**No. 124155**

IN THE
SUPREME COURT OF ILLINOIS

Horsehead Corporation,

*Plaintiff-Petitioner*,

v.

Illinois Department of Revenue et al.,

*Defendants-Respondents*.

On Petition for Leave to Appeal from the
Appellate Court of Illinois, First District, No. 1-17-2802
There heard on appeal from the Illinois Independent
Tax Tribunal, Cook County, Illinois, No. 14 TT 227
The Honorable James M. Conway, Chief Administrative Law Judge Presiding

# BRIEF *AMICUS CURIAE* OF THE TAXPAYERS' FEDERATION OF ILLINOIS

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## INTEREST OF *AMICUS CURIAE*

The Taxpayers' Federation of Illinois ("TFI") is the state's pre-eminent non-partisan state and local tax and fiscal policy advocacy organization. TFI conducts policy research, educates public officials and others on current issues, advocates for a responsible tax structure that encourages economic growth, and supports efficient delivery of government services. Created to serve Illinois' citizens in 1940, TFI has been integrally involved in all major Illinois tax and fiscal policy discussions for over 75 years. TFI was an integral participant in the legislative process leading to the adoption of The Illinois Independent Tax Tribunal Act of 2012.

## INTRODUCTION

The General Assembly created the Tax Tribunal with the express purpose to improve Illinois' business climate by improving the fairness, and perception of fairness, of the tax protest and appeal process for Illinois taxpayers. The decision in *Horsehead Corp. v. Dep't of Rev.*, 2018 IL App (1st) 172802 wrongly applied a clearly erroneous standard of review which undermines that purpose. *Horsehead* is the first appellate case involving a decision of the Tax Tribunal after a full evidentiary hearing.[1] Guidance is

[1] Two cases appealed from motions for summary judgment in the Tribunal have, however, been decided in the appellate court, and both used a de novo standard of review. *See Rogers v. IDOR*, 2017 IL App (1st) 151449, ¶ 30; *Waste Mgmt. of Ill., Inc. v. Ill. Indep. Tax Trib.*, 2017 IL App (1st) 162830-U, ¶ 15 (cited here only for illustrative purposes).



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needed from the Court on whether the clearly erroneous standard should have applied.

The appellate court rejected Horsehead's claim that the review of the Tax Tribunal decision should be de novo, stating that "our supreme court 'has frequently acknowledged the wisdom of judicial deference to an agency's experience and expertise' (citation omitted)" and "[w]e therefore reject Horsehead's contention that the tax tribunal lacks expertise in interpreting the Use Tax Act such that we must apply a de novo standard of review." *Horsehead*, ¶ 16. This approach conflates canons of statutory construction with standards of review. A standard of review refers to the level of deference owed to a lower court's findings, whereas a canon of deference concerns a court's choice to defer to an agency's expertise while engaging in a de novo review of a legal interpretation.

The Department of Revenue has expertise as the agency that administers the tax statutes and as the agency charged with promulgating regulations that interpret the tax statutes. This expertise is often cited by courts as a reason to defer to the Department's written interpretations, and as a litigant before the Tax Tribunal the Department can argue to receive such deference from the Tribunal. But the Tribunal does not administer the tax statutes or make rules, it merely adjudicates. Thus such deference is not owed to the Tribunal. Furthermore, such deference never informs the question of the standard of



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review, which is concerned with institutional competence and judicial power. Lower courts are fact finders so deference is conferred to their factual findings, but reviewing courts are superiorly situated to rule on legal questions. Improperly deferring to the legal determinations of an adjudicative agency such as the Tax Tribunal effectively transfers the judicial power to that agency and may give rise to separation of powers concerns.

The appropriate question for the appellate court below was whether the Tax Tribunal correctly interpreted the relevant statute. The Tax Tribunal could have given deference to the Department's prior written interpretation of the Use Tax Act (*e.g.*, in a regulation, bulletin, or private letter ruling), as could the appellate court on de novo review. It would be unprecedented, however, to defer to the statutory interpretations of an agency like the Tribunal which serves neither a rulemaking function nor administers the tax statute at issue.

Deferring to the Tax Tribunal's interpretations of law, where no deference would be paid to a circuit court with an identical case before it, simply recreates the unfair conditions that led to the creation of the Tax Tribunal. Wealthy taxpayers will avoid the Tax Tribunal, and once again prefer a refund suit in circuit court as they did before the creation of the Tribunal to avoid the Department of Revenue's administrative hearings.



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## ARGUMENT

### I. Illinois' Statutory and Constitutional Structure Supports De Novo Review of the Tax Tribunal's Legal Determinations

The Illinois Constitution states "[t]he judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." ILL. CONST. OF 1970, Art. VI, § 1. Further, "[t]he Appellate Court shall have such powers of direct review of administrative action as provided by law." ILL. CONST. OF 1970, Art. VI, § 6. Only the Judiciary may exercise the judicial power, and "[t]he application of principles of law is inherently a judicial function and article VI, section 1, of the Constitution vests the exclusive and entire judicial power in the courts." *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 322 (1976).[2]

The purpose of the Tribunal Act was to provide "taxpayers with a means of resolving controversies that ensures both the appearance and the reality of due process and fundamental fairness." 35 ILCS 1010/1-5. The Act states that litigants "are entitled to judicial review of a final decision of the Tax Tribunal in the Illinois Appellate Court, in accordance with Section 3-113 of the Administrative Review Law." 35 ILCS 1010/1-75. The Administrative Review

[2] *See also* BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 2, Book III, Ch. 3 (1753) (judicial power includes the power "to determine the law arising upon [the] fact[s]"); *Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."); *Murphy v. N.C.A.A.*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring) ("[T]he judicial power is, fundamentally, the power to render judgments in individual cases.").



