Getting to the Truth: Fundamentals of Discovery & Public Records for SALT Lawyers

American Bar Association Taxation Section
Midyear Meeting

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Moderator:
Discussion Overview

Fundamentals of obtaining information
1. Tax audits
2. Informal appeals
3. Discovery during litigation
4. Requests for public records

Disputes about the exchange of information
1. Preventing disputes
2. Resolving motions
3. Enforcing public record requests

Confidentiality issues
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Tax Audits

Audit usually starts with information requests by the auditor

- Assess reasonableness of request
- Negotiation might be possible (e.g., statistical sampling)
- Consider confidentiality (for example, employee or third party information)
- Make a record of any objections and reasons
- Maintain a positive working relationship between the auditor and Taxpayer contact: stay friendly and firm
- Discuss with auditor supervisor if needed
Tax Audits (cont’d)

- **Timing**

- **Contents of Request by Taxpayer**
  - Be specific!
  - Request should include a request for any and all notes, e-mail and any other correspondence
  - Requests for other types of information
  - Enforcement actions
  - Liability issues
  - Auditor notes
  - Evidence
  - Agency Advice
Tax Audits (cont’d)

• Requests by Taxpayer after filing a petition for redetermination and statement of grounds

• Informal discovery requests
Obtaining Information: Informal Appeals

• Know the key sticking points to your case
• Work out collaborative solution to resolve taxpayer and Audit concerns
• Informal appeal = informal structure
• Effective resolution requires willingness of both taxpayer and taxing authority
Discovery During Litigation

- Privilege
- Experts
- Depositions
- Litigation Hold
- Cost
Discovery During Litigation

• Strategy
  • Timeline
  • Cost

• What do you need to prove your case?
• What do you not want to produce?

• Federal, State, and Local Rules
  • Deadlines
  • Limitations
Requests for Public Records – Overview

- State-specific
  - Check the relevant statutes in that state
  - Policy statements/statements of legislative intent to favor public access
Requests for Public Records—Overview

- Who can request?
- Some states require the requester to be a resident:
  - Delaware (29 Del. C. section 10003(a))
  - Tennessee (Tenn. Code Ann. 10-7-503 (a)(2)(A))
  - Virginia (Va. Code section 2.2-3704(A))
  - Georgia – the law was changed in 2012 removing the residency requirement (HB 397)
Requests for Public Records—Overview

How to request?

- Request must generally be with some specificity
- Is there a specific person that must be notified?
- Is there a charge? Can you request the fee be waived?
Requests for Public Records—Overview

Examples of what might be exempt from disclosure:

- Personal confidential information
- Deliberative process/working papers
- Legal advice or records created for use in litigation
- Investigative processes/procedures
- Creation of records
Requests for Public Records (cont’d)

Be aware of deadlines (for the agency and the requester). Follow up if you don’t get a timely reply.
Disputes: How to Prevent

- Know your opposing counsel/side
- Manage client expectations
- Consider how disputes will look to a decision-maker
- Cost-benefit analysis
- Don’t wait. Be proactive!
Resolving Information Exchange Disputes

• Informal methods:
  • Phone
  • Email

• Reduce the scope of information to the minimum amount necessary to resolve issue

• Know what information taxing authorities are authorized to disclose under confidentiality statutes and what must be disclosed under FOIA/public records act

• Discovery letters and dispute resolution conferences prior to motion practice
Discovery Motions

- Rare—and risk annoying the judge
- Objections and resolutions
- Preparing response
- Schedule an in-person meeting with opposing counsel to resolve objections, or if the jurisdiction allows, may confer by phone, letter, or email
- If all else fails – bring a motion and/or request a hearing on the discovery issues
Requests for Public Records—Enforcement

Agency’s denial

• Did the agency identify any records that respond to the request?
• Did the agency state a specific exemption for withholding the documents?
Requests for Public Records—Enforcement

Would redacted documents be acceptable as a compromise?
Requests for Public Records – Enforcement

- Administrative Appeals
  - Initial administrative appeals may be to the same agency
  - There may be multiple levels of administrative appeals
- Mediation?
- Litigation
  - Costs, etc.
Confidentiality: Protective Orders

Check the jurisdiction’s standards. For example…

Discovery Standard: “parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party . . . Relevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Minn. R. Civ. P. 26.02(b).
Confidentiality: Protective Orders

Check the jurisdiction’s standards. For example…

Protective Order Standard: “for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that a trade secret or other confidential research, development, or commercial information not be disclosed . . .” Minn. R. Civ. P. 26.03(a).

May need to support with other confidentiality or trade secret statutes.
Confidentiality: Protective Orders

Other factors to consider…

• Terms of Order
• Interaction with public records requirements on the forum and tax authority
• Award of Fees and Costs
• Forum’s preferred protocol for submitting protected documents
Confidentiality

- Third Party Disclosures/Intervention
- Redaction
  - Customer information
  - Protected Health Information
  - Identifying Information
Confidentiality

Dig deeper into this topic at tomorrow’s State and Local Taxes Committee session:

“Through the Mists of State Tax Administration”
Questions?

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Thank you!