

SALT Controversy Strategies from Audits through Litigation

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Polling Question!

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Agenda

- Phases – Audit to Appeals
- Refund Claims
- Audit Examinations
- Administrative Appeals
- Litigation

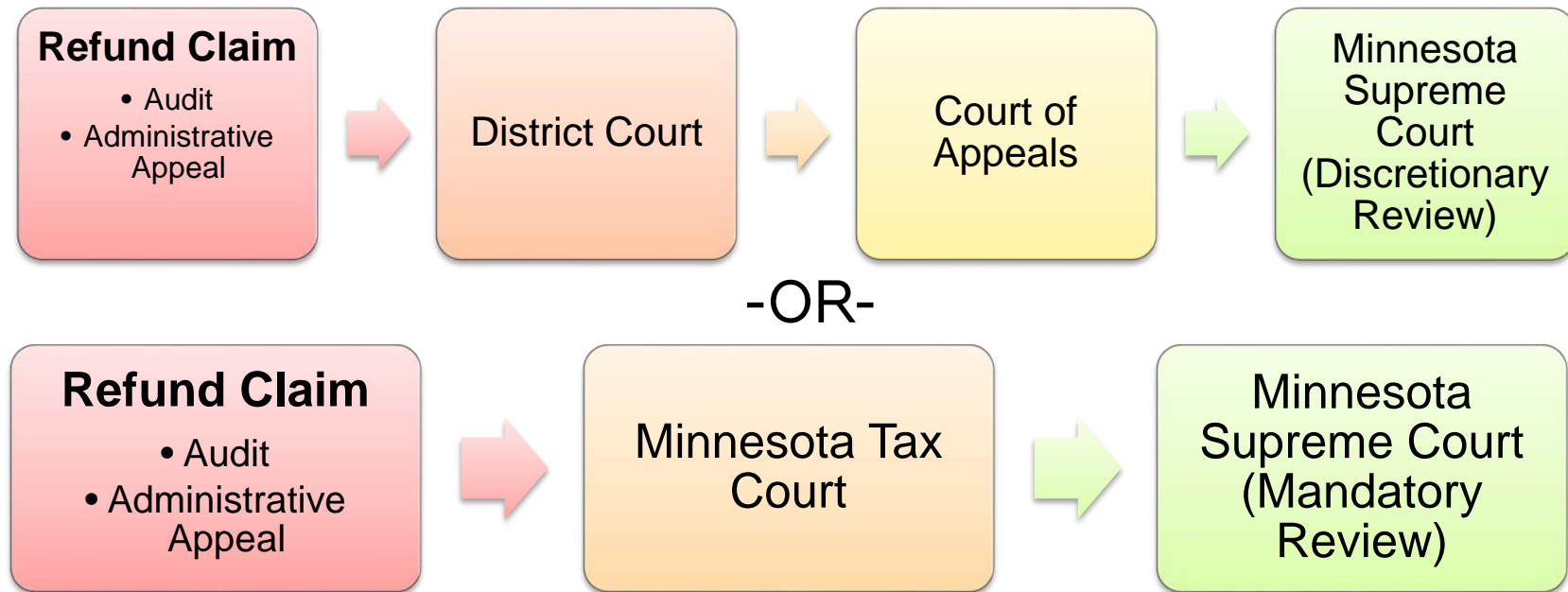
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Phases – Audit to Appeals

