



**MULTISTATE TAX COMMISSION**

*Maximizing the synergies of multi-state tax cooperation*

**To: MTC Executive Committee**

**From: Wood Miller, Chair, MTC Uniformity Committee & Sheldon Laskin, Counsel**

**Date: April 29, 2015**

**Subject: MTC Class Action & False Claims Act Project**

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The purpose of this memo is to request the Executive Committee's guidance as to the future direction of this project. The options are: (1) for the Commission to develop a model state tax whistleblower statute, (2) for the Commission to develop a model state tax false claims act statute, (3) for the Commission to develop both a model state tax whistleblower statute and a false claims act statute or (4) to terminate the project.<sup>1</sup>

This project began in December 2012 when the Commission was approached by business representatives to endorse the ABA Model Transactional Tax Overpayment Act, the purpose of which is to bar consumer class actions that allege overpayment of transactional taxes, provided that the state provides an adequate remedy for consumers to recover any overpayment from the state or from the seller. A copy of the ABA Model Act is attached hereto as Exhibit A. During the Executive Committee meeting of December 2012, COST also asked the Commission to consider the issue of qui tam actions brought to redress alleged undercollection of transaction taxes.<sup>2</sup> The Executive Committee assigned both issues to the Uniformity Committee for consideration. The Commission endorsed the ABA Model Act at its July 2014 meeting.

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<sup>1</sup> If the Commission elects any of options one through three, the Commission should include in any proposed model statute, additional provisions that bar the filing of frivolous or harassing claims by third parties who allege an undercollection or underpayment of tax.

<sup>2</sup> Several such false claims actions have been filed by one law firm in Illinois. See, for example, *State of Illinois ex rel. Schad, Diamond and Shedden v. Fansedge Incorporated, et al.*, Cook County Circuit Court No. 11 L 9550. To date, the plaintiff has not prevailed on the merits in any of these actions. In *Fansedge*, the Court ruled that a defendant in a false claims act case did not intentionally, knowingly, or recklessly create false records to conceal from Illinois its nonpayment of sales tax on shipping charges because the Department of Revenue auditors explicitly told the company that those charges were not subject to tax; costs were also assessed against the plaintiff.

Subsequent to the July 2014 meeting, the Sales and Use Tax Subcommittee continued to study the issue of qui tam actions for undercollection of transaction taxes. The Uniformity Committee is of the view that frivolous or harassing qui tam actions should be barred. At the same time, the Committee believes there should be a procedure in place to allow meritorious third party claims of undercollection of tax to be addressed. Unlike tax overcollection, consumers are unlikely to complain that the seller collected insufficient tax. In the absence of some procedure that encourages third parties to bring information of tax undercollection to the attention of the revenue department, it is unlikely very many of such cases will be pursued other than through the usual audit procedures.

At its meeting in March, 2015, the Uniformity Committee received three presentations regarding two existing models for addressing tax undercollection.<sup>3</sup> The first model is allowing tax undercollection claims to be made under state False Claims Acts, such as New York's. NY State Finance Law, Art. XIII, Sec. 189. A copy of the New York False Claims Act is attached at Exhibit B.<sup>4</sup> The second is a procedure to allow whistleblowers to bring administrative claims of tax underpayment to the revenue department. Such a procedure has been established under IRC §7623. A copy of the federal whistleblower statute is attached as Exhibit D.

Basically, a qui tam or statutory false claims action is initiated by a third party filing a private attorney general lawsuit against the seller for undercollection (or underpayment) of tax that is alleged to be due. The state attorney general can elect to substitute itself for the private plaintiff, can intervene in the action or can decline to intervene and allow the third party to prosecute the action. The New York statute also allows the state attorney general to seek dismissal of the action. The New York Attorney General has brought a number of state tax false claims actions, most notably *People of the State of New York by Eric T. Schneiderman, Attorney General v. Sprint Nextel Corp., et al*, Supreme Court of the State of New York, New York County Index No. 103917-2011.<sup>5</sup> Mr. Fox reported that the state believes the statute has been effective in recovering taxes that are due without encouraging frivolous or harassing lawsuits.

