed and bring suit.[5]

Colorado

The taxpayer may request for hearing on a proposed assessment from the Executive Director of the Department of Revenue within 30 days of the mailing of a notice of deficiency. The request for a hearing must be accompanied by a statement of the taxpayer's reasons and the amount of the requested changes in the deficiency. The Executive Director conducts the hearing. The taxpayer may file any pertinent briefs and affidavits.

Rejected refund claims may be appealed in the same manner as proposed tax assessments. As an alternative to the administrative

hearing, a taxpayer may sue for the refund in the district court if the Department disallows the claim. The taxpayer has two years from the date of the mailing of the notice of disallowance to commence suit. If the Department fails to act on the claim within six months, the taxpayer may proceed to court.

Final determinations of the Executive Director may be appealed within 30 days of the mailing of such determinations. The taxpayer must file any appeal in the district court in which he resides or has his principal place of business. Trial is de novo. The taxpayer bears the burden of proof with few exceptions. Within 15 days after filing a notice of appeal, the taxpayer must file a bond for twice the amount of the contested taxes.[6]

Connecticut

The administrative agency in charge of taxation is the Department of Revenue Services. The Commissioner of Revenue Services examines returns and assesses additional taxes. Taxpayers may apply for a hearing within 30 days of the mailing of the assessment. The Commissioner may grant or deny the requested hearing.

The taxpayer has one month from the Commissioner's hearing decision to file an appeal in the Superior Court for the district of Hartford-New Britain.[7]

Delaware

Delaware's independent board of tax appeals is named the Tax Appeals Board. It has jurisdiction over all appeals from decisions of the State Tax Commissioner. The Board is composed of five members appointed by the Governor. At least two members must be attorneys, one an accountant, and two must be laymen.

An assessment becomes final unless the taxpayer requests a hearing with the State Tax Commissioner within 90 days after the mailing of the notice. After the Commissioner's decision, the taxpayer has 90 days to appeal to the Tax Appeals Board. During the formal hearing, the Board takes testimony and makes a record of the hearing. Rules of evidence apply to the proceedings. Judicial review may be obtained if sought within 30 days of the Board's decision.[8] The scope of review is limited and does not involve a trial de novo.[9]

District of Columbia

The Tax Division of the Superior Court has exclusive jurisdiction over all appeals from tax assessments. The Department of Finance and Revenue makes the initial assessments. The taxpayer has six months after paying the tax and penalites to pursue an appeal in Superior Court. Decisions of the Superior Court are reviewable in the same manner as other decisions of the court in civil cases tried without a jury.

The Chief Judge of the Superior Court designates one Superior Court judge as Judge of the Tax Division. The proceedings are conducted in a formal manner. Federal rules of civil and criminal procedure apply.[10]

Florida

The Department of Revenue issues a deficiency determination. Taxpayers may protest a determination within 60 days of the mailing of the notice by requesting a hearing. The taxpayer may also request a conference for which a written protest is not required.

The conference is an informal proceeding with no official transcript. A request for a conference stays the time to petition for a hearing. If the taxpayer and the Departmental conferee cannot agree, the taxpayer has the right to proceed to a formal hearing. If the petition seeks review of a tax refund denial, the State Comptroller must be made a party.

The taxpayer has 60 days from the date of the Department's final order to seek review in circuit court. Judicial review is confined to a review of the record.[11]

Georgia

A taxpayer may contest any tax assessed by the Commissioner of Revenue by filing a written protest with the State Board of Equalization within 30 days from the date of notice of assessment. The Department makes a record of the hearing including any report by the hearing officer.

A taxpayer may also obtain a hearing to resolve a refund claim. If the claim for refund is denied by the Commissioner, or if the claim is not decided within one year from the date of filing, the taxpayer has the right to sue for refund in Superior Court. The taxpayer can appeal any other final order of the Commissioner by filing a bond to cover the tax in Superior Court. The appeal must be filed within 30 days from the date of the Commissioner's decision. The judicial proceeding is de novo.[12]

Hawaii

Hawaii has a tax court to handle tax appeals. The State has local boards of review to hear property tax appeals. The taxpayer

may, however, bypass the review boards and appeal directly to the tax court.

The Chief Justice of the Circuit Court of the First Circuit designates two judges to serve on the tax court. The hearing before the tax court is de novo. The court has all the power and authority of a Circuit Court.

The taxpayer must file a notice of appeal in writing stating the grounds of his objection within 30 days from the mailing of the assessment. The tax court holds meetings to hear and determine appeals not later than July 1 of each year.[13]

Idaho

Idaho's independent board of appeals is the Board of Tax Appeals. The Board has jurisdiction to hear appeals from final determinations of any tax liability made by the State Tax Commissioner. The taxpayer may file for review with the Board within 30 days from the date of the Commissioner's decision. As an alternative, the taxpayer can, within the same limitations period, seek court review by paying the tax.

Hearings by the Board are conducted in an informal manner, usually by one Board member. The Board takes testimony and makes a record of the proceeding. The Board also has a small claims division.

Review of a Board decision must be made within 30 days in the District Court located in the county of the taxpayer's residence or in the district court of Ada county. Judicial review is limited.[14]

Illinois

A taxpayer has 45 days after a notice of deficiency is mailed to file a protest with the Department of Revenue. The Department holds a hearing at the taxpayer's request. A denial of a refund claim may be appealed within the same limitations period.

The Department or any officer designated by the Director of the Department may hold hearings. The proceedings are informal and the Department is not bound by rules of evidence. The hearing officer's report is not binding on the Director.

A taxpayer may seek review in the Circuit Court of the county where he received a copy of the decision. Demand for payment of the tax cannot be made until the court proceedings have terminated. Review is limited to the record.[15]

Indiana

The Department of State Revenue administers, collects and enforces taxes. The taxpayer has 60 days from notice of a proposed assessment to file a written protest.

Court review may be obtained if such appeal is made within 90 days from the date the Department mails its decision. Appeals may be filed in the Circuit or Superior Court of the county in which the taxpayer resides or has his principal place of business. Under newly revised laws, there is no provision for appeal when the tax has not been paid. The Department is authorized to send out a demand for payment after denying a taxpayer's protest. If the tax is paid, the taxpayer may pursue the appeal in court to obtain a refund. The court hears the appeal de novo and without a jury and

after the hearing may order or deny any part of the requested refund.[16]

Iowa

Iowa has established an independent board to review tax appeals: the State Board of Tax Review. The Board has jurisdiction to review decisions of the Director of Revenue and local property assessors. The Governor appoints three members to the Board.

A taxpayer has 90 days to appeal a notice of deficiency to the Director of Revenue, who is authorized to grant a hearing. Appeal to the Board is available for 30 days after the Director's decision. The appeal before the Board may be heard by two members or before a hearing officer.

