

# ARKANSAS TAX APPEALS COMMISSION

## RESPONSIVE SUMMARY TO PUBLIC COMMENTS REGARDING PROPOSED RULES OF PROCEDURE

### I. INTRODUCTION

The notice of rule-making, including email and physical address for submission of written comments and the date for a public comment hearing, was published in the Arkansas Democrat-Gazette on October 14 – 16, 2022. The Commission held a public hearing on November 10, 2022, to receive comments on the Proposed Rules of Procedure. No verbal comments were submitted at the public hearing. The public comment period closed on November 13, 2022. The persons identified in section II below submitted written comments during the public comment period.

### II. RESPONSES TO COMMENTS

**Commenter:** Michael O. Parker, Wright Lindsey Jennings

**Comment:** Rule 5-106 Filing and Service. In the event the Proposed Rules are not operational on January 1, 2023 then Emergency Rules (Rule 4-107) may be anticipated. If anticipated, please make the Emergency Rule(s) available as soon as possible.

**Response:** Emergency rules are not anticipated.

**Comment:** Relief from service interruptions and clarity is important. Rule 5-601 *et seq* address several related issues. Rule 5-606 addresses technical failures and refers to “conventional filings” and “conventionally.” Please consider addressing emails directly under these circumstances and if permitted provide a specific email address.

Rule 5-201 Appeal Petition. Rule 5-201(b) concerning inability to extend petition deadlines, together with Rule 5-606 concerning technical failures, suggests a technical failure provides an inherent extension of a petition deadline. But the statement that:

“Taxpayer is responsible for meeting ...” may create a potential issue of interpretation that might warrant clarification.

**Response:** Rule 5-606(a) provides that “A technical failure of the electronic filing system shall excuse an untimely filing”. Rule 5-606(c) further provides in relevant part “...documents shall be submitted and served conventionally.” These provisions address filing in the event of a technical failure.

**Comment:** Rule 5-106(a)(2) indicates that the “Mailbox Rule” will not apply. It may be helpful for the Rules to specifically so state.

**Response:** The absence of statement excluding a postmark or “mailbox rule” is acknowledged. In drafting rules, it is preferable to specify what is permitted rather than to attempt to describe all the means that are not permitted. Arkansas Code § 26-18-105 provides for postmark filing with the Department of Finance and Administration, but that provision does not include the Tax Appeals Commission. Arkansas Code § 26-18-1110(a)(4)(B)(i) does not allow the Commission to extend the deadline for filing a petition. Accordingly, a postmark filing has not been provided in the rules.

**Comment:** Rule 5-201(c)(1) encourages Taxpayers to submit petitions online at the Commission’s website. Is the website filing protocol different from the Commission’s electronic filing system?

**Response:** Yes. There is one significant difference between the online submission of a petition and the Commission’s electronic filing system. The submission of a petition does not require any login credentials; the use of the electronic filing system does.

**Comment:** Rule 5-201(c)(2)(A) requires a petition to state “the Taxpayer's reasons for opposing the ... action of the Department; ...” But taxpayers often do not know the real reason the Department has taken an adverse action and will therefore have difficulty under many circumstances stating the taxpayer's reasons for opposing such action, particularly if the Petition is the Taxpayer's only opportunity to do so. (“A reply may not exceed the scope of the petition and answer.”) The meaning of “scope” as used here may also be problematic.

Arkansas Code Section 26-18-806 of the Taxpayer Bill of Rights requires the Department to “... describe the basis for the tax due ...” as part of an adverse action. However, Audit Summaries and Notices of Proposed Assessment often fail to meet this requirement with no adverse consequence to the Department for failures to do so. Witness the differences in the levels of information often contained in the internal

Audit Comments submitted as part of the audit district's internal audit report, compared to the Audit Summary or Notice of Proposed Assessment.

