

**BIENNIAL REPORT OF THE
SUPREME COURT COMMITTEE ON THE TAX COURT OF NEW JERSEY
2014-2015 AND 2015-2016 COURT YEARS
SUBMITTED TO THE SUPREME COURT OF NEW JERSEY**

March 1, 2016

The Supreme Court Committee on the Tax Court of New Jersey (the “Committee”) is comprised of members of the bench, tax bar (both public and private), local, county and State tax officials, and others concerned with the operation of the Tax Court of New Jersey. The Committee held five meetings beginning on June 25, 2015, and ending on February 23, 2016. The Chairman appointed five Subcommittees: a Subcommittee to consider various issues relating to local property tax cases; the State Tax Practice Subcommittee; the Certified Tax Court Practitioner Program Subcommittee; the Efiling Subcommittee; and the Legislation Subcommittee.

The Subcommittee to consider various issues relating to local property tax cases was chaired by the Hon. Mala Sundar, J.T.C. The full Committee approved by wide margins recommending each of the three proposed rule changes recommended by the Subcommittee. The Subcommittee recommended an amendment to R. 8:4-3 to clarify the time in which an answer to a complaint seeking relief under the Correction of Errors Law, N.J.S.A. 54:51A-7, may be filed. In addition, the Subcommittee recommended an amendment to R. 8:5-3, regarding the service of a complaint in local property tax matters where the party challenging the assessment on the property is not the property owner, the captioning of such complaints, and the subsequent service of any counterclaims on the property owner. Finally, the Subcommittee proposed an amendment to R. 8:5-5 regarding the filing of a proof of service of the complaint and counterclaim, if any, on the property owner in local property tax matters filed by a party other than the property owner.

The State Tax Practice Subcommittee was chaired by Margaret C. Wilson, Esq., and Deputy Attorney General Michael J. Duffy. The Subcommittee was charged with considering possible changes to the court rules applicable to State tax practice. The full Committee voted to recommend two of the proposed rules changes offered by the State Tax

Practice Subcommittee. One proposal recommends amending R. 8:11(a)(1) to clarify the Small Claims Division jurisdiction of the Tax Court with respect to State tax matters: (1) in which the Director, Division of Taxation's (the "Director") assessment of penalties, but not underlying taxes, are at issue; and (2) where the taxpayer challenges a final determination by the Director that the taxpayer has sufficient nexus to New Jersey to be subject to the State's taxing authority. The second proposed amendment recommended by the full Committee concerns proposed forms of Order. The proposed amendment requires parties submitting a proposed form of Order to include a provision identifying whether the Order is a final judgment from which the time to appeal shall begin to run.

In addition, the full Committee voted to recommend a proposal by five members of the State Tax Practice Subcommittee. That proposal recommends the adoption of a new court rule requiring the Director to stipulate to the authenticity of certain documents created by the Division of Taxation or in its files. The vote on this proposal was close: 11 in favor, 9 against, and 3 abstentions.

Five members of the State Tax Practice Subcommittee proposed another rule change, which was not adopted by the Committee. That proposal would have required the Director to produce the Division of Taxation's audit file within 35 days of the filing of the Director's answer in State tax matters. The full Committee declined to recommend this proposal by a vote of 6 in favor, 10 against, and 6 abstentions.

The Certified Tax Court Practitioner Subcommittee was chaired by the Hon. Kathi F. Fiamingo, J.T.C. That Subcommittee was charged with investigating the process for creating a Supreme Court certification program for Tax Court practitioners and reviewing the feasibility of instituting such a certification program. The Subcommittee found that the question of creating a certification program for Tax Court practitioners was vested in the

Board on Attorney Certification. At the request of the Subcommittee, the Board on Attorney Certification is considering a request from the Presiding Judge of the Tax Court to establish a certified Tax Court practitioner program.

The Efiling Subcommittee was chaired by Peter J. Zipp, Esq. The Subcommittee did not recommend any amendments to the court rules. The Subcommittee, however, raised a number of items with respect to the Tax Court's eCourts Tax electronic filing program. Those items were relayed to the Presiding Judge and Tax Court Clerk/Administrator, who consulted with the court's technical staff regarding programming changes and upgrades. The Subcommittee's observations and recommendations are an integral part of the ongoing development and operation of eCourts Tax.