The taxpayer has the option of bypassing the Board and seeking judicial review of the actions of the Director. The petition must be filed within 60 days of the date of the Director's decision. A bond of twice the contested tax must be filed. Review is limited to the record.[17]

Kansas

Kansas' independent board is the Kansas Board of Tax Appeals. It is authorized to hear appeals from the Director of Taxation and the Director of Property Valuation. The Governor appoints the five-member board, one member from each congressional district.

Taxpayers may appeal from decisions of the Directors within 30 days. The Board fixes a time for the hearing. Before an appeal can be sought in the District Court, the taxpayer must file a motion for rehearing with the Board. Taxpayers may petition for judicial

review within 30 days from the Board's decision on the rehearing application. Review is not de novo, but is limited to the Board's transcript. The taxpayer must submit a bond for 125 percent of the amount of the contested taxes.[18]

Kentucky

Kentucky has established a Board of Tax Appeals to handle appeals from decisions of any agency of the State or county government. The Governor appoints three members to the board, one of whom must be an attorney.

An aggrieved taxpayer may file a petition of appeal within 30 days of the date of such decision in the Franklin Circuit Court or the Circuit Court where the taxpayer resides or has his principal place of business. Judicial review is limited to the record.[19]

Louisiana

The Louisiana Board of Tax Appeals hears all appeals for redetermination of assessments or determination of overpayments made by the Collector or Revenue of the State. The Board is composed of three members appointed by the Governor.

A taxpayer has 30 days from the date of the decision to petition the Board for review of an assessment. The limitations period for a disallowed refund claim is sixty days. If the Collector of Revenue fails to act within one year, the taxpayer may appeal the claim to the Board.

The taxpayer may appeal to the district court by posting a bond 1 1/2 times the tax and filing a petition within 30 days of the Board's decision. The court renders its decision upon the record.[20]

Maine

Taxpayers may petition the State Tax Assessor within 15 days after receipt of an assessment. The State Tax Assessor must reconsider his determination and hold an informal conference at the taxpayer's request.

The Assessor's decision on reconsideration with or without the informal conference constitutes final agency action. Taxpayers may appeal the decision to the Superior Court within 30 days of the agency's action. Review is limited to the record; in the absence of a record, the hearing on appeal is de novo. No tax, bond, or deposit need be paid or filed prior to applying for a refund or to seeking review.[21]

Maryland

Maryland's independent body designated to hear tax appeals is the Maryland Tax Court. The Court consists of five judges appointed by the Governor.

A taxpayer may apply to the Department of Assessments and Taxation for revision or abatement of any tax within 30 days of the notice of such assessment. The Department may affirm or modify the assessment, or set a date for an informal hearing. Application to the Department is a prerequisite to any appeal. Within 30 days of the Department's final action, the taxpayer may appeal to the Tax Court. The taxpayer must file a bond with surety approved by the Department.

Proceedings before the Tax Court are de novo and conducted in a manner similar to proceedings in courts of equity in the State. Upon the request of any party, the Tax Court may submit issues of

fact for jury trial before a court of law in the jurisdiction where the taxpayer resides. Any party to the proceedings may appeal from the Tax Court's final order directly to the Court of Appeals. Review is limited to the record.[22]

Massachusetts

The State has an independent board, the Appellate Tax Board, to hear appeals from decisions of the Commissioner of Revenue. The Appellate Tax Board has five members appointed by the Governor. The Board is located in the Department of Revenue, but not subject to the control of the Department.

A taxpayer aggrieved by an assessment may apply to the Commissioner for abatement of the tax within three years from the last day for filing the return for such tax, within two years from the date the tax was assessed, or within one year from the date the tax was paid. The Department has a Bureau of Appeal and Review that is authorized to hold conferences relating to proposed additional assessments and to conduct hearings relating to tax abatements. The Chief of the Bureau of Appeal and Review reports to the Commissioner of Revenue.

The taxpayer has 30 days in which to request a hearing from the Bureau of Appeal and Review. After any hearing or the expiration of the 30 day notice period, the Bureau Chief decides whether relief should be granted in whole or in part.

If the Bureau Chief refuses to abate a tax, the taxpayer may appeal to the Appellate Tax Board within 60 days after the date of notice of the decision. If the Department fails to act within six months, the application is deemed denied.

A hearing will be granted upon the request of any party. Parties may also request that all proceedings be officially reported by a stenographer. If no party requests that the proceedings be reported, all parties will be deemed to have waived all rights of appeal to the Supreme Judicial Court concerning the admission or exclusion of evidence and the sufficiency of the evidence. The right to appeal questions of law raised by the pleadings, an agreed statement of facts, or the Board's report, will not be deemed waived.

Taxpayers may appeal to the Supreme Judicial Court in accordance with the Massachusetts Rules of Appellate Procedure. The decision of the Board is final regarding findings of fact. In addition, the court will not consider any issue of law which was not raised before the Board.[23]

Michigan

Michigan has an independent administrative body to hear tax appeals: the Tax Tribunal. The Tax Tribunal is a quasijudicial agency located in the Department of the Treasury. Its rules are similar to those of the U.S. Tax Court. In property valuation disputes, a taxpayer invokes the jurisdiction of the Tax Tribunal by filing a written petition not later than June 30 of the tax year involved. In all matters, the taxpayer must file a written petition within 30 days after a final decision. If the tax is paid subsequent to the filing of the petition, the taxpayer may amend his petition to seek a refund. If the date set by law for payment of taxes has passed, a final decision will not be made until the taxes

are paid. A decision must be made by the Tax Tribunal within a reasonable period.

An appeal from the Tribunal's decision is by right to the Court of Appeals within 20 days after the entry of the order or decision appealed from or within 20 days after denial of a timely motion for rehearing. Scope of review is limited. The court is bound by the factual determinations of the Tax Tribunal.

The Tax Tribunal has two divisions: (1) the Residential Property and Small Claims Division; and (2) the Entire Tribunal Division. Hearing referees may hear cases and prepare proposed findings of facts and conclusions of law to be submitted to the entire Tribunal.

The Small Claims Division is informal. The proceedings are conducted without counsel on either side. The Tribunal supplies the forms and service of process. The hearing is short and a decision is rendered in a matter of weeks. A taxpayer has no appeal, but decisions of a hearing officer may be reheard by a Tribunal member. The entire Tribunal hears matters in a three-member panel in Lansing or Detroit.

Minnesota

Minnesota has an independent agency to hear tax appeals called the Tax Court of Appeals. The agency is the final authority for all questions of law and fact arising under the tax laws. The Governor appoints the three members to the Tax Court.

The taxpayer may appeal a decision of the Commissioner of Revenue within 60 days of such decision. The hearing is de novo. The

Tax Court follows the rules of procedure for the district courts of Minnesota.

Minnesota has a small claims division that holds informal hearings. These decisions are not appealable.

