STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

HODGSON RUSS LLP

Petitioner,

Hon. Timothy J. Walker
Index No.: 2014000097

Hybrid proceeding/action for judgment Pursuant to Articles 78 and 30 of the CPLR and 42 U.S.C. § 1983

v.

MINNESOTA DEPARTMENT OF REVENUE

MYRON FRANS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MINNESOTA DEPARTMENT OF REVENUE

Respondents.

MEMORANDUM IN SUPPORT OF HODGSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO MINNESOTA REVENUE'S MOTION TO DISMISS

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Introduction

Petitioner, Hodgson Russ, LLP ("Hodgson") submits this memorandum in support of its motion for partial summary judgment and in opposition to the motion to dismiss filed by Respondents Minnesota Department of Revenue and Myron Frans (collectively, "Revenue").

Preliminary Statement

This case concerns Revenue's constitutionally impermissible assertion of its income tax jurisdiction over Hodgson based on nothing more than Hodgson's receipt of fees reflected on Forms 1099 carrying a payor address in Minnesota. Revenue's nexus determination against Hodgson violates the Interstate Commerce and Due Process clauses of the U.S. Constitution, and Hodgson is entitled to partial summary judgment on its claims seeking declaratory, injunctive, and other relief.[1]

Argument

A party seeking summary judgment must make a *prima facie* showing of its entitlement to judgment as a matter of law.[2] The moving party does not have to disprove every "remotely possible state of facts" on which the opposing party might succeed;[3] and a court has no duty to "ferret out speculative issues" of fact if none exist.[4]

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1 Hodgson's showing in support of its own motion for summary judgment requires the denial of Revenue's motion to dismiss.

2 *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 320 (2009); *see also* N.Y. C.P.L.R. § 3212 (McKinney's 2014) (stating that summary judgment is appropriate where the proof sufficiently establishes that no genuine issues of fact exist such that judgment is warranted as a matter of law).

3 *Ferluckaj,* 12 N.Y. 3d at 320 (holding that plaintiff's "theorizing" was insufficient to defeat defendant's motion for summary judgment).

4 *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974) ("Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law.").

Once the moving party has made its *prima facie* showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.[5] "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment.[6]

"When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing."[7] As discussed more fully below, Hodgson's claims raise pure issues of law for which it is entitled to summary judgment.

I. HODGSON IS ENTITLED TO SUMMARY JUDGMENT ON ITS FIRST CAUSE OF ACTION FOR DECLARATORY JUDGMENT

"CPLR 3001 is . . . a remedial provision the primary purpose of which is to stabilize legal relations and eliminate uncertainty as to the scope and content of present or prospective obligations."[8] A declaratory judgment action is "appropriate when the application of

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5 *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

6 *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 967 (1988) (citation omitted).

7 *Goodwin v. Cirque du Soleil, Inc.*, 2012 N.Y. Misc. LEXIS 2368, at *4 (Sup. Ct. N.Y. Cnty. May 14, 2012) (citing *Hindes v. Weisz*, 303 A.D.2d 459 (2d Dep't 2003)).

8 WEINSTEIN, KORN, MILLER, New York Civil Practice, § 3001.02 at 30-10, 2d ed. (LexisNexis 2014); *see also Brown v. N.Y.S. Tax Comm'n*, 199 Misc. 349 (1950), *aff'd*, 279 A.D. 837, *aff'd*, 304 N.Y. 651 (1952) ("The general purpose of a declaratory judgment is to quiet and stabilize uncertain or disputed jural relations either as to present or prospective obligations, and no limitation has been placed or attempted to be placed upon its use."); *Socony-Vacuum Oil Comp. v. City of New York*, 247 A.D. 163, 166 (1st Dep't 1936) (stating same in an action for declaratory judgment and injunctive relief); *Morgenthau v. Dist. Atty. of N.Y. Cnty.*, 59 N.Y.2d 143, 147 (1983) ("[D]eclaratory relief . . . is not an extraordinary remedy. Instead, a declaratory judgment 'is a remedy *sui generis* and escapes both the substantive objections and procedural limitations of special writs and extraordinary remedies. * * * * In keeping with the remedy's nonextraordinary nature . . . the court has a broader power to grant declaratory judgment than it does with prohibition.").

a statute to a given case is challenged[.]"[9]

In the tax context, "[a]n action for a declaratory judgment may be maintained, despite the provisions of a taxing statute providing that the methods of judicial review prescribed therein shall be exclusive, where the jurisdiction of the taxing authorities is challenged on the ground that the statute is unconstitutional, or where the tax laws are inapplicable to the taxpayer."[10] Indeed, New York caselaw makes clear that "[a] declaratory judgment action is the proper vehicle to test the jurisdiction of . . . taxing authorities."[11] And a party need not pursue an

