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Report No. 1470
December 15, 2022

Amanda Hiller
Acting Commissioner and General Counsel
New York State Department of Taxation and Finance
Albany, NY 12227

Re: Application of New York False Claims Act to Tax Controversies

Dear Acting Commissioner Hiller:

We write to discuss our experiences with the New York False Claims Act (the "FCA").[1] The FCA has been applicable to tax cases for over 10 years. Although Governor Hochul vetoed Senate Bill Number 4730 at the close of 2021, which would have further expanded the

[1] The principal author of this letter was Elliot Pisem. Substantial contributions were made by Ian David. Helpful comments were received from John Lutz, Yaron Reich, and Michael Schler. This letter reflects solely the views of the New York State Bar Association Tax Section and not those of the New York State Bar Association's Executive Committee or its House of Delegates.

application of the FCA in tax cases,[2] the Governor's veto message applauded the intent of the drafters, which she characterized as singularly focused on empowering the FCA to catch taxpayers who defraud New York by failing to file required tax returns. The Governor's veto, however, was issued because "… the language in the bill is broader than impacting only non-filers, and would implicate more tax filing controversies to the False Claims Act than just non-filers."[3]

We are not endeavoring in this letter to comment on the Bill, the Governor's veto, or existing provisions of the FCA, although we may do so if a revised bill moves forward in the legislative process. Rather, we seek to share our experiences with senior officials at the New York State Department of Taxation and Finance (the "DTF"). In doing so we hope to assist the DTF in discharging its consultative role under the FCA in respect of tax controversies, which includes advising the office of the Attorney General (the "AG") in connection with review of potential FCA tax cases brought by relators. Our goal is to help you help the AG's office more quickly and reliably to determine which cases are lacking in merit and to concentrate its resources on FCA cases which may be more meritorious.

Members of the Tax Section of the New York State Bar Association have extensive experience in New York State tax matters and have represented taxpayers in connection with FCA investigations and suits brought by the AG and, in some cases, by private parties. Because the experience of the members of the Tax Section is concentrated in the tax area, our suggestions accordingly reflect our knowledge of the New York Tax Law, of the

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[2] State Finance Law § 189.4 now provides that an action under the FCA can be brought in the tax context only with respect to matters described in paragraphs (a) through (g) (but not in paragraph (h), relating to concealing, decreasing, or avoiding payment obligations vis-à-vis the State or a local government) of State Finance Law § 189.1. The matters for which § 189.4 permits such an action generally require some sort of affirmative action by a taxpayer. Senate Bill Number 4730 would have eliminated the rule that prevents application of § 189.1(h) in tax cases and thereby made the FCA applicable to non-filers.

[3] Governor Hochul's Veto Message Number 83 (December 31, 2021).

powers, expertise, organization, and practices of the DTF, and of the way that the Tax Law is applied by the DTF. We are not in a position to comment on whether similar expertise, organization, and practices exist in other areas of state government and, thus, on whether our suggestions can appropriately be carried over to other areas in which FCA investigations commonly occur and in which FCA suits may be brought.

I. Background

The FCA, as originally enacted in 2007, was substantially similar to the Federal statute upon which it was modeled.[4] Claims can be brought by the New York State Attorney General under the FCA, as by the U.S. Attorney General under the Federal False Claims Act. Each statute has key features designed to encourage private whistleblowers to alert authorities to fraudulent activity and to ensure that there is adequate time to pursue such claims in court. Under the FCA, private whistleblowers are encouraged to step forward by the promise of monetary awards, which range from 15% to 30% of the proceeds of any action or settlement; the precise amount depends on the perceived value of the whistleblower's contribution and on whether it is the whistleblower or the Attorney General that tries the case or negotiates a settlement.[5] The award to a whistleblower can be quite substantial, as the statute allows for treble damages,[6] ensuring that the State can be made whole and that the whistleblower's award is no mere token. Time to pursue claims is provided by a 10-year statute of limitations for civil actions under the FCA.[7]

The Federal False Claims Act does not apply to tax matters, and the FCA, as originally enacted, similarly left enforcement of tax matters exclusively to the DTF (or

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[4] The Federal False Claims Act is codified in 31 U.S.C. § 3729 *et seq*. The FCA is codified in State Finance Law § 187 *et seq*.

