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**TAX LITIGATION MEMORANDUM**

**TO:** CPAs, Clients & Associates

**FROM:** David L. Silverman, Esq.  
Shirlee Aminoff, Esq.

**DATE:** April 2, 2010

**RE:** Appealing a Determination of the Tax Appeals Tribunal

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The Tax Appeals tribunal sits as the final administrative tax tribunal. A CPLR Article 78 proceeding is the “dotted line” in the flowchart that brings the tax dispute out of administrative tribunal system and into the New York judicial court system. From a tax petitioner’s standpoint, Article 78 is far from perfect: it possesses treacherous statutes of limitations, it is inherently capable of providing only narrowly circumscribed relief, and it imposes onerous bonding requirements. Still, like the Spirit of St. Louis, Article 78 will at least take the taxpayer into the courtroom of the Appellate Division, where counsel may be able to convince the Court of reversible error below.

Article 78 review must be commenced within 4 months following an adverse decision or declaratory ruling by the Tax Appeals Tribunal. An Article 78 petition is returnable to the Appellate Division, 3rd Department, in Albany. If corporate sales tax is in issue, the taxpayer must deposit the tax or post an undertaking. No undertaking is required to seek review of personal income and corporate tax determinations, including responsible person determinations; however, assessment and collection of these taxes may proceed during the pendency of an Article 78 proceeding. Article 78 review is commenced by personal service of a notice of petition and verified petition upon the Tax Appeals Tribunal, the Commissioner, and the Attorney General. The Commissioner must serve an answer at least 5 days before the petition is returnable. Judicial review is limited to the record before

the agency — no new evidence may be submitted. The stipulated record and a brief must be filed within 9 months after the date of commencement of the proceeding.

The Appellate Division will affirm if it finds the decision was (i) supported by “substantial evidence” and was not (ii) erroneous, arbitrary or capricious. Following submission of the record and briefs, oral argument before five judges will be scheduled in the Appellate Division. Within 4 to 6 weeks, a decision will be handed down. An appeal to the Court of Appeals from an adverse decision of the Appellate Division must be taken within 30 days after being served with a notice of entry. Failure to timely take an appeal is a fatal jurisdictional defect that will foreclose all further relief. The Court of Appeals generally reviews only questions of law. However, it may also review the Appellate Division’s reversal of the administrative tribunal’s finding of fact or exercise of discretion.

Appeals to the Court of Appeals may be taken either by permission or as of right. In either case, no oral argument on the motion is permitted. Appeals as of right may be taken where (i) two justices dissented on a question of law in favor of the taxpayer; or (ii) the issues in dispute directly involve a constitutional question. With respect to (i), it is not enough that there have been two dissenting judges; each must have advocated judgment in favor of the taxpayer based on questions of law. With respect to (ii), even where a constitutional question is presented, the appeal will be dismissed if the decision could have been decided on other grounds. Thus, a constitutional question cannot be raised solely to obtain jurisdiction.

A motion seeking permission to appeal may be based upon three grounds: (i) the decision conflicts with a prior Court of Appeals decision; (ii) a novel question is presented; or (iii) a question of substantial public importance is presented. Permission is typically sought under (ii) or (iii). The motion must include (a) a concise statement of facts; (b) a statement of the procedural history and a showing that the motion is timely; (c) a showing that the Court has jurisdiction; (d) an argument as to why the case merits review; and (e) an identification of portions of the record where the questions sought to be reviewed were preserved for appellate review. Within 10 days taking an appeal by right or by permission, the petitioner must “perfect” the appeal by filing a jurisdictional statement. The petitioner must then file and serve his brief, with the record and original exhibits. Oral argument is before the Chief Judge, now Judge Judith S. Kaye, and six Associate Judges.