Certiorari by the Supreme Court is available upon petition of any party within 60 days of the Tax Court's decision. Review is limited to questions of Tax Court jurisdiction, sufficiency of the evidence, and conformity of the order with the law.[25]

Mississippi

A taxpayer may appeal an action of the State Tax Commissioner to the Board of Review. The Board of Review is staffed by the chiefs of six of the major divisions of the Tax Commission. The appeal must be filed within 30 days from the date of the disputed action. The Board of Review renders a decision within 30 days of the hearing. If the Board of Review determines that the taxpayer owes tax, the taxpayer has 30 days to pay. Within this period, the taxpayer may appeal to the Board of Review's full Tax Commission.

The taxpayer's written petition to the Tax Commission must state the taxpayer's reasons for requesting a hearing. The State Tax Commission considers the petition, grants a hearing, and notifies the taxpayer of the time and place. After the Tax Commission's determination, the taxpayer has 30 days to file a petition in the Chancery Court. The petition must be accompanied by a bond in a sum double the amount in controversy.[26]

Missouri

The Missouri Administrative Hearing Commission hears appeals from all orders of the Director of Revenue. The Administrative Hearing Commission is assigned to the Department of Consumer Affairs, Registration and Licensing. The two Commissioners are appointed by the Governor.

The Department of Revenue is also authorized to hold hearings. A taxpayer has 30 days from the date of the Department's action to appeal. The taxpayer need not meet any formal procedural requirements when filing the complaint.

Appeals are heard by the Court of Common Pleas. Application must be made within 30 days of the Commission's decision. Court review is confined to the record.[27]

Montana

The Montana State Tax Appeal Board has jurisdiction to hear appeals from county tax appeals boards concerning property taxes, and from the Department of Revenue. The three members, who must have knowledge of tax matters, are appointed by the Governor.

A taxpayer has 20 days to appeal decisions of the county tax appeal board and 30 days to appeal decisions of the Department of Revenue. The hearing is conducted in accordance with the provisions of the Montana Administrative Procedure Act.

The taxpayer may obtain judicial review by filing a petition in District Court within 60 days of the Board's determination. Review is upon the record, but the Court may, if good cause is shown, permit additional evidence to be introduced. In cases of alleged

procedural irregularities not shown on the record, the Court may admit additional evidence.[28]

Nebraska

A taxpayer wishing to contest a proposed assessment made by the Tax Commissioner may appeal to the State Board of Equalization and Assessment. The State Board is composed of the Governor, Secretary of State, Auditor of Public Accounts, State Treasurer and Tax Commissioner. The Board has the authority to review and equalize property assessments as well as to hear appeals from income tax deficiency assessments.

The taxpayer has 30 days after the date of mailing of the Tax Commissioner's notice in which to request a hearing. The Board must set a hearing date at the earliest possible date but in no event can it be more than 90 days after the filing of the notice of appeal. Proceedings before the Board are governed by Article 9--Rules of Administrative Agencies. A taxpayer also has the option of bypassing the Board and seeking judicial review. The appeal is taken to the District Court by filing a petition within the same 30-day limitations period.

Following a decision of the Board, a taxpayer may seek judicial review within 30 days from the Board's decision. Judicial review is without a jury and based solely upon the record of the agency, whether the appeal is from a Commission decision or a State Board of Equalization and Assessment decision. No court may enjoin the collection of any tax.[29]

Nevada

The Nevada Tax Commission heads the Department of Taxation. The Tax Commission consists of seven members appointed by the Governor. The Governor is an ex officio, non-voting member of the Commission. The Tax Commission may review all decisions made by the Executive Director of the Department of Taxation.

A taxpayer initiates the review process by filing a petition for a redetermination within 30 days after receiving a deficiency determination. The Department must consider the determination and grant the taxpayer an oral hearing at his request. The Department's resulting order becomes final within 30 days, but the Department may grant an extension of up to 15 days if the taxpayer appeals to the Tax Commission. Appeals to the Tax Commission must be filed within 15 days after the receipt of the Department's decision. Hearings before the Tax Commission are conducted according to the provisions of the Nevada Administrative Procedure Act.

The Administrative Procedure Act provides for judicial review within 30 days after service of the final decision. The review is without a jury and is based solely upon the record, although the Court may for cause, hear additional evidence.[30]

New Hampshire

The Board of Taxation hears appeals concerning all tax matters, including equalization of valuations. The Board consists of three members, appointed by the Supreme Court and commissioned by the Governor.

A taxpayer may appeal to the Board or petition the Superior Court for a hearing within 60 days of the decision of the Commis

sioner of Revenue Administration. The proceedings before either body are de novo. Electing to bring an action before the Board is deemed a waiver of any right to bring an action in the Superior Court.

The taxpayer may appeal the Board's decision within 30 days by submitting an appeals notice to the Supreme Court. The Supreme Court is bound by the Board's finding of fact. Review is limited to questions of law. The review procedures thus provide the taxpayer with a de novo hearing before the Board or in court. The taxpayer is not entitled to a de novo administrative hearing and de novo court trial on the same issue.[31]

New Jersey

New Jersey's Tax Court was established in 1978 and began operating on July 1, 1979. The Tax Court has jurisdiction to hear and determine appeals from decisions of the County Board of Taxation and from decisions of the Director of Taxation. A taxpayer has 45 days to appeal actions of the County Tax Board and 90 days to contest actions of the Director of Taxation.

The Tax Court consists of eight judges, all with tax expertise. The Court also has a small claims division that holds informal hearings. The Court began hearing cases in September 1979. Determinations of the Tax Court may be appealed as of right to the Appellate Division of the Superior Court.[32]

New Mexico

Taxpayers may file a written protest with the Taxation and Revenue Department. The Director may provide for an informal con-

ference before setting a hearing date or acting on a claim for a refund. The protest must be filed within 30 days of the date of the mailing of notice of assessment. A taxpayer whose refund is denied may request a hearing within the same limitations period. The Director has 30 days to notify the taxpayer in writing of the decision and of the right to appeal to the Court of Appeals. The taxpayer must pursue the appeal in court within 30 days of the decision. Review is confined to the record.

If a refund claim is denied, the taxpayer may, instead of requesting a Departmental hearing, commence a civil suit in District Court. The same 30 day limitations period applies to such suits.[33]

North Carolina

The independent review board that handles tax appeals is the Tax Review Board. It is composed of the State Treasurer ex officio; chairman of the Utilities Commission, ex officio; a member appointed by the Governor, and the Secretary of Revenue (for certain limited purposes).

The taxpayer initiates the review process by requesting a hearing before the Secretary of Revenue within 30 days of receiving a proposed assessment. A taxpayer cannot obtain a hearing before the Tax Review Board without first having a hearing before the Secretary. Within 30 days of the Secretary's decision, the taxpayer must file a notice of intent to appeal with the Tax Review Board. The written petition is due 60 days after the filing of the notice. The same procedure applies to the denial of refund claims.