[5] State Fin. Law § 190.6.

[6] State Fin. Law § 189.1(h).

[7] State Fin. Law § 192.1.

other appropriate taxing authorities, such as the New York City Department of Finance). However, in 2010, New York departed from the Federal model and added tax matters to the FCA's purview.[8] The FCA now applies to claims, records, and statements made under the Tax Law where the net income of the taxpayer exceeds $1,000,000 for the taxable year, the alleged damages exceed $350,000, and the taxpayer has violated one or more enumerated provisions of the FCA.[9] Currently, violations subject to the FCA are limited to those enumerated in State Finance Law § 189.1(a)–(g), each paragraph of which involves a taxpayer who "knowingly" presents false or fraudulent claims or "knowingly makes, uses, or causes to be made or used" false records in an attempt to defraud the government.[10] However, the tax provisions of the FCA currently exclude the application of State Finance Law § 189.1(h), which applies to "knowingly" concealing, decreasing, or avoiding obligations to pay or transmit money to the State or a local government.[11]

As a result of the 2010 extension of the FCA to taxation matters, every New York State tax claim is potentially subject to challenge under two entirely distinct regimes, one (the FCA) administered by the AG with consultative input from the DTF, and the other (the Tax Law) administered by the DTF. As an expression of this distinction, extension of the FCA to tax claims was not accompanied by changes to the Tax Law, provisions of which

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[8] State Fin. Law § 189.4.

[9] These net income and damages thresholds apply to both individuals and business entities. State Fin. Law § 188.8.

[10] As discussed in greater detail below, the FCA's "knowingly" requirement can be met even when a person lacks "actual knowledge" of the falsity of certain information, so long as the person acts with "deliberate ignorance" or "reckless disregard" of the truth. State Fin. Law § 188.3. In contrast, when civil penalties under the Tax Law have a *scienter* requirement, that requirement often is used to distinguish between taxpayers who act negligently or with "intentional disregard" of the law and those who act with "intent to defraud." *See, e.g.*, N.Y. Tax Law §§ 685(b) and (e).

[11] As discussed above, Senate Bill Number 4730 would have extended the application of State Finance Law § 189.1(h) to taxation, but Governor Hochul vetoed the bill due to concerns that its changes to the FCA would "implicate more tax filing controversies to the [FCA] than just non-filers."

relating to penalties,[12] statutes of limitations,[13] and enforcement mechanisms differ in material ways from the FCA. Thus, two separate regimes have been created, varying markedly in potential outcomes and in the tools and expertise that the State brings to bear on investigating, evaluating, and resolving any controversy.[14]

This letter attempts to highlight some practical effects of these dueling regimes, in particular those areas where the DTF, by virtue of its greater familiarity with State and Federal tax law and procedure, can best assist the AG in taking action under the FCA. As explained below, there have been instances in which allegations brought by a relator under

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[12] As mentioned above, persons found liable under the FCA may be required to pay treble damages. State Fin. Law § 189.1(h). Although the civil penalty for tax fraud is two times the amount of the taxpayer's deficiency, the penalty for negligence is only five percent of such deficiency, plus 50 percent of any associated interest charge, and the penalty for a "substantial understatement" is 10 percent of the underpayment of tax attributable to such understatement. N.Y. Tax Law §§ 685(b), (e), (p), 1085(b), (f), (k).