In contrast, whistleblower claims are processed administratively by the taxing authority within the framework of existing audit procedures. Mr. Gillin reported that the IRC Whistleblower Program has been highly successful in identifying and redressing tax noncompliance.

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<sup>3</sup> The presenters were: Kevin Gillin, Counsel, IRS Whistleblower Program, Dennis J. Ventry, Professor of Law UC Davis School of Law and Randy Fox, partner, Kirby McInerney LLP and former bureau chief of the New York attorney general's Taxpayer Protection Bureau.

<sup>4</sup> Attached as Exhibit C is a list of state qui tam statutes that either partially or entirely exclude state taxes from the scope of those statutes. A number of states allow state tax qui tam actions, including Delaware, Florida, Nevada, New Hampshire, New Jersey and New York. With the exception of Illinois, it does not appear that frivolous or harassing state tax false claims actions have become a problem in other states.

<sup>5</sup> The issue in *Sprint Nextel* is whether Sprint Nextel knowingly filed false sales tax returns and failed to pay over \$100 million in sales taxes by falsely labeling part of its fixed monthly charge for voice services as being imposed for non-taxable "interstate usage." The case is pending in the trial court.

Both the New York state tax false claims act and IRC Section 7623 authorize the payment of an award to the whistleblower if the state successfully recovers additional taxes as a result of the information provided by the whistleblower.

The Committee requests the Executive Committee's guidance as to which procedure, if any, to further explore – the litigation model of a qui tam or false claims act action or the audit model of a whistleblower procedure, or both. Industry strongly prefers the whistleblower procedure because it exists within the framework of existing audit procedures. In contrast, the false claims act model bypasses those procedures by allowing third parties to bring those actions in court without involvement by the state revenue department. Industry believes the NY Sprint Nextel case was unnecessary because Sprint was already under audit. Industry also believes a whistleblower action was inappropriate in Sprint because industry asserts that liability is not clear in that case and therefore the issues should properly be addressed through the usual audit and appeal procedures.

On balance, staff believes an administrative whistleblower program is the more appropriate means of dealing with state tax underpayment or undercollection issues.<sup>6</sup> The litigation qui tam model is a departure from well-established tax audit and appeal procedures and has the effect of using the courts to make initial factual decisions and legal rulings regarding the collection or payment of tax. Under the existing state tax appeal procedures, the initial decisions are properly assigned to state revenue departments who have the expertise to make those decisions in light of established state tax policies and procedures, subject to appellate judicial review. The litigation model replaces the revenue department's specialized expertise and substitutes general trial courts which may well lack either the expertise or experience in interpreting and applying complex state tax law. Furthermore, there seems to be little reason to do so. A properly constructed whistleblower program serves the same function in encouraging third parties to come forward with information of tax underpayment without substituting an untested and novel litigation model of tax dispute resolution for existing audit and appeal procedures. Furthermore, the whistleblower model is less potentially disruptive to existing state revenue department policies and procedures than would be the case for the litigation model. For these reasons, staff recommends that, if the Executive Committee decides to continue the project, it instruct the Uniformity Committee to limit its work to the administrative whistleblower model.

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<sup>6</sup> There appears to be no reason to limit a whistleblower program to transaction taxes. The federal program largely involves claims of underpayment of income tax.

EXHIBIT A

**AMERICAN BAR ASSOCIATION**  
**SECTION OF TAXATION**  
**REPORT TO THE HOUSE OF DELEGATES**  
**RESOLUTION**

1       RESOLVED, That the American Bar Association adopts the Model Transactional Tax Overpayment Act, dated February 2011, and recommends its adoption by appropriate legislative bodies.

**TRANSACTION TAX OVERPAYMENT MODEL ACT PROJECT**

**Section 1. Title.**

This Act may be cited as the Transaction Tax Overpayment Act.

**Section 2. Statement of Purpose and Scope.**

This Act applies to state and local taxes that a seller is required to collect from a purchaser on taxable sales. The Act outlines procedures a purchaser may use to seek a refund of an overpayment of those state and local taxes; limits the ability of a purchaser to assert claims against a seller arising from or in any way related to an overpayment; and establishes rights and obligations of purchasers, sellers, and the taxing jurisdiction with respect to such overpayments.