The Legislation Subcommittee, chaired by Jeffrey M. Gradone, Esq., monitored bills, which, if enacted, would affect practice in the Tax Court and might require rule changes. No statutes were enacted during this cycle of the Committee that require a change to Tax Court rules.

Finally, the Committee approved recommending a non-substantive amendment to R. 8:12 to correct the numbering of subsection (d) of the Rule.

RULE AMENDMENTS RECOMMENDED FOR ADOPTION

An ambiguity arose recently in a matter pending before the Tax Court with respect to the time in which a party may file an answer to a complaint seeking relief pursuant to the Correction of Errors Law, N.J.S.A. 54:51A-7. In order to eliminate any uncertainty with respect to this question, the full Committee unanimously voted to recommend an amendment to R. 8:4-3 to provide that such answers must be filed in accordance with R. 4:6-1, subject to R. 1:3-3.

The recommended amendment follows:

R. 8:4-3. Time for Filing Responsive Pleadings

The time for filing all pleadings other than the complaint, including answers to complaints filed under the Correction of Errors Law, N.J.S.A. 54:51A-7, shall be as prescribed by R. 4:6-1 and subject to R. 1:3-3 except that:

- (a) (no change)
- (b) (no change)

Pursuant to N.J.S.A. 54:3-21 a “taxpayer feeling aggrieved by the assessed valuation” on real property may file a complaint in the Tax Court challenging the assessment. This statute has been interpreted to allow parties other than the property owner to challenge an assessment on real property. In Village Supermarkets, Inc. v. Township of West Orange, 106 N.J. 628 (1987), the Court held that a tenant responsible for the payment of taxes on real property may file a challenge to an assessment on that property in certain circumstances. The Court held that the property owner must be put on notice of such complaints. Subsequent to the holding in Village Supermarkets, standing to file a challenge to an assessment has been extended to a mortgagee after default by the mortgager, Chemical Bank N.J., NA v. City of Absecon, 13 N.J. Tax 1 (Tax 1992), a court-appointed rent receiver, NNN Lake Center, LLC v. Township of Evesham, 28 N.J. 82 (Tax 2014), and, in an unpublished Appellate Division opinion, to a contract purchaser of the property. Omega Self Storage of NJ, LLC v. Township of Lawrence, 2013 N.J. Super. Unpub. LEXIS 1653 (App. Div. 2013).

The Committee recommends that R. 8:5-3 and R. 8:5-5 be amended to effectuate these opinions by requiring that complaints filed by parties who are not property owners reflect that fact, as well as the relationship between the party and the property owner, and that such complaints be served on the property owner. The Committee also recommends that the party filing such a complaint be required to serve on the property owner any counterclaim filed in those cases. In addition, the Committee recommends that R. 8:5-5 be amended to require the filing of a proof of service of complaints and counterclaims in these circumstances.

The recommended amendments follow:

R. 8:5-3. On Whom Served.

(a) Review of Action of a County Board of Taxation or Direct Review by the Tax Court.

- (1) (no change)
- (2) (no change)
- (3) (no change)
- (4) (no change)
- (5) (no change)
 - (i) (no change)
 - (ii) (no change)
 - (iii) (no change)
- (6) (no change)
- (7) (no change)

(8) A ~~tenant~~ plaintiff who is not the record owner of a property who files a complaint to contest a local property tax assessment, whether such complaint is by direct review pursuant to N.J.S.A. 54:3-21, 54:4-63.11, 54:4-63.28, or 54:4-63.39, or to review the action of a County Board of Taxation pursuant to N.J.S.A. 54:51A-1, shall caption the complaint with the name of the record owner of the property, the name of the plaintiff, and the relationship of the plaintiff to the record owner of the property. In such cases, the plaintiff shall serve a copy of the complaint, as well as any counterclaim, on the record owner of the property. The court, on application or on its own motion, may permit the owner to intervene as a party plaintiff, may require service on other tenants, or may take such action as it deems appropriate under the circumstances.

