STATE OF NEW YORK
STATE ETHICS COMMISSION

Advisory Opinion No. 90-18: Application of the post-employment restrictions of §73(8) of the Public Officers Law to a former State employee who anticipates future contact with his former State agency.

INTRODUCTION

The following advisory opinion was requested after issuance by the State Ethics Commission ("Commission") of an informal advisory opinion dated May 7, 1990, concerning the application of the post-employment restrictions contained in §73(8) of the Public Officers Law. The requesting individual, [former position] with the New York State Department of Taxation and Finance ("Department"), is specifically concerned with the application of §73(8) to certain post-employment activities:

a. the preparation of and participation in sales tax compliance audits and tax returns,
b. contact with the Audit Division of the Department,
c. appearances before the Tax Appeals Bureau (Division of Tax Appeals),
d. performing audits at the request of various "vendors" to see if they are in compliance with the New York sales tax laws (at the time of such audits, the vendors will not be under audit by the Department), and
e. the propriety of whether an employee of a corporation in which the former employee is the sole stockholder would be able to perform any of the above.

Pursuant to the authority vested in the Commission by §94(15) of the Executive Law, the Commission hereby renders its opinion on the application of §73(8) to such circumstances.

DISCUSSION

Section 73(8) of the Public Officers Law provides, in relevant part, that

No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation, or association in relation to any case, proceeding or application or other matter before such agency. No person who has served as a state officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he personally participated during the period of his service or employment, or which was under his or her active consideration. . . .

This subdivision is generally referred to as the "revolving door" provision, for it sets the ground rules for what individuals may do with the knowledge, experience and contacts gained from public service after they terminate their employment with a State agency. In short, subdivision 8

of §73 bars former State officers and employees for two years after termination from appearing or practicing before their former agencies or receiving compensation for any services rendered in relation to any case, proceeding, application or other matter before such agency. In addition, it imposes a lifetime bar against appearing, practicing or receiving compensation for services on a matter before any State agency if the former employee had been directly concerned and personally participated in the matter or if it had been under his active consideration.

(1) Section 73(8) does not preclude an individual from preparing tax returns for, or participating in tax compliance audits conducted by, the federal government. The post-employment restrictions apply only to activities engaged in before State agencies. For a period of two years after termination from State service, a former employee is barred from participating in any tax audit, whether sales tax or any other tax, conducted by the Department, and from the preparation of State tax returns for compensation. The two-year bar precludes any appearing, practicing or receiving of compensation for services rendered on any matter before the Department and any of its divisions.

(2) Whether the requesting individual can appear or practice before the Division of Tax Appeals raises a different question. The Division of Tax Appeals is an independent entity within the Department.[1] The Division has a tax appeals tribunal, which consists of three commissioners appointed by the Governor for a term of nine years. The tax appeals tribunal has the power of appointment and removal of its employees and prepares and submits a budget to the Commissioner of the Department which cannot be revised in any manner by the Commissioner.[2] It is clear, from both the legislative intent contained in §2000 of the Tax Law and the provisions of Article 40, that the Division of Tax Appeals is a separate entity from the Department.[3] Therefore, appearing or practicing before or receiving compensation related to a matter before the Division would not violate the two-year bar contained in §73(8). The activity would not be one before the State agency, the Department, from which the individual terminated. There are several caveats, however, to this conclusion. First, the individual cannot provide any services before the Division of Tax Appeals in relation to any case in which he was directly concerned and personally participated or which was under his active consideration while at the Department. The lifetime bar prohibits such activity before *any* State agency, not only the State agency from which the individual terminated. Therefore, before the Division, he cannot appear, practice or receive compensation in relation to those cases, reviews, applications, etc., in which he had been involved while at the Department.

Second, matters come before the Division of Tax Appeals on appeal from determinations by the Department. Proceedings are commenced by a petition, which protests a Department written notice concerning, among other matters, a tax deficiency, taxes due, a denial of a refund or credit application.[4] The requesting individual, during the two-year bar from appearing before the Department, cannot participate in any way in the review or activity by the Department in relation to any matter, which may later be appealed to the Division. When the matter is before the Division as a result of an appeal, the requesting individual is not barred by the two-year absolute bar, since the Division is not his former agency. However, his appearance before the Division cannot include appearances before the Department to obtain material or support for his Division activities.

