



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #352

Replace Tax Appeals Commission with Office of the Commissioner of Tax Appeals (General Fund Taxes)

[LFB 2003-05 Budget Summary: Page 181, #2]

CURRENT LAW

The Tax Appeals Commission (TAC) is an independent, quasi-judicial state agency, whose primary function is to determine disputes between taxpayers and the Department of Revenue (DOR) and, to a lesser extent, the Department of Transportation. The TAC is the final administrative authority for the hearing and determination of most tax-related matters arising in Wisconsin.

The TAC has three commissioners, attorneys who are appointed outside the classified service, who must be experienced in tax matters. The commissioners are nominated by the Governor and appointed with the advice and consent of the Senate for staggered, six-year terms expiring on March 1 of odd-numbered years. The Governor designates one commissioner to serve as the TAC Chairperson. The TAC has a support staff consisting of 3.0 classified FTE positions, and is attached to the Department of Administration (DOA) for administrative purposes.

In addition to tax appeals, the TAC also decides appeals of state assessments of manufacturing property and equalized values of taxation districts.

Currently, the Chairperson initially assigns each appeal to a commissioner. The assigned commissioner handles scheduling, rules on pretrial motions, and presides if a hearing is scheduled. After receipt of post-hearing briefs filed by the disputing parties, the assigned commissioner issues a written decision resolving the dispute. If the amount at issue is more than \$2,500, then two of the three commissioners must generally agree and sign the decision.

In the event that a party to a tax appeals case disagrees with the TAC's decision, the party may request a rehearing with the TAC or appeal the decision to Circuit Court.

GOVERNOR

Eliminate the TAC and replace it with the Office of the Commissioner of Tax Appeals (OCTA). In addition, reduce associated funding and positions as follows: (a) decrease funding by \$317,700 GPR in each year; (b) reduce the number of unclassified commissioner positions from 3.0 to 1.0; and (c) decrease the number of classified support positions from 3.0 to 1.0. These provisions would take effect on the bill's general effective date.

The bill would transfer the TAC's duties to OCTA, which would be attached to DOA for administrative purposes. All statutory references to the TAC and its commissioners would be changed to refer to the Office of the Commissioner of Tax Appeals and the Tax Appeals Commissioner, respectively. Instead of the three commissioner positions and 3.0 classified staff positions, OCTA would have a single Tax Appeals Commissioner and 1.0 classified FTE.

The following provisions would apply to the Tax Appeals Commissioner: (a) the Commissioner would be nominated by the Governor and appointed with the advice and consent of the Senate for a six-year term expiring on March 1 of an odd-numbered year; (b) the Commissioner would be required to be experienced in tax matters; (c) the Commissioner would hold office until a successor was appointed and qualified; and (d) the Commissioner would not be permitted to serve on or under any committee of a political party. In addition, the Commissioner would be assigned to the same executive salary group (ESG 4) as applies to the current commissioners. These provisions are similar to those current provisions for tax appeals commissioners.

The duties of OCTA would be the same as those of the TAC. However, a change would be made with respect to case decisions. Under current law, any member of the TAC or its hearing examiner may hear tax appeals. However, with the exception of small claims cases (those involving disputed amounts of less than \$2,500) and other cases for which the parties have agreed to have the case disposed of by one commissioner, at least two commissioners must agree and sign a decision. For a case that does not require the agreement of a two commissioners, a single commissioner assigned to the case by the TAC Chairperson prior to the hearing is responsible for deciding the case.

The bill would eliminate such requirements and would specify, instead, that all decisions would be made by either the Tax Appeals Commissioner or by a hearing examiner assigned to the case by the Commissioner. Such a hearing examiner would be authorized to administer oaths, summon and examine witnesses, and issue subpoenas for evidence. Currently, a tax appeals commissioner or an employee who has written authorization from the TAC Chairperson may administer oaths. However, only tax appeals commissioners may summon and examine witnesses and issue subpoenas for evidence for tax appeals cases in front of the TAC.

The bill would transfer all assets and liabilities, remaining incumbent employees, tangible personal property, contracts, rules and orders, and all pending matters before the TAC to OCTA on the effective date of the bill. With respect to the transfer of employees, the bill would specify that: (a) all employees transferred would retain the same rights and employee status held prior to the transfer; and (b) no employee who had attained permanent status in a classified position would be required to serve a new probationary period.

Total funding for OCTA would be \$270,300 GPR in the first year and \$274,000 GPR in the second year. As compared to the anticipated costs of maintaining the TAC, these amounts would be lower by \$317,700 GPR in each year. The bill would not reestimate expected state general fund revenues from the resolution of tax appeals.