A taxpayer who chooses can pay the tax and within 30 days of the Secretary's decision bring a civil action instead of seeking administrative review with the Tax Review Board.

A taxpayer aggrieved by the Board's decision can file an appeal in Superior Court within 30 days of the Board's action. Under the provisions of the Administrative Procedure Act, review is limited to the record.[34]

North Dakota

Taxpayers have a right to a hearing before the Tax Commissioner following any determination of additional liability made by the Commissioner. A taxpayer may also apply for a revision of a tax at any time within three years after the return was filed. The Tax Commissioner must hold a hearing if he determines that the tax is incorrect or excessive. He is authorized to resettle the tax.

The taxpayer may appeal any final agency action according to the provisions of the Administrative Agencies Practice Act. The taxpayer has 30 days from the receipt of notice of the action to appeal to District Court. The Court will hear the appeal and review the evidence in the record.[35]

Ohio

The Ohio Board of Tax Appeals hears appeals from the County Board of Revision (property tax), the Tax Commission, and the Commissioner of Tax Equalization. The Board is composed of three members appointed by the Governor. The Board of Appeals obtains a transcript of the proceedings before the Tax Commissioner or the Commissioner of Tax Equalization. A taxpayer must file a petition with the Tax Commissioner within 30 days after service of the notice of assessment. Following a hearing, the tax becomes due and payable within three days. The taxpayer has 30 days after the Tax Commissioner's decision to appeal to the Board.

The Board may order the appeal to be limited to the record, but upon the application of a party, the Board can order the introduction of additional evidence.

The taxpayer may appeal to the Supreme Court or to the Court of Appeals for the county in which the property is located or in which he lives. The appeal must be taken within 30 days of the Board's decision. If upon the record the Court finds that the decision of the Board was lawful and reasonable, it must affirm the decision.[36]

Oklahoma

A taxpayer may protest an additional assessment within 30 days after the notice is mailed. If the taxpayer requests a hearing, the Commission must grant the hearing and advise the taxpayer of the date. The taxpayer may appeal any order of the Commission directly to the Supreme Court of Oklahoma by filing a written notice with the Tax Commission of his intention to appeal within ten days of the order. Within 30 days from the Commission's order, the taxpayer must file a petition with the Clerk of the Supreme Court. Payment of the tax is a jurisdictional prerequisite. In lieu of payment, a taxpayer may file a bond with the Commission in double the amount of the tax.

The taxpayer has the option of paying the tax and suing for a refund, within the same 30-day limitations period. This judicial remedy is available without exhausting any administrative remedies, provided that the taxes are an unlawful burden on interstate commerce, or that their collection violates a congressional act or a

provision of the federal constitution, or that jurisdiction is vested in the federal courts.[37]

Oregon

The Oregon Tax Court is a court of record and of general jurisdiction. The Court has judicial authority to hear and decide all questions arising under the tax laws. All proceedings before the Court are original proceedings, tried de novo without a jury.

In the case of proceedings to set aside an order of the Department of Revenue, the issues of fact and law are restricted to those raised by the parties before the Department. The Court promulgates rules of practice and procedure for the conduct of proceedings, except with respect to the small claims divison, which conforms to the rules of equity practice and procedure in the State.

A judge of the Tax Court is elected for a term of six years. A judge must be an attorney who has practiced for at least three years preceding his election.

A taxpayer may pursue an appeal in the Small Claims Division of the Tax Court. Hearings are informal and judgments cannot be appealed.

Appeals to the Tax Court must be filed within 60 days after a copy of the Department's order has been served on the appellant. The appeal may include issues of law which cannot be raised before the Department. If the Department fails to respond to the appeal within 12 months, the appeal is considered denied and a taxpayer can bring suit in the Tax Court. The Tax Court may, as a condition

of staying collection of the tax, require the posting of a bond sufficient to guarantee the payment of the tax.[38]

Pennsylvania

The Board of Finance and Revenue hears appeals from the Department of Revenue. A taxpayer may first file a petition for review with the Department within 90 days of any assessment. The Department must dispose of the petition within six months. The taxpayer has 90 days from the date on which the Department of Revenue mails its decision in which to request review by the Board. The Board's members are the State Treasurer, the Attorney General, the Secretary of the Commonwealth, the Auditor General, and the Secretary of Revenue. The Board must act on all appeals within six months.

The Board designates monthly meeting dates for hearing oral arguments, but a taxpayer may elect to have his case decided on the record. The oral presentation is relatively informal. Either immediately following oral argument or within a few days, the Board discusses the case and votes. Decisions are mailed shortly thereafter.

The taxpayer may appeal from the Board's decision within 30 days to the Commonwealth Court. The hearing is de novo, except that the taxpayer may only raise those questions argued below.[39]

Rhode Island

A taxpayer may petition the Tax Administrator for a redetermination of a deficiency assessment within 90 days of the mailing of such notice. The petition may also assert a claim for refund.

No petition may be denied without an opportunity for the taxpayer to present his case during a hearing. The taxpayer may appeal the Tax Administrator's decision to the Sixth Division of the Division Court. The Court is authorized to determine the correct amount of the liability. Unless the taxpayer files a bond with the Tax Administrator, a pending review in court will not stay collection of the tax.[40]

South Carolina

A taxpayer may apply to the Tax Commission for revision of an assessed tax at any time within one year from the filing of the return or from the date of the notice of the assessment. The Commission is authorized to hold a hearing and redetermine an incorrectly assessed tax. An aggrieved taxpayer may pay the tax under written protest and bring an action within 30 days for a refund.[41]

South Dakota

A taxpayer wishing to challenge the assessment of a tax must pay the tax under written protest. Within 30 days after payment and the filing of a notice of protest, the taxpayer must serve a petition on the Secretary of Revenue. The petition must be verified and state the legal and factual reasons for the taxpayer's claim. Upon receipt of the petition, the agency proceeds under the "contested case provisions" of the South Dakota Administrative Procedures Act. A taxpayer is entitled to judicial review if filed within 30 days of the decision. Review is conducted by the courts without a jury and is confined to the record.[42]

Tennessee

The Department of Revenue provides an opportunity for a hearing at the taxpayer's request if made within ten days of the Department's disputed action. The Commissioner of Revenue may personally hold such hearings or designate a hearing officer. The Commissioner may utilize prehearing conferences to simplify issues. An informal disposition may also be made of any contested action.

If a formal hearing is held, the hearing officer submits his fact-findings and conclusions of law to the Commissioner within a reasonable time after the conclusion of the hearing. If the Commissioner concurs, he issues the same findings. However, he may upon review of the record make such conclusions as the record justifies.