(b) (no change)

- (1) (no change)
- (2) (no change)
- (3) (no change)
- (4) (no change)

(c) (no change)

R. 8:5-5. Proof of Service

Proof of service shall be submitted at the time a complaint is filed unless service is by mail and is not effected initially, in which case subsequent proof of service by simultaneous mailing by certified or registered mail, return receipt requested, and ordinary mail shall be submitted when service is effected. For purposes of R. 8:5-3(a)(8), a plaintiff who is not the record owner of the property shall also file a proof of service of the counterclaim, if any, when the same is served by plaintiff on the record owner of the property. Such proof should include the date of service, the method of service utilized, and the name and address of the record owner of the property served.

Parties in State tax matters have experienced some instances in which the finality of a ruling by the Tax Court is unclear. Two factors contribute to these circumstances. First, it has long been the practice of the Tax Court that both individual Judges and the Clerk/Administrator of the Tax Court enter Judgments. While this practice has not raised ambiguities in the local property tax arena, where the vast majority of Judgments are issued through use of a form Judgment, State tax matters are often resolved through summary judgment motions. Circumstances have arisen in which an individual Judge signs a proposed form of Order submitted with a summary judgment motion and the Clerk/Administrator issued a Judgment in the same matter on a later date or, alternatively, the Clerk/Administrator does not intend to issue a Judgment at all. In such instances, the date on which the time to file an appeal begins to run is ambiguous. The Committee thus recommends that R. 8:9-1 be amended to require the parties to submit a proposed form of Order with motions containing a provision that would allow the motion Judge to indicate unequivocally if the Order is a final Judgment for purposes of commencing the running of the time in which to file an appeal.

The recommended amendment follows:

R. 8:9-1. Form of Judgment

The final determination of any matter heard by the Tax Court shall be by a judgment signed by the Court or by the Tax Court Administrator acting under the Court's direction. An interlocutory determination shall be by an order signed by the Court. Any proposed form of order shall provide the following language whereby the Tax Court may indicate whether the order constitutes a final judgment: "This order is a final judgment from which the time to file an appeal shall begin to run: Yes [] No []." Where a standard form of judgment is in use by the Tax Court, the judgment shall be in accordance with the form unless a party shall request a change in the form prior to the issuance of the judgment, in which case the form shall be settled and then submitted to the Court in accordance with R. 4:42-1.

According to N.J.S.A. 2B:13-14, the “Tax Court shall have a Small Claims Division with jurisdiction in those classes of cases as may be provided by the Rules of the Supreme Court.” The Tax Court’s Small Claims Division jurisdiction is established by R. 8:11. At present, the rule provides that in State tax cases the Small Claims Division will hear cases in which the amount of a refund claimed or the taxes or additional taxes sought to be set aside with respect to any tax year does not exceed \$5,000, exclusive of interest or penalties. Certain State tax cases are filed pursuant to which the taxpayer challenges the assessment of a penalty, but in which either no tax was assessed with the penalty, or the taxpayer does not challenge or seek a refund of any or all of the tax assessed with the penalty. In some instances, the penalty challenged exceeds \$5,000 by a considerable amount. Because no tax assessment is challenged, however, under the present configuration of R. 8:11, these cases fall within the jurisdiction of the Small Claims Division.

In addition, in another category of cases, taxpayers challenge determinations by the Director, Division of Taxation that the taxpayers have sufficient nexus with New Jersey to be subject to the State’s taxing authority. In most instances, because it is only the threshold determination of whether the taxpayer is subject to New Jersey taxes that is at issue, no tax returns have been filed by the taxpayer and no specific amount of tax has been assessed by the Director. Under the present configuration of the R. 8:11, because no assessment of tax is challenged, these “nexus” cases fall within the jurisdiction of the Small Claims Division of the Tax Court. Nexus cases, however, often involve complicated factual disputes requiring a significant amount of discovery from putative corporate taxpayers. In such cases, Small Claims Division jurisdiction, with its limited discovery periods, is not appropriate.

It was the unanimous consensus of the Committee that R. 8:11(a)(1) should be amended to exclude from the Small Claims Division jurisdiction of the Tax Court: (1) State

tax matters in which no tax is in dispute and in which the taxpayer challenges an assessment of penalties in excess of \$5,000; and (2) nexus cases.