DISCUSSION POINTS

1. The Board of Tax Appeals was created under Chapter 412, Laws of 1939. Prior to that time, state tax assessments and adjustments were appealed to the 71 county tax commissioners. The Board was renamed the Tax Appeals Commission under Chapter 75, Laws of 1967.

2. As described above, the bill would eliminate the TAC and replace it with OCTA; replace the three commissioner positions with a single Commissioner of Tax Appeals; reduce the size of the classified staff from three to one; and transfer incumbent employees holding positions in the TAC to OCTA. These provisions would take effect on the general effective date of the bill.

3. It is unclear whether the bill would treat commissioners as "employees" for the purpose of the proposed transfer of incumbent employees to OCTA, and, if so, who the incumbent commissioner would be. One of the three commissioner positions has been vacant since February 3, 2003. The terms of the two sitting commissioners expire on March 1, 2005, and on March 1, 2007. The administration has indicated that the intent of the proposal is to end the terms of the current commissioners on the effective date of the provision. The Governor would subsequently appoint a new Commissioner of the Office of Tax Appeals in the manner described above. If the Governor's proposal were approved, the bill could be amended to clarify this point.

4. Another option would be to require that one of the two sitting commissioners be reappointed to serve the remainder of one of the existing terms. For example, the bill could be modified to require the Governor to appoint one of the current commissioners to serve as the Tax Appeals Commissioner from the effective date of the bill until either March 1, 2005, or March 1, 2007.

5. Concerns have been raised about the ramifications of the proposal in the following areas: (a) the workload and associated state revenues from appeals decisions; (b) the process for addressing appeals that can not be heard by the new Commissioner; (c) the quality of tax appeals decisions; and (d) the effect on taxpayer services. The following sections address these issues.

Impact on the Tax Appeals Workload and State Revenues

6. The following table provides the number of appeals filed with the Commission, the number of case dispositions, and balance of cases at the end of the year for fiscal years 1996-97 through 2001-02. The table also provides the TAC Chairperson's projections of the 2002-03 totals, based on year-to-date information.

Wisconsin Tax Appeals Commission Appeals & Dispositions -- 1996-97 Through 2002-03

<u>Fiscal Year</u>	<u>Appeals</u>	<u>Dispositions</u>	<u>Ending Balance</u>
1995-96			5,004
1996-97	632	1,954	3,682
1997-98	371	2,165	1,888
1998-99	283	617	1,554
1999-00	219	588	1,185
2000-01	256	334	1,107
2001-02	274	198	1,183
2002-03*	543	299	1,427

* 2002-03 numbers are projections based on year-to-date actuals.

7. Total filings in 2002-03 are projected to increase 98% over appeals 2001-02. The TAC Chairperson believes that the increase in the number of appeals this year is due, in part, to DOR's having taken action on remaining cases related to federal pensions and to other specific types of cases (mostly income tax related) that have become more common in recent years.

8. The TAC has carried forward a balance of unresolved cases in each year shown in the table. The numbers of appeals, dispositions, and ending balances are affected by the complexity of the cases before the TAC and the resultant time required for the appeals process. While the table does not indicate such fluctuations, it does demonstrate a trend towards increasing numbers of appeals and the end-of-the-year caseload balances in recent years.

9. It is difficult to predict with precision the impact of the Governor's proposal on the speed with which tax appeals cases would be decided. While the proposal would reduce the number of commissioners from three to one, the bill would also eliminate the requirement that more than one commissioner must agree with the decision in order to resolve most cases other than small claims cases. The percentage of cases requiring such review fluctuates, but estimates place the figure at approximately 65% of appeals. However, even in such cases, it is typical that a single commissioner performs the greatest amount of work. The extent to which the elimination of this requirement would contribute to speedier resolution of tax appeals is unclear.

10. The administration has indicated that, based on efficiencies expected from OCTA, it does not expect a reduction in the state's capacity to process and resolve tax appeals under the proposal. However, the administration has not clarified the nature of the expected efficiencies under the proposal, other than to suggest that similar cases could be “batched.”

11. The TAC Chairperson, on the other hand, believes that the caseload capacity would be reduced and that there is a potential for a resulting loss of state revenue. While acknowledging that it is not possible to estimate a precise fiscal effect, the TAC Chairperson has suggested that the average time from appeal to resolution of cases may increase from 11 months to 13 months. Based on additional information provided by the TAC Chairperson on pending assessments and the percentage of appeals that could be expected to be resolved in favor of the Department of Revenue's position, the longer time needed to finalize cases could mean a reduction in associated collections for the general fund of \$2 million annually.

12. Without a detailed analysis of the day-to-day activities required in the tax appeals process, it is not possible to verify either of these sets of expectations about the impact of the Governor's proposal on the tax appeals workload capacity or on state tax revenues.