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Law ("ARL") declares that judicial review of administrative decisions "shall extend to *all questions of law* and fact presented by the entire record before the court. . . . The findings and conclusions of the administrative agency *on questions of fact* shall be held to be prima facie true and correct." 735 ILCS 5/3-113 (emphasis added). The ARL further defines the scope of appellate review, stating it "shall extend to all questions of law and fact" and that only questions of fact are prima facie true. 735 ILCS 5/3-110.

Nothing within this constitutional or statutory structure even suggests, let alone requires, a deferential standard for the review of the Tribunal's legal conclusions. Indeed, by specifically providing that an administrative agency's findings of fact are *prima facie* correct the Legislature rejected according a similar deference to an agency's legal determinations. The Constitution, the Tribunal Act, and the ARL all guarantee a right of judicial review over "all questions of law" contained in the Tribunal's decisions. That is consistent with cases originating in circuit court where, on appeal, the reviewing court grants deference to the factual record but exercises plenary authority with respect to legal questions. The text of the governing statutes evidence no intention for Article VI courts to defer to the legal findings of a mere agency.

Indeed, when dealing with an agency that has no function beyond adjudication (*i.e.*, it does not regulate or administer laws), the Constitution's structure suggests that deference to the Tax Tribunal is forbidden because it



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infringes upon the judicial power of the courts. Article II, Section 1 states that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Article VI, Section 6 of the Illinois Constitution reserves "the powers of direct review of administrative action" for the appellate court. Thus the Constitution does not contemplate the appellate courts yielding the judicial power of interpreting the law and making binding legal judgments to democratically-unaccountable agencies through deference to them on the function which is the very essence of judicial power.[3]

Construing the Tribunal Act in a manner that cedes to an administrative agency the judicial power to interpret statutes and exercise independent judicial review violates the separation of powers.[4] This is not a facially unconstitutional violation—"delegation to administrators or agencies of the quasi-judicial power to adjudicate rights . . . is not invalid so long as there is an opportunity for judicial review of the administrative action." *See Waukegan v. Pollution Control Bd.*, 57 Ill. 2d 170, 181 (1974). Rather, the cumulative effect of the Tribunal

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[3] *See* Hudson, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L. J. 373, 375–77 (2009) (explaining why state court judges are much more politically-accountable than federal judges, and arguing for less deference to state agency rulings as a result).

[4] *See Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (overly deferential review "suggests an abdication of the Judiciary's proper role in interpreting federal statutes. This type of reflexive deference exhibited in some of these cases is troubling. . . . The proper rules for interpreting statutes . . . should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.").



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deferring to the Department's interpretations, and then the appellate court deferring to the Tribunal's interpretation creates an almost insurmountable hurdle for any taxpayer, even when the taxpayer might otherwise have the better argument.[5] When judicial review of an agency may rarely if ever be availing due to this "double deference," one must question whether taxpayers are given the opportunity to "contest . . . the correctness of the administrator's interpretation of the statute . . . and whether or not his decision was arbitrary." *Id.*

## II. Independence and Due Process Are Served By De Novo Review, and Undermined By the Clearly Erroneous Standard

The Tribunal's independence from the Department helps bolster "both the appearance and the reality of due process and fundamental fairness." 35 ILCS 1010/1-5. Tribunal litigants "are entitled to judicial review of a final decision of the Tax Tribunal in the Illinois Appellate Court . . . ." 35 ILCS 1010/1-75(a). Moreover, "[e]very action to review any final administrative decision . . . shall extend to all questions of law . . ." 735 ILCS 5/3-110. If due process "means anything, it surely requires a judge not to defer to one of the

[5] It could also arise that there are conflicting claims for deference based on expertise, where the Department appeals seeking deference to its own reading of the statute when the Tax Tribunal did not agree below, and the other party claims deference is due to the Tax Tribunal's own reading of the statute. The mere possibility illustrates the error of deferring to the Tax Tribunal's interpretations of law.



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parties, let alone to defer systematically to the government." HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (U. Chi. Press 2014).[6] Thus "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012).

Beyond considering the Tax Tribunal's factual findings to be *prima facie* true and correct as required by the ARL, applying a deferential standard of review to the Tribunal's decisions is contrary to the General Assembly's intent to make it easier for taxpayers to protest assessments, and negatively impacts the perception that Illinois has a good business environment and ensures the rights and property of taxpayers are protected.[7] The expertise of the Tax Tribunal's ALJs does not alter this analysis. Expertise in tax matters enhances efficiency, but expertise is no guarantee of accuracy. *See* Lederman, *(Un)appealing Deference to the Tax Court*, 63 DUKE L.J. 1835, 1884 (2014) ("[A]s far as perceived fairness is concerned, specialized trial courts benefit even more than generalist courts from appellate review because specialized courts are particularly subject to accusations of bias.").

[6] The "double deference" identified in the previous section systematically favors the government.

[7] Recognizing this, "[i]t is the intent of the General Assembly to place guarantees in Illinois law to ensure that the rights, privacy, and property of Illinois taxpayers are adequately protected during the process of the assessment and collection of taxes." 20 ILCS 2520/2.



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Indeed, the legal determinations of circuit court judges with expertise in tax matters, *e.g.*, the judges of the Miscellaneous Tax and Remedies Division of Cook County circuit court, have never been accorded deference.[8] Giving deference to the Tax Tribunal that is denied to the circuit courts is jarring when juxtaposed with the General Assembly's findings that "taxes are the most sensitive point of contact between citizens and their government, and that there is a delicate balance between revenue collection and freedom from government oppression" [35 ILCS 2520/2] and the importance of "the appearance and the reality of due process and fundamental fairness," [35 ILCS 1010/1-5].

