

**ARTICLE 78 PROCEEDINGS ON APPEALS FROM
ADMINISTRATIVE DETERMINATIONS**

by

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§ 7801 N.Y.C.P.L.R. Nature of proceeding.

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or
2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

§ 7802 N.Y.C.P.L.R. Parties.

(a) Definition of "body or officer". The expression "body or officer" includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article (b) Persons whose terms of office have expired; successors. Whenever necessary to accomplish substantial justice, a proceeding under this article may be maintained against an officer exercising judicial or quasi-judicial functions, or member of a body whose term of office has expired. Any party may join the successor of such officer or member of a body or other person having custody of the record of proceedings under review.

(c) Prohibition in favor of another. Where the proceeding is brought to restrain a body or officer from proceeding without or in excess of jurisdiction in favor of another, the latter shall be joined as a party.

(d) Other interested persons. The court may direct that notice of the proceeding be given to any person. It may allow other interested persons to intervene.

§ 7803 N.Y.C.P.L.R. Questions raised.

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. 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, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. 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.
5. A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the effective date of this subdivision.

(As amended by Laws 2003, ch. 492, Sec. 2, eff. Sept. 1, 2003.)

§ 7804 N.Y.C.P.L.R. Procedure.

(a) Special proceeding. A proceeding under this article is a special proceeding.

(b) Where proceeding brought. A proceeding under this article shall be brought in the supreme court in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides.

(c) Time for service of notice of petition and answer. Unless the court grants an order to show cause to be served in lieu of a notice of petition at a time and in a manner specified therein, a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least twenty days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served at least five days before such time. A reply, together with supporting affidavits, if any, shall be served at least one day before such time. In the case of a proceeding pursuant to this article against a state body or officers, or against members of a state body or officers whose terms have expired as authorized by subdivision (b) of section 7802 of this chapter, commenced either by order to show cause or notice of petition, in addition to the service thereof provided in this section, the order to show cause or notice of petition must be served upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which venue of the proceeding is designated, or if there is no office of the attorney general within such county, at the office of the attorney general nearest such county. In the case of a proceeding pursuant to this article against members of bodies of governmental subdivisions whose terms have expired as authorized by subdivision (b) of section 7802 of this chapter, the order to show cause or notice of petition must be served upon such governmental subdivision in accordance with section 311 of this chapter.

(d) Pleadings. There shall be a verified petition, which may be accompanied by affidavits or other written proof. Where there is an adverse party there shall be a verified answer, which must state pertinent and material facts showing the grounds of the respondent's action complained of. There shall be a reply to a counterclaim denominated as such and there shall be a reply to new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed. The court may permit such other pleadings as are authorized in an action upon such terms as it may specify.

(e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact. The court may order the body or officer to supply any defect or omission in the answer, transcript or an answering affidavit. Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner. Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted.

(f) Objections in point of law. The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just; and unless the order specifies otherwise, such answer shall be served and filed within five days after service of the order with notice of entry; and the petitioner may re-notice the matter for hearing upon two days' notice, or the respondent may re-notice the matter for hearing upon service of the answer upon seven days' notice. The petitioner may raise an objection in point of law to new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard.

(g) Hearing and determination; transfer to appellate division. Where the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding.

(h) Trial. If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith. Where the proceeding was transferred to the appellate division, the issue of fact shall be tried by a referee or by a justice of the supreme court and the verdict, report or decision rendered after the trial shall be returned to, and the order thereon made by, the appellate division.

(i) Appearance by judicial officer. Notwithstanding any other provision of law, where a proceeding is brought under this article against a justice, judge, referee or judicial hearing officer appointed by a court and

(1) it is brought by a party to a pending action or proceeding, and

(2) it is based upon an act or acts performed by the respondent in that pending action or proceeding either granting or denying relief sought by a party thereto, and

(3) the respondent is not a named party to the pending action or proceeding, in addition to service on the respondent, the petitioner shall serve a copy of the petition together with copies of all moving papers upon all other parties to the pending action or proceeding. All such parties shall be designated as respondents. Unless ordered by the court upon application of a party the respondent justice, judge, referee or judicial hearing officer need not appear in the proceeding in which case the allegations of the petition shall not be deemed admitted or denied by him. Upon election of the justice, judge, referee or judicial hearing officer not to appear, any ruling, order or judgment of the court in such proceeding shall bind said respondent. If such respondent does appear he shall respond to the petition and shall be entitled to be represented by the attorney general. If such respondent does not elect to appear all other parties shall be given notice thereof.

§ 7805 N.Y.C.P.L.R. Stay.

On the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review, upon terms including notice, security and payment of costs, except that the enforcement of an order or judgment granted by the appellate division in a proceeding under this article may be stayed only by order of the appellate division or the court of appeals. Unless otherwise ordered, security given on a stay is effective in favor of a person subsequently joined as a party under section 7802.

§ 7806 N.Y.C.P.L.R. Judgment.

The judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent. Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.