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9 *Namro Holding Corp. v. New York*, 17 A.D.2d 431, 434-35 (1st Dep't 1962) (stating that "[declaratory judgment] is . . . appropriate when the application of a statute to a given case is challenged[,]" and noting that "[t]he availability of the administrative remedy of an appeal to the Board of Standards and Appeals does not preclude this action challenging the application of the statute and the rules to the facts of this case") (citation omitted); *see also Dun & Bradstreet v. City of New York*, 276 N.Y. 198, 206 (1937) (citing *Richfield Oil Corp. v. City of Syracuse*, 287 N.Y. 234, 239 (1942)).

10 *Nat'l Steel Corp. v. New York*, 1 Misc. 2d 1012, 1013 (Sup. Ct. N.Y. Cnty. 1953) (citing *Richfield Oil Corp.*, 287 N.Y. at 239; *see also Nat'l Steel Corp.*, 1 Misc. 2d at 1013-16 (denying tax authority's motion to dismiss complaint and granting plaintiff's motion for summary judgment which challenged the "constitutional power of the defendants to assess, collect or enforce the payment of the tax in question," rejecting tax authority's exhaustion argument, and declaring, as a matter of law, that the tax imposed on plaintiff constituted an impermissible and invalid "attempt by the city to tax the privilege of soliciting interstate business," which "constitute[d] a violation of the commerce clause of the United States Constitution," and was thus invalid as to the plaintiff); *see also People ex rel. Erie R. Co. v. State Tax Com.*, 246 N.Y. 322, 326-27 (1927) ("The Commission erroneously determined the existence of facts essential to its jurisdiction and, therefore, its acts in assessing property exempt from assessment were void.").

11 *Troy Towers Redevelop. Co. v. City of Troy*, 51 A.D.2d 173, 175-76 (3d Dep't 1976) (citing *Dun & Bradstreet*, 276 N.Y. 198; *People ex rel. Erie R.R. Co.*, 246 N.Y. 322; *Matter of City of New York [Woodhaven Blvd.]*, 260 A.D. 659 (2d Dep't 1940)) (noting that "an assessment upon property that is exempt from taxation is a nullity, void from its inception"); *see also Dun & Bradstreet*, 276 N.Y. at 204 ("It is elementary that taxing statutes when of doubtful validity or effect must be construed in favor of the taxpayers.") (reversing the appellate division and affirming the trial court's decision denying City's motion to dismiss and holding that declaratory judgment was the appropriate remedy); *see also id.*, 276 N.Y. at 206 ("If taxing officers act without jurisdiction, their acts are illegal and void. In such a case, certiorari is not an adequate remedy even if a proper one."); *Hotel Armstrong, Inc. v. Temp. State Hous. Rent Comm'n*, 11 A.D.2d 395, 402 (1st Dep't 1960) ("Since constitutionality of the statute was involved, the remedy of declaratory judgment was a particularly appropriate one and plaintiff is not confined to the statutory administrative procedure and the review provided by article 78 of the Civil Practice Act.").

"administrative remedy" — thus consenting to an administrative agency's jurisdiction — in order to contest the very jurisdiction it challenges.[12]

A. There Are No Disputed Issues Of Fact Regarding The Basis For Revenue's Unconstitutional Nexus Determination

Revenue claims that there are "unresolved issues of fact" that somehow preclude this Court from granting declaratory relief. *See* MR Memo. at 3, 6, 7. Revenue ties this argument to its very recent (and convenient) characterization of its nexus determination as one that is "initial" or "preliminary," and part of an ongoing "investigation." *See, e.g.,* MR Memo. at 3, 8, 10, 11. But there is no reason for this Court to credit Revenue's characterization. It isn't accurate.[13] Revenue's March 25 letter to Hodgson spells out exactly what Revenue is requiring of Hodgson and why:

> *A* corporation or ***partnership is required to file a Minnesota franchise tax return for every taxable year in which it transacts business within Minnesota.*** According to information available to this office, your firm has been conducting business in our state, but has not filed any Minnesota franchise tax returns.