## III. Differences Between the Tax Tribunal and the Department of Revenue Merit Withholding Deference to the Tax Tribunal's Interpretation of Laws

### A. Differences In Function Between the Tax Tribunal and the Department of Revenue

The vast differences between the Tax Tribunal and the Department of Revenue militate in favor of treating these agencies differently with regard to judicial deference to their interpretation of tax laws. The Tax Tribunal Act

[8] General Orders of the Circuit Court of Cook County, No. 1.2. Operation, 2.1(a)(3)(viii) Tax and Miscellaneous Remedies Section "to include . . . all tax matters including administrative review of such matters[except administrative review of Property tax Appeal Board final decisions . . .]. Sept. 15, 2017, *available at* <http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/ArticleId/188/GENERAL-ORDER-NO-1-2-2-1-County-Department.aspx>



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states flatly "[t]he Tax Tribunal shall operate as an independent agency, and shall be separate from the authority of the Director of Revenue and the Department of Revenue." 35 ILCS 1010/1-15. But independence of the Tribunal from the Department is more than a formality—it has substantive effect.

The Department of Revenue is the agency tasked with administering the various statutory tax codes enacted by the General Assembly. The Department's responsibilities on this front include creating tax forms and instructions, staffing help-lines for taxpayers, collecting taxes from individuals and businesses, distributing tax revenues to local governments (*e.g.*, the local portion of the Use Tax), auditing taxpayers, assessing penalties and interest for tax deficiencies, administering tax liens, and providing informal binding and non-binding advice to taxpayers, among other duties. The Tax Tribunal does none of these things.

The Department of Revenue also serves a rulemaking function. The General Assembly has delegated to the Department the authority to administer, and for that purpose, to interpret the tax statutes. The Department's regulations, which undergo the Illinois Administrative Procedure Act's mandatory notice-and-comment process and are approved by the Joint Committee on Administrative Rules [see 5 ILCS 100/5-5 et seq.], are presumed to have the force of law. In some instances, the Department's forms have the



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force of regulations, *i.e.*, "[the t]erm regulations includes rules promulgated and forms prescribed by the Department." 35 ILCS 5/1501(a)(19). Further, the Department issues informal, non-binding guidance to inform the public about certain tax issues. *See* 2 Ill. Admin. Code §§ 1200.110 & 120. The Tax Tribunal does none of these things.

The Department also serves the role of advocate by commenting on proposed tax legislation. 20 ILCS 2505/2505-700. It has the power to compile statistical records for taxes collected. 20 ILCS 2505/2505-65. It has the power to require from all State and local officers any information necessary to discharge its duties. 20 ILCS 2505/2505-600. It has the power to investigate the tax systems of other states and countries. 20 ILCS 2505/2505-705. Moreover, in discharging these and other functions, the Department's leadership routinely speaks to the public, both in political forums (*e.g.*, House and Senate hearings) and informal settings (*e.g.*, taxpayer and practitioner meetings). The Tax Tribunal does none of these things.

Finally, the Department still serves an adjudicative function through its administrative hearings division. Currently, only denials of sales tax exemptions, property tax exemptions (properly viewed in a regulatory context since the Department grants or denies applications for these), and cases under $15,000 are adjudicated by the Department's administrative hearings division. The



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remaining active administrative hearings docket was transferred to the Tribunal upon its creation. *See* 35 ILCS 1010/1-45(a).

In contrast, the Tax Tribunal serves only one function: to adjudicate certain tax disputes.[9] This has substantive impact.

On a given tax issue, the Department and the taxpaying community might agree 99% of the time, but the Tribunal would never know this, because it only sees *a fraction of* the 1% outlier cases.[10] For example, accountants and lawyers that represent taxpayers during audits with the Department know that penalties are often abated by the Department for reasonable cause. In affirming the Tax Tribunal's denial of Horsehead's penalty abatement, the appellate court said that "Horsehead cannot rely on its own erroneous interpretation of the statute to argue it exercised ordinary business care and prudence," [¶ 28] but that is exactly what every taxpayer does while explaining that its erroneous interpretation was nevertheless reasonable and that penalties are therefore appropriately abated.

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[9] Similarly, the U.S. Tax Court "is a specialized tribunal passing upon controversies in the traditional manner of the judiciary" and "the Tax Court is no more administrative in character than a district court." Eisentstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 541–42 (1945). U.S. Tax Court decisions are reviewed de novo. *See infra* Part VI.B.

[10] The Tribunal would only see a fraction of the 1% because not every disagreed audit is protested to the Tribunal—some are protested in circuit court, others are settled, and in other cases the taxpayer simply decides litigation is not worth the trouble.



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The Tribunal judges never see the many instances where the Department has abated penalties, maybe on identical facts to those before it, and taxpayers can never produce such evidence because of taxpayer confidentiality laws.[11] By design, despite the statutory requirement of tax expertise for its appointed judges, the Tribunal does not have the same depth and breadth of expertise as the Department and it should not be shown deference as though it had that experience.

### B. Differences In Adjudicative Procedures Between the Tax Tribunal and the Department of Revenue

The Department's administrative hearings are informal and very different from the procedures in circuit court. The Tribunal, on the other hand, adopted the Illinois Supreme Court Rules as its default procedural rules, and proceedings in the Tribunal are more similar to circuit court than to the Department's administrative hearings.

By initiating an "informal review" through the Department's administrative hearing section, non-lawyers can represent taxpayers before the Department. 86 Ill. Admin. Code § 200.135. Such non-attorneys can also testify

[11] *See* 86 Ill. Admin. Code § 700.400(b)–(d) (regulation concerning reasonable cause noting that exercising "ordinary business care and prudence" is the hallmark of reasonable cause, and also that "a taxpayer's filing history" is also relevant). The Tribunal, due to its limited experience, will not know what practices the Department has considered "ordinary business care and prudence," nor, due to confidentiality laws, will the Tribunal and litigants know whether the taxpayer's filing history is similar or different from that of others for whom the Department has abated penalties.