Notice of Petition and Petition in an Appeal of Administrative
Determination

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application	:	
of	:	
LMN SPORTS, INC.,	:	
Petitioner,	:	<u>NOTICE OF PETITION</u>
for a Judgment Pursuant to Article	:	Index No.
78 of the Civil Practice Law and	:	
Rules	:	
against	:	
THE CITY OF NEW YORK COMMISSIONER	:	
OF FINANCE,	:	
Respondent.	:	

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TO THE SUPREME COURT OF THE STATE OF NEW YORK:

PLEASE TAKE NOTICE, that upon the annexed Petition of LMN Sports, Inc. ("Petitioner"), verified on August 27, 2007, an application will be made to the Supreme Court of the State of New York, County of New York, at an IAS part thereof, located at the Courthouse, 60 Centre Street, New York, New York, on the 17th day of September, 2007, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order pursuant to Article 78 of the Civil Practice Law and Rules directing that this proceeding be transferred for disposition to a term of the Appellate Division of the Supreme Court, First Judicial Department, pursuant to CPLR Section 7804 (g) and that a judgment be entered in favor of Petitioner pursuant to Article 7B of the Civil Practice Law and Rules:

1. Annulling and setting aside as contrary to law, arbitrary and capricious, and not supported on the entire record by substantial evidence the determination of the City of New York Commissioner of Finance ("Respondent") which found that Petitioner did not have a regular place of business outside of New York City and did not allocate properly its income within and without New York City.

2. Directing Respondent to determine that Petitioner has no additional liability for New York City corporation tax with respect to the year 2003.

3. Granting Petitioner's costs, including attorneys' fees, and interest thereon.

4. Granting such other and further relief as the Court may deem proper.

PLEASE TAKE FURTHER NOTICE, that Respondent's answer and supporting affidavits, if any, shall be served upon attorneys for Petitioner at least five (5) days before the return date hereof and that pursuant to Section 7804(e) of the Civil Practice Law and Rules, Respondent shall file with the Clerk of the Court a certified transcript of the record of the proceedings to be considered herein.

Petitioner designates New York County as the place of hearing. The basis of venue is the location of the principal

office of Respondent and where Respondent's determination was made.

Dated: New York, New York
August 27, 2007

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TO: CITY OF NEW YORK
COMMISSIONER OF FINANCE
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MICHAEL A. CARDOZO
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100 Church Street
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application	:	
of	:	
LMN SPORTS, INC.,	:	
Petitioner,	:	<u>PETITION</u>
for a Judgment Pursuant to Article	:	Index No.
78 of the Civil Practice Law and	:	
Rules	:	
against	:	
THE CITY OF NEW YORK COMMISSIONER	:	
OF FINANCE,	:	
Respondent.	:	

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TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Petitioner, LMN Sports, Inc., for its petition pursuant to Article 78 of the Civil Practice Law and Rules, alleges:

FOR A FIRST CAUSE OF ACTION

1. Petitioner, LMN Sports, Inc. ("Petitioner") is a New York corporation with headquarters in New York City.
2. Petitioner is engaged in the production of television broadcasts of sports events.
3. On August 4, 2001 the New York City Department of Finance issued a notice of determination against Petitioner asserting that additional New York City corporation tax in the amount of \$356,189.21 plus interest was due for the calendar year 1999.
4. Petitioner timely filed a petition for a redetermi-

nation of the asserted tax deficiency.

5. A formal hearing was held before Walter G. Magellan, hearing officer, at the offices of the New York City Department of Finance on December 10, 2002 and February 21, 2003.

6. At the hearing Petitioner presented witnesses and documentary evidence. The Department of Finance did not present any evidence other than jurisdictional papers such as tax returns, which are routinely introduced at such a hearing.

7. Respondent, the New York City Department of Finance ("Respondent"), rendered a final determination dated July 12, 2003 (a copy of which is attached hereto as Exhibit A), upholding in its entirety the original determination deficiency of \$356,189.21 and in addition imposing interest of \$113,269.81, thus making a total deficiency of \$469,459.02.

8. In 1989 the Paris office of Petitioner, LMN Sports, Inc., employed five full-time employees who were housed in a suite of offices at 32 Avenue d'Olay, Paris 75001.

9. The Paris office was run by Mr. Richard Foge, who was Vice President for European Affairs of Petitioner.

10. The Paris office of Petitioner used its own letterhead, identifying itself as "LMN Sports, Inc." and its own enclosure cards similarly identifying itself.

11. The Paris office of Petitioner maintained its own listed telephone number, 540-84-87 and its own listed telex number, "LMN 105381".

12. The Paris office of Petitioner received letters, telexes and telephone calls addressed to LMN Sports, Inc. related to the business of LMN Sports, Inc.

13. The Paris office of Petitioner used a return address sticker on its outgoing mail in the name of "LMN Sports."

14. Mr. Foge and his executive assistant, Mrs. Climenson, disseminated business cards identifying their association with "LMN Sports, Inc." at the Paris address of Petitioner.