A taxpayer is required to pay the tax under protest in order to pursue an appeal to courts. The taxpayer may at any time within six months after payment sue for a refund. Suit is brought against the collection officer.[43]

Texas

The State Comptroller administers the various State taxes and makes assessments. A person may contest an assessment by filing a petition for redetermination with the Comptroller within 30 days of the date of the notice of the assessment. Taxpayers are entitled to a hearing at their request. An order of the Comptroller becomes final 15 days after service on the taxpayer. A taxpayer may also obtain a hearing on a refund claim.

Further review requires payment of the tax under protest. The protest must be in writing and state the reason for recovering

payment. The taxpayer has 90 days after the date of the protest payment to bring suit. The trial is de novo.[44]

Utah

The Utah Tax Commission assesses taxes and hears appeals from its determinations. A taxpayer has 90 days from the date of the notice to file a petition for redetermination. The petition must specify each error alleged to have been committed by the Tax Commission, together with a statement of facts upon which the taxpayer relies. A hearing is held at the taxpayer's request. The action of the Tax Commission on the petition becomes final 30 days after the date of mailing of the notice. Before appealing to the Tax Division of the District Court, the contested taxes must be deposited with the Tax Commission.

The Tax Court Act of 1977 created a Tax Division in each of the District Courts, with jurisdiction over all petitions for review of Tax Commission decisions rendered after a formal hearing. Within 30 days after notice of any decision by the State Tax Commission, a taxpayer may file a petition for review in the Tax Division of the District Court located in the county of the taxpayer's residence. As an alternative, a taxpayer may elect to waive review and trial de novo in the district court and seek review by the Utah Supreme Court upon writ of certiorari.

Proceedings in the District Court are independent proceedings without a jury by a trial de novo. The issues of fact and law are restricted to those raised by the parties in the hearing before the Commission. The sole remedy for review of a decision of the tax division of the District Court is appeal to the Supreme Court.[45]

Vermont

A taxpayer may petition the Commissioner of Taxes within 30 days after receipt of a deficiency assessment. The Commissioner shall grant a hearing and notify the taxpayer in writing of his determination. The Commissioner conducts the hearing according to the provisions on administrative procedure in contested cases.

The taxpayer has 30 days from the Commissioner's determination to file an appeal in Washington Superior Court or the superior court of the county in which the taxpayer resides or has business. Judicial review of administrative proceedings are confined to the record.[46]

Virginia

A taxpayer may pursue an appeal from an assessment by applying for relief to the State Tax Commissioner within 90 days from the date such assessment was mailed. As soon as possible after the filing of the petition, the Commission sets a date for the hearing. The Commission sits in its capacity as a court and considers all matters of law and fact. Petitions for refund of any fee or assessed tax must be filed within one year of the payment of such fee or tax. A taxpayer aggrieved by the action of the Commission may present a petition to the Supreme Court or Appeals for a writ of error and supersedeas.

Any person assessed with any tax administered by the Department of Taxation may, within three years from the date of such assessment, apply to a Circuit Court for relief. The tax must be paid before judicial review is granted.[47]

Washington

The Board of Tax Appeals hears appeals from decisions of the County Board of Equalization as well as from the Director of Revenue. The three members are appointed by the Governor. A person may appeal a notice of a denial of a petition or a notice of determination within 30 days from the date of the decision. A party has the option of a formal or informal hearing. The petition to the Board must state if the taxpayer intends to hold the hearing pursuant to the Administrative Procedure Act.

A taxpayer may obtain a de novo judicial review of the Board's decision only if the decision was rendered pursuant to an informal hearing. If the taxpayer had a formal hearing, the provisions of Title 34 on Administrative Law apply to the appeal process. Review is confined to the record. Pursuant to Title 34, the petition must be served and the tax must be paid within 30 days of the final decision of the agency.

A taxpayer has the option of suing for a refund. Within ten days after filing a notice of appeal, the taxpayer must file a surety bond payable to the State for $200. The trial in the Superior Court is de novo. The taxpayer need not protest against payment of any tax or petition the Director for a hearing in order to appeal to Superior Court. This judicial review, however, does not apply to any tax that has been the subject of an appeal to the Board of Tax Appeals for which a formal hearing was elected. No refund may be made by the Department for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made.[48]

West Virginia

A taxpayer has 60 days after the service of a notice of assessment to file a petition for review with the Tax Commissioner. If a taxpayer is not satisfied with the Tax Commissioner's determination of a refund claim, or if the Tax Commissioner has not determined the claim within 90 days of its filing, the taxpayer may file a petition stating any objections. The petition must be filed within 60 days after the taxpayer is served with notice of denial of the claim. The taxpayer is entitled to a hearing on the petition contesting an assessment or the denial of a refund claim. The hearing must be held within 90 days from the date of filing of the petition.

The hearing is informal. It is conducted by the Tax Commissioner or a hearing examiner designated by the Commissioner. The taxpayer has the burden of proving that the assessment is incorrect.

The taxpayer may appeal the Commissioner's decision to the Circuit Court within 60 days of such decision. The taxpayer must file a cash bond or a corporate surety bond with the Clerk of the Circuit Court. The Court determines anew all questions submitted to it.[49]

Wisconsin

The Tax Appeals Commission is the independent agency established to hear tax appeals. The Commission is the final authority for the determination of all questions of law and fact arising under the tax laws. The Commission is composed of three members who are appointed by the Governor.

A taxpayer must appeal determinations of the State Board of Assessors within 15 days; appeals from all other decisions must be made within 60 days. No taxpayer may have a matter reviewed by the Court unless the taxpayer had a hearing before the Commission. The appeal to the Circuit Court must be filed within 30 days.[50]

Wyoming

The three members of the State Tax Commission serve as the executive and administrative heads of the Department of Revenue and Taxation and also as the State Board of Equalization. The State Board of Equalization hears appeals from county boards of equalization, reviews State excise tax cases, and reviews its own assessments of property and tax determinations. The three members of the Commission are appointed by the Governor, with Senate confirmation, to six year terms.

The Commission may not compromise or reduce the tax liability of any person owing a tax. The Commission is required to assess and levy the full amount. An aggrieved taxpayer may appeal a decision pursuant to the Wyoming Administrative Procedure Act. Appeal is to a county district court, where a trial de novo is available.[51]