The Use of Additional Hearing Examiners

13. Current law makes reference to the "Tax Appeals Commission or its hearing examiner." However, there is no funding or position authority provided for hearing examiners within TAC. The proposal would make statutory references to a hearing examiner as well. But in this case, such a hearing examiner would be referred to as a person to whom cases could be assigned by the Tax Appeals Commissioner (rather than as the TAC's hearing examiner). As under current law, there would be no specific position or expenditure authority provided for a hearing examiner. However, there are no provisions that would prohibit the use of a hearing examiner under a contract for services.

14. It has been suggested that perhaps OCTA could contract with a hearing examiner to help manage the tax appeals workload under the reduced staffing levels in the proposal. It has also been suggested that hearing examiners in the Division of Hearings and Appeals (DOHA), within the Department of Administration, could be utilized for this purpose.

15. Upon the request of an agency that is not prohibited from contracting with a third party for contested case hearing services, DOHA is authorized to contract with the agency to provide such services. When asked, DOHA cited an hourly fee of \$100 as an example of a rate typically charged for such contracted services.

16. From information provided by the TAC about anticipated expenses under the Governor's proposal, it is estimated that approximately \$44,000 per year could be applied towards purchasing the services of a hearing examiner. [This estimate makes a variety of assumptions about other supplies and services costs under the proposal, and may be higher or lower than such expenditures would actually be.] At a rate of \$100 per hour, the \$44,000 would pay for the

equivalent of 11 weeks of full-time services of a hearing examiner.

17. A factor that would affect the success of such an approach would be the availability of a hearing examiner with the necessary level of expertise in tax matters in the needed timeframe.

18. The administration has indicated that its intention would be to utilize a hearing examiner only in the event that the Commissioner of OCTA had to be recused from an appeals case as a result of a conflict of interest or if specific expertise was required that the Commissioner did not possess. It should be noted, however, that the bill would not provide such limits to the use of a hearing examiner for tax appeals.

Quality of Decisions

19. The TAC Chairperson cites the review of cases by more than one commissioner as a critical component of the high quality of decisions by the TAC. According to the Chairperson, only about 2% of the Commission's cases in the last eight years have been appealed to the Circuit Court. Of these cases, the Commission's decisions have been sustained 91% of the time.

20. The three tax appeals commissioners provided under current law are appointed to six-year, staggered terms. When there is a change in administration, it is not unusual to have at least one commissioner that has been appointed by the prior administration.

21. Under the proposal, there would be a single Commissioner. It could be argued that having a single Commissioner appointed by the Governor (with the advice and consent of the Senate) would render the tax appeals process more susceptible to political influence than having three commissioners with staggered, six-year terms.

22. In addition, a single Commissioner would be solely responsible for all areas of tax law, rather than being able to develop expertise in certain areas, as can be done with more than one commissioner. The decreased ability to specialize and the smaller amount of time that could be devoted to each case, under the proposal, could have adverse affects on the quality of tax appeals decisions.

Taxpayer Services

23. When possible, the TAC schedules hearings at locations throughout Wisconsin in order to minimize the cost and inconvenience to taxpayers of litigating before the Commission. While not requiring the TAC to conduct hearings in other locations, current law makes reference to rooms for hearings outside the City of Madison and requires county boards to provide rooms for the use of the TAC upon the request of the TAC Chairperson. Most hearings are in Madison and Milwaukee. However, other hearing locations include Appleton, Ashland, Black River Falls, Eagle River, Eau Claire, Fond du Lac, Green Bay, Kenosha, La Crosse, Oshkosh, Racine, Sparta, Superior, Waukesha, and Wausau. It is likely that, as a result of the proposal, the majority of the hearings would be held in Madison, in order to maximize the efficiency of the Commissioner.

24. According to the TAC Chairperson, about 40% of taxpayers appearing before the Commission are non-attorneys, who are typically unfamiliar with procedures before the Commission. The TAC Chairperson reports that commissioners and staff currently spend considerable time responding to taxpayers' questions on procedures, both via telephone and through the mail. For taxpayers not represented by attorneys, commissioners draft subpoenas in response to taxpayers' requests, as such taxpayers cannot issue subpoenas. Under the proposal, it is unlikely that taxpayers could be afforded the same level of assistance with the requirements and rules associated with the tax appeals process as that currently provided.

Other States

25. The majority of other states provide for an independent review of tax appeals. A number of these states have a "tax court" as part of the judicial branch of state government. In such cases, the tax court judges are generally selected in the same manner as other trial court judges.