**Section 3. Definitions.**

As used in this Act:

- (a) (1) The term “overpayment” means an amount charged by a seller to a purchaser as tax, paid by the purchaser to the seller, and remitted by the seller to a taxing jurisdiction, if and to the extent that such amount was paid by the purchaser--
  - (A) in error, including those instances in which the transaction would not have been subject to tax if the purchaser had presented an exemption or resale certificate or other documentation at the time of sale,
  - (B) when no tax was lawfully due to such taxing jurisdiction at the time of sale, or
  - (C) in an amount greater than the amount of tax that was lawfully due to such taxing jurisdiction at the time of sale.
- (2) The term “overpayment” shall not include a payment of tax to a seller for which an exemption may be available but where entitlement to the exemption is conditioned on the purchaser paying the tax at the time of sale and seeking a refund directly from the taxing jurisdiction.
- (b) The term “purchaser” means a person who has been charged an amount by the seller as tax and who has paid, or who is responsible for another person’s having paid, such amount to the seller.
- (c) (1) The term “refund” means the payment by the seller or the taxing jurisdiction to the purchaser of an overpayment, or by the taxing jurisdiction to the seller of an amount representing an overpayment.

(2) In the case of a refund paid by the seller to the purchaser, or by the taxing jurisdiction to the seller, the term “refund” shall include a credit if and to the extent that—

(A) there is, at the time the credit is issued, a balance on the recipient’s account against which to apply the credit, or

(B) the recipient consents to a credit applied to such recipient’s account.

(d) The term “purchase” or “sale” means any transaction on which the seller charges the purchaser an amount as tax, collects such amount from or on behalf of the purchaser, and remits such amount to the taxing jurisdiction.

(e) The term “seller” means a person licensed or registered under applicable law to make taxable sales and with respect to such taxable sales is required to collect tax from purchasers and remit such tax to the taxing jurisdiction.

(f) The term “tax” means the tax imposed by *[identify by statutory reference the tax or taxes to which this Act applies]*.<sup>1</sup>

(g) The term “taxing jurisdiction” means the State of \_\_\_\_\_, or the city, county or other local jurisdiction of such State,<sup>2</sup> that imposes the subject tax; provided, however, that in the event the governmental entity imposing the subject tax is different from the governmental entity responsible for administration of such tax, the term “taxing jurisdiction” shall include, as the context requires, the governmental entity that is responsible for administration of such tax.

#### **Section 4. Purchaser Recourse.**

(a) The provisions of this Act apply to any claim by a purchaser against a seller arising from or in any way related to an overpayment, regardless of whether or not such claim is characterized as a tax refund claim.

(b) The relief with respect to any claim by a purchaser against a seller related to an overpayment shall be limited to a refund claim pursuant to Section 5(a)(1).

(c) In any action that arises from or relates to an overpayment, the seller shall not be named as a party to such action by either the purchaser, the taxing jurisdiction or any other party to such action. Nothing in this Act shall preclude a government agency or official from exercising any powers such agency or official possesses to take action to prevent continuing over-collection of tax.

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<sup>1</sup> It is intended that this Act would apply to all transaction taxes that the seller is required to add to the sales price of taxable goods, products or services, collect from the purchaser, and remit to the taxing jurisdiction. The Act could also apply to fees and other impositions that have these characteristics.

<sup>2</sup> This Act could be adopted by any U.S. jurisdiction that imposes a transaction tax; and therefore the term “State” is intended to include not only any state of the United States but also other jurisdictions, such as the District of Columbia and Puerto Rico.

(d) Nothing in this Act shall limit any rights or remedies the purchaser may have against the taxing jurisdiction arising from any overpayment under tax refund statutes or other applicable law.

