



ARKANSAS TAX APPEALS COMMISSION

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Date: September 10, 2024

To: Rebecca Miller-Rice, Administrative Rules Counsel,
Bureau of Legislative Research

From: Matt Boch, Chief Commissioner, Tax Appeals Commission

Re: Responses to Comments Received Regarding Proposed Rulemaking

The notice and comment period for the proposed rulemaking amending the Rules of Procedure of the Arkansas Tax Appeals Commission and associated forms ended on Tuesday, September 3, 2024. Comments were received from attorney T.J. Lawhon of Wright Lindsey Jennings and from CPA Patrick D. Sanford of Probitry Accounting. In addition, Commissioner Sanford recommended several changes at the Commission's public hearing and meeting on August 20, 2024.

The following responses and revisions were approved unanimously by the Commission at its meeting on September 5, 2024. They have been organized by commenter for this submission.

Also being submitted are (1) a markup of the revisions to the proposed rulemaking and (2) a markup showing the proposed rulemaking with these revisions adopted.

1. Comments from Patrick Sanford, Probity Accounting

a. Rule 5-101(a)

Comment: Mr. Patrick Sanford recommends using “adjudicates” instead of “hears” to clearly encompass appeals decided without a hearing.

Response: The verb “hear” is used several times in the rules to encompass all proceedings before the commission, in the sense of the Commission giving official consideration to a matter after receiving information from the parties. In addition to 5-101(a), see also 5-201(a)(2), 5-204(a), 5-304(c), and 5-407(a). In a proceeding on written submissions only, the parties are “heard” by the Commission through their written submissions.

b. Rule 5-101(c)

Comment 2: Mr. Patrick Sanford suggests specifying fairness considerations as to the parties.

Response to Comment 2: Decline to add language to clarify fairness. Under Arkansas law, an assessment of “fairness” involves weighing all relevant interests and factors at play in a particular situation. Narrowing the assessment to the parties’ interests only limits the term and conflicts with “fairness” as a term of art. *See, e.g., Battishill v. Dep’t of Human Seros.*, 78 Ark. App. 68, 71, 82 S.W.3d 178, 179 (2002) (explaining that determining fairness depends on considering the law and the several interests at stake in a particular situation).

c. Rule 5-102(b)

Comment: Mr. Patrick Sanford suggests indexing the single commissioner or en banc case assignment presumption amounts to inflation.

Response: The case assignment presumption amounts are provided by law and are not indexed for inflation. Ark. Code Ann. § 26-18-1113(e)(2)(B).

d. Rule 5-102(d)

Comment: Mr. Patrick Sanford suggests providing a means for a Commissioner to recommend hearing a case en banc.

Response: Case assignment, including whether a case is heard en banc, is ultimately up to the Chief Commissioner, subject to the presumptions provided by law. It has always been true that any Commissioner can ask the Chief to consider assigning a case to the en banc panel – indeed, a party has always been able to file a motion under 5-301 requesting en banc consideration, although none have been received. Rule 5-102(d) is intended to encourage either or both parties to ask for en banc consideration where appropriate. En banc recommendations by Commissioners continue to be allowed and handled internally; an express rule is unnecessary.

e. Rule 5-201(a)(1)

Comment: Mr. Patrick Sanford suggests specifying that a Taxpayer can file an appeal petition “to the Tax Appeals Commission.” This is to avoid confusion with any other appeal procedures.

Response: Adopt.

f. Rule 5-201(e)(4)

Comment: Mr. Patrick Sanford suggests removing the reference to not hearing appeals for which the Arkansas Department of Finance and Administration (“ADFA”) Office of Hearings and Appeals has issued an administrative decision or held a hearing or prehearing. Now that the transition period is over, this language is no longer needed.

Response: Adopt this change to delete subdivision (e)(4). The following subdivisions are renumbered. The relevant statute, Arkansas Code Annotated section 26-18-1110(b)(4), remains operative and in effect.

g. Rule 5-204(d)

Comment: Mr. Patrick Sanford asks about inclusion of rules specifically addressing joint refund offsets under subdivision (d) of Rule 5-204, which is generally about expedited cases.