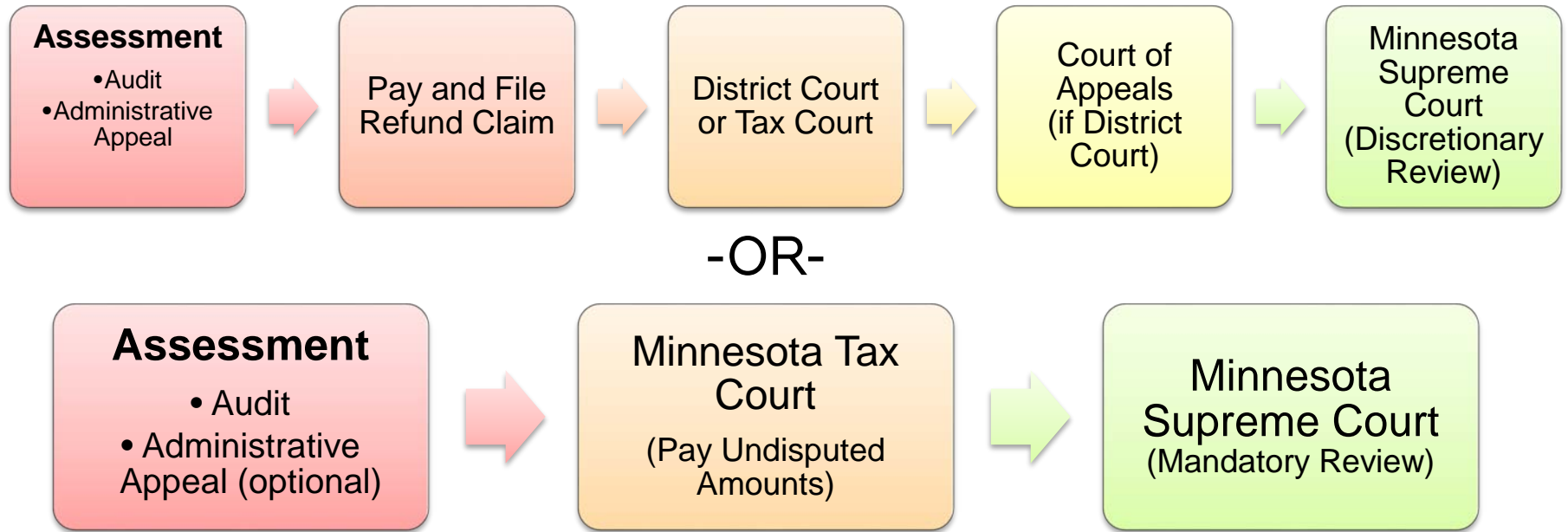
Process Phases Vary by State

- Audit
- Administrative Appeal (non-tribunal)
- Tax Tribunal / ALJ Proceedings
- Tax Court
- District or Circuit Court
- Intermediate Appellate Court
- State Supreme Court
- United States Supreme Court

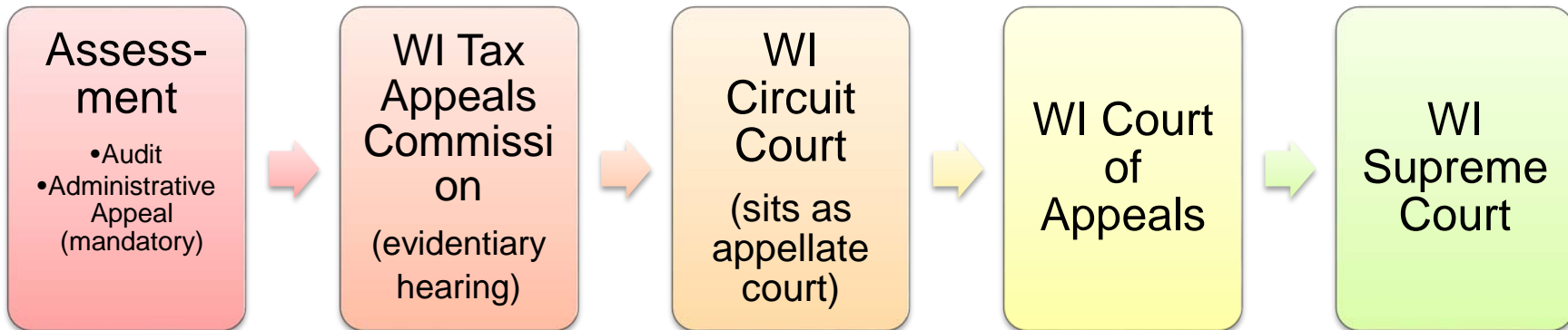
Refund Claim Appeal Paths in Minnesota



Assessment Appeal Paths in Minnesota



Sample Appeal Path in Wisconsin



Refund Claims



The Minnesota Society of CPAs (MNCPA) is registered with the National Association of State Boards of Accountancy (NASBA) as a sponsor of continuing professional education on the National Registry of CPE Sponsors. State boards of accountancy have final authority on the acceptance of individual courses for CPE credit. Complaints regarding registered sponsors may be submitted to the National Registry of CPE Sponsors through its website: www.NASBARegistry.org

Refund Claims

Procedural Issues – Sales and Use Tax

- Vendor Claims
 - Timing of Refund to Purchaser
- Purchaser Claims
 - Not Permitted
 - Permitted Only if Vendor Waives Right
 - Permitted Only if Vendor Assigns Right
 - Permitted Only if Vendor Refused to Respond/File
 - Statutory Limitations (i.e. dollar thresholds, registration requirement, limited number per year, etc.)

