

RULES OF PRACTICE AND PROCEDURE OF THE NEW YORK CITY TAX APPEALS TRIBUNAL

§1-05 Motion practice.

(a) *General.* To enable the parties to resolve the controversy expeditiously, these rules permit a motion to the tribunal for an order that is appropriate in a proceeding governed by the CPLR, but do not permit a motion for costs or disbursements or motions related to discovery procedures as provided for in the CPLR. For good cause shown, the tribunal commissioners or an administrative law judge designated by the chief administrative law judge may order a form of discovery not otherwise provided for under these rules.

(1) All motions must be made, on notice to the adverse party, within 90 days of the service of a pleading by the adverse party unless a different time period is otherwise prescribed for a particular motion by these rules. The motion shall be filed with the chief administrative law judge and shall be made returnable at the tribunal. The return date on which the motion will be considered by an administrative law judge designated by the chief administrative law judge must be at least 30 days after service of notice of the motion. The adverse party may file an answering affidavit with the chief administrative law judge and must serve a copy on the moving party. The answering affidavit must be filed and served no later than 10 days prior to the return date. Papers may be filed or served as provided in section 1-17 of these rules.

Any reply affidavit shall be filed and served at least one day prior to the return date.

(2) All motions will be decided on the moving papers and answers submitted without oral argument, unless specific application is made for oral argument by a party and the administrative law judge grants that application.

(3) A notice of motion should be typewritten and must specify the supporting papers (e.g., affidavits, admissions, bills of particulars) upon which the motion is based, the return date of the motion and, in separate numbered paragraphs, the relief requested and the grounds for such relief. Any brief shall be filed with the notice of motion and a copy served on the adverse party. Any answering brief must be filed and served no later than 10 days before the return date. Any reply brief must be filed and served at least one day prior to the return date.

(4) The filing of a motion does not constitute cause for postponement of a scheduled pre-hearing conference or hearing, unless such continuance is specifically ordered by the administrative law judge following receipt of such motion.

(5) An order by an administrative law judge on any motion that does not finally determine all matters and issues contained in the petition, for purposes of review by the tribunal commissioners, shall not be deemed final and conclusive until the administrative law judge shall have rendered a determination on the remaining matters and issues. An order by the tribunal commissioners that does not finally decide all matters and issues contained in the petition, for purposes of review under article 78 of the CPLR, shall not be deemed final and conclusive until the tribunal commissioners shall have rendered a decision on the remaining matters and issues.

(b) *Motion to dismiss.* (1) The commissioner of finance may move to dismiss the petition on the ground that:

- (i) a defense is founded upon documentary evidence;
- (ii) the tribunal lacks jurisdiction over the subject matter of the petition;
- (iii) the petitioner lacks legal capacity to petition;
- (iv) there is an action pending between the same parties on the same controversy in a court of any State or the United States;
- (v) the petition may not be maintained because of discharge in bankruptcy, infancy or other disability of the petitioner, payment, release, or statute of limitations;
- (vi) the petition fails to state a cause for relief;
- (vii) the petition has not been timely filed;
- (viii) the tribunal should not proceed in the absence of a person who should be a party; or
- (ix) the tribunal lacks jurisdiction over the taxpayer.

In no event shall a failure by the commissioner of finance to make such a motion be deemed a waiver of any defense. Only one such motion shall be made. The administrative law judge need not issue a determination on the grounds set forth in this paragraph, but may instead make such order as justice requires.

(2) On a motion to dismiss, the administrative law judge may:

- (i) order an immediate hearing to determine facts relating to the grounds for dismissal;

(ii) treat the motion as a motion for summary determination and, on notice to the parties, proceed pursuant to subdivision (d) of this section; or

(iii) should it appear that facts essential to support opposition to the motion may exist, but cannot then be stated, order a continuance to permit further evidence to be obtained or make such other order as may be just.

(c) *Dismissal by the administrative law judge or the tribunal commissioners on their own motion.* The administrative law judge or the tribunal commissioners may, on their own motion and on notice to the parties, issue a determination or decision dismissing a petition on the ground that:

- (1) the tribunal lacks jurisdiction over the subject matter of the petition;
- (2) the tribunal lacks jurisdiction over the taxpayer; or
- (3) the petition has not been timely filed or served.