### **Section 5. Refund Procedures.**

(a) (1) A purchaser seeking a refund of an overpayment may, within [*applicable limitations period*] of payment of such amount to the seller, file a refund claim with such seller by providing the seller written notice of the claim, and including with such notice information reasonably necessary for the seller to determine whether all or part of the amount claimed constitutes an overpayment. The seller may, within ninety (90) days following receipt of such notice, refund the amount claimed by the purchaser or such other amount that the seller has determined to be an overpayment. If the seller has not, within ninety (90) days of receiving notice of a refund claim from the purchaser, refunded the amount claimed by the purchaser, the seller shall be deemed to have denied the claim with respect to such amounts not refunded to the purchaser. Notwithstanding any provision of law to the contrary, no interest shall accrue or be paid with respect to amounts refunded by a seller to a purchaser except as provided in Section 5(d)(2).

(2) A purchaser seeking a refund of an overpayment may, within [*limitations period*], file a refund claim with the taxing jurisdiction pursuant to subsection (b) if—

(A) Such purchaser did not previously file a refund claim with the seller pursuant to this subsection, or

(B) Such purchaser previously filed a refund claim with the seller under this subsection and all or part of such claim was denied or deemed denied; provided, however, that the filing by a purchaser of a refund claim with the seller under this subsection shall extend for one hundred twenty (120) days the limitations period for such purchaser to file a refund claim with the taxing jurisdiction.

(b) A refund claim filed by a purchaser with the taxing jurisdiction shall be in writing and shall include the information reasonably required by the taxing jurisdiction, which may include, but is not limited to, the purchaser's name and address, the name and address of the seller, the amount of the claimed overpayment that has not previously been refunded by the seller (or a reasonable estimate thereof), the approximate date or dates of the claimed overpayment, evidence that the amount claimed was paid to the seller, and a brief explanation of why the purchaser believes that the amount claimed constitutes an overpayment.

(c) (1) The taxing jurisdiction shall, within ninety days following receipt of a refund claim from a purchaser, notify the purchaser in writing of any specific information or records needed for purposes of determining whether and in what amount an overpayment was made.

(2) The taxing jurisdiction may seek information, documents or records in the seller's possession that are needed in processing the purchaser's refund claim; provided,

however, that any such requests must be consistent with the taxing jurisdiction's authority to examine the seller's books and records to determine whether the correct amount of tax has been remitted.

(3) (A) The taxing jurisdiction shall notify the purchaser in writing of its determination with respect to the purchaser's refund claim.

(B) If the purchaser's refund claim is approved in whole or in part, and such approval is based on a new policy or interpretation that would apply to the tax treatment of other transactions, the taxing jurisdiction shall provide guidance concerning such policy or interpretation in the manner generally used for providing informal guidance to taxpayers with respect to the subject tax.

(C) If the purchaser's refund claim is denied in whole or in part, the notification shall include the specific legal and factual reasons for denial. A purchaser's refund claim shall be deemed to have been denied if the taxing jurisdiction does not approve or deny such refund claim within six (6) months of the later of (i) the taxing jurisdiction's receipt of the purchaser's refund claim, or (ii) the taxing jurisdiction's receipt of the purchaser's response to a request for information or records made by the taxing jurisdiction pursuant to this subsection.

(4) If the taxing jurisdiction determines that an overpayment was made, the taxing jurisdiction shall refund such amount to the purchaser and shall allow and pay interest on such amount for the time period and at the rate prescribed by law for overpayments of the subject tax.

(d) Nothing in this Act shall be construed to preclude a seller from acting on its own initiative to refund to a purchaser an overpayment that the seller has determined to have been made or to file a refund claim with the taxing jurisdiction in its own name and have the taxing jurisdiction determine whether an overpayment was made by ruling on such refund claim. Notwithstanding the foregoing, a seller that has received a ruling on a refund claim that an overpayment was made shall only be entitled to receive a refund of such overpayment from the taxing jurisdiction if such seller either—

(1) establishes that the seller has refunded the overpayment to the purchaser or purchasers from whom the amount was collected; or

(2) agrees that, within 30 days or such longer period agreed to by the taxing jurisdiction, the seller will refund the overpayment to the purchaser or purchasers from whom the amount was collected, together with any interest paid by the taxing jurisdiction.

(e) A seller that has previously refunded an overpayment to a purchaser may, within *[the applicable limitations period]*, file a refund claim or take credit for the amount of such overpayment against remittances of the tax; provided, however, that any such credit shall be subject to examination by the taxing jurisdiction, and provided further that the seller shall not be allowed or paid any interest on such amount for the period of time prior to the date the seller



refunded the overpayment to the purchaser, and on or after that date interest shall be paid only in accordance with applicable law.