An amendment of R. 8:11(a)(1) would also require amendment to R. 8:3-4(d)(1), which concerns the allegations required for a complaint alleging Small Claims Division jurisdiction.

The recommended amendments follow:

R. 8:11. SMALL CLAIMS DIVISION; PRACTICE AND PROCEDURE

(a)(1) The small claims division will hear all state tax cases in which the amount of refund claimed or the taxes or additional taxes sought to be set aside with respect to any year for which the amount in controversy as alleged in the complaint does not exceed the sum of \$5,000 exclusive of interest and penalties; provided, however, that if there is no tax in controversy, the jurisdictional amount will be applied to interest and penalties. This provision will not apply to State tax cases where no actual tax amount due is yet specified (for example, in nexus cases where no tax returns have yet been filed).

(2) (no change)

(b) (no change)

(c) (no change)

(d) (no change)

(e) (no change)

R. 8:3-4

(a) (no change)

(b) (no change)

(c) (no change)

(d) Small Claims Classification.

(1) In state tax cases the complaint shall state whether the ~~amount of refund claimed or the taxes or additional taxes sought to be set aside or the amount in controversy, as the case may be, with respect to any year, exceeds the sum of \$5,000 exclusive of interest and penalties~~ jurisdictional amount in Rule 8:11(a)(1).

(2) (no change)

(e) (no change)

(f) (no change)

Several members of the State Tax Practice Subcommittee proposed a new rule to assist in the efficiency of State tax cases. The proposed new rule follows the federal Tax Court's approach of requiring stipulations on matters that are not in material dispute by requiring stipulations with respect to the authenticity of certain documents, such as tax returns and documents in the files of the Division of Taxation. The full Committee voted to recommend the new rule by the following vote: 11 in favor, 9 opposed, and 3 abstentions.

The proposed new rule follows:

8:14. STIPULATIONS IN STATE TAX CASES

(a) Generally. In state tax cases, the parties shall seek to stipulate, for submission to the Tax Court the following matters that are not the subject of material dispute:

(1) The authenticity of copies of any and all tax returns previously submitted to the Division of Taxation that one or more parties contend are relevant to the determination of the action;

(2) The authenticity of copies of any and all documents prepared by the Division of Taxation that are contained in the files maintained by the Division with respect to the matter at issue; and

(3) The authenticity of copies of any and all documents produced by the Division of Taxation.

Where the authenticity of facts or evidence claimed to be relevant by one party is not disputed, an objection on other grounds such as materiality or relevance may be noted by any other party but is not to be regarded as just cause for refusal to stipulate. The requirement of stipulation under this rule applies without regard to where the burden of proof may lie with respect to the matters involved. Documents or papers or other exhibits annexed to or filed with the stipulation shall be considered to be part of the stipulation.

(b) Form. Stipulations under this Rule shall be in writing, signed by the parties thereto or by their counsel. Each stipulation shall be clear and concise. Separate items shall be stated in separate paragraphs, and shall be lettered or numbered serially. Exhibits attached to a stipulation shall be numbered serially, i.e., 1, 2, 3, etc. The exhibit number shall be followed by "P" if offered by the Plaintiff, e.g., 1-P; "D" if offered by the Defendant, e.g., 2-D; or "J" if joint, e.g., 3-J.

(c) Filing. The original and two copies of a document containing the parties' executed stipulations prepared pursuant to this Rule, with related exhibits, shall be filed by the parties at or before commencement of the trial of the case, unless the Court shall otherwise specify a date certain for the filing of such document. A stipulation when filed need not be offered formally to be considered in evidence.

(d) Objections. Any objection to all or any part of a stipulation should be noted in the stipulation, but the Court may consider any objection to a stipulated matter made (1) at the commencement of the trial or for good cause shown made during the trial or (2) if a motion for summary judgment is filed, as argued by the parties in their respective motions.

(e) Binding Effect. A stipulation filed by both parties shall be treated, to the extent of its terms, as an admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties. The Court will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so where justice requires. A stipulation and any admissions therein shall be binding and have effect only in the pending case and shall not be used for any other purpose, and shall not be used against any of the parties thereto in any other case or proceeding.