**Response:** § 5-203 has been revised to read "... scope of the petition **or** answer" [emphasis added].

**Comment:** It is understood that more formal procedures for pleadings in Commission appeals than have existed in the past are warranted. However, it may be useful for the Rules to permit the Commission to request or require additional responses from the parties identifying the differences in the parties' positions in more detail short of formal briefs, in the nature of the Office of Hearings and Appeals Answers to Information Requests, upon motion of a party or when the presiding Commissioner finds additional factual development or argument in advance of the hearing is appropriate. And to also apply a liberal interpretation of the scope of the petition and answer. Rule 5-303 No Discovery should provide an exception for inquiries by the Commission prior to hearing.

**Response:** The statute anticipates that the Commission will receive additional pleadings or briefs, if any. Arkansas Code § 26-18-1116(b)(1)(A).

**Comment:** It may also be helpful to specifically provide for one or more prehearing conferences with the presiding Commissioner for procedural or scheduling purposes, or to press for stipulations, consistent with prior practice.

**Response:** Prehearing conferences are anticipated; a rule is not needed to permit prehearing conferences.

**Comment:** Rule 5-404 Evidence. It appears that evidence is admissible in exhibit form but it is not clear what type of exhibits are permissible or whether such evidence is permissible even though the evidence was not made available to the Department during the underlying adverse action.

Please consider revising 5-404(a) to read as follows: The Presiding Commissioner shall admit relevant evidence through admission of exhibit(s), including but not limited to real, illustrative, written, demonstrative, and hearsay, if it is probative of a material fact in controversy regardless if the evidence was previously made available between the parties during the underlying adverse action. For example, documents, photographs, physical objects, emails, text messages, audio tapes, and videos.

**Response:** The only limitations placed on receipt of evidence are those in Arkansas Code § 26-18-1115(d)(2), which requires that the Commission shall admit relevant evidence and exclude irrelevant and repetitious evidence. The term “shall” makes this mandatory. A rule to this effect is not needed.

**Comment:** Please consider revising 5-404(d) to read as follows: Exhibits shall be filed with the Commission and served on the opposing party or authorized representative at least five (5) days prior to the hearing or attached to post-hearing brief(s), if any.

**Response:** Scheduling is at the discretion of the presiding commissioner, including whether to permit post-hearing briefs or post-hearing exhibits. A rule to this effect would unduly circumscribe the commissioner’s discretion. The five-day rule has been clarified to apply to exhibits for the hearing in Rule 5-404(d).

**Comment:** Rule 5-601 Scope and Applications of Electronic Filing. It appears that the phrase: “Use of the electronic filing system is required for an authorized representative ...” only applies following the filing of the initial petition(?). Otherwise Rule 5-106 permitting the filing of petitions in paper format would directly conflict with this mandate and be a potential trap for the unwary. Clarification is suggested.

**Response:** Rule 5-601(a) has been modified to clarify that electronic filing of the petition is not required; accordingly, the Commission will accept conventional paper filing of petitions from authorized representatives if accompanied by the appropriate power of attorney.

**Comment:** Rule 5-601 Scope and Applications of Electronic Filing. The undersigned would like to express personal concern over the Commission's reliance on the electronic filing system. I am not familiar with any similar system currently in use in Arkansas. It is unclear whether the filing system will include access to an open docket; and if so how confidentiality will be preserved. Service using the electronic filing system as set out in Rule 5-106(c)(1) will by necessity rely on emails that the Commission is avoiding at the Commission level. Filters in use by parties must rely on high levels of security that one would anticipate to interfere with email service via the electronic filing system.

**Response:** Confidentiality will be preserved via authorized user credentials. Notifications sent by the Commission via email will not contain confidential information. Only parties specifically invited into the electronic filing system will have access to any information and that access will be limited to the matters to which those parties are assigned.

**Comment:** Rule 5 - Adjudicative Proceedings (Generally). For the benefit of taxpayers proceeding pro se and others please consider including language setting out the burden of proof in Commission proceedings pursuant to Arkansas Code § 26-18-313.

**Response:** Burden of proof varies according to the proceeding and can be a complex legal determination that must be addressed on a case-by-case basis.