[13] Under the Tax Law, the statute of limitations in income tax cases is generally three years from the date on which the tax return is filed. N.Y. Tax Law §§ 683(a), 1083(a). However, in the case of non-filing or fraud, but not of the taxpayer's negligence or even recklessness, the statute of limitations is completely open-ended. N.Y. Tax Law §§ 683(c), 1083(c). In contrast, the FCA allows for a 10-year statute of limitations in the case of "knowing" violations, and "knowing" is defined as having "actual knowledge," acting in deliberate ignorance of the truth, or acting in reckless disregard of the truth, thereby encompassing a significantly broader range of conduct than that which would invoke the Tax Law's complete lifting of the limitations bar. State Fin. Law § 188.3. Thus, limitations under the FCA can be either shorter than those under the Tax Law (in the case of non-filing (which may not even give rise to a cause of action under the FCA) or fraud) or longer (in other cases). A taxpayer facing challenge under the FCA 10 years after reporting a given transaction, will face material and, to many taxpayers and tax professionals, surprising recordkeeping and substantiation challenges. Conversely, a taxpayer who commits actual tax fraud which remains undetected for at least 10 years cannot be found liable under the FCA, although the tax and the fraud penalty may still be assessed under the Tax Law.

[14] For example, when the DTF issues a notice of determination, the taxpayer has the choice to challenge that determination in an administrative proceeding in front of either the Bureau of Conciliation and Mediation Services or the Division of Tax Appeals (which includes the Tax Appeals Tribunal). N.Y. Tax Law § 2006.4; 20 NYCRR § 4000.3(a). The taxpayer's right to use the former, less formal process is protected by New York's Taxpayer Bill of Rights. N.Y. Tax Law § 3004(a); DTF Pub. 131, "Your Rights and Obligations Under the Tax Law." In contrast, FCA actions are filed in the Supreme Court, and the FCA offers no avenues for the taxpayer's case to be heard in an informal process (Conciliation) or by a tribunal expert in tax matters (the Division of Tax Appeals and its Tax Appeals Tribunal). In addition, adverse decisions by the Tax Appeals Tribunal are appealable directly to the Appellate Division, Third Department, and are not heard at the Supreme Court level. The Division of Tax Appeals gives taxpayers and the DTF a hearing at a specialist tribunal expert in tax matters and in deciding cases which often involve difficult matters of interpretation unique to the Tax Law. Indeed, at least two of the members of the Tribunal must be attorneys admitted to practice in New York State for a period of at least 10 years and be knowledgeable on the subject of taxation, and the third member, who need not be an attorney, must also be knowledgeable on the subject of taxation. By contrast, courts hearing FCA tax cases generally have less experience with tax matters and cannot benefit from the Tribunal's expertise. This heightens the importance of the DTF's input in its consultative capacity.

the FCA are (to a tax professional) clearly lacking in merit. While the AG has usually recognized these cases and declined to pursue them, it has sometimes done so only after significant expenditure of resources (both by the AG and the taxpayer);[15] in many of these cases, it may have been possible to come to that conclusion more quickly and efficiently with the DTF's aid in better understanding whether allegations brought by the relator are likely to be credible.

II. Discussion

A. Expertise and Lines of Communication

As tax attorneys practicing in New York, we work closely with the DTF and with local taxing agencies staffed by subject area experts responsible for handling audit and litigation matters that touch on all aspects of the State's tax laws. The primary purpose of these interactions, from the State's perspective, is of course to ensure the integrity of the State's tax system, but they also influence taxpayers' views of the legitimacy and fairness of the State's taxing system.

Under the FCA, the AG's office is responsible for initiating suits and for deciding whether or not to intervene in a private whistleblower's fraud claim.[16] The AG is required in tax cases to "… consult with the commissioner of the [DTF] prior to filing or intervening in any action…," but the extent, nature, and force of this consultation is not clear and may