NOTES TO APPENDIX I

1. ALA. CODE §40-18-40; 40-2-22 (1975).
2. ALASKA STAT. §§43.05.240; 43.05.250 (1977).
3. ARIZ. REV. STAT. ANN. §§42-141; 43-532; 43-553 (1980).
4. ARK. STAT. ANN. §§84-4719; 84-4720; 84-4721 (1980).
5. CAL. CONST. ART. 13 §17; CAL. REV. TAX CODE §§18591, 18593, 18596, 19082, 19083, 19085.
6. COLO. REV. STAT. §§39-21-103, 39-21-104, 39-21-108, 39-21-105 (Supp. 1981).
7. CONN. GEN. STAT. ANN. §§12-510, 12-521, 12-522.
8. DEL. CODE ANN. TIT. 30 §§329, 321, 1182, 1185, 1203, 330, 331.
9. State Tax Comm. v. Wilmington Trust Co., 266 A.2d 419 (Del. Super. Ct. 1968).
10. D.C. CODE ANN. §§11-1201, 47-3304, 11-908 (1981).
11. FLA. STAT. ANN. §214.11 (1980); FLA. ADMIN. CODE Ch. 12 C-1.311; FLA. STAT. ANN. §120.68; FLA. ADMIN. CODE Ch. 12c-1.311(5).
12. GA. CODE ANN. §91A-241, 217, 245, 255.
13. HAWAII REV. STAT. §§232-16, 232-8, 232-13, 232-12, 235-114, 232-10 (1976).
14. IDAHO CODE §§63-3811, 63-3049, 63-3809, 63-3815, 63-3812 (1976).
15. ILL. ANN. STAT. CH. 120, §§9-904, 9-908, 9-910, 9-914, CH. 110 §267, CH. 100 §12-1201, CH. 120 §9-902(b) CH. 110, §274.
16. IND. CODE ANN. §§6-8.1-3-1, 6-8.1-5-1, 6-8.1-9-1, 6-8.1-8-2.
17. IOWA CODE ANN. §§421.1, 422.28, 422.29; IOWA ADMIN. CODE §730-2.2; IOWA CODE ANN. §17A.19.
18. KAN. STAT. ANN. §§74-2437, 74-2433, 74-2438, 74-2426 (1980).
19. KY. REV. STATE. §§131.340, 131.315, 131.340, 131.370.
20. LA. REV. STATE. ANN. §§47:1407, 47:1403, 47:1565, 47:1625, 47:1434.
21. ME. REV. STAT. ANN. TIT. 36, §151, TIT. 5, §11002, TIT. 5, §11006.
22. MD. ANN. CODE ART. 81, §§224. 259, 260, 229.
23. MASS. ANN. LAWS CH. 58A, §1, CH. 62C, §37, CH. 62C, §39, CH. 58A, §10, CH. 58A, §13.

24. MICH. COMP. LAWS ANN. §225.731, §205.735, §205.743, §205.753; see also Morgan, The Michigan Tax Tribunal. 56 Mich. State B.J. 135 (1977); Op. Atty. Gen. 1976, Mo. S138, p. 704; 306 N.W. 2d 461, 105 Mich. App. 231 (1981).

The Tax Tribunal has a complicated history. In 1974, the Tax Tribunal was created to hear protests of property valuations. The Tax Tribunal was to assume jurisdiction of all tax appeals from the State Board of Tax Appeals beginning in January, 1977. The initial proposal envisioned an agency that functioned both as a trier of contested tax cases and as an administrator of the various State taxes. However, the final provisions omitted the administrative functions. Administration of the property tax laws rests primarily with the State Tax Commission. Other taxes are administered by the Revenue Division of the Department of the Treasury.

The Tax Tribunal's functions were substantially undercut when the law granting the Tribunal jurisdiction over tax appeals that were formerly heard by the State Board of Tax Appeals was declared unconstitutional by the Attorney General because it violated Article 4, Section 25 of the State Constitution for attempting to amend or revise another statute by reference to its title alone. In subsequent litigation, the Attorney General's opinion was reversed. Meanwhile, the Legislature acted on the presumed validity of the Attorney General's opinion and passed statutes in 1980 which maintained the existence of the State Board of Tax Appeals. The new enactments also amended specific tax statutes and repealed those provisions which provided specific methods of review. The 1980 statutes designated January 1981 as the new cutoff date for transfer of appeals to the Tax Tribunal.

25. MINN. STAT. ANN. §271.01, §271.06, §271.013, §271.10. §271.21.

26. MISS. CODE ANN. §27-7-79, §27-7-71, §27-7-73.

27. MO. ANN. STAT. §161.252, §161.273, §536.110, §536.140.

28. MONT. CODE ANN. §§15-2-201, 15-2-101, 15-2-102, 15-2-301, 15-2-302, 15-2-303, 2-4-704.

29. NEB. REV. STAT. §77-501, 77-27, 84-917.

30. NEV. REV. STAT. §§360,010, 360.245, 360.360, 360,390, 360.400, 233B.020, 233B.130, 233B.140.

31. N.H. REV. STAT ANN. §§71-3:5, 71-8:1, 71-b:25, 71-B:11, 70-B:12, 541:6, 541:13.

32. N.J. STAT. ANN. §§2A:3A-1, 2A:3A-4.1.

33. N.M. STAT. ANN. §7-1-24, §7-1-25, §7-1-26.

34. N.C. GEN. STAT. §§105-2698.2, 105-241.1, 105-241.2, 105-241.4, 105-241.3, 150A-51.

35. N.D. CENT. CODE §§57-01-11, 57-38-40, 28-32-15, 28-32-19.

36. OHIO REV. CODE ANN. §§5717.01, 5717.02, 5703.03, 5745.07, 5717.04.

37. OKLA. STAT. ANN. TIT. 68 §§221, 225, 226.

38. OR. REV. STAT. §§305.405(1), 305.425, 305.452, 305.455, 305.555, 305.560, 305.565.

39. PA. STAT. ANN. TIT. 72, §§1102, 1103, 1104, TIT. 71 §115; see also Schweintz. Practice and Procedure of the Board of Finance and Revenue, 36 Temp. L. R. 443. 456-7 (1963).

40. R.I. GEN. LAWS §44-30-89, §44-30-90.

41. S.C. CODE ANN. §§12-7-2300, 12-47-220.

42. S.D. COMP. LAWS ANN. §§10-55-2, 10-55-4, 10-55-5, 1-26-31, 10-55-6, 1-26-35.

43. TENN. CODE ANN. §§67-101, 67-2303, 67-2305.

44. TEX. TAX CODE ANN. §§111.009, 112.051, 112.054, 112.054.

45. UTAH CODE ANN. §§59-14A-71, 59,14A-72, 59-14A-74, 59-14A-77, 59-24-1, 59-24-2, 59-24-3, 59-24-8.

46. VT. STAT. ANN. TIT. 32, §§5883, 5885, TIT. 3 §815.

47. VA. CODE §§58-1118, 58-1124, 58-1122, 58-1126, 58-1130.

48. WASH. REV. CODE ANN. §§82.03.130, 82.03.190, 82.03.020, 82.03.140, 82.03.180, 34.04.130, 82.32.180.

49. W. VA. CODE §§11-10-8, 11-10-9, 11-10-10.

50. WIS. STAT ANN. §§73.01(4), 73.01(5), 73.015, 227.16.

51. WYO. STAT. §§39-1-302, 39-1-304, 39-1-305, 39-1-306; WYOMING CONSTITUTION ARTICLE 15, §10.

APPENDIX II

INDEPENDENCE OF TAX ADJUDICATION IN THE CONTEXT OF ADMINISTRATIVE ADJUDICATION GENERALLY

This Report suggests that a primary defect in the existing system of tax appeals is the failure to provide a decisionmaking agency that is entirely independent of the functions of tax collection and administration. At the least, the existing structure creates a perception that the process for determining the relevant facts and law creates a risk of bias. The President of the Tax Commission's other role as executive officer of the Department means that he is called upon to judge the very acts for which he is responsible. His role as the promulgator of regulations carries the risk that he will bring the policy considerations that properly concern him as "legislator" to the tasks demanded of him as a "judge." For these reasons, one of the options facing the State is to structure the appeals process so that it is entirely divorced from the other functions of the Department.