**Comment:** General Instructions for Filing Petition. The Commission may want to reword the following excerpts from the Instructions: Petition and corresponding Instructions: Petition for Expedited Proceeding. “The Tax Appeals Commission requires this petition be filed online at <https://tac.arkansas.gov>. Taxpayers proceeding pro se may file this form: (1) in person, Monday through Friday between 8:00 am and 4:30 pm (except on state government holidays); or (2) by mail to: ...”

Presumably taxpayers proceeding pro se may also file the petition online. And no requirement that a petition may only be filed online on anyone's part is apparent. Rule 5-201 only encourages taxpayers to submit petitions online at the Commission's website and permits both paper petitions and petitions other than using the prescribed forms. Clarification of the introductory Notes and the above General Instructions is suggested.

**Response:** In practice, any petition received by the Commission within the applicable statutory deadline will be accepted as submitted, regardless of its form. The language in the instructions to the petition forms is intended to encourage all parties to take advantage of the opportunity to file electronically.

**Commenter:** Patrick d. Sanford, Probitry Accounting

**Comment:** Amounts Indexed for Inflation – Two dollar amounts under proposed sections 5102(a)(1) and 5-102(a)(3) are listed in the rules. I recommend the Commission consider indexing these dollar amounts (and any other dollar amounts added to the rules subsequently) based on the purchasing power of the dollar. \$25,000 and \$250,000 has a certain purchasing power in 2022, but this could be substantially different in 5 year, 10 years, or more. These dollar amounts could be amended in a subsequent rule making procedure, however including an indexing feature will allow the amounts to be adjusted automatically without the need for the Commission to go through the rule making process. If this cannot be changed by the Commission's ability to promulgate rules, I recommend the Arkansas state legislature give the Commission the authority to make these changes.

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**Response:** Act 586 of 2021 does not empower the Commission to inflation-index the dollar amounts provided in Rule 5-102.

**Comment:** Commission's Power of Attorney Form – Under proposed section 5-103(b) specifies that a completed Power of Attorney form must be the Commission's form. I recommend the Commission accept the IRS Form 2848: Power of Attorney and Declaration of Representative if the appropriate Arkansas tax types and forms are listed. I also recommend the Commission accept the Department of Finance and Administration's (DFA) Power of Attorney form. These forms have essentially all of the same and required information for representation before the Commission, and the execution of these forms gives the authorized representative the right to view tax information of the taxpayer. No new rights or powers are granted by having the Commission a separate form. I believe the Commission is within its power to accept these forms under promulgated rules. In support of this position, I wish to bring to the Commission's attention that the DFA will accept the IRS Form 2848 in lieu of its own Power of Attorney form, provided the proper Arkansas tax type(s), tax form references, and tax period(s) or year(s) are identified on the federal form.

**Response:** Power of Attorney forms promulgated by agencies other than the Commission grant authority to represent the taxpayer before those agencies, which is not intended in matters before the Commission. For that reason, the Commission requires that its POA form be used to appoint an individual to represent a party in a matter before the Commission.

**Comment:** Vacancies – I request that the Commission provide more procedural guidance if a vacancy occurs. Section 3-101(c) states quorums in non-adjudicative matters, but no other guidance is available for the possibilities of a vacancy. If the Chief Commissioner position is vacant, my concern would be who would perform the duties of the Chief Commissioner and when those duties would be fulfilled during that vacancy.

I would also like the Commission to consider rules of adjudicative proceedings if the presiding Commissioner is vacant during the proceedings, or to reassign a proceeding to a different Commissioner if the Presiding Commissioner vacates his or her position.

**Response:** Arkansas Code 26-18-1106(j) addresses vacancies and states, "If all of the commissioners have withdrawn from hearing a matter under this section, the Governor shall appoint a special master to act as a commissioner...." If a commissioner steps aside on a particular matter, Arkansas Code § 26-18-1106(b)(5) requires the Chief Commissioner to apportion the matter to another commissioner.