Response: Joint refund offsets are a subtype of expedited cases. The Commission views all the administrative appeals listed in Arkansas Code Annotated sections 26-18-1115(k)(2) and 26-18-1116(b)(1)(B) as expedited appeals, which includes joint refund offset appeals under sections 26-36-315 or 26-18-507(e)(1)(B)(ii)(c).

h. Rule 5-204(d)(2)

Comment: Mr. Patrick Sanford asks about a taxpayer filing a petition to challenge the amount of a debt to be collected in a joint refund offset appeal.

Response: The amount of a debt must be challenged with the claimant agency under Arkansas Code Annotated section 26-36-309. The Commission's jurisdiction is limited to spousal relief under Arkansas Code Annotated section 26-36-315.

i. Rule 5-403(d)

Comment: Mr. Patrick Sanford suggests indexing for inflation the \$10,000 de minimis no efforts to stipulation presumption.

Response: While there is no floor to the stipulation efforts requirement in Arkansas Code Annotated section 26-18-1114, Commission experience is that efforts to stipulate have not been productive in small cases, particularly those with self-represented taxpayers. The General Assembly has chosen a \$10,000 threshold for small sales tax appeals in Arkansas Code Annotated section 26-18-1117(b)(4), which is not indexed for inflation. Rule 5-403(d) matches this threshold as a reasonable proxy for small cases where stipulation is presumed to be unnecessary.

j. Rule 5-405(d)

Comment: Mr. Patrick Sanford suggests having the Commission record and transcribe all en banc hearings for the benefit of other taxpayers to be better able to understand binding Commission decisions.

Response: Commission proceedings are confidential and closed to the public. Ark. Code Ann. § 26-18-1115(c)(1)(B); Rules 2-101(a)(2), 3-102. This bars publication of a hearing transcript. Only the publication of decisions with taxpayer-identifying information redacted is allowed. The Commission seeks to issue and publish comprehensive decisions with precedentially relevant information unredacted, consistent with Arkansas Code Annotated section 26-18-1119.

k. Rule 5-503(b)

Comment: Mr. Patrick Sanford questions what is precedent where a decision is authored by a single commissioner, with another commissioner concurring but not joining in the decision.

Response: While all en banc decisions have been unanimous so far, Rule 5-503 has been created to specifically address in advance various possible scenarios with en banc decisions. The statement that “[a] decision or portion of a decision in which two or more Commissioners join creates binding precedent ...” is a succinct summary of the principle that at least two commissioners need to agree with reasoning for it to be precedential. If a case is decided by two commissioners concurring, with no joint decision, then the commission has not adopted any interpretation of a statute beyond the appropriate outcome as applied to the facts of the case. No change to the proposed rule language is needed.

l. Petition Form, Part VI

Comment: Mr. Patrick Sanford suggests adding a “to the best of my knowledge” caveat to the signature certification as to the facts in the petition in Part VI, Signature.

Response: The Commission agrees, and this comment is implemented.

m. Power of Attorney Form, Part I, Line 1 and accompanying Instructions

Comment: Mr. Patrick Sanford suggests deleting the Letter ID field, to make it easier for taxpayers and their representatives to complete the form.

Response: The Commission agrees, and this comment is implemented. The Letter ID field has been deleted from the form, and the references in the Instructions have been replaced by references to the tax period(s) field.

n. Power of Attorney Form Instructions, Part I, Line 3

Comment: Mr. Patrick Sanford suggests not requiring a manual taxpayer signature in the instructions for Part 1, Line 3.

Response: The Commission adopted the manual signature requirement to protect taxpayers from unauthorized representation. The Commission will study this issue further but, at this time, it declines to delete the language.

o. Joint Refund Offset Petition Addendum, Part II

Comment: Mr. Patrick Sanford suggests providing rows toward the top of the table for allocating items of income and deduction between the taxpayers.

Response: In the Commission's experience with joint refund offset appeals, such information is not needed and will add delay and confusion. Given the structure of the Arkansas tax brackets, almost all marriages where both taxpayers earn income and file together involve use of filing method 4, married filing separately on the same return, not filing method 2, married filing jointly. With filing method 4, each spouse's income, deductions, and tax owed are already separately calculated and reported on the return, so the information does not need to be added to the Commission's form. Filing method 2, married filing jointly, is used by families generally where one spouse is the sole source of income and tax liability, and so detail is not needed there either.