The combination of adjudicatory, executive, and legislative functions exhibited by the State Tax Commission is typical of the pattern existing in other administrative agencies in New York and in other American jurisdictions. In light of this widespread practice, it is necessary to examine in more detail the reasons that might justify or fail to justify this pattern with respect to tax appeals.

In brief, the argument that is put forward proceeds as follows. Independent adjudication provides the norm for deciding legal controversies in our system of government. Deviations from

that norm require special justifications. Such justifications have been developed to defend the combination of functions in certain types administrative agencies, but those justifications are without force in the context of the determination of tax appeals. Consequently the norm of independent adjudication ought to prevail.

A. The Model of Independent Adjudication

The standard mechanism for determining the rights and obligations of individuals in our legal system is adjudication by independent courts of law. Ordinarily, adjudication is thought of as a process in which a court decides a concrete controversy by impartially applying pre-existing and impersonal rules. A court does not apply its own judgment of the merits, but utilizes more general judgments that have already been made and which have been embodied in the applicable rules of law. Modern students of jurisprudence may find this orthodox view unrealistic but there is little doubt that it describes the deep seated expectations of most litigants and lawyers concerning the task of courts of law.

To be sure, it is generally recognized that there is an inevitable legislative and therefore minimally discretionary aspect to adjudication under the common law. But even common law adjudication is ordinarily severely constrained by well established precedents and it is only the exceptional and novel case in which judicial creativity plays a major role. Thus, common law policy-making by courts is, in Holmes' phrase, "confined from molar to molecular motions."[1] Such adjudication, therefore, is not inconsistent with the general conception of the role of courts as involving the application of established rules and standards.

The wide support for this view is probably a product of a conviction that the coercive power of legal authority ought to be applied only when the individuals who are subject to it can be presumed to have advance warning. In this way, both liberty and security from arbitrary government action are promoted. The insistence on government action through a priori, general, and known rules, lies at the heart of our traditional concept of the "rule of law."

This standard view of adjudication conceives of courts as acting within objectively defined limits. Notions of the character or worth of the particular litigants or some judicially defined idea of the general welfare outside of those limits are improper considerations for a court. The independence of the judiciary, by reducing the likelihood that these factors will intrude into judicial decisionmaking, is thus a critical element of the concept of fair adjudication.

B. Distinguishing Administrative Adjudication

The combination of functions in administrative agencies is clearly in conflict with the standard model of independent adjudication. This departure from the norm has, however, been defended on the grounds that the tasks committed to administrative agencies are significantly different from those expected of courts of law.

Defenders of the combination of functions in administrative agencies have largely relied on the functional differences between agencies and courts. A court exists to apply static, predetermined rules. In contrast, an administrative agency is an action-oriented entity, created to achieve certain goals often only broadly defined

in statute. Unlike a court, the agency is charged with reshaping the world to accomplish its legislative goal. This mission requires the agency constantly to make new decisions of policy within the broad boundaries suggested by the governing legislation. These particular policy decisions are purposely left to the discretion of the agency which is assumed to be more capable in this regard than a legislature. In addition, these policymaking powers are to be exercised in whatever form is most likely to advance the agency's general purpose. They cannot be confined to executive decisions and legislation but, when appropriate, ought to extend to the agency's adjudication as well. Consequently, adjudication should be under the control of the policymakers--that is, the agency heads.

These special needs of administrative agencies, which are supposed to justify a departure from the standard model, are sometimes illustrated by an analogy to the management of a business enterprise. Certainly it would be unnatural in designing a business organization to divide it between two entirely independent departments: one having responsibility for setting business policy and the other having responsibility for the application of that policy in specific instances. This organizational scheme would clearly be an inefficient way of achieving the business's goals.[2]

Nonetheless, it is exactly this "inefficient" structure that has been chosen for the conduct of most "public business" insofar as it directly controls individual activity. The desire for effective government is subordinated to a general distrust of governmental power. The safety and security of restricting government by

the rule of law is preferred to whatever social benefits might be attained by implementing policy on a case-by-case bases, without warning, in the course of making governmental decisions concerning individual behavior.[3] Notwithstanding the now well-established exception of administrative agencies, this is still the norm in American government. Departures from it--such as those inherent in the New York State Tax Commission--ought to bear the burden of showing in each case that they are justified.

C. Possible Justifications for the New York State Tax Appeals System

The literature that defends the combination of functions in administrative agencies suggests how to evaluate whether that special burden of justification has been carried. In general, it must be shown that the maintenance of adjudication under the control of the agency heads is necessary for the agency effectively to discharge its policymaking functions. In particular, three conditions must be satisfied. First, the area of law being administered must require frequent policy decisions that cannot be implemented by ordinary legislation. Second, those policy decisions must demand case-by-case formulation so that they could not be adequately addressed by prospective and general rules. Third, the necessary case-by-case policymaking must be undertaken by the same agency to which the other aspects of policy-creation and implementation have been committed and cannot be competently performed by an independent board or tribunal. Only if these three conditions are satisfied can a case be made for vesting the adjudicatory function in the same persons who are responsible for supervising the affairs of

the administrative agency. But satisfying these three conditions will not, by itself, be sufficient to justify such an arrangement. It is also necessary to show that the need for combining the adjudicatory and supervisory functions is so acute that it outweighs the risk of injury that is always inherent in abandoning the ordinary adherence to the separation of powers. These factors are now examined in the context of the New York tax appeals system.