At the request of one of the publishers of the court rules, the Committee considered a recommendation with respect to the amendment of R. 8:12. The Committee approved the non-substantive amendment correcting the numbering of subsection (d) of the Rule. The recommended amendment follows:

R. 8:12. FILING FEES

- (a) (no change)
- (b) (no change)
- (c) (no change)
 - (1) (no change)
 - (2) (no change)
 - (i) (no change)
 - (ii) (no change)
 - (3) (no change)
 - (4) (no change)
- (d) Matters Exempt from fee. ~~(4)~~ No fee shall be paid upon the filing of a complaint within the small claims jurisdiction in an action where the sole issue is eligibility for any homestead credit, rebate, or refund program administered by the Division of Taxation or a senior citizen's or veteran's exemption or deduction.

RULE AMENDMENTS NOT RECOMMENDED FOR ADOPTION

As noted above, several members of the State Tax Practice Subcommittee proposed a rule change concerning discovery in State Tax cases. The full Committee considered the amendment and voted as follows with respect to the proposal: 6 in favor, 10 against, 6 abstentions. For the sake of presenting the Court with a full record of the Committee's deliberations, the proposal is included in the Appendix to this report.

Respectfully submitted,


Hon. Patrick DeAlmeida, P.J.T.C.

MEMBERS OF THE SUPREME COURT COMMITTEE ON THE TAX COURT

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Peter J. Zipp, Esq., Vice Chair
Marlene G. Brown, Senior Deputy Attorney General, Vice Chair

Hon. Kathi F. Fiamingo, J.T.C.
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Farah Ansari, Esq.
Paul T. Beisser, MAI, CRE
Michael D. Benak, Esq.
Richard Carabelli
Timothy J. Cunningham, Esq., Director, Division of Local Government Services
Michael J. Duffy, Deputy Attorney General
James L. Esposito, Esq.
Susan A. Feeney, Esq.
John J. Ficara, Esq., Acting Director, Division of Taxation
A. Paul Genato, Esq.
Michael J. Gilmore, Esq.
Jeffrey M. Gradone, Esq.
Amber N. Heinze, Esq.
Lee Holtzman, Esq.
Chaim Kofinas, CPA
Edward J. Kuch, III, Esq.
Martin W. Lynch, President, AMANJ
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Mitchell A. Newmark, Esq.
William T. Rogers, III, Esq.
Michael I. Schneck, Esq.
Peter J. Ulrich, Esq.
Gerald A. Vitarello
Margaret C. Wilson, Esq.
David B. Wolfe, Esq.
Patricia Wright, Deputy Director, Division of Taxation

AOC Staff:

Cheryl A. Ryan, Clerk/Administrator, Tax Court of New Jersey
Lynne E. Allsop, Court Executive, Tax Court of New Jersey

APPENDIX

RULE PROPOSALS OF INDIVIDUAL COMMITTEE MEMBERS NOT ADOPTED BY THE COMMITTEE

RULE 8:6. PRETRIAL PROCEEDINGS

8:6-1. Discovery; Exchange of Appraisals and Comparable Sales and Rentals

(a) Discovery. Discovery may be taken in accordance with the provisions of R. 4:10-1 through R. 4: 18-2 and R. 4:22 through R. 4:25 insofar as applicable except as follows:

(1) In state tax cases (other than small claims cases) leave of court, granted with or without notice, must be obtained if a party seeks to take a deposition by oral examination prior to the expiration of 60 days after service of the complaint.

(2) In state tax cases the 180 days for the completion of discovery shall commence to run on the date the answer is served. At any time the court, in its discretion or by agreement between the parties, may extend or reopen the time to complete discovery. Completion of discovery shall be coordinated with pretrial conferences and memoranda. Requests for admission shall be served in a separate document so titled and shall not be combined with interrogatories, document production requests, or any other material.

(i) In state tax cases, within 35 days of the date the answer is served, defendant(s) shall provide the plaintiff(s) with copies of documents in the audit file and documents in the conference file, if any, that were created by or produced by the Division of Taxation.

(3) In actions to review any equalization table, answers to interrogatories shall be served within 20 days from the date of service of the interrogatories.

(4) (no change).