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[15] The facts of two recent cases illustrate how burdensome it can be for both the AG's office and taxpayers to respond to meritless FCA claims brought by private whistleblowers. In *New York v. Egon Zehnder Int'l, Inc.*, No. 21-cv-6883 (LJL), 2022 WL 3927942 (S.D.N.Y. Aug. 31, 2022), the AG's legal team spent three years, hired an outside Federal tax expert as a consultant, and reviewed nearly 150,000 pages of the documents provided by the taxpayer before deciding that a case brought by a private whistleblower and involving complex Federal tax issues was meritless. *Id.* at *2. *State ex rel. Walsh v. Dayan*, No. 101426/2014 (N.Y. Sup. Ct. June 27, 2022), similarly involved a significant expenditure of time and resources which led only to the conclusion that a whistleblower's claim lacked merit; the AG's office received over 55,000 pages of documents from the taxpayer and third parties and spent over five years investigating the relator's allegations before ultimately moving to dismiss the case. (In *Dayan*, the AG's lengthy investigation was further complicated by the relator's repeated misconduct and lack of cooperation with the AG's legal team, which, according to a letter submitted by the AG to the court, created "additional, unnecessary work.")

[16] State Fin. Law § 190.1.

not always be substantive.[17] If for any reason (whether as a result of consultation with the DTF or otherwise) the AG declines to pursue a claim initiated by a whistleblower, the whistleblower is entitled to proceed with a *qui tam* civil action.[18] In the case of a *qui tam* action brought by a private whistleblower without the participation of the AG, the only safeguard in the FCA to protect taxpayers' records from disclosure requests which may be overly invasive or unduly burdensome is a requirement that the whistleblower receive approval from the AG prior to moving to compel the DTF to disclose tax records.[19]

It has been our experience that communication on tax cases with the AG's office in the FCA context is often less collegial and less grounded in common experience and expertise than interactions with the DTF. For example, one of our members recounts that an attorney in the AG's Taxpayer Protection Bureau (the "TPB") was adamant that the taxpayer, a financial institution, should have obtained a formal tax opinion discussing the depreciation period for each of the taxpayer's tangible assets. Obtaining an opinion of that nature is not common practice, nor is failure to obtain it an indication, to any extent, of the sort of fraud at which the FCA is aimed. By contrast, we believe that the subject matter experts who staff the DTF would not have suggested that the failure to obtain this opinion was evidence of any degree of wrongdoing. Disputes of this nature increase distrust and place a burden on taxpayers' counsel to educate the AG's legal team on the customary standard of care used by taxpayers and their advisors in discharging their duties under both

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[17] State Fin. Law § 189.4(b).

[18] State Fin. Law § 190.2.

[19] State Fin. Law § 189.4(b).

Federal and State tax laws (including the Tax Law),[20] and these problems are only exacerbated when a private plaintiff brings suit and the AG's office declines to intervene.

The DTF is ideally positioned to counsel the AG's office regarding standard tax reporting practices and a universe of other issues that the DTF regularly confronts in examining tax returns and resolving tax cases. As suggested by one recently decided case that involved complex issues of Federal taxation, regular consultation between the AG's office and the DTF during the course of an FCA investigation can improve outcomes for both the State and taxpayers.[21] Accordingly, we suggest that the DTF should be proactive in advising the AG on such points as what a typical level of diligence would be for a particular issue. We realize that the DTF has a consultation right only. However, we have no reason to believe that that the AG would ignore such counsel if offered (which of course is different from deferring to it).

Because of the structure of the FCA, there will necessarily be some lack of uniformity in the manner in which State tax laws are interpreted and tax controversies are conducted, as there is no requirement for the AG to follow the DTF's advice on the substantive tax law or on whether the taxpayer's behavior meets the "knowingly" standard of the FCA.[22] More active consultation, however, could reduce that lack of uniformity without compromising the pursuit of genuine tax fraud. (Absent changes to the statutory scheme, however, even a more robust consultation process would not prevent a private *qui tam* plaintiff from bringing an FCA case that the AG, in consultation with the DTF, had

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[20] In-depth analysis of whether the applicable standard of care has been met is critical under the FCA, liability under which requires a showing of wrongdoing materially greater than mere negligence.

[21] *See New York v. Egon Zehnder Int'l, Inc.*, No. 21-cv-6883 (LJL), 2022 WL 3927942 (S.D.N.Y. Aug. 31, 2022).