Refund Claims

Procedural Issues – Sales and Use Tax

- Bad Debt Procedures
 - Private Label
 - General Purpose
- Successors
- Class Actions



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Refund Claims

Claim Requirements

- Basic Requirements
 - In Writing
 - Specific Grounds
 - Requested Refund Amount
 - Reporting Periods
 - State-Specific Claim Forms, Schedules and Amended Returns

Refund Claims

Claim Requirements

- Supporting Schedules
 - *E.g.* Transactional Worksheets
 - Narrative Explanation of Reason for Request

Sample Worksheet for Sales Tax Paid in Error to a Vendor

The examples are for reference only. Add a column for each local tax.

Invoice Date	Invoice Number	Vendor Name	Item Purchased	Mo/yr tax was paid	Purchase price paid	Total tax paid	MN tax	St. Cloud area tax	Reason for request
3/14/15	7026	XYZ Corporation	Lubricants	3/15	\$1000	\$78.75	\$68.75	\$5.00	Consumed in industrial production
3/22/15	7050	XYZ Corporation	Product Labels	4/15	\$2500	\$196.88	\$171.88	\$12.50	Product ID labels used in industrial production
2/21/16	1371	ABC of St. Paul	Brochures - 95% exempt sent out of state	2/16	\$5000	\$393.75	\$343.75	\$25.00	95% of advertising is used outside MN
TOTAL					\$8500	\$669.38	\$584.38	\$42.50	

Refund Claims

Claim Requirements

- Specific Issues
 - Sales Tax v. Use Tax
 - Bad Debt
 - Apportioned Purchases
 - Incentive Programs & Certifications
 - Research & Development Credits
 - Unitary Group Composition
 - Business/Non-Business Income

Refund Claims

Timing

- Typical Statute of Limitations
- Timing Within an Audit
 - Auditor Relationship
 - Interest Impact

Refund Claims

Timing

- Specific Issues
 - Assessment / Refund / Refund Paid in Error
 - Refund of Assessed Items
 - Impact of Waivers / Appeals Proceedings
 - Impact of Federal Waivers or RARs
 - Amended Returns
 - Closing Agreements

Refund Claims

Other Considerations

- Triggering an Audit
 - Sales Tax v. Use Tax
 - Vendor v. Purchaser Claims
- Public Relations Impact
- Impact of Attorney/Client Privilege
- Taxpayer Rights Advocates
- Impact of Streamlined Agreement

Refund Claims

Other Considerations

- Optional v. Mandatory Deemed Denials
- Risk of Reassessment by DOR
- Alternative Options
 - Prospective Credits
 - Short-Paying Invoices
- Leveraging a Positive Result
 - Advisory Opinions/Letter Rulings
 - Settlements

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Audit Examinations



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Audit Examinations

Procedural Issues

- Notice Type
 - Nexus Questionnaire
 - Requirement to File
 - Audit Notice
 - Notice of Proposed Liability
 - Notice of Liability
 - Personal Liability Notice

Audit Examinations

Procedural Issues

- Initial Information Requests
- Statute of Limitations Waivers
- Sampling Agreements
- Closing Agreements

Audit Examinations

Information Requests

- General Ledger / Trial Balance
- Transactional Data
- Invoices
- Exemption Certificates
- Incentive Certifications
- Use Tax Accruals
- Tax Returns
- Workpapers
- Apportionment Schedules
- System Configuration Design
- Taxability Matrices
- Bank Records

Audit Examinations

Objecting to IDR Items

- Don't Overshare
- Reasonable Request or Not?
- Alternative Documentation
- What is the State Entitled To?
- Impact on Auditor Relationship
 - What does auditor really want?
- Do I Need Help?

Audit Examinations

Typical Audit Issues

- Nexus
 - PL 86-272
- Missing Supporting Documentation
 - Exemptions, Deductions, Credits
 - Purchases without tax
 - Purchase card transactions
- Positions Taken on Returns
- Industry-Specific Audits

Audit Examinations

Typical Sales and Use Tax Audit Issues

- Atypical Tax Impositions
 - Data Processing and Information Services
 - Insurance Services
 - Software (a.k.a. Wisconsin telecom?)