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at Department hearings and "assist counsel in the preparation of cases for presentation to the Administrative Law Judge at hearings." 86 Ill. Admin. Code § 200.110(b). The proceedings of these hearings are not strictly governed by the Illinois Supreme Court Rules or the Illinois Code of Civil Procedure. *See, e.g.*, 86 Ill. Admin. Code § 200.130(a) (in seeking to compel a response to discovery "it shall not be required that the provisions of Section 201(k) of the Supreme Court Rules be followed."). Rather, administrative hearings are governed by unique rules promulgated by the Department itself. For example, discovery is more limited than in the Tribunal or circuit court. *See* 86 Ill. Admin. Code § 200.125. Moreover, no party is "bound by the technical rules of evidence in the taking or admission of proofs." 86 Ill. Admin. Code § 200.155(a).

Upon the conclusion of the Department's hearing, the ALJ, who is one of the Department's employees, makes a recommended disposition. 86 Ill. Admin. Code § 200.165. The Director of the Department can either accept, reject, or remand his subordinate ALJ's decision. *Id.* Only the final decision of the Department is made public—the proceedings are otherwise kept confidential, unlike the Tribunal or circuit court. *See* 86 Ill. Admin. Code §§ 200.165 & 200.225. A taxpayer wishing to appeal the Department's administrative decision must protest in circuit court. The Department is not allowed to appeal if it loses an administrative hearing.



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In contrast, only lawyers may represent taxpayers in the Tribunal (except for the allowance of *pro se* litigants). 35 ILCS 1010/1-80(a). Discovery in the Tribunal is governed by Illinois Supreme Court Rules and the Code of Civil Procedure. 35 ILCS 1010/1-60(a); 86 Ill. Admin. Code § 5000.325(a). The Tribunal's hearings are open to the public, unlike the Department's administrative hearings, and all information submitted to the Tribunal is public (with some exceptions), just as in circuit court. *See* 35 ILCS 1010/1-65(c) & 1-100. The rules of evidence applicable in civil cases tried in circuit court are also applicable in the Tribunal's hearings. 35 ILCS 1010/1-65(e). Final decisions of the Tribunal are appealed directly to appellate court, and both taxpayers and the Department can appeal. 35 ILCS 1010/1-75(a).

Proceedings in the Tribunal are similar to those in circuit court, by design. Appellate review of the Tax Tribunal's legal determinations should, therefore, be reviewed like circuit court decisions under the de novo standard.

## IV. The Difference Between Deference to Agency Rulemaking and A Deferential Standard of Review

The differences between an administrative and rulemaking agency like the Department, and a purely adjudicative one like the Tribunal, play directly into the types of deference afforded to those agencies. The concepts of deference to an administrative agency's interpretative regulations, as opposed to



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a deferential standard of review, are often confused. The former is a canon of interpretation, the latter clarifies the reviewing court's function.

The standard of review refers to the level of deference a reviewing court owes the lower court, here the Tax Tribunal. *See* BLACK'S LAW DICTIONARY, p. 1441 (8th Ed. 2004) (definition of "standard of review"). The Tribunal is entirely independent from the Department of Revenue [see 35 ILCS 1010/1-15(a)], so the standard of review for the Tribunal's decisions does not implicate the Department's standing as an agency. In contrast, a canon of interpretation is a customary rule used by courts to construe statutes. See BLACK'S LAW DICTIONARY, p. 219 (8th Ed. 2004) (definition of "canon of construction"). When a court is reviewing a question of statutory interpretation, it may decide to apply a canon of agency deference, but in doing so it would have still reviewed the legal findings of the lower court de novo. The Department is merely a litigant in Tax Tribunal cases, hence the fact that courts sometimes choose to defer to the Department's interpretation of a statute says nothing about the appropriate standard of review for a decision written by one of the Tribunal's ALJs.

This distinction is crucially important. Courts review questions of statutory interpretation de novo. *See Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 16. Courts can then *choose* to defer to an agency's interpretation of a statute, but they are not *required* to do so. This principle is illustrated by Illinois



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case law,[12] as well as federal case law, where a similar canon of deference (*Chevron*) is employed.[13] Deference to agency interpretations is weaker and less well-established in Illinois law when compared to federal law.[14]

Going back to the differences between the Department and the Tribunal, deference to an agency's regulatory interpretation of an ambiguous statute can be appropriate when that agency is tasked with administration and rulemaking duties. *See, e.g., Abrahamson v. Ill. Dep't of Prof. Reg.*, 153 Ill. 2d 76, 97–98 (1992) ("[A] court of review is not bound by an administrative agency's interpretation of a statute. However, courts will give substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with the administration and enforcement of the statute.") (internal citations omitted). The Tribunal does not administer any taxes, nor does it serve a

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[12] *See, e.g.*, *Hartney*, 2013 IL 115130, ¶¶ 58–64 (acknowledging deference to the Department of Revenue's regulations but invalidating them nonetheless because they impermissibly narrowed the statute); *Kean v. Wal-Mart*, 235 Ill. 2d 351, 371–72 (2009) ("[T]he Department's regulations are entitled to some deference . . . [but they] must be consistent with . . . the statute under which they are promulgated.").

[13] *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984) (if the statute is ambiguous, a regulation interpreting that statute is granted deference if "based on a permissible construction of the statute."); *but see Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015) (applying *Chevron* but nevertheless invalidating the agency's regulation); *Utility Air Reg. Group v. E.P.A.*, 573 U.S. 302 (2014) (same); *King v. Burwell*, 135 S. Ct. 2480 (2015) (refusing to apply *Chevron* deference).