A determination of an administrative law judge denying a motion to dismiss is not subject to review by the tribunal commissioners.

(d) *Motion for summary determination.* (1) After issue has been joined, any party may move for summary determination. Such motion shall be supported by an affidavit, by a copy of the pleadings and by any other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact to be tried and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows sufficient basis to require a hearing of any issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion.

(2) Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist, but cannot then be stated, the administrative law judge may deny the motion or may order a continuance to permit affidavits or admissions to be obtained and may make such other order as may be just.

(3) A determination of an administrative law judge denying the motion for summary determination is not subject to review by the tribunal commissioners.

(e) *Request to withdraw or modify a subpoena.* (1) Upon issuance of a subpoena pursuant to section 1-08 of these rules, any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, request that the subpoena be withdrawn or modified by filing such request with the administrative law judge or presiding officer assigned to the case or, if no such assignment has been made, to the chief administrative law judge. Such request shall be upon notice to the other party and returnable no later than 1 day prior to the subpoena's return date and shall otherwise conform to the procedural requirements of this section for motions.

(2) *Appeal to tribunal commissioners.* Notwithstanding the provisions of paragraph (5) of subdivision (a) of this section, a party or any person to whom a subpoena is directed may appeal an order granting or denying the request to withdraw or modify the subpoena by filing an exception thereto with the tribunal commissioners.

(f) *Motion to recuse.*

(1) *Motion to recuse administrative law judge or presiding officer.* (i) Either party may move before the chief administrative law judge to recuse the administrative law judge or presiding officer assigned to its case on the basis that the administrative law judge or presiding officer has a personal bias with respect to the case or that the administrative law judge or presiding officer is otherwise disqualified to hear and decide the case.

(ii) The motion to recuse the administrative law judge or presiding officer must be accompanied by an affidavit setting forth the facts upon which the assertion of bias or other disqualification is based.

(iii) The motion to recuse must be made at least 15 days prior to the scheduled hearing date, shall be on notice to the adverse party, and, where not inconsistent with the procedures prescribed in this subdivision (f), shall comply with all procedural provisions of this section.

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(iv) The adverse party may respond to the motion to recuse by

(iv) The adverse party may respond to the motion to recuse by serving its response on the chief administrative law judge and the moving party not later than five days from the date the motion to recuse was served on such adverse party.

(v) In response to the motion to recuse, the chief administrative law judge shall assign a different administrative law judge or presiding officer to the case or deny the motion by written order. Such order shall be issued not later than five days prior to the scheduled hearing date. A party may not file an exception to such an order until the administrative law judge shall render a determination on the remaining matters and issues.

(2) *Motion to recuse a tribunal commissioner.*

(i) On exception, either party may move to recuse a tribunal commissioner on the basis that the commissioner has a personal bias with respect to the case or that the commissioner is otherwise disqualified to hear and decide the case.

(ii) The motion to recuse must be accompanied by an affidavit setting forth the facts upon which the assertion of bias or other disqualification is based.

(iii) The motion must be made with the exception where the movant is the party taking the exception or with the brief in opposition to the exception where the movant is not the party taking the exception.

(iv) The motion to recuse shall be on notice to the adverse party and, where not inconsistent with the procedures prescribed in this subdivision (f), shall comply with all procedural provisions of this section.

(v) The adverse party may respond to the motion to recuse by serving its response on the tribunal and the moving party not later than five days from the date the motion to recuse was served on such adverse party.

(vi) In response to the motion, the tribunal commissioners, without the commissioner who is the subject of the motion, shall either deny the motion or shall decide the exception. The tribunal commissioners shall not issue a separate decision on the motion.

(g) Motion to consolidate or sever.

(1) On the motion of either party, cases may be consolidated and joined for hearing where there exist common parties, common questions of law or fact, or both, or in such other circumstances as justice and efficiency may require, provided there is no reasonable objection interposed.

(2) On the motion of either party, hearings may be severed and held separately where the taxes in question are imposed under different tax laws, where there are different tax periods, where there are different taxpayers, or where the furtherance of justice and efficiency so require.