15. Mr. Foge and his staff were primarily involved in negotiating contracts for the acquisition by LMN Sports, Inc. of broadcast rights to international sporting events and in maintaining relations on behalf of LMN Sports, Inc. with European and international sporting federations.

16. Mr. Foge was given broad latitude to negotiate broadcast rights on the best terms available under the particular circumstances of each transaction, and he participated in 40 to 45 such negotiations leading to concluded contracts during 1999.

17. These contracts were not printed form contracts; each was drafted and typed in the Paris office and was drafted by Mr. Foge to state the particulars of each separate transaction, and they were executed on behalf of LMN Sports, Inc. by Mr. Foge, either at the Paris office or at some other convenient European location.

18. In negotiating contracts and in maintaining relations with sports federations, Mr. Foge received some direction

from the New York office of LMN Sports and he consulted with the New York staff, for example, the legal staff, from time to time.

19. All expenses associated with the Paris office of Petitioner, LMN Sports, Inc., were reflected as costs on the books of LMN Sports, Inc. Some expenses were paid from an LMN Sports-Paris expense checking account maintained in Paris that was funded directly by LMN Sports, Inc. in New York, and other expenses were paid initially by the LMN News Division in Paris, which were later reimbursed by LMN Sports, Inc. through an intra corporate payment.

20. All revenues that ultimately resulted from the activities of the Paris office were booked to Petitioner, LMN Sports, Inc.

21. LMN Sports, Inc. openly held itself out as regularly conducting business in Paris and Mr. Foye, who was in charge of the Paris office, believed that it was a regular place of business of LMN Sports, Inc. during 1999.

22. Petitioner, LMN Sports, Inc. during 1989 maintained a regular place of business outside of New York City.

23. Petitioner, LMN Sports, Inc. is requested by its parent, Ryan Communications Inc. ("Ryan"), to produce television shows of sports events in various locations.

24. Petitioner, LMN Sports, Inc. acquires the right to televise these shows from the organizers of the sporting events by paying fees in most instances.

25. Petitioner, LMN Sports, Inc. sends a crew to the location of the sporting event.

26. In the majority of instances the television sports event is broadcast live from the sports location to the Ryan network which then disseminates the television signal to its affiliated stations throughout the United States.

27. Petitioner, LMN Sports, Inc. performs a service for its parent Ryan by carrying out the activities alleged in paragraphs 23 to 26 above and derives approximately 97% of its revenue in this manner.

28. Respondent's determination is irrational, arbitrary, and capricious and is not supported on the entire record by substantial evidence.

FOR A SECOND CAUSE OF ACTION

29. Petitioner repeats and realleges paragraphs 1 through 28 as is fully set forth herein.

30. Respondent's determination is contrary to law, arbitrary, and capricious.

WHEREFORE, Petitioner prays that this court make an order directing that this proceeding be transferred for disposition to a term of the Appellate Division of the Supreme Court, First Department, and, that a judgment be entered in favor of Petitioner pursuant to Article 78 of the Civil Practice Laws and Rules (i) annulling and setting aside the decision of Respondent that Petitioner had no regular place of business outside of New York City and that Petitioner did not properly allocate its income within and without New York City; (ii) directing Respondent to

determine that Petitioner has no additional liability for New York City corporation tax for the taxable year 1989; (iii) granting Petitioner's costs, including attorney's fees and interest thereon; and (iv) granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York
August 27, 2007

SMITH & JONES
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415 Madison Avenue
New York, New York 10017
(212) 754-2700

[Verification]

STIPULATION OF TRANSFER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the Matter of the Application :
of :
LMN SPORTS, INC., : STIPULATION OF TRANSFER
Petitioner, : Index No. 121092/95
for a Judgment Pursuant to Article :
78 of the Civil Practice Law and Rules :
against :
THE CITY OF NEW YORK COMMISSIONER :
OF FINANCE, :
Respondent. :
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IT IS HEREBY STIPULATED, by and between the undersigned attorneys for the parties herein, that the motion of the Petitioner, pursuant to CPLR Section 7804(g), to transfer the proceeding to the Appellate Division of the Supreme Court, First Judicial Department, be granted on consent and that the attorneys for the Respondent have no objection to the entry of an order to effectuate such transfer.

Dated: New York, New York
September , 2007

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September , 2007

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STIPULATION WAIVING CERTIFICATION

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT**

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In the Matter of the Application	:	
of	:	Index No. 121092/95
LMN SPORTS, INC.,	:	
Petitioner,	:	STIPULATION WAIVING
for a Judgment Pursuant to Article	:	<u>CERTIFICATION</u>
78 of the Civil Practice Law and	:	
Rules	:	
against	:	
THE CITY OF NEW YORK COMMISSIONER	:	
OF FINANCE,	:	
Respondent.	:	

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IT IS HEREBY STIPULATED that the foregoing consists of true and correct copies of all pertinent papers in this proceeding, and the whole thereof, now on file in the Office of the Clerk of the County of New York and that certification thereof is hereby waived.

Dated: December 10, 2007

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Dated: December 10, 2007

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