**Comment:** Dissenting Opinions – The Commission shall issue a written decision under proposed section 5-501, including findings of fact and conclusions of law. I recommend the Commission consider having rules that strongly encourage a dissenting Commissioner to write their dissenting opinion, if applicable, and have it included with the written decision of the Commission. This situation would only occur when the proceeding is assigned to all the Commissioners sitting en banc. Appeals heard by all of the Commissioners sitting en banc sets precedent for future cases heard by the Commission concerning the same statute(s). Having a dissenting opinion written will help the Commission see the reasoning of the dissent and its applicability to the law, and may help the Commission decide in a more just way future cases.

**Response:** A dissent in an en banc proceeding will be noted in the decision. The dissenting commissioner has the option of writing a dissenting opinion.

**Comment:** Petition Form – Given that an authorized representative can fill out, sign, and submit the Petition to the TAC, I recommend the Commission change the title to “Part VI Taxpayer’s Signature” to “Part VI Petitioner’s Signature.” The above recommendation is also applicable to the Petition for Expedited Proceeding.

**Response:** The petition forms will be changed to read “Part VI Signature”.

**Comment:** In the instructions for the Petition, the instructions say to “indicate whether [the petitioner] elects for the hearing to be in person, by teleconference, by videoconference, or by a combination thereof.” However, Part V on the face of the form says to “Indicate your preference by checking the appropriate box below.” I recommend the Commission change the language on the face of the form to indicate that the petitioner may select more than one box.

**Response:** The instructions advise taxpayers that desire a hybrid proceeding (in-person with one or more individuals participating virtually), to check the box for an in-person hearing and notify the Clerk.

**Comment:** Timely Filing of Petition Not Received – I recommend the Commission consider allowing a grace period or relief provisions if a taxpayer submits a petition to TAC via the United States Postal Service with Certified Mail but the Commission never receives the petition, or the petition is delivered significantly after the post mark date. If this cannot be changed by the Commission’s ability to promulgate rules, I recommend the Arkansas state legislature give the Commission the authority to make these changes.

**Response:** The Commission is prohibited from extending the time for filing a petition. Providing a postmark rule could result in an extension of time.

**Comment:** Tax Issues Regarding Married Taxpayers – If the issue to be brought before the TAC involves an individual income tax return that has the filing status of “Married Filing Jointly” or “Married Filing Separately on the Same Return,” guidance from these procedure rules do not address the issue of the joint and severable liability of the taxpayers. I recommend the Commission add rules that make it clear that either party may petition a decision of DFA, that the Commission’s decision is binding on all taxpayers, and authorization of a representative of one party may present the case for the taxpayers or is appropriately limited.

I recommend the Commission be able to order a severance and a separate case if a single petition regarding the deficiency or liability involves more than one taxpayer and the circumstances suggest severing the case would benefit the application of the tax law. Also, it should be allowed that either party can make a motion for severance of the case.

Additionally, I recommend the Commission make it clear, in the rules and in the instructions of the Petition and the Expedited Petition, that individual taxpayers must BOTH file a petition if the substance matter involves a deficiency or application of the tax law on both individuals on a married return.

**Response:** Either taxpayer, or each taxpayer, may file a petition to appeal an action of the Department related to a joint return. The concept of severance does not apply to Commission proceedings.

**Comment:** Authorized Representatives – Arkansas Code § 26-18-1118 states that a taxpayer may be represented by an authorized representative who has provided a completed power of attorney form. I recommend the Commission consider limiting authorized representatives to follow the individuals authorized to practice before the IRS, or a variation of those individuals. These would include: Attorney, Certified Public Accountant, Office, Full-Time Employee, Family Member. Allowing individuals who have not completed the experience, training, or expertise needed to represent taxpayers in complex tax matters would not be beneficial to the taxpayer. If this cannot be changed by the Commission’s ability to promulgate rules, I recommend the Arkansas state legislature give the Commission the authority to make these changes.

**Response:** Act 586 of 2021 dictates who can represent a taxpayer in matters before the Commission.

**Comment:** Withdrawing from Representing Taxpayer – Under proposed section 5-103(e), the Presiding Commissioner may grant an authorized representative to withdraw from representing a taxpayer on a written motion for good cause shown. I recommend the Commission consider allowing any authorized representative to withdraw for any reason, or for an unstated reason.