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12 *Niagara Mohawk Power Corp. v. City School Dist.*, 59 N.Y.2d 262, 271 (1983) ("[I]t is inconsistent to insist that the taxpayer pursue an administrative remedy, thereby impliedly recognizing the jurisdiction of the district, at the same time it challenges the legality of the district's action.") (citation omitted); *see also First Nat'l City Bank v. New York Fin. Admin.*, 36 N.Y.2d 87, 92-93 (1975) ("When a tax statute, however, is alleged to be unconstitutional, by its terms or application, or where the statute is attacked as wholly inapplicable, it may be challenged in judicial proceedings other than those prescribed by the statute as 'exclusive'; the invalidity or total inapplicability affects the entire statute, including the limitations and restrictions on the remedy provided in it."); *see also Yonkers Raceway, Inc., v. City of Yonkers*, 66 Misc. 2d 589, 592-93 (Sup. Ct. Westchester Cnty. 1971) (rejecting City's argument that plaintiff was required to exhaust administrative remedies, denying City's motion to dismiss, granting petitioner's motion for summary judgment, declaring certain of the petitioner's revenues untaxable, and further declaring that the City comptroller had no authority to levy a tax on the income in dispute); *New York Bus Tours, Inc. v. City of New York*, 111 Misc. 2d 10 (Sup. Ct. Bronx Cnty. 1981) (rejecting defendants' exhaustion argument and noting that the petitioner's Article 78 proceeding was properly commenced where the petitioner sought to "prohibit respondent from exceeding its jurisdiction by applying the sales tax law to petitioner's operation").

13 While only disputed issues of material fact are sufficient to defeat a motion for summary judgment, Hodgson notes that for purposes of Revenue's own motion, the allegations in the complaint must be accepted as true. *See, e.g., Sikora Realty Corp. v. Gillroy*, 37 Misc. 2d 285 (Sup. Ct. Queens Cnty. 1954) ("Since this is a motion to dismiss the complaint, [the plaintiff's allegations] are deemed to have been admitted for the purpose of the motion.").

* * * *

> We are aware that federal forms 1099's have been issued to your firm, showing that your firm has provided services to Minnesota clients who have received services within Minnesota for the tax years of 12/31/2004 forward.
>
> We now request that Minnesota Corporation or Partnership tax returns be submitted for 12/31/2009 – 12/31/2012. Please carefully review the revenue received from all Minnesota companies ***and remember that once nexus to Minnesota has been determined, as it has with your company***, all Minnesota property, payroll and sales must be apportioned to Minnesota.[14]

There is no genuine dispute as to the existence of, or the basis for, Revenue's nexus determination.[15] Revenue's statement to Hodgson in demanding Hodgson to file Minnesota tax returns is that nexus "has been determined," and that the basis for that determination is the "federal forms 1099's" issued to Hodgson.[16] For the reasons discussed in Section III. below, the mere issuance of federal Forms 1099 by Minnesota payors is insufficient to create constitutional nexus between Hodgson and Minnesota, and there are no genuinely

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[14] *See* Affirmation of Christopher L. Doyle, dated November 21, 2014 ("Doyle Aff."), Ex. 7 (March 25, 2014 letter from Minnesota Revenue to Hodgson) (emphasis added); *see also id.*, Ex. 9 (May 7, 2014 email from Minnesota Revenue to Hodgson: "[A]nd remember that once nexus to Minnesota has been determined, ***as it has with [Hodgson]***, all Minnesota property, payroll and sales must be apportioned to Minnesota. ***We claim jurisdiction*** on all Minnesota sales, revenue received, fees assessed, etc.") (emphasis added); MR Memo. at 2 (admitting that Revenue's May 7, 2014 email was intended to "explain[ ] the basis of Minnesota Revenue's nexus determination")

[15] *Zuckerman v. New York City Trans. Auth.*, 49 N.Y.2d 557, 562 (1980) ("We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim . . . ."); *BGC Partners, Inc. v Refco Sec., LLC*, 35 Misc. 3d 1210(A), at *4-5 (Sup. Ct. N.Y. Cnty. 2012) ("Genuine issues of material fact that preclude summary judgment are '[o]nly disputes over facts that might affect the outcome of the suit under the governing law.' The party opposing summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue of material fact for trial.") (internal citations omitted).

[16] "Prior to the commencement of this litigation, ***the only evidence available to Minnesota Revenue were the forms 1099s filed by Petitioner's Minnesota clients***, which indicated that petitioner provided services and billed those Minnesota clients at those mailing addresses." MR Memo. at 7 (emphasis added).

disputed issues of fact precluding this Court from granting the summary relief that Hodgson seeks.

