S.4009-B, Part KK/A.3009-B, Part KK

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BILL S.4009-B, Part KK/A.3009-B, Part KK
SUBJECT Applicability of False Claims Act to Tax Law
DATE April 03, 2023
OPPOSE

The Business Council opposes the provisions found in both the Senate and Assembly one-house budget bills that would expand the applicability of the state's false claims act to Tax Law **"violations"** where a taxpayer "knowingly concealed or knowingly and improperly avoided an **obligation to pay** taxes to the state or a local government." As is the case for current FCA applicability to tax law issues, this would only apply to a person or business with more than $1 million in income and when the alleged "damages" are at least $350,000.

Similar language was vetoed after the 2021 and 2022 legislative sessions.

Our concern is very simple. The proponents of this legislation say the purpose is to allow for false claim act's qui tam claims and increased penalties in cases where a taxpayer failed to file a required return. However, that is not what this language says.

While a number of business and tax professional organizations question whether the false claims act should apply at all to tax claims (it doesn't under federal law, nor in most states), our opposition to this language is that it doesn't specifically address non-filings.

A simple solution would be to use language that specifies non-filing.

For example, new language could apply the false claims act to instances where an entity "is required to file a return showing tax due and who, with knowledge of that requirement, knowingly fails to file such return at the time or times required by law or regulation."

However, the legislative budget language presents the same unintended consequences as in the previously vetoed bills. It would extend the false claims act to "violations" of the Tax Law and would apply to cases where an entity "knowingly conceals or knowingly avoided an obligation to pay taxes to the state or a local government."

While failure to file a return would certainly count as Tax Law “violations” and result in avoiding “an obligation to pay,” those terms also capture a wide range of Tax Law issues that are now addressed on audit and through administrative hearings. As such, this language goes well beyond the failure to file required returns.

These proposals would also make these new provisions retroactive, applying them to any pending case where a tax obligation was knowingly concealed or knowingly avoided before, on, or after the effective date of these changes. The FCA has a ten-year statute of limitations. If applied retroactively, these amendments would subject countless taxpayers and their advisors to government inquiries and private lawsuits arising from “obligations” dating as far back as 2013. Retroactive legislation is largely disfavored in New York, which has adopted the U.S. Supreme Court’s holding in Landgraf v. USI Film Products, which stated that, where new legislation increases a party’s liability for past conduct, “elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.” Further, the state Court of Appeals has previously held that retroactivity periods as short as 16 months are excessive in the due process context.

In summary, we believe that existing state law provides New York with effective mechanisms to enforce its tax laws. Expanding the application of the False Claims Act to additional categories of tax compliance issues undermines the Tax Department’s primary role in administering and enforcing the Tax Law and will result in uncertain and inconsistent of state Tax Law.

If it is determined that it is necessary to expand the FCA to explicitly address non-filing of tax returns, we believe that objective can be achieved through more specific, more targeted amendments that avoid significant unintended consequences.

For these reasons, we oppose the approval of these provisions in the Senate and Assembly budget proposals.