S.5319 (Hoylman) / A.2506 (Weinstein)

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BILL
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SUBJECT
Expansion of the False Claims Act Related to Tax Issues
DATE
January 01, 2022
OPPOSE

The Business Council opposes this legislation that would amend the state's False Claims Act as it applies to tax law issues.

Most significant, it creates a separate mechanism in the False Claims Act to allow for the recovery of "damages, including consequential damages" against any person who uses a false record related to their tax liabilities to the state or a local government, or who "conceals or improperly avoids or decreases" their tax obligations to the state or a local government. This proposal would allow for Attorney General and qui tam civil actions to recover alleged delinquent taxes and interest, and costs (but not treble damages nor civil penalties), without having to prove that such avoidance was done "knowingly."

Separately, the bill also makes the current provisions of the False Claims Act applicable to "obligations" under the Tax Law, which would expand the scope of current law to instances where a taxpay failed to file a return.

From a broad policy perspective, The Business Council opposes the application of the False Claims Act to tax issues. Neither the federal government nor the vast majority of states apply their false claims act to their tax laws. New York is already an outlier in its application of its false claims act to tax claims. This legislation would further usurp the Department of Taxation and Finance's ability to administer, interpret and enforce the state's tax laws. Further, New York's existing FCA gives private parties significant financial interest to pursue claim, including up to 30 percent of any recovery or settlement and payment of their legal expenses, even in cases where the Department of Taxation and Finance has not found a reason to take action.

Of greatest concern to us, this bill would open all categories of tax disputes and filing errors to Attorney General and third party litigation, since it bill would not require a "knowing" avoidance of tax payments, significantly lowering the bar for such litigation. The False Claims Act (even before actions were permitted for tax claims) has always been an "anti-fraud" law and had

always required a showing that the false claim was knowingly made (i.e., purposeful). In no other area of the state's FCA, nor in any other state's FCA to our knowledge, can an action be sustained without a showing of knowingly false claims.

As a practical matter, this means that issues ranging from simple math errors, to a misunderstanding of a provision of tax law, to disputes based on a lack of clarity in statute, regulation and/or guidance could be the subject of third party litigation. Moreover, these third party suits could be commenced for ten years after the date of the alleged violation, well past the period in which the Tax Department is statutorily required to assess tax underpayments, typically set at three years after a tax was due or a return was filed. This ten-year lookback includes periods well before this proposed law change, raising serious fair notice and even constitutional concerns. Likewise, without a provision protecting taxpayers, this legislation would still allow false claim actions to be brought against taxpayers that have settled their audits with the Department of Taxation and Finance, including through a formal settlement agreement.

There are other ramifications of subjecting routine tax disputes now addressed by the Department to litigation before state courts. For example, taxpayers will lose the protections of the Taxpayer Bill of Rights (including taxpayer secrecy) and would not be able to avail themselves of the administrative appeals processes which are designed to place complex tax matters before tax experts in a forum that is cost effective, efficient, less formal and less burdensome. Having routine tax disputes addressed by the courts in FCA actions could also result in the development of inconsistent and unintended tax policy.

The state's Department of Taxation and Finance has a well-financed, highly knowledgeable, and technologically-advanced compliance and audit staff. It is well suited to retain full responsibility for the audit of state tax returns and the determination of taxes due to the state. The Department also has a range of statutory remedies available to it - including a criminal fraud enforcement statute - and can apply appropriate remedies, recoveries and penalties based on the specific factors of a case. Therefore, the need to create a new mechanism for third party suits in response to non-fraudulent tax issues is unclear at best.

On the other hand, we can see many instances where this proposal for expanded third party enforcement authority would result is bad public policy outcomes.

For example, the state's corporate franchise tax was significantly revised in 2014, effective for the 2015 tax year, resulting in significant changes in how the state calculates taxable corporate income. However, more than six years after those statutory changes were adopted, the Tax Department has yet to issue a single final regulation. Instead, taxpayers have had to rely on informal (and evolving) draft regulations and other informal information on key compliance issues as they prepare and file their Article 9-A returns. It would make no sense to subject these returns to third party litigation alleging that they reflect a misapplication of statute, when the Department has yet to produce final compliance rules, and in some instances has modified and changed their statutory interpretations.

If the purpose of this legislation is to provide a financial incentive for third parties to raise concerns in cases of underpayment due to error or negligence, a far more straightforward approach is that used by the Internal Revenue Service under its "whistleblower" statute (IRC § 7623).

However, this proposed legislation would subject New York State taxpayers to significant and prolonged uncertainty as to their final tax liabilities to the state, and would open them up to additional litigation by third parties with limited knowledge of the intricacies of state tax law.

For these reasons, The Business Council opposes adoption of S.5319 (Hoylman) / A.2506 (Weinstein).