B. Minnesota's Administrative Tribunals Have No Authority And Thus Are Not Competent To Adjudicate The Unconstitutionality of Revenue's Nexus Determination

Revenue argues that "[t]here is no necessity for this Court to entertain [Hodgson's] request for declaratory relief as Minnesota law makes conventional ***forms of relief*** readily available to [Hodgson]." MR Memo. at 4; *see also id.* at 6. It then goes on to argue that because there is an administrative process for Hodgson to challenge Revenue's nexus determination in Minnesota, Hodgson's first cause of action should be dismissed. *Id.* at 3.

There are three fundamental and fatal deficiencies in Revenue's argument. First, Revenue's argument clearly confuses the concepts of available "relief" with available "forums." Revenue goes on-and-on about Minnesota's administrative process, and then wrongly concludes that the existence of this process alone shows that Hodgson has "conventional ***forms of relief*** readily available to [it]." MR Memo. at 4.[17] Nowhere does Revenue claim that its administrative tribunal is capable of adjudicating issues concerning the constitutionality of Revenue's nexus determination. Nor could it. Administrative agencies are not competent to

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[17] For the reasons discussed in this brief, Hodgson disagrees that it has "conventional forms of relief" available to it. *See* §§ I.B. and III, *infra*. But even if Revenue's claim were true, the New York Court of Appeals has made clear that "[t]he mere existence of other adequate remedies . . . does not require dismissal [of a party's request for declaratory relief]." *Morgenthau v. Dist. Atty. of N.Y. Cnty.*, 59 N.Y.2d 143, 148 (1983) (stating further that "[w]e have never gone so far as to hold that, when there exists a genuine controversy requiring a judicial determination, the Supreme Court is bound, solely for the reason that another remedy is available, to refuse to exercise the power conferred by [the predecessor statutes to CPLR 3001]") (alterations in original) (citation omitted).

decide matters concerning the constitutionality of the laws and regulations they oversee and enforce.[18]

Second, it is not true that Hodgson has access to the "conventional forms of relief" that Revenue suggests are beckoning for Hodgson in Minnesota. Minnesota's statutory law is pretty straightforward on this point: "[a] foreign limited partnership transacting business in [Minnesota] ***may not maintain an action or proceeding in [Minnesota]*** unless it has a certificate of authority to transact business in the state."[19] Hodgson does not maintain a certificate of authority in Minnesota, and it is not otherwise authorized to do business there.[20] Thus, even assuming Revenue's invitation to fully litigate the issue of constitutional nexus in Minnesota had any appeal (which it does not), the courthouse doors of Minnesota are closed to Hodgson.

Third, the entire predicate for Revenue's "all-of-this-is-unnecessary" argument is a red-herring. Revenue's position is that Hodgson has the ability to challenge Revenue's nexus determination provided it either files the very tax returns that it disputes having any obligation to

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18 *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978) (stating that the exhaustion doctrine is "not an inflexible one[,]" and is "subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile[.]"); *Hurlbut v. Whalen*, 58 A.D.2d 311, 317 (4th Dep't 1977) (holding that the "exhaustion of whatever administrative remedies were open to [the plaintiff] would have been futile since the administrative agency lacked both the power and competence to pass on the constitutionality of its own actions and procedures") (citing *Finnerty v. Cowen*, 508 F.2d 979, 982 (2d Cir. 1974) ("Federal agencies like the Board 'have neither the power nor the competence to pass on the constitutionality of administrative or legislative action.'"); *Matter of Smith v. Vann*, 16 Misc. 3d 1132(A), 1132A, at *6 (Sup. Ct. Clinton Cnty. 2007) ("[I]t is clear that the exhaustion rule need not be followed where an agency's action is challenged as either unconstitutional or wholly beyond its grant of power. This exception to the exhaustion requirement is necessitated by the fact that administrative agencies are not in [a] position to pass upon the constitutionality of legislative or regulatory enactments."); *see also In re McCannel*, 301 N.W.2d 910, 919 (Minn. 1980) ("As a general rule, administrative agencies lack the power to declare legislation unconstitutional. Instead, these issues must be raised in a court of the judiciary.").

19 *See* Minn. Stat. § 321.0907(b) (2014).

20 *See* Doyle Aff. ¶ 16.

file, or allows Revenue to do the honors.[21] In essence, Revenue's argument is that if Hodgson would just comply with Revenue's nexus determination by filing tax returns for 2009-2012, the jurisdictional dispute that Hodgson has placed before this Court would not need to be adjudicated. Of course, the same would be true if Revenue would just agree that its basis for asserting constitutional nexus over Hodgson is illegitimate and wrong (which it is).