[22] There may be other areas where input of administrative agencies with expertise should be required under the FCA. This letter focuses only on tax, but some of its suggestions may be more broadly applicable.

determined was not meritorious; in such instances, a *qui tam* plaintiff's interest in a monetary award and the State's larger policy interests can quickly diverge.[23])

B. Scienter and Motivations

The FCA is designed to shine a light on fraud that threatens the State fisc. As such, the statute has a *scienter* requirement, under which a defendant can be liable only for acting "knowingly," defined in the statute as having "actual knowledge," acting in deliberate ignorance of the truth, or acting in reckless disregard of the truth.[24] The statute explicitly states that it does not cover "acts occurring by mistake or as a result of mere negligence."[25]

There are myriad ambiguities and uncertainties in the Tax Law and in the Federal Internal Revenue Code (the "Code"), large parts of which are "incorporated by reference" into the Tax Law. Assertions by the DTF that a taxpayer has underpaid taxes often represent good faith disagreements regarding the law or the facts. Even when the position of the tax authorities prevails, the taxpayer has often acted entirely reasonably. And even when that is not the case, the taxpayer's culpability is often no greater than negligence; only much more rarely are underpayments of tax even asserted to be the result of fraud. However, in our experience, the AG and, even more so, private plaintiffs, have sometimes pursued alleged "tax fraud" claims under the FCA where a taxpayer's position is substantively correct or the taxpayer has made substantial, good faith, and reasonable efforts to comply with the law. For example, Justice D'Auguste's Decision and Order in

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[23] For example, in the recent *Egon Zehnder* case, after a lengthy investigation the AG ultimately intervened in a case it thought lacked merit only to introduce for the court's review a settlement agreement that it was able to negotiate with the defendant. Though for a relatively small sum, the AG's office contended that the negotiated settlement agreement furthered the interests of the State, the real party in interest, by avoiding litigation risks associated with the case. 2022 WL 3927942 at *6–7. The court ultimately approved the settlement agreement, over the relator's objections. *Id*. at *11.

[24] State Fin. Law § 188.3.

[25] State Fin. Law § 188.3(b).

State ex rel. Saric v. GFI Breslin, LLC,[26] concluded that the taxpayer was substantively correct with respect to a transfer tax position that a relator asserted was "knowingly" in violation of the law. In our experience, this situation is unfortunately not unique.

One practitioner highlighted an interaction with the TPB, in which, because of the interaction between the Code and the Tax Law, a matter governed solely by Federal statutory interpretation could have also affected the taxpayer's New York State tax liability. A private whistleblower alerted the IRS and the AG's office to the matter. The IRS was best situated to examine the facts, analyze the law, and determine whether the taxpayer's position was incorrect and, if it was, whether any fraud had occurred, but the TPB insisted that its own investigation run concurrently. Further, the TPB denied that the outcome of the IRS investigation had any impact on its own determination under the FCA. Looking at the statute, divorced from the real world, this might be correct; the FCA contains no explicit requirement that the AG consult with the IRS or give any weight to IRS determinations. However, where, as in this instance, the issues involved were solely a matter of Federal tax law, an IRS audit that was focused on the Federal tax issues raised in the FCA investigation had commenced, and that audit eventually determined that the TPB's interpretations of the Federal tax issues were not correct and that the taxpayer committed no fraud, it is baffling that the TPB pursued the case and, without regard to the ongoing IRS audit, asserted that a tax position had been taken with knowing disregard for the truth.[27]

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[26] *State ex rel. Saric v. GFI Breslin, LLC*, No. 101812/2018, 2021 BL 144216 at *12–15 (N.Y. Sup. Ct. Apr. 16, 2021). The AG's office did not pursue this case, but it was litigated by the relator.