**Response:** The phrase “for good cause shown” has been removed from section 5-103(e).

**Comment:** Discrepancies on Forms – The instructions to the Petition and the Expedited Petition do not have the same language.

**Response:** The language in the instructions to the two petition forms has been made consistent with each other.

**Comment:** Alternative Claims and Defenses – Proposed section 5-201, the Commission gives the rules of procedure for filing an Appeal Petition. Under section 5-201(c)(2), the petition shall “state facts sufficiently clear to identify the Taxpayer, ... and the Taxpayer’s reasons for opposing the proposed assessment, denial of a claim for refund, or other action of the Department; and reasonably specify the matter ... for consideration by the Commission.” I recommend the Commission promulgate rules regarding the ability for a party to set forth two or more statements of a claim or defense alternatively or hypothetically. Each claim or defense under an alternative statement should be in separate paragraphs, and include all support of the claim or defense, and be taken to consideration by the Commission separately.

**Response:** Under the rules as drafted, the parties may raise alternative arguments in the petition.

**Comment:** Minors, Incompetent Persons, and Death – If a taxpayer is a minor in the state of Arkansas or an incompetent person has a guardian, committee, conservator, or other like fiduciary, either provided for by law or by general power of attorney document, I recommend the Commission consider promulgating rules for accepting petitions filed on behalf of the taxpayer made by such persons and to authorize additional authorized representatives on behalf of the taxpayer. If a taxpayer dies or becomes incompetent during the proceedings of the appeal, I recommend the Commission promulgate rules for any party or the Commission to be able to make a motion to assign an authorized

representative. Both of these may already be provided by other Arkansas statutes, but instructions or rules relating to these issues will make the process of representing taxpayers in these instances easier.

**Response:** Issues regarding guardians, conservators, fiduciaries, and executors will be addressed under applicable law on a case-by-case basis.

**Comment:** Burden of Proof – The rules proposed by the Commission do not identify the burden of proof of either party. I recommend the Commission consider adding a rule of procedure setting out the burden of proof in a general petition and in certain circumstances. The burden of proof should also be set by the TAC if the Presiding Commissioner determines that the burden of proof is not clear or situational circumstances require the adjustment of the burden of proof for the clear application of justice.

**Response:** Burden of proof varies according to the proceeding and can be a complex legal determination that must be addressed on a case-by-case basis.

**Commenter: Patrick J. Reynolds, Council on State Taxation**

**Comment:** Section 5-303 provides there will be no discovery in Commission adjudications, and Section 5-403 encourages parties to stipulate facts. Stipulations, however, often arise only after a fair amount of discovery. We therefore respectfully request that more consideration be given to whether the use of discovery is appropriate and its scope.

**Response:** The Commission's statute expressly provides for stipulations, Arkansas Code § 26-18-1114. The statute does not provide for discovery. Compare Section 11 of the Model State Administrative Tax Tribunal Act with Arkansas Code § 26-18-1114, in which only the stipulation provision has been retained. Additionally, the Commission's statutes do not give the agency subpoena authority.

**Comment:** Section 5-301 of the proposed rules generally provides that responses to motions must be filed within seven days. We respectfully suggest that the seven-day period, in many instances, may be too short for an effective reply, and the Commission should also consider extending response times.

**Response:** The Commission is charged with the efficient resolution of tax disputes. The motion response time rule applies to all motions, including basic procedural motions. A party needing more time to respond to a complex motion can request additional time.

**Commenter:** Nina E. Olson, Center for Taxpayer Rights, and Jennifer Gardiner, Legal Aid of Arkansas

**Comment:** Section 5-103 of the proposed rules discusses the right of a taxpayer to obtain representation before the Commission. This rule also lays out the role of the representation in relation to the taxpayer and the Commission. We propose that this rule be amended to include a subsection requiring that authorized representatives be copied on all correspondence between the taxpayer and the Department or Commission.