That juxtaposition is at the very heart of the parties' dispute — a dispute that is unquestionably ripe for adjudication here.[22] Declaratory relief is appropriate to deal with precisely this sort of jural impasse[23] — particularly where, as here, this Court is the ***only*** tribunal that is ***both*** capable of ***and*** competent to render a decision on the constitutional issue which Hodgson has raised. For the reasons discussed above, and those below in Sections II. and III., Hodgson is entitled to summary judgment on its first, second, and third causes of action, and a declaration that Revenue's nexus determination is unconstitutional.[24]

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21 "Minnesota statutes provide for both administrative and judicial review of any order of the Minnesota Commissioner of Revenue. Petitioner may file a return as . . . Minnesota Revenue requested." MR Memo. at 4. "If Petitioner refuses to file a return, Minnesota Revenue may file a return (Commissioner Filed Return or CFR) on the Petitioner's behalf or issue an Order for Assessment based on the information available to Minnesota Revenue." MR Memo. at 4.

22 *Booth v. City of New York*, 268 A.D. 502, 506 (1st Dep't 1944), *aff'd*, 296 N.Y. 573 (1946) (reversing trial court; granting petitioner's request for declaratory judgment on the pleadings; and finding that petitioner was not required to await an assessment and challenge same through a certiorari proceeding, and further that petitioner was not required to utilize the "exclusive remedies" articulated under the City's administrative code "under circumstances [in which] the taxing authority is on the very face of the threatened action exceeding the powers given it by the enabling act"); *see also Gordon v. Rush*, 100 N.Y.2d 236, 242 (2003) (noting, in the Article 78 context, that whether agency action is final and ripe for review depends on whether the agency's determination "impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process[,]" and finding that the agency's determination which required petitioner to file a draft environmental impact statement imposed a sufficient obligation on petitioner to give rise to its Article 78 request for prohibition) (citing *Matter of Essex Cnty. v. Zagata*, 91 N.Y.2d 447 (1998)).

23 *See* WEINSTEIN, KORN, MILLER, New York Civil Practice, § 3001.02 at 30-10, 2d ed. (LexisNexis 2014); *see also Brown*, 199 Misc. 349, *aff'd*, 279 A.D. 837, *aff'd*, 304 N.Y. 651.

24 None of the cases cited by Revenue compel a different conclusion, as none of them involve a constitutional challenge like the one that Hodgson has rightly placed before this Court to determine. *See, e.g., Xerox Corp. v. Dep't of Tax. & Fin. of the State of N.Y.*, 140 A.D.2d 945 (4th Dep't 1988) (no

II. HODGSON HAS PROPERLY CHALLENGED REVENUE'S NEXUS DETERMINATION UNDER ARTICLE 78 ON THE GROUNDS THAT IT IS ARBITRARY AND CAPRICIOUS, AFFECTED BY AN ERROR OF LAW, AND IN EXCESS OF REVENUE'S JURISDICTION

A. Hodgson's Request For Article 78 Relief Is Appropriate And Should Be Granted

Should this Court determine that more than its broad Article 30 powers are necessary to adjudicate the parties' dispute, Article 78 provides an adequate mechanism for the Court to find that Revenue's assertion of tax jurisdiction over Hodgson based on the mere issuance of federal Forms 1099 was arbitrary and capricious, and thus null and void. Instead of addressing the merits of Hodgson's Article 78 claim, or the appropriateness of the relief that Hodgson seeks under it (when properly characterized), Revenue opts to take the Court on a detour to discuss writs of prohibition in the context of ongoing "investigations." Once headed down this path, Revenue concludes that Hodgson's request for prohibition is improper.

There is a twofold problem with Revenue's argument-by-misdirection, however. First, Hodgson's second cause of action clearly states, in part, that in issuing a "determination of nexus between Hodgson and Minnesota under Minnesota Statute 290.015, Respondents have acted both in excess of their jurisdiction, and in an arbitrary and capricious manner." Doyle Aff., Ex. 2 at 9, ¶ 39 (Verified Petition).[25] These particular allegations are ***not*** in the nature of a writ of prohibition, but rather a mandamus to review.

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constitutional issue raised, factual questions existed as to nature and extent of Xerox's ownership of stock in another company, and Xerox had previously commenced an as yet unconcluded administrative proceeding with the state tax department); *Allstate Ins. Co. v. Tax Comm'n of New York*, 115 A.D.2d 831 (3d Dep't 1985) (no constitutional issue raised and factual questions existed as to the relationship between petitioning taxpayers and the deductible nature of certain receipts which precluded the court from resolving the issue as a "pure matter of law"); *Kallenberg Meat Prods. v. O'Cleireacain*, 209 A.D.2d 381 (2d Dep't 1994) (constitutionality of city tax commissioner's conduct not challenged, and unresolved issues of fact existed as to relationship between the plaintiff, the managing entity, and the city).