(f) Nothing in this Act shall be construed to preclude a seller from obtaining a refund of an overpayment from a taxing jurisdiction if such seller establishes that it is obligated to pay or has paid tax in the amount of such overpayment on the same transaction(s) to another taxing jurisdiction pursuant to a valid assessment or claim by such other taxing jurisdiction.

(g) The taxing jurisdiction may establish procedures for assuring that the amount of any overpayment is not refunded by the taxing jurisdiction to both the seller and the purchaser, as well as other procedures necessary to administer this Act.

(h) In the event that a taxing jurisdiction determines, in connection with three or more refund claims from purchasers that it has approved, that there are numerous similar transactions with respect to which tax should not have been collected, the taxing jurisdiction shall send written or electronic notice to all affected registered sellers advising them not to collect tax on such transactions. The taxing jurisdiction shall also post an announcement prominently on its official website notifying affected purchasers of the procedures they must follow in order to request a refund of tax on any such purchase transactions.

## REPORT

### **I. Introduction**

A topic of concern to sellers, purchasers and state and local governments alike is seller liability and purchaser remedy procedures for overpaid transaction tax. The conflicting interests of sellers, purchasers and state and local government call for legislation that balances such interests. The attached model, the “Transaction Tax Overpayment Model Act,” attempts to resolve these issues in the manner best-suited to addressing the needs of all interested parties. By using the term “transaction tax,” we are referring to state and local taxes that a seller is required to collect from a purchaser on taxable sales.

Sellers collecting state and local transaction taxes face two main liability risks: First, if sellers fail to collect sufficient tax, they face liability risks attributable to audit assessments. Second, if sellers over-collect or collect for the wrong jurisdiction, they face potential actions and lawsuits filed on behalf of purchasers or pursuant to consumer protection statutes. These lawsuits can also name state and local governments as codefendants.

Purchaser liability actions relating to collection and administration of state and local transaction taxes generally fall under three main categories: jurisdictional rate assignments, sourcing conventions and product/service taxability.

Sellers often successfully defend against these actions because they used due diligence and remitted the funds to the taxing jurisdictions. Sellers do not benefit from any over-collection because they remitted in full the taxes collected to the taxing jurisdictions. However, even a successful defense is not without costs to the seller. These costs can add up to significant amounts for large sellers. Exposure to lawsuits will increase the cost of collection and will discourage some retailers from voluntarily collecting state and local transaction taxes. It is in the interest of both state and local governments and sellers and purchasers to address liability risks resulting from complying with state and local transaction tax provisions.

Common themes in recent cases and emerging issues in the area of seller liability for transaction tax collection duties include:

1. Most of the recent cases are class actions, with the plaintiffs/purchasers suing the defendant/seller for improperly collecting a state or local transaction tax from the plaintiffs/purchasers.
2. The typical forum is not a tax tribunal, but rather a state trial court of general jurisdiction.
3. Typically, the taxing authority is not a party to the case.

4. In many cases, the court must first decide whether the relevant tax applies to the transaction at hand. In these cases, a non-tax tribunal is deciding the threshold tax issue without the input of the taxing authority.

Even though consideration was given to whether the Streamlined Sales and Use Tax Agreement (“SSUTA”) had made seller liability issues moot in the area of sales and use tax collection, SSUTA clearly contemplated a consumer action as a second level/stage remedy. Ultimately, it was concluded that, although SSUTA attempted to balance the rights of purchasers, sellers and state and local governments, it does not resolve all of the problems in this area. The SSUTA is generally silent on refund procedures, but it does require member states whose laws allow consumers to seek refunds from sellers to adopt two seller-protection provisions. That is, SSUTA contemplates that some states will have pre-existing mechanisms for allowing some type of purchaser claims against the seller and does not deprive the purchaser of recourse against an adverse determination of the seller. The 60-day notice language of SSUTA provides additional protection to sellers in those states where it is already clear that state customers have a valid cause of action against the sellers. Unfortunately, in other states where this is not clear, the SSUTA provision appears to enhance the risk of consumer suits. Accordingly, the draft model legislation is consistent with SSUTA while, at the same time, providing an exclusive remedy for a purchaser to obtain a refund of over-collected tax.