26. Most of the states that provide for independent review of tax appeals, however, do so as part of an executive branch agency. Some of these states also use a "tax court." For example, the Minnesota Tax Court is an executive branch court established to hear only tax-related cases. Similar to Wisconsin's process for appointing commissioners, the Minnesota tax court judges are appointed by the Governor with the advice and consent of the Senate. Most tax appeals are heard and decided by one judge. However, upon petition of a party to the case or a motion by the tax court judge, a case may be tried before the entire, three-person tax court.

27. Of the states with an independent tax review agency, only Alaska has a single gubernatorial appointee that hears and determines tax appeals. However, the appointee must be selected from a list provided by the Alaska Judicial Council, which is a constitutional body consisting of the Chief Justice of the Alaska Supreme Court and appointees by the Governor and the Alaska state bar. The Judicial Council performs a similar function with respect to the appointment of judges.

Options

28. Based on information provided by the administration, it appears that the Governor's proposal is intended to reduce GPR expenditures without diminishing the speed with which tax appeals are resolved or the quality of the decisions. However, without additional information about the manner in which sufficient efficiencies could be expected under the proposal, it seems likely that the proposal would result in a loss of speed in case resolution and, potentially, in the quality of taxpayer services associated with the tax appeals process.

29. Another option would be to retain the TAC, but to reduce the staff by one commissioner and one support position (compared to current law). Compared to the bill, this option would restore one commissioner and one support position. Current law provides that a panel of three members is to generally decide cases other than small claims cases. The statutes could be amended to require the two commissioners to decide such cases. However, in order to avoid

situations under which the TAC would be unable to proceed, current law could also be amended to specify that: (a) if the two commissioners could not reach agreement, then the opinion of the Commission Chairperson would prevail; and (b) in the event that one of the Commissioners had to be recused due to a conflict of interest, the remaining commissioner would be authorized to make the decision. As compared to the bill, this option would increase expenditures by \$158,900 GPR per year. Compared to the adjusted base, this option would reduce annual expenditures by \$158,800 GPR (which would be approximately one-half of the amount of GPR that would be saved under the Governor's proposal).

30. A similar option would be to retain the TAC but to eliminate one commissioner and two support staff positions. Compared to the bill, this option would restore one commissioner. Under this option, one support position would be responsible for all of the duties currently performed by three employees. However, it is not clear whether it would be possible for one person to do so without losses in the efficiency of the TAC. As compared to the bill, this option would increase expenditures by \$113,300 GPR in each year of the 2003-05 biennium. As compared to anticipated costs under current law, expenditures would be reduced by \$204,400 GPR each year.

ALTERNATIVES

1. Approve the Governor's proposal to eliminate the Tax Appeals Commission and replace it with the Office of the Commissioner of Tax Appeals, with a modification to specify that the appointments of the current commissioners would terminate on the effective date of the bill, and that the provisions relating to incumbent employees would not refer to tax appeals commissioners.

2. Approve the Governor's proposal, with a modification to require the Governor to select one of the current TAC commissioners to serve as the Tax Appeals Commissioner for a term starting on the effective date of the bill and expiring on one of the following dates:

- a. March 1, 2005; or
- b. March 1, 2007.

3. Delete the Governor's proposal. Instead, retain the TAC but reduce the number of commissioners from three to two and eliminate one FTE support position and funding of \$158,900 GPR in each year. Specify that the sitting commissioners would retain their appointments for the duration of their current terms. Amend the statutes to specify that: (a) if the two commissioners could not reach agreement on cases requiring a decision by both of them, then the opinion of the Commission Chairperson would prevail; and (b) in the event that one of the commissioners had to be recused due to a conflict of interest, the remaining commissioner would be authorized to make the decision. Compared to current law, this option would delete 2.0 GPR positions and \$158,800 GPR in each year. Compared to the bill, 2.0 GPR positions would be restored and funding would be increased by \$158,900 GPR in each year.

<u>Alternative 3</u>	<u>GPR</u>
2003-05 FUNDING (Change to Bill)	\$317,800
2004-05 POSITIONS (Change to Bill)	2.00

4. Adopt Alternative 3 and eliminate an additional support position. Compared to current law, reduce funding by \$204,400 GPR in each year and eliminate 3.0 GPR positions. Compared to the bill, this alternative would increase funding by \$113,300 GPR in each year and restore 1.0 GPR position.

<u>Alternative 4</u>	<u>GPR</u>
2003-05 FUNDING (Change to Bill)	\$226,600
2004-05 POSITIONS (Change to Bill)	1.00

5. Delete provision.

<u>Alternative 5</u>	<u>GPR</u>
2003-05 FUNDING (Change to Bill)	\$635,400
2004-05 POSITIONS (Change to Bill)	4.00

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