[25] "More specifically, Respondents' actions are arbitrary and capricious in that they have established no reasonable or legitimate basis for the nexus determination reached by Revenue; and, accordingly, the

> CPLR 7803 distinguishes between a proceeding to review 'whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence' (CPLR 7803(4)), on the one hand, and ***a proceeding to review 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion'*** (CPLR 7803(3)), on the other hand. The distinction reflects the difference between the common-law writ of certiorari to review, where the court must determine the 'substantiality of the evidence', and the common-law ***writ of mandamus to review***, in which the Court must determine 'the rationality of the administrative act.'[26]

"To the extent that [an Article 78 petitioner] seeks to annul [a] determination made . . . without there having been any hearing directed by law, the relief sought is in the nature of mandamus to review, and the only question is whether the [administrative entity's] determination was irrational, arbitrary, or capricious."[27] In this context, the Court of Appeals has spoken on the appropriate scope of review:

> A reviewing court, in dealing with a determination which an administrative agency alone is authorized to make, ***must judge the propriety of such action solely by the grounds invoked by the agency.*** If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.[28]

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request that Hodgson file tax returns for the tax years ended December 31, 2009 through December 31, 2012 exceeds Respondents' jurisdiction." *See* Doyle Aff., Ex. 2 at 9, ¶ 40 (Verified Petition).

26 *Poster v. Strough*, 299 A.D.2d 127, 142 (2d Dep't 2002) (internal citations omitted) (emphasis added).

27 *Poster*, 299 A.D.2d at 141; *see also New York Bus Tours, Inc.*, 111 Misc. 2d at *17 (rejecting defendants' exhaustion argument and stating that "[p]laintiffs need not await determination of their administrative remedies when as herein the constitutionality of a tax law and its application past, present and future is in issue").

28 *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991) (granting petition and annulling Board's determination as arbitrary and capricious, and stating that "[w]e perceive of no reason why the settled rule which limits judicial review of the determination of an administrative agency in certiorari proceedings to judging 'the propriety of such [determination] solely by the grounds invoked by the agency' should not apply equally to mandamus to review proceedings") (citation omitted).

The Article 78 device of a petition for mandamus to review thus allows a court to review an administrative, rather than a quasi-judicial, determination of a government agency, and requires the reviewing court to do so on the particular basis offered by the agency which issued the determination.[29] That is precisely what Hodgson has asked the Court to do here. Hodgson's second cause of action asks the Court, among other things, to review and annul Revenue's determination of nexus; and Article 78 is a proper procedural mechanism for bringing this dispute.[30]

The second problem with Revenue's argument is that it is incorrect about the purported limitations on this Court's ability to issue a prohibition writ in instances where administrative agencies act in a quasi-judicial capacity[31] — as they do when they make

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29 *Scherbyn*, 77 N.Y.2d at 757; *Matter of Joralemon Realty NY, LLC v. State of N.Y. Div. of Hous. & Cmty. Renewal*, 102 A.D.3d 965, 967 (2d Dep't 2013); *see also Town of Riverhead v. Cnty. of Suffolk*, 78 A.D.3d 1165, 1166 (2d Dep't 2010) (stating that a proceeding which requires the petitioner to convince the court that actions taken "'represented an irrational construction of the governing statutes . . . is plainly encompassed within the grounds for mandamus to review set forth in CPLR 7803(3)'") (quoting *N.Y.C. Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 205 (1994)); *Matter of King v. Kay*, 39 Misc. 3d 995, 997 (Sup. Ct. Suffolk Cnty. 2013) ("A determination remains purely administrative when it involves an exercise of judgment or discretion in the absence of a trial-type hearing.") (citing *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005) (annulling decision suspending petitioner's driver's license)).

30 *See* Doyle Aff., Ex. 2 at 9 ¶ 41 (Verified Petition) ("As such, Hodgson requests a judgment: (a) annulling Respondents' determination of Hodgson's purported nexus to Minnesota; (b) enjoining and prohibiting Respondents from asserting through the issuance of notices or assessments or in any other medium that Hodgson is subject to tax in Minnesota for years prior to 2013; (c) granting Hodgson such other and further relief to which it is entitled under CPLR § 7806; and (d) restitution/damages for lost attorney time, out-of-pocket expenses, and other costs and disbursements incurred by Hodgson to prosecute its claims and/or defend against Respondents' 'determination' of nexus, for which it demands judgment.").