[27] Had the Federal audit resulted in adjustments adverse to the taxpayer, the taxpayer would have been required by law to notify the DTF, in order to provide the DTF with the opportunity to enforce the Federal conformity contemplated by the Tax Law. The system is not working properly when the AG and relators can simply ignore a Federal audit result that favors the taxpayer.

Another example, widely reported in the press, Vidya Kauri, "NY Judge Dismisses $2.4B Tax-Dodging Suit Against Citigroup," LAW360 (May 18, 2017), available at https://www.law360.com/articles/925813/ny-judge-dismisses-2-4b-tax-dodging-suit-against-citigroup illustrates that the FCA's failure to require the involvement of the DTF in tax matters can be harmful when private whistleblowers "go it alone" and pursue *qui tam* actions under the FCA. In 2013, a relator filed a *qui*

Carried to an extreme, the same duplicative investigation by the TPB could have occurred even if a Federal court had determined that the taxpayer's position was in fact correct. Of course, this experience stands in contrast to other instances of which we are aware when the AG's office took a more reasonable approach and considered the outcome of an IRS audit when deciding whether or not to intervene in a case whose claim was derivative of questions of Federal tax law raised in that prior audit. Similar issues can arise with respect to audits conducted by the DTF.[28]

When a taxpayer has been audited by the IRS or the DTF with respect to any issue, it will make little sense for the AG to repeat the process if expert agency personnel have already and affirmatively determined that no fraud occurred, *i.e.*, that the position taken was either correct, or, if not, that any incorrectness was due to mistake or mere negligence, at least absent new facts which were not taken into account in making the initial determination. Similarly, if the DTF has raised an issue on audit without any allegation of fraud, there may be no reason for the AG to relitigate the case.

Of course, in some cases, the DTF may have been unaware of fraud, may for whatever reason not have focused on fraud, or may have compromised a case by

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tam suit against Citigroup, citing statements in Citigroup's publicly filed Forms 10-K regarding its Federal and State tax filings, which had been prepared in accordance with guidance provided by the IRS. In light of those facts, the AG properly declined to pursue the case. Nonetheless, this case dragged along in court for four years, until it was finally dismissed from the bench. Citigroup followed appropriate guidance from the IRS (and likely from its own tax counsel), and neither the Federal nor the State government accused it of any wrongdoing. Yet, it was required by an individual with no particular stake in the case's outcome, other than the opportunity to collect a bounty and attorneys' fees if he won, to defend its tax reporting position in court all the same. (Under the FCA's attorneys' fees rules, an unsuccessful defendant must pay the plaintiff's attorney's fees, but, if the defendant prevails, the AG is never required to pay the defendant's fees, and even a relator must pay the successful defendant's fees only if the suit is "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." These asymmetric rules may create perverse incentives and may be the subject of future comment.)

[28] Our understanding is that the AG's position is that an audit by the DTF cannot be an administrative action the pendency of which would foreclose an FCA claim. *See* State Fin. Law § 190.9(a)(i) ("[The Court shall dismiss a qui tam action under this article if] it is based on allegations or transactions which are the subject of a pending civil action or an administrative action in which the state or local government is already a party."). The question of whether a civil audit focused on the question at issue can properly be treated as an administrative action for purposes of this section of the FCA is beyond the scope of this letter and we express no opinion thereon.