Both the proposed rules and the Arkansas Taxpayer Bill of Rights protect the taxpayer's right to be represented when interacting with the Department and the Commission;<sup>7</sup> however, it is our experience that authorized representatives often do not receive copies of notices and other communications sent to the taxpayer. This practice makes adequately representing taxpayers nearly impossible, and it jeopardizes other rights to which all Arkansas taxpayers are entitled. Therefore, to protect these rights and the right to representation, we suggest that section 5-103 include an explicit requirement that authorized representatives are to be copied on all correspondence to the taxpayer during the appeal process.

**Response:** Communications between the Department and a taxpayer before a Commission petition is filed, after Commission proceedings are concluded, or regarding taxes or periods not before the Commission are outside of the Commission's purview. For Commission proceedings, the authorized representative, if any, receives service.

**Comment:** Section 5-104 of the proposed rules provides that a taxpayer is not required to attend an in-person appeals conference in Little Rock. Rather, the taxpayer may request an in-person conference in a more convenient location in Arkansas, a telephone conference, or a videoconference. The flexibility offered by the Commission is laudable, especially given the challenges that accompanied the COVID-19 pandemic. Additionally, these options mean that taxpayers without reliable transportation, those with busy schedules, or those otherwise unable to travel to Little Rock will be able to avail themselves of their appeals rights with the Commission, which is invaluable.

Along with the numerous advantages that accompany video and phone conferencing come dangers that may jeopardize taxpayers and their personal information. When a taxpayer appears in-person, steps can be taken to ensure that sensitive information remains secure. For example, access to documents can be restricted, private offices can be used, and manual redaction is possible. However, these measures are not conducive to remote hearings. Although phone and videoconferences allow taxpayers to attend hearings in a more convenient setting, this convenience often comes with a price – security. Taxpayers may not be alone while attending their hearing, they may not have

access to a secure wireless network, and they may not have options for sharing documents safely.

Consequently, we recommend that the Commission implement guidance relating to how phone and videoconferences are conducted so that taxpayer information remains secure. This guidance could be made available to Commission employees and to taxpayers when they receive notice of their appeal rights. Recently, both the IRS Independent Office of Appeals and the United States Tax Court implemented guidance on videoconferencing and virtual proceedings, both of which may serve as models of guidance that the Commission may implement for its own conferences. The guidance issued by the federal government offers recommendations for both employees and taxpayers when engaging in a virtual conference. This guidance includes properly identifying all parties to the call, removing unnecessary background images, and ensuring that a secure connection is available before discussing any personal identifying information. By taking these steps, the IRS and the Tax Court have attempted to make themselves more readily available to taxpayers without sacrificing taxpayer security.

The Commission's efforts to expand access to appeal rights for Arkansans are impressive, but the Commission should be prepared for threats to taxpayer security that come with broadening the ways in which taxpayers can access them.

**Response:** The Commission will provide guidance to parties relating to security protocols in its proceedings, and the Commission will consult the referenced materials in developing that guidance. These issues are best handled in guidance and procedures and do not need to be incorporated into the rules.

**Comment:** The Commission should implement a mailbox rule when considering timely filing of documents with the Commission.

Section 5-106 of the proposed rules discusses the filing of documents with the Commission. In addition to filing electronically, taxpayers may deliver documents to the Commission via in-person visit or through the mail. This rule also states that for documents that are delivered in a non-electronic format (i.e., via hand delivery or through first class mail), the document is considered filed when "the document is received...at [the Commission's] office during [its] hours of operation." The Commission does not consider postmarks or other signs of mailing when considering on what date the document is filed.

We recommend that the Commission adopt a mailbox rule rather than a receipt rule with respect to the filing of paper documents. In this context, a mailbox rule would determine the date of filing based on the postmark of a document mailed to the Commission. Taxpayers are easily at risk of missing a deadline because their documents cannot be delivered on time. In the case of a taxpayer who has mailed a

document in accordance with these proposed rules, the taxpayer has no control over how quickly the delivery occurs. Requiring the document to be received by the Commission by the required deadline, the Commission is shortening the time to respond as guaranteed by various statutes and guidelines set by the state.