Audit Examinations

Defense Strategies

- Preparation
 - Take Advantage of Relevant Technology
 - Reliable and Accurate Data Sets
 - Consistent and Reconcilable Monthly Workpapers
 - Dashboards Leading to Discovery and Correction of Tax Issues
 - Exemption Certificate Management to Enter/Validate/Maintain Certificates
 - Rates and Determinations Through Tax Engines

Audit Examinations

Defense Strategies

- Preparation (Cont.)
 - Store Relevant Documentation
 - Minimum of Four Years of Data, Invoices, Certificates
 - Apportionment Schedules
 - Mitigate Risks
 - Entity-Level Nexus Evaluation
 - Voluntary Disclosure Agreements
 - Public or Private Letter Rulings
 - Financial Statement Reserves

Audit Examinations

Defense Strategies

- Know your state (people and policies)
- Sampling
 - Know Your Data **Before** Agreeing to a Sample
 - Limit Population to Relevant Accounts
 - Incorporate Business Trends into Sampling Plan
 - Eliminate Acquired Entities from Population
 - Consider Impact of P-Cards on Sample

Audit Examinations

Defense Strategies

- Missing Documentation
 - Exemption Certificates Where Needed
 - XYZ Letters (Self-Assessed or Audited)
 - Alternative Documentation
 - Vendor Invoices
 - Purchase Orders

Audit Examinations

Defense Strategies

- Taxability Disputes
 - Work Through the Department's Chain of Command
 - Review **Everything** Before Providing to the Department
 - Don't Answer Questions You Haven't Been Asked
 - Know Your Statutes, Regulations, Case Law and Their Precedential Weight
 - Consult Help Before Conceding Anything Controversial
 - Keep Litigation in Mind

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Appeals

Settle or Appeal?

- Dollar amount
- Burden of proof
- Future impact
- What are competitors doing?
- Publicity and political impact
- Confidential or proprietary information
- Impact in other states
- Availability of witnesses
- Availability of information
- Opportunity to settle on appeal
- Appeal procedures
- Taxpayer friendly courts
- Internal costs
- External costs

Administrative Appeals

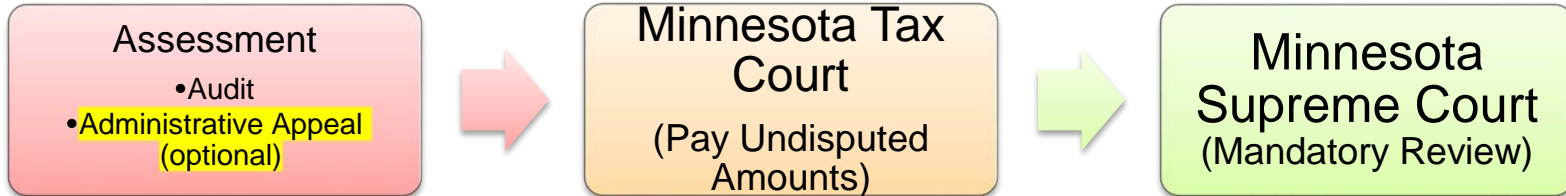
- Appellate Rights & Timelines
 - Representation Capabilities Differ by State
 - Representatives at Tax Tribunals and ALJ Hearings **Must Be a Practicing Attorney Admitted in That Particular State**
 - Appeal Timelines Differ by State; Extensions Often Available
 - Right to In-Person Hearing
 - Right to Provide Supplemental Documentation

Administrative Appeals

- Issues on Appeal
 - Appeals Reviews the Audit File
 - Can Appeals Raise New Issues or Positions?
 - Ability to Hold Appeals in Abeyance Pending Tax Court Results for You or Others
- Preparing for Litigation
 - Potential for Litigation is Leverage in Appeals
 - Create a Trial Ready File as Early as Possible
 - Eliminate Duplicating Efforts/Costs

Administrative Appeal Versus Litigation

- Experience with administrative appeals on same issue
- Confidentiality
 - Administrative appeals are generally confidential
 - Court proceedings are public
- Cost: attorneys, experts, internal, pay to play
- Delay



District Court Versus Tax Court

- Judge with knowledge of tax likely only in tax court
- “Pay to play” likely only for district court
- De novo review (deference level varies by state)
- Jurisdiction for constitutional issues (tax court can obtain in some states)
- Both are public proceedings (tax court opinions are typically easier to find)
- Both follows rules of civil procedure (discovery, motions, etc.)
- Both follows rules of evidence

Litigation Strategies

- Know your judge and opposing counsel
- Litigation Hold
- Issues Appealed
- Discovery and Depositions
- Confidential or Proprietary Information
- Stipulations of Fact
- Getting to Summary Judgment
- Creating a Record for Further Appeal
- Settlement During Litigation – Consider Mediation

Appellate Litigation

- Appellate Court reviews the record created below
- Preservation of issues
- Varying levels of deference among the states



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