First, is the administration of the tax laws of New York the kind of governmental activity which requires constant and detailed policymaking? This would be the case if the subject matter to be regulated were so elusive that general rules made in advance by the Legislature could not adequately achieve their principal goals.[4] Unlike such general legislative objectives as discouraging "unfair and deceptive practices," promoting "fair competition," or serving "the public interest and convenience,"[5] the goals of the tax system have been traditionally regarded as achievable through precise formulation by legislation. Certainly the actions of the New York Legislature, which has set forth its tax policies in a lengthy and detailed code of legislation, are consistent with this view.[6]

Second, even assuming a need exists for the State Tax Commission to make some discretionary policy decisions, vesting adjudicatory power in it can only be justified if there is a need for that policy to be made on a case-by-case basis, instead of through the use of prospective rules. Perhaps in some areas of regulation such policymaking by general rule may not be effective, for example, if the subject matter being regulated is prone to substantial and frequent changes so that a fixed policy prescription designed for one

set of circumstances cannot be relied upon to meet the overall objective in a different situation. In addition to rapidly changing circumstances, some areas of administrative jurisdiction may be so varied and complex that policy must be enunciated somewhat differently in each case--a state of affairs that favors policymaking by adjudication.[7]

The subject matter of policymaking in the tax field is extremely varied. It is far from clear, however, that the kinds of fact situations which are usually present in contested tax determinations are so different that they call for truly novel policy decisions rather than the application of established policy to new circumstances. Moreover, as the length and detail of the New York tax law indicates, the Legislature has responded to the complexity of fact situations by addressing the subject with great particularity.

Furthermore, even in the kinds of circumstances described for which adjudication has been claimed to be a particularly appropriate policymaking vehicle, the rulemaking process may still be workable. A leading commentator has argued that the flexibility of regulation by prior rule has been seriously underestimated:

> A rule can be written in the form of a set of facts and an answer, and the rule can specifically provide that all the words used in the rule are to be evaluated against the single set of facts. A rule can do anything an adjudicatory opinion can do. . . . An adjudicatory opinion can never say anything that cannot be said as well or better in a rule.[8]

Third, even if substantial policy decisions must be made in a continuing, discretionary way on a flexible case-by-case basis, a further need must be demonstrated. Such flexible policy formation

might also be developed in decisions made by a tribunal that is independent of the agency that has responsibility for prosecuting the cases. Consequently, the propriety of uniting all functions in one agency must depend on an argument that this policymaking must be in the same hands as those who otherwise make policy through rulemaking and enforcement decisions. Divided policymaking is common in those areas of law in which rules are promulgated by the Legislature and also, in a subordinate and limited way, by the independent common law courts. Divided policymaking also exists with respect to tax policy, insofar as interstitial policy decisions are made by the United State Tax Court and other federal courts deciding tax matters.[9] To justify retention of the adjudicatory function in the State Tax Commission, it is necessary to argue that policymaking by an independent tribunal would create unacceptable problems of coordination.[10] But the examples given of federal tax adjudication as well as those of other agencies in which cases are decided by independent boards show that this need not be the result.[11]

A somewhat different defense of uniting adjudicative with legislative and executive policymaking in the area of tax appeals might be based on the claim that an independent adjudicator would lack the technical competence to make such policy determinations intelligently. Although this position might be plausible with respect to a system that transfers adjudication from the agency to the common law courts, it is unconvincing if the independent tribunal contemplated would itself be limited to determination of tax issues and its members would be specially qualified in that field.

Finally, the need to retain adjudication in the primary agency is sometimes based on the desirability of using the process of decisionmaking in individual cases to inform the agency's other activities.[12] The experience of adjudication is deemed invaluable in allowing agency heads to understand the concrete impact of their actions. This argument is also unpersuasive with regard to tax appeal adjudication. Whatever information the agency acquires from adjudication could be as easily acquired from its participation in the same matters as an advocate and from the decisions rendered by the independent review agency.

This brief discussion reveals that none of the needs that would justify a departure from ordinary principles seems particularly acute in the field of tax appeals. The benefits that do accrue must be balanced against the risks associated with such a departure. Among these risks is the possibility that the combination of functions will lead to decisions influenced not merely by impersonal policy considerations, but also by such entirely extraneous factors as those discussed in this Report.

Additionally, the very intrusion of new policymaking considerations in adjudication imposes costs on taxpayers in the form of surprise, uncertainty, and retroactivity. In fact, it should be clear that the special needs discussed which, under certain circumstances, might justify such policy-oriented adjudication amount exactly to a defense, in these circumstances, of surprise, uncertainty and retroactivity.[13] But these needs should be great indeed before they are met in ways so alien to our legal tradition. Surely, no one would suggest that the imposition of criminal sanctions

should follow this model, although a plausible case might be made that society would benefit from a criminal law policy that was flexible, individualized, and coordinated with other law enforcement activities.[14] While stability, generality, and predictablity are important values in all areas of law, it has been suggested that the requirements of economic planners make them particularly critical in the field of taxation. This fact should arguably lead to requiring even stronger justification for ad hoc policymaking in tax administration.[15]

In sum, the reasons that are claimed to justify the combination of functions in other administrative agencies are, in the case of the State Tax Commission, insufficient to overcome the presumption in favor of impersonal, a priori rules applied by an independent and impartial tribunal.[16] Even in the absence of any showing of actual bias, this discussion points in the direction of changing the current structure.

NOTES TO APPENDIX II

1. Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917).

2. James M. Landis put the point this way: "If in private life we were to organize a unit for the operation of an industry it would scarcely follow Montesquieu's lines", quoted in J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS IN AMERICAN GOVERNMENT 172-76 (1978).

3. "The known certaintie of the law is the safetie of all." E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 395 (1633).

4. See K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 20-21, 48 (1976).

5. See Stewart, note 54 supra, Chapter III at 1699; cf. Cohen & Rabin, note 57 supra, Chapter III at 691, 696.

6. N.Y. Tax Law §§1-1519.

7. See S.E.C. v. Chenery Corp., 332 U.S. 194, 202-03 (1943); Baker, Policy by Rule or Ad Hoc Approach--Which Should It Be? 22 Law & Contemp. Prob. 658, 661 (1957).

8. Davis, note 4 supra, Appendix II at 64 (emphasis in original). See also id. at 65-66. The Chenery case, note 7 supra, Appendix II, which endorsed agency policymaking by adjudication also noted that: "The function of filling the interstices of the Act should be performed, as much as possible, through quasi-legislative promulgation of rules to be applied in the future." 332 U.S. at 202.

9. Cf. Dobson v. Commissioner, 320 U.S. 489, 498-502 (1945).

10. Committee on Administrative Procedure, Administrative Procedure in Government Agencies S. Doc. No. 8, 77th Cong., 1st Sess. 57-59 (1941).

11. See Auerbach, note 54 supra, Chapter III at 239.

12. See Fuchs, Agency Development of Policy Through Rule-Making, 59 N.W.U.L. Rev. 78, 789-90 (1965); Cohen & Rabin, note 57 supra, Chapter III at 715-16, 725; Baker, note 7 supra, Appendix II at 661.

13. See Lorch, note 54 supra, Chapter III at 49; Baker, note 7 supra, Appendix II at 662; Cohen & Rabin, note 57 supra, Chapter III at 714; Fuchs, note 12 supra, Appendix II at 793; S.E.C. v. Chenery Corp., 332 U.S. 194, 203 (1947).

14. See Stewart, note 54 supra, Chapter III at 1699.

15. See L. Wright, note 60 supra, Chapter III at 43.

16. See Chapter III at 17-25.