In addition to ensuring that taxpayers are not unfairly affected by factors beyond their control, adopting a mailbox rule would conform with other filing-related rules adopted by the Arkansas Department of Finance and Administration and the Internal Revenue Service. Income tax returns are considered filed by the state according to the date of the U.S.P.S. postmark. The Internal Revenue Service and the Tax Court also consider the date of the postmark of an approved mailing service when determining the date on which a document is filed.

In addition to protecting a taxpayer's right to respond, conformity with other features of the state tax system would minimize confusion while protecting the right to an appeal guaranteed to taxpayers.

**Response:** The issue of a "mailbox" or postmark rule has been addressed above in responses to comments from Michael Parker and Patrick Sanford. The Commission does not have jurisdiction to extend petition deadlines. Arkansas Code § 26-18-1110.

**Comment:** Taxpayers should have 15 days to cure when an appeal petition is delivered to the incorrect office.

Section 5-106(c)(3) of the proposed rules states, "The Taxpayer shall not serve the appeal petition on the Department. Service by the Taxpayer of the appeal petition upon the Department shall be void..." When taxpayers -- especially those with limited experience with the tax system and those with limited English proficiency -- engage with multiple departments within a tax agency, they often do not understand the difference between the roles of those departments and that there are different procedures for each. With multiple pieces of correspondence from multiple offices, it can be confusing for taxpayers to understand the necessary steps to file their appeal petition. As is expressed elsewhere in these proposed rules, the Commission encourages electronic filing for pro se taxpayers, and it requires electronic filing for authorized representatives. Consequently, those mailing or delivering petitions in-person to the department will be unrepresented and likely unsophisticated.

We suggest that in the event that a taxpayer delivers an appeal petition to the wrong address (for example, to the Department), that office should forward the document to the right office, notify the taxpayer that it has done so, and the Commission should consider the date of filing to be the date that the petition was received by the original addressee. In the alternative, the Department or the Commission should notify the taxpayer of the error, and it should give the taxpayer 15 days to resend the petition to

the Commission, giving clear instruction in the notice of the appropriate address for delivering the appeals petition.

Without giving taxpayers a chance to fix a mistake, the Commission risks making a decision not on the merits of a taxpayer's case, but instead on procedural and administrative subtleties. In allowing taxpayers to correct what will surely be a common error, the Commission can protect taxpayers' right to an appeal, both administrative and, ultimately, judicial.

**Response:** The Commission specifically does not have jurisdiction to extend petition deadlines. Arkansas Code § 26-18-1110. Questions of deemed receipt within the petition deadline can be addressed based on the specific facts of the situation. Additionally, a taxpayer that misses the Commission's petition deadline can still pursue a judicial appeal. See Arkansas Code § 26-18-406.

**Comment:** The timely filing rule of section 5-201 should be treated as a claims processing rule, and equitable tolling should be applied in cases where documents are delivered after the deadline.

Similarly, it is not inconceivable that a taxpayer might miss the 90-day window for submitting an appeal petition due to a reason beyond their control – weather events like tornadoes, unexpected health problems (perhaps more of a concern given the COVID-19 pandemic) might prevent a taxpayer from filing an appeal petition within this timeframe despite their intent to do so.

We recommend that the Commission treat the deadline in section 5-201 similarly to how the Tax Court will now treat collection due process (CDP) petitions in accordance with the Supreme Court's recent decision in *Bocehler v. Commissioner*, which holds that the 60-day deadline to file a Tax Court petition in a CDP case is non-judisdictional and is subject to equitable tolling. When the deadline is considered to be a claims processing rule rather than a jurisdictional rule, the taxpayer does not lose the right to review simply because the deadline was missed, nor does it guarantee that their claim will be heard. Rather, the factfinder can hear evidence as to the circumstances that caused the delay to determine whether it would be equitable to toll the applicable deadline.

Treating this section as a claims processing deadline rather than a jurisdictional deadline would help preserve the taxpayer's right to appeal in the event that a situation out of their control arose, causing the taxpayer to miss the deadline. Indeed, the Commission would not be inundated with cases filed well after the deadline; instead, it would have the discretion to determine, based on the facts and circumstances of each case, whether it would be fair to toll the deadline for the taxpayer who missed the deadline.