31 "[A] petitioner seeking a writ of prohibition must demonstrate that: (1) a body or officer is acting in a judicial or quasi-judicial capacity[;] (2) that body or officer is proceeding or threatening to proceed in excess of its jurisdiction[;] and (3) petitioner has a clear legal right to the relief requested." *Matter of Garner v. N.Y.S. Dep't of Corr. Servs.*, 10 N.Y.3d 358, 361-62 (2008). While a court is permitted to examine the "gravity" of the harm, a showing of irreparable harm by the writ's proponent is not a necessary predicate to its issuance. *Id.*, 10 N.Y.3d at 361 (noting several factors that a court can consider in issuing this discretionary writ, including the "gravity of the harm that would result to petitioner, the availability of another adequate remedy to correct that harm, and whether prohibition would provide a more complete and effective remedy if [other] remedies are potentially available"); *see also Gordon*, 100 N.Y.2d at 245 (finding that a town board "acted outside the scope of its authority when it decided to conduct its own SEQRA review and issued a positive declaration[,]" and prohibiting further action by the

determinations about their own jurisdiction to act.[32] A pair of Court of Appeals decisions are instructive on this point.

In *Erie Railroad Co. v. State Tax Comm'n*, 246 N.Y. 322 (1927), the petitioner sought to collaterally attack the Tax Commission's assertion of jurisdiction, and thus to void the assessments it had received. The Court of Appeals upheld the petition, noting that the Commission had wrongly "determined the existence of facts essential to its jurisdiction." *Id.*, 246 N.Y. at 326. In reaching this conclusion, the Court reaffirmed its earlier holding in *Elmhurst Fire Co. v. New York*, 213 N.Y. 87, 90-91 (1914), in which it stated:

> In making the determination [as to their jurisdiction, tax assessors] ***act judicially*** and within the sphere of their duty, ***but their decision is not conclusive as to their*** jurisdiction. They were officers clothed by statute with limited powers, and their decision on a question determinative of their authority is not final and may be attacked collaterally. When a statute, as in this case, leaves to the assessing officers questions of a jurisdictional character it is well settled that their decision does not preclude parties aggrieved from resorting to judicial remedies. When their authority depends upon the existence of some fact, which they erroneously determine to exist, their acts pursuant to it are void.

The authority cited by Revenue in its own motion shows that the prohibition writ is unquestionably available where public officers act in a quasi-judicial capacity.[33] As the Court

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board because "[e]ven if the Board ultimately granted [petitioners] variances, petitioners would have already spent the time and money to prepare the DEIS ***and would have no available remedy for the unnecessary and unauthorized expenditures***") (emphasis added).

[32] *See also Niagara Mohawk Power Corp.*, 59 N.Y.2d at 269 ("When the taxing authority exceeds its power, however, the taxpayer may challenge its levy collaterally in a plenary action. It need not meet statutory conditions precedent or follow the procedures set forth in the Real Property Tax Law because the assessment is void. In such case, a legal issue is critical, the power to tax not the facts underlying the tax, and thus there is little need for the taxing authority to investigate or to attempt to adjust the claim. This jurisdictional issue, as in most legal proceedings, may be raised collaterally without regard to the normal procedures or the necessity of complying with conditions precedent.").

[33] *See* MR Memo. at 9 (citing *McGinley v. Hynes*, 51 N.Y.2d 116, 125 (1980), in which the Court of Appeals distinguished between the quasi-judicial and executive functions of public prosecutors, and noting that its

of Appeals' teachings above make clear, when public officers make determinations as to their jurisdiction to act, they do so in a quasi-judicial capacity.

Hodgson commenced this Article 78 proceeding, in part, to prohibit Revenue from subjecting Hodgson to its tax jurisdiction based on an unconstitutional determination that nexus exists with Minnesota — and to save itself the time, expense, resources, and efforts of challenging a later tax assessment wrongfully predicated on Revenue's constitutionally impermissible determination. New York courts have recognized that these are appropriate motives for invoking the prohibition writ under Article 78.[34]

Frankly, Revenue's own letters and sheer common sense dictate the conclusion that in reaching its incorrect determination that Hodgson has nexus with Minnesota based purely on the issuance of federal Forms 1099, Revenue necessarily made a judicial or quasi-judicial determination.[35] In its March 25, 2014 letter, and then again in its May 7, 2014 email, Revenue

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decision "does not in any way conflict with prior cases in which we have recognized the availability of prohibition as a means to prevent a public prosecutor from acting in excess of his authority").

