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**TAX LITIGATION MEMORANDUM**

**TO: CPAs, Clients & Associates**

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

**DATE: April 8, 2010**

**RE: Collection of Responsible Person Assessment Barred Until Judgment**

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Tax Law §1138(a)(1) sets forth the procedure in which (i) sales tax is determined; (ii) the determination is mailed to the taxpayer (“Notice of Determination”); and (iii) 90-day appeal rights to the division of tax appeals for redetermination of a deficiency are established. §1138(a)(1) further provides that 90 days following the mailing of a notice of determination, such notice shall constitute an assessment, except for the amounts as to which the taxpayer has applied for a hearing. Tax Law §1133 establishes that a corporate officer or other “responsible person” may be held personally liable for the payment of sales tax. §1138(a)(3)(B) provides that (i) a responsible person may appeal to the division of tax appeals in the same manner as the corporation, i.e., within 90 days after the giving of a notice of determination; and that (ii) if the determination is based on the determination issued to the corporation, “a separate application to the division of tax appeals for a hearing shall not be required.” §1138(a)(3)(B) further provides (in language similar to that used in §1138(a)(1)), that the determination against a responsible person shall become an assessment unless such person,

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Any advice herein is not intended or written by our firm to be used, and cannot be used by any taxpayer, for the purpose of avoiding any penalties that may be imposed under the Internal Revenue Code, nor does such advice constitute legal advice for a particular case, since state laws vary as do factual circumstances. Advice from our firm relating to Federal tax matters may not be used in promoting, marketing or recommending any entity, investment plan or arrangement to any taxpayer.

within 90 days of the giving of notice of such determination, applies to the division of tax appeals for a hearing.

Is a corporate officer who would not otherwise contest a responsible person determination required to file a pro forma petition to the division of tax appeals contesting the responsible person determination solely to prevent immediate collection? The answer should be “no,” provided the corporation has timely filed a petition for redetermination of the sales tax deficiency. Until determined tax becomes an assessment against the corporation, no responsible person tax liability should conceivably arise. No corporate assessment can occur until a final tax determination has been made against the corporation. Recently, this office faced a situation where a “Notice and Demand for Tax Due” was sent to a corporate officer who had not contested a responsible person determination, but whose corporation had timely filed a petition for redetermination of the sales tax deficiency with the division of tax appeals. To prevent collection, a declaratory judgment action seeking injunctive relief was commenced Suffolk Supreme Court seeking an order restraining the Department from collecting any tax against the responsible person until the conclusion of proceedings against the corporation.

Attorney General Cuomo, whose office represents the Department in state courts, conceded the issue, and stipulated to an order barring collection until after a final judgment (if any) was rendered against the corporation. Apparently, the aggressive collection efforts arose out of the Department’s concerns that the statute of limitations with respect to the responsible person assessment was operating against the Department’s interest. The case points out that the taxpayer must always be vigilant to aggressive collection actions which may not be permitted by statute. The case also seems to illustrate that dispute resolution venues outside of the Department’s “home turf” in the administrative tax appeals tribunals may be less sympathetic to the Department.

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