**Response:** The Commission does not have jurisdiction to extend petition deadlines. Arkansas Code § 26-18-1110. The Commission intends to hear cases within its jurisdiction as much as possible. Specific situations can be addressed on a case-by-case basis.

**Comment:** The Commission should ensure that taxpayers are adequately informed of their right to appeal and the steps required to do so.

Section 5-201(a)(1) of the proposed rules limits petitions to those “protesting certain actions or decisions of the Department that have become final or without more will become final after the expiration of time.” We propose the addition of a rule which protects the right of the taxpayer to be informed of the deadline for filing an appeal by requiring that correspondence sent to taxpayers during the appeal process contain clear, plain-language explanations of their rights and the steps required to avail themselves of those rights.

Many taxpayers are not aware of their right to appeal or disagree with an action or decision of the Department, due to language barriers, unclear instructions, and limited resources available to them. For the same reasons, many taxpayers are not aware of the 90-day deadline for filing a petition to disagree with an action or decision of the Department. We suggest that all notices of actions or decision of the Department and the Commission contain clear statements of the steps which the taxpayer should take if they either agree or disagree with the decision.

Adopting a rule requiring clearer language would protect not only the taxpayer’s right to an appeal, but it would also protect their right to be informed. In the same way that notices are required generally throughout the Department, including language of the right, the deadline to benefit from that right, and the steps needed to claim that right should be required.

**Response:** The Arkansas Taxpayer Bill of Rights, Arkansas Code §§ 26-18-801 *et seq.*, addresses notice issues generally. The Commission is not involved in the Department’s issuance of notices to taxpayers.

**Comment:** The Commission should make an exception to its “no discovery” rule to give taxpayers the right to access their tax record.

Section 5-303(c) provides that a taxpayer can contact the Department to obtain tax records. However, subsection (a) of this rule also states, “There is no discovery in commission adjudications...” To prevent subsection (c) from being cancelled out by subsection (a), we proposed that the Commission modify the language of subsection

(c) to explicitly create an exception to the “no discovery” rule, thus guaranteeing the taxpayer’s right to their tax record.

It is our experience that receiving tax records from the Department is difficult if not impossible. However, information contained in those records is crucial to the proper resolution of a taxpayer’s case. Without this information, a taxpayer is severely disadvantaged and unable to thoroughly pursue their appeal. Modifying this rule to better protect the taxpayer’s right to their records would preserve the fairness of the appeals process and help reach the correct result in appeal cases.

**Response:** As noted in responses to other comments, the statutes governing Commission proceedings do not provide for discovery. Language clarifying that the Commission does not adjudicate records requests has been added to Section 5-303.

**Comment:** The Instructions: Petition should be revised to correctly reflect section 5-601 of the proposed rules and to prevent taxpayer confusion.

The petition instructions are ambiguous regarding the filing procedure, and they do not appear to conform with sections 5-601(a) and (b) of the proposed rules. Therefore, we recommend that the Commission revise the instructions.

Under the heading “General Instructions for Filing Petition,” the first sentence states, “The Tax Appeals Commission requires the petition be filed online...” The second sentence states that taxpayers proceeding pro se may file the petition in person or by mail. The first sentence should read in conformity with the “NOTE” appearing above the General Instructions, to wit: “The Tax Appeals Commission requires this petition be filed online at <https://tac.arkansas.gov> when the filing is completed by an authorized representative.” The second sentence should read: “Taxpayers proceeding pro se may file this form: (1) online, or (2) in person, or (3) by mail.”

As stated in proposed section 5-601, authorized representatives must file the petition using the Commission’s electronic filing system. Taxpayers without representation are encouraged to file their appeal petition via the electronic filing system, but they are not required to. Pro se taxpayers may also file their petition via in person delivery to the Commission or by mail. Revising this section will not only ensure conformity with the proposed rules, but it will also reduce confusion for taxpayers, especially those without representation.

**Response:** The language in Section 5-601 has been revised to provide that both pro se taxpayers and authorized representatives can file initial petitions electronically or in conventional paper format. The language in both petition instructions has also been revised accordingly.