[14] *See* Coles, *Mixed Up Questions of Fact and Law: Illinois Standards of Appellate Review in Civil Cases Following the 1997 Amendment to Supreme Court Rule 341*, 28 S. ILL. L. J. 13, 53 & n.194 (2003) (*Chevron*-like deference not mandatory in Illinois, and Illinois' constitutional structure and the lack of legislative intent favoring such deference militate against making it mandatory).



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rulemaking function by promulgating interpretative regulations. Hence no deference is owed to the Tribunal's interpretations. Binding and final legal interpretations are emphatically the province of the courts, not agencies.[15]

The typical standard of review—deference to the lower court's fact findings, de novo review of the lower court's legal determinations—"serves the dual goals of doctrinal coherence and economy of judicial administration." *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). Trial courts hear witnesses, assess credibility, and make the factual record, and therefore are assumed to have superior competence in resolving questions of fact. *Id.* Appellate courts don't have to find facts, which allows them to focus on the legal questions, a focus which is further aided by the appellate briefs concentrated on these legal issues. *Id.* at 232. Further, appellate cases are staffed by multi-judge panels that can more comprehensively and reflectively consider important legal questions than a single trial judge who presides over fast-paced hearings and trials. *Id.* Thus appellate courts are presumed to be superior at resolving questions of law.

[15] *See, e.g., BNSF Railway Co. v. Loos*, 586 U.S. ___ (2019) (Gorsuch, J., dissenting) ("Instead of throwing up our hands and letting an interested party—the federal government's executive branch, no less—dictate an inferior interpretation of the law . . . my colleagues rightly afford the parties before us an independent judicial interpretation of the law. They deserve no less.").



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Having distinguished between deference to an agency's regulation and deference to an a non-rulemaking agency's adjudicative decisions, one more type of deference deserves mention. It will sometimes be argued that the Department's interpretation of a statute is owed deference when that interpretation is not promulgated in a regulation, or indeed, in any written guidance. This would be deference to the Department's litigation positions,[16] a canon of deference which is disfavored. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (deference to an agency's position is unwarranted when it is "a convenient litigating position" or advanced as a post-hoc rationalization of past agency action). Indeed:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time . . . and demands deference.

*Id.* at 158–59.

## V. Blanket Deferral to the Tribunal Is Not Required by Existing Illinois Case Law

An analysis of existing law reveals that reviewing the Tribunal's legal determinations de novo would hardly be revolutionary. Much confusion has

[16] In any case before the Tribunal, the Department is a litigant represented by the Attorney General's office. The Department is not a rulemaking or administering agency in its capacity as litigant when it asserts a novel interpretation of a statute.



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been sowed since the adoption of the clearly erroneous standard of review for mixed question of law and fact in *Belvidere v. Ill. State Labor Relations Bd.*, 181 Ill. 2d 191, 204 (1998). As another court pithily noted "we have a difficult time imagining any case not involving the examination of the legal effect of a given set of facts." *Swank v. Dep't of Rev.*, 336 Ill. App. 3d 851, 861 (2d Dist. 2003). Virtually every determination by a lower court will be a mixed question of fact and law, which makes that a questionable factor for implicating a special standard of review. *Cf. Carpetland U.S.A., Inc. v. Ill. Dep't of Employ. Sec.*, 201 Ill. 2d 351, 369 (2002) ("[I]n *City of Belvidere,* we did not entirely abandon the *de novo* standard in administrative review cases."); *Graves v. Ill. Dep't of Human Rights*, 327 Ill. App. 3d 293, 296 (4th Dist. 2002) ("[t]he supreme court in cases since *Belvidere* has broken the question down into its fundamental parts, review questions of fact at the appropriate standard, such as manifest weight, and questions of law de novo.").

Predictably, courts since *Belividere* have not reserved the de novo standard for those rare, pure, questions of law. Instead, courts have granted de novo review of an agency's legal determinations where:

> [T]the historical facts are admitted or established, but there is a dispute as to whether the governing legal provisions were interpreted correctly by the administrative body, the case presents a purely legal question for which our review is de novo.



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*Chicago Bears Football Club v. Cook County Dep't of Rev.*, 2014 IL App (1st) 122892, ¶ 24 (internal citation omitted). Many other tax cases have repeated similar formulations. *See, e.g.*, *Eden Retirement Ctr., Inc. v. Dep't of Rev.*, 213 Ill. 2d 273, 284 (2004); *AT&T Teleholdings, Inc. v. Ill. Dep't of Rev.*, 2012 IL App (1st) 113053, ¶ 30; *Home Interiors & Gifts, Inc. v. Dep't of Rev.*, 318 Ill. App. 3d 205, 209–10 (1st Dist. 2000); *Blessing/White, Inc. v. Zehnder*, 329 Ill. App. 3d 714, 727–28 (1st Dist. 2002). Thus it seems that a mixed question of fact and law only garners a clearly erroneous standard of review when "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard . . . ." *AFM Messg'r Serv., Inc. v. Dep't of Employ. Sec.*, 198 Ill. 2d 380, 391 (2001) (citations omitted).

The *Blessing/White* case explains why mixed questions of law and fact in tax cases will usually be legal questions reviewed de novo. There, the Court reasoned that "[w]hile the facts before the Department, like the facts [in *Belvidere*] were not in dispute, the Department was not required, like the labor board [in *Belvidere*], to draw any additional factual findings from the evidence." *Blessing/White*, 329 Ill. App. 3d at 727. The taxpayer and the Department stipulated to the material facts, and therefore "the Department's decision represents a legal determination subject to de novo review." *Id.* at 728. Extensive factual stipulations are also required by the Tribunal's rules. 86 Ill. Admin. Code § 5000.340(a) ("The parties are required to stipulate, to the fullest



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extent to which complete or qualified agreement can or fairly should be reached, all undisputed facts not privileged that are relevant to the pending controversy.").