2. Comments from T.J. Lawhon, Wright Lindsey Jennings

a. Rule 5-101(c)

Comment: Mr. Lawhon proposes more clearly setting forth the proposition that the Commission cannot waive a statutory provision.

Response to Comment 1: The language as written is legally sufficient to reiterate the existing legal principle that a legislatively created administrative Commission cannot waive a statute.

b. Rule 5-402(f)(3)

Comment: Mr. Lawhon requests confirmation that the striking of this sentence is not intended to limit testimony: “However, an officer, trustee, partner, or similar representative may provide testimony for a Taxpayer that is not an individual.”

Response: Yes, as discussed in the August 20 meeting concerning a question from Commissioner Sanford, the preceding sentence from current rule 5-402(f)(3) prohibiting testimony from representatives is being stricken to allow testimony from accountants or similar individuals concerning the filing or audit history of a matter. With testimony from representatives now allowed with the deletion of the limitation, the clarifying sentence about allowing an owner or officer to testify for a self-represented entity taxpayer is not needed.

c. Rule 5-503(c)

Comment: For en banc proceedings where only two commissioners are participating, Mr. Lawhon suggests a more neutral approach of resolving in favor of the party bearing the burden of proof, which would generally be determined under Arkansas Code Annotated sections 26-18-1115(h) and 26-18-313.

Response: The Commission recognizes that it is intended to be a neutral body, and that affirming an ADFA action or decision in a tied case is arguably inconsistent with neutrality. Adopting a burden of proof approach as proposed is more neutral, but it runs the risk of the commissioners disagreeing about who has the burden, for example whether a provision should be considered an exemption (taxpayer burden) or exclusion (ADFA burden). The Commission adopts the comment’s proposed language in slightly modified form, and with an additional tie-breaker subsection for the Presiding Commissioner to determine which party has the burden if the Commissioners disagree.

3. Proposals from Commissioner Sanford

a. Rule 5-101(b)

Proposal: Commissioner Sanford proposes modifying the language to more clearly set forth the Commission's authority to determine the parties' compliance with the rules.

Response: Additional language as written is legally sufficient to reiterate the Commission's existing statutory authority to determine the parties' compliance with the rules.

b. Rule 5-103(a)

Proposal: Commissioner Sanford suggests clarifying which individuals can act on behalf of a self-represented entity taxpayer.

Response: Adopt the suggestion in modified form, as subdivision (a)(2) to further clarify: "Alternatively, a Taxpayer may be self-represented, including self-representation by an owner, officer, managing member, partner, trustee, or similar individual with authority for an entity Taxpayer." This replaces the existing sentence with which Commissioner Sanford is concerned.

c. Rule 5-105(b)

Proposal: Commissioner Sanford recommends allowing deconsolidation by the Commission "for any reasonable cause" instead of "due to changed circumstances."

Response: Adopt.

d. Rule 5-204(d)(1)(D)

Proposal: Commissioner Sanford proposes referring to "Forms W-2 or 1099" instead of just "W-2s."

Response: Adopt. This both (1) properly refers to the documents as "Forms" and (2) appropriately also references 1099s.

e. Joint Refund Offset Petition Addendum Instructions, Part II

Proposal: Commissioner Sanford recommends modifying the first sentence to better refer to “tax withheld as reported on Forms W-2 or 1099, and payments made.” He also expressed concern with the instructions on splitting joint items.

Response: Both changes are implemented. Concerning the second suggestion about the references to joint items, that sentence and the preceding one have been combined to read: “Taxes, credits, and payments should be assigned to the relevant individuals or split where appropriate.”

4. Minor Corrections

In reviewing and responding to these proposals and comments, some formatting issues were identified for correction: (1) consistent capitalization of “Presiding Commissioner” in the Rules; (2) updating the revision dates on the forms to October 2024; and (3) correcting capitalization of certain headers on the Power of Attorney Form.