(3) Providing audit services on behalf of private vendors not currently under audit by the Department is not prohibited by §73(8). The prohibitions of §73(8) concerning appearances, etc., are only applicable when such activities constitute an appearance or practice *before* the former State agency. Although it is possible that, pursuant to an audit or other proceeding, clients for whom a former employee renders services could eventually appear before the Department, the provision of general accounting services to these persons is not directly related in such a way as to fall within the prohibition of §73(8). However, the requesting individual must direct such clients that no audit report or other product generated pursuant to such a private audit may be submitted by the client to the Department during the course of an audit or proceeding conducted by the Department. Should the Department require an audit of a former employee's clients within two years from that individual's termination from State service, any participation by the former employee in such an audit, even though a "private" audit, is strictly prohibited.

(4) The final question is whether employees of a corporation, of which the former Department employee is the sole stockholder, are precluded from appearances or other similar activities before the Department. Section 73(10) of the Public Officers Law states, in part:

Nothing contained in this section . . . shall be construed or applied to prohibit any firm, association or corporation, in which any present or former statewide elected official, state officer or employee . . . from appearing, practicing, communicating or otherwise rendering services in relation to any matter before, or transacting business with a state agency . . . where such employee does not share in the net revenues, as defined in accordance with generally accepted accounting principles by the state ethics commission . . . in relation to persons subject to their respective jurisdictions, resulting therefrom, or acting in good faith, reasonably believed that he or she would not share in the net revenues as so defined. . . .

Such employees could so act as long as the former State employee and sole stockholder received *no* net revenues generated from such work by such employees.[5] The former State employee/sole stockholder could receive *no* compensation in relation to any barred services as well as *no* part of the net revenues accrued as a result of such employees' activities. It is difficult for the Commission to believe that the former State employee/sole stockholder can meet this standard, unless the revenue generated as a result of compensation received in relation to activities before the Department are minor compared to all the other revenue producing activities of the corporation. Therefore, if the majority of the income generated by the non-barred employees of the corporation is received for services for which the former State employee/sole stockholder would be barred under §73(8), such former employee would be barred from sharing in any of the net revenues generated from the barred activity.

Further, where a former State employee is the sole stockholder of a corporation or other entity, the Commission finds that overhead expenses also cannot be drawn from such barred revenues. The test the Commission would apply, to determine if the "revolving door" provision were violated by such a former State employee, is whether he or she would receive a meaningful benefit from the receipt of such revenues. If the former State employee/sole stockholder would receive such a meaningful benefit, use of such revenues, even for overhead payments, would violate the "revolving door" provision.[6] The question of whether a former State employee who is the sole stockholder or owner of an entity, which does business with his or her former State agency, has received barred revenues is easier to measure under this test. The question of a

former State employee, who is a majority or significant stockholder in such an entity which has received barred revenues, would have to be reviewed under the specific facts in that case.

Finally, if the former employee/sole stockholder were to use his name as the corporation's name, the Commission would find that, if any employee of the corporation appeared before the Department or Division on what would be prohibited activity for the former employee, the former employee was actually appearing in violation of §73(8). Such a named corporation would be construed as a veil for the actual appearance of the barred former Department employee.

This Opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the requesting individual who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion.

All concur:

Elizabeth D. Moore, Chair

Angelo A. Costanza
Norman Lamm, Members

Dated: August 9, 1990

ENDNOTES

1. The Division of Tax Appeals was created pursuant to Article 40 of the Tax Law and became effective on September 1, 1987. Section 2002 specifically provides that ". . . [T]here shall be in the department of taxation and finance a separate and independent division of tax appeals. The powers, functions, duties and obligations of the division shall be separate from and independent of the authority of the commissioner of taxation and finance."

2. Tax Law, §2006.

3. Section 2000 states, in part, "This article is enacted to establish an independent division of tax appeals within the department of taxation and finance . . ." The Division was created to provide for independent reviews and resolutions of controversies resulting from determinations issued by the Department.

4. Tax Law, §2008.

5. It is assumed that such employees are not former employees of the Department or the Division.

6. A "meaningful benefit" could be received either from a high proportion of overhead expenses attributed to such barred revenue or a loss diminished by the receipt of such barred revenue.