The "clearly erroneous" standard in Illinois is misaligned with the similar federal standards of review. In *AFM,* the Court cited *Pullman* for the definition of a mixed question of fact and law. *See AFM Messg'r*, 198 Ill. 2d at 391 (citing *Pullman-Standard v. Swint*, 456 U.S. 273 (1982)). In *Pullman*, the Supreme Court unequivocally stated it was not addressing "the applicability of the [clearly erroneous] standard to mixed questions of law and fact" and continued by noting the "support in decisions of this Court for the proposition that conclusions on mixed question of law and fact are independently reviewable by an appellate court." *Pullman*, 456 U.S. at 289 n.19. *AFM* then cited *U.S. Gypsum*'s construal of the clearly erroneous standard set forth in Rule 52(a) of the Federal Rule of Civil Procedure. *AFM Messg'r*, 198 ll. 2d at 392–93. But *U.S. Gypsum* itself states unambiguously that Rule 52(a) "prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous.'" *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

The clearly erroneous standard is *not* used to review mixed questions of fact and law in federal courts—it is only used to review pure factual findings. *See* Fed. R. Civ. P. 52(a)(6). Instead, the standard of review for mixed questions of fact and law depends "on whether answering it entails primarily legal or



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factual work." *U.S. Bank Nat. Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018). If the controversy "immerse[s] courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments," etc. then it should be reviewed with deference. *Id.* But if the question "involves developing auxiliary legal principles of use in other cases" the standard of review is de novo. *Id.* There is no unique feature of Illinois law that has been identified to compel or justify that misalignment between similar federal and Illinois standards for dealing with mixed questions of fact and law, so a reexamination of the standard articulated in *Belvidere* and *AFM* may be appropriate given how it was misapplied by the *Horsehead* appellate court below.

For instance, in a case involving issues of Illinois state law, the U.S. Seventh Circuit Court of Appeals recently observed that the "issues in these appeals are 'mixed question[s] of fact and law' which is not necessarily a helpful label." *Straits Fin. LLC v. Ten Sleep Cattle Co.*, 900 F. 3d 359, 367 (7th Cir. 2018). The court then wrote that "[o]ur general task on such questions 'is to determine the legal significance of a set of facts' found by the district court, which entails significant deference to its conclusions when those conclusions are confined to the specific context of the case presented." *Id.* at 368. It added, however, "that deference ends when the district court ventures beyond 'case-specific factual issues and reaches broader legal conclusions applicable to a whole class of future cases.'" *Id.* (citing *Village at Lakeridge*, 138 S. Ct. at 967).



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Therefore courts "tak[e] care not to defer to the district court's judgment where it effectively announced new legal rules that would govern future cases." *Id.* The Tax Tribunal's interpretation of the Use Tax Act in *Horsehead* would govern future cases, and therefore is the type of broad legal standard that is reviewed de novo, despite the fact that it may be a mixed question of fact and law.

But even if the Court intends to uphold and apply the *Belvidere* framework to decisions of the Tax Tribunal, it should clarify that the character of a mixed question of law and fact determines the standard of review. Specifically, where no material facts are disputed and only disputes about the meaning of the applicable laws remain, the Tribunal's ruling presents a question of law reviewed de novo.[17] The clearly erroneous standard of review should not apply to these types of mixed questions of fact and law. *See AT&T*, 2012 IL App (1st) 113053 at ¶ 30. But where the material facts are agreed along with the meaning of the applicable statutes and constitutional provisions, and only the inferences drawn from those facts are disputed, then the clearly erroneous standard of review is appropriate under the *Belvidere* framework. *See AFM Mess'r*, 198 Ill. 2d at 391.

[17] *Cf.* Bickford, *The Trial of the Tax Court*, 23 TAXES 482, 490 (1944) ("[S]ince the beginning of time in this country, at least, a stipulated case of ultimate facts has been held to present *nothing but a question of law*, subject to review on a writ of error which could bring up *nothing but questions of law*.") (emphasis in original).



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## VI. The Legislative Intent of the Illinois Independent Tax Tribunal Act Supports De Novo Review of Legal Issues Decided by the Tribunal

### A. THE LEGISLATURE ENACTED THE TRIBUNAL ACT TO REDUCE THE APPEARANCE OF BIASED TAX PROCEEDINGS AND THEREBY MAKE ILLINOIS MORE TAXPAYER-FRIENDLY.

Section 1-5(a) of the Tribunal Act states that the purpose of the Tax Tribunal is "to increase public confidence in the fairness of the tax system" by providing a process which "ensures both the appearance and the reality of due process and fundamental fairness." 35 ILCS 1010/1-5. There was a national perception that the Department's decisions were biased, not because of the Department's lack of expertise, but due to the fact that it was allowed to make the rules, apply the rules, and then adjudicate its own claims.[18] This appearance of bias was then bolstered when a deferential standard of review (clearly erroneous) was employed on appeal.

The appellate court was mistaken to rely on the statutorily-required tax expertise of the Tax Tribunal appointees as a basis for deference on interpretation of the Use Tax. During the passage of the Tribunal Act, Rep. Reboletti asked if the Tribunal's decisions could be appealed to circuit court, and the sponsor, Rep. Zalewski, responded "[i]t's going to go directly to the

[18] *See* Letter from COST to Rep. Zalewski (May 21, 2012) ("In COST's most recent survey of state tax administration systems, Illinois scored a very low D – in the bottom 10 of all states – in large part because of its current lack of an independent tax appeals tribunal. Illinois' low score is out of step with many of its sister states in the Midwest . . . ."). Attached as Exhibit A.