Competing public policy concerns regarding the topic of seller exposure to class actions, consumer protection claims, claims for unfair trade practices, etc. have to be taken into account in any model legislation. These concerns include:

1. Difficulties presented when highly technical tax issues are adjudicated in non-tax forums by non-tax lawyers and, perhaps, without involvement of the state revenue departments who are the real parties in interest.
2. Potential chilling effect of the threat of litigation on seller decisions whether to tax a transaction, i.e., incentive to avoid taxing in close cases.
3. Subjecting a seller to material defense costs when it is not the real party in interest with respect to collected taxes may seem unfair and, again, a deterrent to diligent tax collection efforts.
4. The likelihood that consumers who are overcharged taxes in relatively small amounts will not have any effective recourse if they cannot be represented in class actions brought either against retailers or revenue authorities.
5. The impracticality of maintaining refund claims against revenue authorities by groups of small taxpayers other than through the class action approach, i.e., practical problems with lawyers representing large groups of small taxpayers before the revenue departments, difficulty of mobilizing such groups, privacy concerns, decision-making, etc.

“Governing Principles on Transaction Tax Overpayments” which are addressed in the model legislation are set forth below:

- Principle 1: The use of licensed sellers to collect transaction taxes on behalf of a taxing jurisdiction is an effective and efficient way to collect transaction taxes.
- Principle 2: State legislatures have determined that the collection burden imposed on sellers is justified generally because --
- a. the taxing jurisdictions are granting sellers the privilege of doing business in the taxing jurisdiction, and
  - b. the compliance burden on the purchaser and the administrative burden on the taxing jurisdiction are greatly reduced.
- Principle 3: Because sellers are fulfilling a statutory mandate in collecting the tax on behalf of the taxing jurisdiction, the burdens on sellers should be kept as low as possible<sup>3</sup>.
- Principle 4: In most taxing jurisdictions, the economic burden of the tax is intended to fall on the purchaser – not on the seller. The taxing jurisdiction and the purchaser are the “real” parties in interest in a transaction tax dispute.
- Principle 5: Transaction tax laws are complex and their application to various fact situations may be unclear.
- Principle 6: Sellers are, in collecting tax from purchasers and paying it over to the taxing jurisdiction, acting merely as agents for the taxing jurisdiction. Accordingly, sellers should not be subject to claims arising from or in any way related to an overpayment by purchasers or liability to such purchasers or anyone else other than a taxing jurisdiction revenue department or other government official, regardless of the nature of the claim or cause of action asserted.
- Principle 7: Because sellers may be subject to pay the tax if they fail to collect it from their purchasers, sellers should not have any obligation to construe doubts in favor of the purchaser.
- Principle 8: Similarly, sellers should not have any obligation to contest written guidance provided by a revenue department or an audit determination of the revenue department, even if reasonable grounds exist to do so.
- Principle 9: Any purchaser who has overpaid a tax should be entitled to a refund if a timely and adequate claim is filed.

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<sup>3</sup> For example, some state legislatures have determined that it is appropriate to allow a vendor discount or allowance to compensate the seller, to some degree, for the costs incurred in complying with their collection obligations.

- Principle 10: A seller has no right to a refund of any transaction tax that is collected by the seller unless it can demonstrate that the tax has been or will be refunded or credited to the purchaser.
- Principle 11: A taxing jurisdiction has a legitimate interest in ensuring that duplicate refunds are not issued. Accordingly, a taxing jurisdiction may establish procedures for that purpose.
- Principle 12: Taxing jurisdictions should attempt to minimize costs to the seller of administering any refunds.
- Principle 13: A clear and practicable method should be available for a purchaser to obtain a refund of any overpaid tax, which may include expedited procedures or consolidation of claims.
- Principle 14: A taxing jurisdiction has a compelling interest in the fair and equitable interpretation of its transaction tax laws and should be an indispensable party in any litigation determining the proper application of those laws.
- Principle 15: The taxing jurisdiction has no legitimate interest in administering a lawful tax in an unlawful manner.