withdrawing a fraud allegation in exchange for a taxpayer's concession of a substantive issue, and the particular facts and circumstances should always be evaluated in determining what weight the AG should give to a taxpayer's prior interactions with the DTF or the IRS. However, knowledge that the State may get two bites at the apple can make taxpayers less inclined to settle cases brought by the DTF, because such a settlement does not protect them from the hazards of litigation, to the detriment of tax administration generally. On the other hand, adopting a policy (even if not binding) that the DTF would generally use its consultative powers to advocate against such relitigation would likely incentivize resolution of tax controversies. Similarly, the DTF could use its consultative powers to recommend that taxpayers who have received private letter rulings from, or entered into closing agreements, with the IRS or the DTF, or who are acting in accordance with publicly issued guidance from the IRS or the DTF, should be protected from any claim under the FCA concerning the subject matter of such rulings, agreements, or guidance, absent, of course, failure to have disclosed facts which would have affected the determination in question. Similar recommendations could be followed with respect to issues that were affirmatively considered by the IRS or DTF on audit of a taxpayer's return and resolved favorably to the taxpayer or as to which a taxpayer received favorable written advice, sufficient to avoid penalties under the Tax Law, from a qualified and reputable tax advisor. Of course, in each case, a recommendation that a settled issue not be relitigated should be subject to the same limits as the settlement itself. When the DTF might reopen a settlement into which it had been induced to enter by a misrepresentation of the taxpayer, there should not be a recommendation that the AG not pursue an FCA case. Moreover, when true "badges of fraud," such as those recently enumerated by the Tax Court in *Harrington v. Commissioner*,

TC Memo 2021-95, are present,[29] it is entirely appropriate for the AG to pursue an FCA investigation, and where the facts warrant, to file suit. But there should be consultation and real evidence of misrepresentation, not a mere "fishing expedition." We think most New York taxpayers would assume that such rules were already in place. Unfortunately, because of the structure of the FCA, they are not. However, better communication and coordination between the DTF and the AG can go a long way towards minimizing the potential for relitigation of settled issues (whether settled at the Federal or State levels).

The DTF could also work together with the AG to seek a pathway by which the IRS's opinion could be solicited regarding allegedly fraudulent activity when an issue of Federal tax law is involved. We suggested above that the AG should work more closely with the DTF, and the DTF already often works closely with the IRS. If necessary, the FCA's already lengthy statute of limitations could be tolled by agreement during any such Federal audit or review.

Much of what is flawed in practical application of the FCA to tax questions could be mitigated by greater cooperation between the AG's office and the DTF.[30] Taxpayers would benefit from increased guidance clarifying when and how they can demonstrate that any error on their tax filings is the result of mistake or negligence and not knowing fraud. Administering the FCA as suggested in this letter would in fact strengthen the statute by

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[29] In that case, the Court said, "Circumstances that may indicate fraudulent intent, often called 'badges of fraud,' include but are not limited to: (1) understating income, (2) keeping inadequate records, (3) giving implausible or inconsistent explanations of behavior, (4) concealing income or assets, (5) failing to cooperate with tax authorities, (6) engaging in illegal activities, (7) supplying incomplete or misleading information to a tax return preparer, (8) providing testimony that lacks credibility, (9) filing false documents (including false tax returns), (10) failing to file tax returns, and (11) dealing in cash. See Schiff v. United States, 919 F.2d 830, 833 (2d Cir. 1990); Bradford v. Commissioner, 796 F.2d 303, 307–308 (9th Cir. 1986), aff'g T.C. Memo. 1984-601; Parks, 94 T.C. at 664–665; Recklitis v. Commissioner, 91 T.C. 874, 910 (1988); Morse v. Commissioner, T.C. Memo. 2003-332, 86 T.C.M. (CCH) 673, 675, aff'd, 419 F.3d 829 (8th Cir. 2005). No single factor is dispositive, but the existence of several factors 'is persuasive circumstantial evidence of fraud.' Vanover, 103 T.C.M. (CCH) at 1420–1421."

[30] We are, therefore, encouraged by indications in a recently published opinion that the AG's legal team and the DTF "consulted regularly" during the course of the AG's investigation. *New York v. Egon Zehnder Int'l, Inc.*, No. 21-cv-6883 (LJL), 2022 WL 3927942 at *2 (S.D.N.Y. Aug. 31, 2022).

allowing the AG to focus on true instances of fraud, where treble damage provisions and an extended statute of limitations are appropriate.

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We appreciate your consideration of our comments. If you think it helpful, we are available to meet, in person or virtually, with you (and, if appropriate, representatives of the AG's office). If you have any questions regarding the matters discussed in this letter, please contact me.

Respectfully Submitted,

Robert Cassanos
Chair

CC:

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