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Illinois Appellate Court." *97th General Assembly, House of Representatives, Transcription Debate*, p. 67 (May 26, 2012). The context of that remark implies that the Tribunal would not receive the deferential review accorded the Department's administrative hearings decisions. That is because the Department's administrative hearing decisions must be appealed to the circuit court for review. *See* 86 Ill. Admin. Code § 200.195. Only after this intermediate step can an administrative hearings decision be appealed to the appellate court, but even then it is not the circuit court's decision that is reviewed but the Director's decision accepting, modifying, or rejecting the recommendation of the Department's ALJ's.

Having removed most of the adjudicative function from the Department, the Legislature also ended the ability and discretion of the Director to accept, modify, or reject a decision, as could have been done with the recommendation of an ALJ. The Director does not review or modify the Tribunal's decisions. It therefore does not follow that the General Assembly would expect the courts to accord the same deference previously shown the Department to a Tax Tribunal not charged with administering any tax law other than the Tribunal Act itself. Instead, it is evident that the General Assembly expected Tax Tribunal decisions to receive the same review accorded to decisions of a circuit court, and in so doing the General Assembly did not to any degree diminish the deference that either the circuit court, Tax Tribunal, or



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appellate court could give the Department in interpreting the laws it is charged to administer and enforce.

B. THE EXPERIENCE OF THE UNITED STATES TAX COURT, DECISIONS OF WHICH ARE REVIEWED DE NOVO, PROVIDES PARTICULARLY APT GUIDANCE

The United States Tax Court began in 1924 as the Board of Tax Appeals, which was an administrative hearings division of the IRS, just like the Illinois Department of Revenue's hearings division. Lederman, *(Un)appealing Deference to the Tax Court*, 63 DUKE L.J. 1835, 1841 (2014). Eventually the Board was renamed the "Tax Court," and in 1969 the Tax Court was moved out of the Treasury Department as an independent tribunal where taxpayers could protest assessments without paying the tax up front, mirroring the Illinois progression. *See Freytag v. Comm'r*, 501 U.S. 868, 870 (1991).

Legal conclusions of the IRS's Board of Tax Appeals were reviewed de novo.[19] However, in a surprising 1941 decision, the U.S. Supreme Court held that reviewing courts should defer to the Board's legal conclusions. *See Dobson v. Comm'r*, 320 U.S. 489 (1942). *Dobson* was harshly criticized by the academy

[19] *See, e.g.*, *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937) ("The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the Board.").



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and the bar.[20] Hugh C. Bickford, a former Internal Revenue attorney who wrote the first textbook on Tax Court procedure, quipped that apparently "the men and women who sit on the Tax Court have passed beyond the philosophical ken of human error and need no scrutiny, whereas, on other hand, the judges of the Federal Circuit Courts of Appeals lack the perspicacity to review tax cases, although they have been doing so with Constitutional and legislative warrant since . . . 1796." Bickford, *The Trial of the Tax Court*, 23 TAXES 482, 485 (1945). Presaging the standard of review controversy in *Horsehead*, critics raised many of the same points raised in this brief.

After years of confusion, the Supreme Court eventually realized its error, repudiated *Dobson*, and clarified that as a matter of judicial and constitutional principles the Tax Court's legal findings must be reviewed de novo. *See Freytag*, 501 U.S. at 891. Under the de novo standard of review, the Tax Court has flourished, as illustrated by the fact that 95% of federal tax protests are currently filed there. *See* Lederman, 63 DUKE L.J. at 1881 n.240. Like Illinois, federal taxpayers have the option to bypass the Tax Court and proceed in the U.S. district courts or in the Court of Claims, but they overwhelmingly choose to file in the Tax Court.

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[20] *See, e.g.*, Randolph Paul, Dobson v. Commissioner*: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753 (1944); Erwin Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1170–73 (1944).



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Virtually all of the reasons for reviewing the Tax Court's decisions de novo apply with equal force to judicial review of the Illinois Tax Tribunal's decisions. Even the appellate review statutes are similar. *Compare* 26 U.S.C. § 7482(a) ("The United States Courts of Appeals . . . shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury . . . .") *with* 35 ILCS 1010/1-75 (litigants "are entitled to judicial review of a final decision of the Tax Tribunal in the Illinois Appellate Court . . . ."). The path already forged by the Tax Court and the federal courts should inform the standard of review applied to Illinois Tax Tribunal decisions.

## VII. Deference to Tax Tribunal Decisions Will Lead the 'Haves' to Circuit Court and the 'Have Nots' to the Tax Tribunal

The appellate court's application of the clearly erroneous standard to the Tribunal's legal determinations would undermine the purpose of the Tribunal, create an unfair "two-track" system based on wealth disparities, and jeopardize the Tribunal's existence.

Taxpayers are allowed to protest Illinois tax assessments in circuit court if they first pay the liability in full pursuant to the Protest Act. *See* 30 ILCS 230/2a. If the Tribunal's decisions will be reviewed under the clearly erroneous standard, few taxpayers of means will file suit in the Tribunal. They will incur the higher initial cost of proceeding in the circuit court to preserve as even a



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playing-field as possible by reducing deference to the government if an appeal is necessary.

We expect that only taxpayers lacking the funds to pay their tax assessments under protest would then utilize the Tribunal. The Tribunal would become a place where small, cash-oriented businesses with notoriously bad tax compliance go to settle their tax assessments. Individuals might file in the Tribunal if they are not assessed much beyond the $15,000 jurisdictional threshold, but those that have larger assessments will likely also have the means to pay for entry into circuit court to avoid the Tax Tribunal. Attorneys will likely advise their clients not to file in the Tax Tribunal where they have the means to avoid it, so large businesses and smaller businesses with adequate cash flow (and defensible tax positions) would similarly cease filing suit in the Tribunal. That plausibly foreseeable outcome is not one the General Assembly intended when it created the Tax Tribunal.