### **Model Transaction Tax Overpayment Act**

#### **Findings:**

Requiring licensed or registered sellers to collect state and local transaction taxes from purchasers on taxable sales and to remit those taxes to the taxing jurisdiction is an effective and efficient way for the taxing jurisdiction to collect those taxes.

The collection and remittance burdens imposed on sellers are justified because the taxing jurisdiction grants such sellers the privilege of doing business in the taxing jurisdiction and because the compliance burden on the purchaser and the administrative burden on the taxing jurisdiction are greatly reduced.

Because a seller is fulfilling a statutory duty in collecting state and local transaction taxes from a purchaser at the time of sale and remitting those taxes to the taxing jurisdiction, the seller is acting merely as an agent of the taxing jurisdiction; and therefore the burdens on the seller should be kept as low as possible.

Transaction tax laws are complex and their application to various fact situations may be unclear.

Because a seller is fulfilling a statutory duty in collecting taxes from the purchaser at the time of sale, and because the seller can be held liable to the taxing jurisdiction for under remitting tax, the seller has no obligation to resolve doubts as to taxability in favor of purchasers.

The taxing jurisdiction and the purchaser are the real parties in interest in a dispute regarding the application of state and local transaction taxes that a seller is required to collect from the purchaser and remit to the taxing jurisdiction.

A seller should not be subject to claims or liability with respect to an overpayment of state and local transaction taxes that the seller collects from the purchaser and remits to the taxing jurisdiction, regardless of the nature of the claim, provided that tax and other governmental entities should retain any powers they may have to take action to prevent continuing over-collection of tax.

The taxing jurisdiction has a compelling interest in the correct, fair and equitable interpretation of its tax laws and should be an indispensable party in any litigation determining the proper application of those laws.

A clear and practicable method should be available for a purchaser to seek a refund of state and local taxes that a seller has collected from the purchaser if the purchaser believes the taxes were overpaid.

Respectfully submitted,



Charles H. Egerton  
Chair, Section of Taxation  
February, 2011

GENERAL INFORMATION FORM

Submitting Entity: Section of Taxation

Submitted By: State and Local Tax Committee

1. Summary of Recommendation(s).

That the Association urge all state, territorial and local legislative bodies to adopt the Model Transactional Tax Overpayment Act or an adaptation thereof appropriate to conform with existing state, territorial or local tax procedural requirements. The Act applies to state and local taxes that a seller is required to collect from a purchaser on taxable sales and obligated to remit to state and local tax collectors. The Act provides protections for sellers who merely act as a conduit for such taxes, as required by state and local law, and who have no interest in the amounts collected. The typical state refund procedure requires a purchaser to file any claim for refund after the collected tax is paid over to the taxing authority and, in fairness, the seller should be immune from any liability to the purchaser once the tax is paid over. The Act outlines procedures a purchaser may use to seek a refund of an overpayment of those state and local taxes; limits the ability of a purchaser to assert claims against a seller arising from or in any way related to an overpayment because sellers typically are required by state law to participate in the tax collection system and have no material interest in amounts collected as tax; and establishes rights and obligations of purchasers, sellers, and the taxing jurisdiction with respect to such overpayments. The Act balances the competing interests of tax collectors, purchasers and sellers and promotes compliance with and administration of sound tax policy.

2. Approval by Submitting Entity.

Submitted to House of Delegates contingent on Section Membership approval at the Midyear Meeting Plenary Session on January 22, 2011.

3. Has this or similar recommendation been submitted to the House or Board Previously?

None.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

None.

5. What urgency exists which requires action at this meeting of the House?

None.

6. Status of Legislation. (If applicable.)

Not Applicable.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

To all Sections and Divisions. NCCUSL has been given an opportunity to review this recommendation and did not have any substantive issues with the Act and, as they have previously looked at, and decided against, working in the area of state sales tax, they anticipate that there would not be any conflict with their ongoing work. They did ask, however, that the report to the House of Delegates reflect the fact that that the Section consulted with NCCUSL in accordance with Bylaw 24.6 of the American Bar Association. The Section of Litigation has also been given the opportunity to review this recommendation.