[34] *In re Estate of Haas*, 33 A.D.2d 1, 8 (4th Dep't 1969) ("It is 'far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed.'"); *see also Matter of Flynn v. State Ethics Comm'n*, 208 A.D.2d 91, 93-94 (3d Dep't 1995), *aff'd*, 87 N.Y.2d 199 (1995) (holding that "administrative agencies, as creatures of statute, are without power to exercise any jurisdiction beyond that conferred by statute . . ." and determining that a writ of prohibition was the proper remedy, rather than to force petitioner to wait for an appeal after spending time and money on the extra-jurisdictional proceeding); *Carey v. Kitson*, 93 A.D.2d 50 (2d Dep't 1983) (holding that even though the error could be corrected on appeal, a writ of prohibition was proper because the claim "challenges the legality of the 'entire action or proceeding'" and because failure to grant the writ would subject defendant to submit to further unlawful prosecution); *see also New York Bus Tours, Inc.*, 111 Misc. 2d at *14 (holding that petitioner "can properly maintain [an] Article 78 proceeding" where it looks to "prohibit respondent from exceeding its jurisdiction by applying the sales tax law to petitioner's operation[,]" and granting petitioner summary judgment).

[35] *See Matter of Livingston Parkway Ass'n, Inc. v. Town of Amherst Zoning Bd. of Apps.*, 114 A.D.3d 1219, 1220 (4th Dep't 2014) (evaluating petition for writ of prohibition concerning a town zoning board's legal interpretation that a zoning condition was no longer enforceable); *Roschelle v. Nyquist*, 61 A.D.2d 1073 (3d Dep't 1978) (deciding a petition for a writ of prohibition against the Commissioner of Education, and evaluating the Commissioner's quasi-judicial actions in interpreting and applying the pertinent law); *Rottkamp v. Young*, 21 A.D.2d 373, 376 (2d Dep't 1964) (holding that a building inspector's determination of permits is quasi-judicial in character because it necessarily involves the construction of the zoning ordinance and a consideration of the facts before him); *Matter of Stop BHOD*, 22 Misc. 3d 1136(A) (Sup.

quotes Minnesota law, cites authorities, and purports to offer legal justification for its nexus determination on the basis of "modern dormant commerce clause jurisprudence."[36] It does this while ultimately concluding that Hodgson has nexus with Minnesota, and must file tax returns for 2009-2012 because Revenue "claim[s] jurisdiction on all Minnesota sales, revenue received, fees assessed, etc." Doyle Aff., Ex. 7. It is difficult to imagine what that determination (and the corresponding assertion of jurisdiction) is, if it isn't, at least, "quasi-judicial" in nature as New York courts have recognized.[37]

Hodgson's request for relief under Article 78 — under both the mandamus to review and the writ of prohibition standards — is appropriate.[38] And as discussed in Section III. below, Hodgson has shown a clear right to the relief it seeks on this motion because Revenue's nexus determination is unconstitutional as a matter of law, and it should not be permitted to exercise jurisdiction over Hodgson on such a basis.

Ct., Kings Cnty. 2009) (holding that an agency official, like the State Comptroller, has been found to be acting in a quasi-judicial capacity when he performs his audit functions, which involves the power to hear, examine, allow or reject claims for monies allegedly owed and to seek recovery of monies allegedly improperly paid).

36 Doyle Aff., Ex. 9 (May 7, 2014 email from Minnesota Revenue to Hodgson reaffirming its March 25, 2014 nexus determination).

37 To the extent that Revenue repeats its arguments concerning the purported availability of adequate alternative legal remedies in addressing Hodgson's Article 78 cause of action, the arguments articulated above in Section I.B. and below in Section III., address and refute Revenue's position here as well.

38 *Matter of Garner*, 10 N.Y.3d at 361 (citing N.Y. C.P.L.R. § 7803(3) ("[A] petition seeking Article 78 relief in the nature of prohibition should be granted upon a showing that a 'body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction.'")); *see also Gordon*, 100 N.Y.2d at 245 (noting that "the mere assertion of jurisdiction alone was not the actual, concrete harm that was inflicted upon petitioners. Rather, the harm was the issuance of the positive declaration directing petitioners to prepare a [draft environmental impact statement], involving the expenditure of time and resources . . . ."); *Scherbyn*, 77 N.Y.2d at 757-58 ("In a mandamus to review proceeding, however, no quasi-judicial hearing is required; the petitioner need only be given an opportunity 'to be heard' and to submit whatever evidence he or she chooses and the agency may consider whatever evidence is at hand, whether obtained through a hearing or otherwise.").