The General Assembly explicitly worked with TFI and the taxpayer community and adopted their concerns into the legislative record. These organizations emphasized the need for an independent tribunal that was not operated on a "pay-to-play" basis. Such independence is, practically speaking, a mirage if the Tribunal's decisions are treated as identical to those of the Department of Revenue's with respect to the deferential standard of review. Upholding a blanket clearly erroneous standard of review for Tax Tribunal



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decisions plunges Illinois back into the pre-Tribunal era where taxpayers perceived the need to pay-to-play in order to get a fair shake. This state of affairs is antithetical to the legislative intent of the General Assembly.

## VIII. CONCLUSION

Taking full account of the constitutional and statutory structure under which the Tribunal Act was adopted, the legislative intent of the General Assembly, Illinois law and public policy issues regarding judicial review, and issues of fairness, the standard of review for legal determinations of the Tax Tribunal should be de novo. That includes de novo review for the rare "pure legal questions" as well as the more common "mixed questions of law and fact" where the material facts are undisputed and only a dispute about the meaning of the relevant statutory or constitutional provisions is at issue.



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Respectfully submitted,

*AMICUS CURIAE*

**TAXPAYERS' FEDERATION OF ILLINOIS**

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Dated: March 7, 2019



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## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing or words contained in the Rule 341(d) cover, the Rule 341(h) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 7,716 words.

*/s/ Michael J. Wynne*

Michael J. Wynne, *Attorney for Amicus Curiae*



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# Exhibit A

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COST
COUNCIL ON STATE TAXATION

**Officers, 2011-2012**

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**Chair**
*Sprint*

**Theodore H. Ghiz, Jr.**
**Vice Chair**
*The Coca-Cola Company*

**Jeffrey L. Hyde**
**Treasurer**
*GE Capital Corporation*

**Amy Thomas Laub**
**Secretary**
*Tempur-Pedic International Inc.*

**John J. Pydyszewski**
**Immediate Past Chair**
*Johnson & Johnson*

**Bob L. Burgner**
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**President**
*Council On State Taxation*

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*Georgia-Pacific LLC*

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*Wal-Mart Stores, Inc.*

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*E.I. DuPont De Nemours and Company*

**R. Paul Weatherford**
*Sears Holdings Management Corporation*

**James R. Williams**
*Massachusetts Mutual Life*

**Douglas L. Lindholm**
*President & Executive Director*
(202) 484-5212
dlindholm@cost.org

May 21, 2012

*Via Mail and E-Mail*

Representative Michael J. Zalewski
231 E
Stratton Office Building
Springfield, IL 62706

Re: COST's Support for the Illinois Tax Tribunal Act of 2012

Dear Representative Zalewski:

I am writing on behalf of the Council On State Taxation (COST) to express COST's strong support for the enactment of the Illinois Tax Tribunal Act of 2012 (as contained in House Amendment #1 to House Bill 5192). This Act would fulfill the mandate to establish an independent tax appeals tribunal as provided in Public Act 097-0636, and would significantly improve the business climate in Illinois and enhance the state's reputation as a fair and competitive place to do business.

## About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of nearly 600 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

## Fair, Efficient and Customer-Focused Tax Administration

Regardless of the types of taxes utilized in any state's revenue system, taxpayers deserve fair, efficient and customer-focused tax administration. In COST's most recent survey of state tax administration systems, Illinois scored a very low D – in the bottom 10 of all states – in large part because of its



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current lack of an independent tax appeals tribunal. Illinois' low score is out of step with many of its sister states in the Midwest, including Minnesota, which earned an A-, and Michigan, Indiana, Iowa, Missouri, Ohio, and Wisconsin, which all earned a B. Foremost in good tax administration is a fair and efficient tax appeals system.

Today, over half of the states provide an independent non-judicial appeals process specifically dedicated to hearing tax cases. The most recent state to join these ranks is Georgia, where Governor Nathan Deal signed legislation creating the Georgia Tax Tribunal on April 19, 2012 (Act 609).

The ability to reach an independent tribunal without prepayment is another key indicator of a fair and efficient appeals process. Currently, almost two-thirds of states offer this opportunity through a non-judicial forum at a minimum, often with both judicial and non-judicial review.

The Illinois Tax Tribunal Act of 2012, which is based on a model developed by the American Bar Association, will bring Illinois into the majority of those other states that provide an independent appeals tribunal. Its enactment will significantly improve Illinois' national reputation for fair, efficient and customer-focused tax administration. I can assure you that this improvement will be reflected in the next COST administrative "scorecard".

To be sure, enactment of the Illinois Tax Tribunal Act of 2012 will not put an end to our common work to improve tax administration in the State of Illinois. This is recognized by the reservation of appeals of liabilities equal to or less than $15,000, or penalties and interest in that amount, to the Department of Revenue's administrative hearings process. We believe that an impartial hearing should be available to all taxpayers, large and small, and therefore pledge to continue working with you to expand the jurisdiction of the Tax Tribunal once it is fully functioning and demonstrates its effectiveness as a venue for deciding tax appeals.

In conclusion, we are proud to be in support of the Illinois Tax Tribunal Act of 2012 and are greatly appreciative of, and want to recognize, your leadership on this issue. Enactment of this legislation will go a long way toward improving Illinois' business reputation in general, and its grade for tax administration specifically. Please let me know if I can be of any assistance as you move forward with this important measure.

Sincerely,

Douglas Lindholm

cc: COST Board of Directors

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