

July 13, 2021

Ms. Beth Garvey, Esq.
Acting Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: S.4730 (Krueger)

Dear Ms. Garvey:

The undersigned organizations are submitting this joint recommendation against gubernatorial approval of S.4730, which, in further expanding the application of the state's false claims act to tax issues, will subject individual and business taxpayers to increased compliance and enforcement uncertainty.

This legislation, which moved quickly to final passage in the last days of the 2021 session, ostensibly extends the state's False Claims Act to tax cases in which individual or business taxpayers – using language from the sponsors' memo -- “. . . knowingly and illegally fail to file New York tax returns . . .”

First, we oppose this legislation based on our longstanding concerns about the application of the False Claims Act to any tax controversy. This was initial done in New York in the last days of the 2010 session, when S.8378/A.11568 (later approved as Chapter 379) was introduced and pass in three days with virtually no public review or input. Neither the federal government nor the majority of states apply their false claims acts to their tax laws, meaning that New York is already an outlier in its application of its false claims act to tax issues. As such, 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 thirty 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.

Second, we have significant concerns regarding the provisions of this bill, and its potential for unforeseen adverse outcomes.

The bill would expand the application of State Finance Law §189 to “. . . claims, records, statements and obligations under the Tax Law” in instances where the net income or sales of the taxpayer equal or exceeds \$1 million and where “damages” sought exceed \$350,000. Article 13 defines “obligations” as “. . . an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.” Presumably, this would be read

as saying that, under the Tax Law, there is an “established duty . . . from statute or regulation” to file required returns. If so, then this provision alone would seem to satisfy the sponsors’ intent.

But the bill would also extend the False Claims Act’s tax law provision to circumstances defined in §189.1.h, which applies the Act to instances in which a taxpayer “. . . knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a local government, or conspires to do the same. . . .”

The provisions of paragraph (h) were never intended to apply to Tax Law cases. Paragraph (h) was created by 2013 legislation as part of a package addressing Medicaid fraud. That legislation (Chapter 56, Laws of 2013) also added State Finance Law § 189.4(iii) which basically excluded application of paragraph (h) to tax law cases. That exclusion was adopted based on arguments made at the time that the language in paragraph (h) would be inappropriately applied to issues that are properly addressed in Tax Department audits, where the Department is charged with determining if correct taxes are paid and/or if any additional taxes are owed.

Allowing these routine types of audit issues to be overtaken by third party or Attorney General enforcement measures would be bad public policy. It removes these cases from an administrative review and appeals process, designed to be accessible to taxpayers and managed by tax experts, and moves them into the state courts where costs can easily deter taxpayers from defending their positions, and where complex tax issues are evaluated and decided upon by judges with little or no tax law expertise, and would likely eliminate any taxpayer confidentiality. New York has a well-funded Tax Department, staffed with issue experts, where tax controversies are ultimately reviewed by an independent Tax Appeals Tribunal. It makes little public policy sense to undermine that process with third party actions.

As a practical example of how this legislation’s provisions could be misapplied, consider recent experiences during the COVID pandemic. We know that the COVID emergency produced a significant volume of “temporary” business and worker arrangements, resulting in activities occurring in jurisdictions other than those where they had typically, if not exclusively, occurred prior to COVID. These arrangements during COVID may raise new issues about business nexus and/or employee domicile, impacting both tax liabilities and obligations to file. While these circumstances are being addressed by various policy actions – Executive Order, statutory changes, Departmental guidance – there remains considerable taxpayer uncertainty. Under provisions of S.4730, however, any issue of non-filing could become the target of a third-party lawsuit motivated by financial gain, rather than a goal of achieving more clear compliance standards.

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.

For these reasons, we urge that S.4730 not be approved in its current form.

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Associated General Contractors of New York State
Buffalo Niagara Partnership
Business Council of New York State, Inc.
Business Council of Westchester
Capital Region Chamber
Commerce Chenango
Food Industry Alliance of NY
Greater Binghamton Chamber of Commerce
Lawsuit Reform Alliance of New York
Long Island Association
New York Association of Convenience Stores
New York Insurance Association
New York State Builders Association
New York State Society of Certified Public Accountants
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