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

That the Association urge all state, territorial and local legislative bodies to adopt the Model Transactional Tax Overpayment Act or an adaptation thereof appropriate to conform with existing state, territorial or local tax procedural requirements. The Act applies to state and local taxes that a seller is required to collect from a purchaser on taxable sales and obligated to remit to state and local tax collectors. The Act provides protections for sellers who merely act as a conduit for such taxes, as required by state and local law, and who have no interest in the amounts collected.

### 2. Summary of the Issue that the Resolution Addresses

The typical state refund procedure requires a purchaser to file any claim for refund after the collected tax is paid over to the taxing authority and, in fairness, the seller should be immune from any liability to the purchaser once the tax is paid over.

### 3. Please Explain How the Proposed Policy Position will address the Issue

The Act outlines procedures a purchaser may use to seek a refund of an overpayment of those state and local taxes; limits the ability of a purchaser to assert claims against a seller arising from or in any way related to an overpayment because sellers typically are required by state law to participate in the tax collection system and have no material interest in amounts collected as tax; and establishes rights and obligations of purchasers, sellers, and the taxing jurisdiction with respect to such overpayments. The Act balances the competing interests of tax collectors, purchasers and sellers and promotes compliance with and administration of sound tax policy.

### 4. Summary of Minority Views

No minority views have been identified at this time.

**NEW YORK FALSE CLAIMS ACT**  
**STATE FINANCE LAW, ART. XIII**  
**(2013)**

**§ 187. SHORT TITLE**

This article shall be known and may be cited as the "New York false claims act".

**§ 188. DEFINITIONS**

As used in this article, the following terms shall mean:

1. "Claim"

(a) means any request or demand, whether under a contract or otherwise, for money or property that:

(i) is presented to an officer, employee or agent of the state or a local government; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the state or a local government's behalf or to advance a state or local government program or interest, and if the state or local government (A) provides or has provided any portion of the money or property requested or demanded; or (B) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded;

(b) does not include requests or demands for money or property that the state or a local government has already paid to an individual as compensation for government employment or as an income subsidy with no restrictions on that individual's use of the money or property.

2. "False claim" means any claim which is, either in whole or part, false or fraudulent.

3. "Knowing and knowingly"

(a) means that a person, with respect to information:

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(b) require no proof of specific intent to defraud, provided, however that acts occurring by mistake or as a result of mere negligence are not covered by this article.

4. "Obligation" means 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.

5. "Material" means having a natural tendency to influence, or be capable of influencing the payment or receipt of money or property.
6. "Local government" means any New York county, city, town, village, school district, board of cooperative educational services, local public benefit corporation or other municipal corporation or political subdivision of the state, or of such local government.
7. "Original source" means a person who:
  - (a) prior to a public disclosure under paragraph (b) of subdivision nine of section one hundred ninety of this article has voluntarily disclosed to the state or a local government the information on which allegations or transactions in a cause of action are based; or
  - (b) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the state or a local government before or simultaneous with filing an action under this article.
8. "Person" means any natural person, partnership, corporation, association or any other legal entity or individual, other than the state or a local government.
9. "State" means the state of New York and any state department, board, bureau, division, commission, committee, public benefit corporation, public authority, council, office or other governmental entity performing a governmental or proprietary function for the state.

## **§ 189. LIABILITY FOR CERTAIN ACTS**

1. Subject to the provisions of subdivision two of this section, any person who:
  - (a) knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval;
  - (b) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
  - (c) conspires to commit a violation of paragraph (a), (b), (d), (e), (f) or (g) of this subdivision;
  - (d) has possession, custody, or control of property or money used, or to be used, by the state or a local government and knowingly delivers, or causes to be delivered, less than all of that money or property;
  - (e) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the state or a local government and, intending to defraud the state or a local government, makes or delivers the receipt without completely

knowing that the information on the receipt is true;

(f) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the state or a local government knowing that the officer or employee violates a provision of law when selling or pledging such property;

(g) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government; or

(h) 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; shall be liable to the state or a local government, as applicable, for a civil penalty of not less than six thousand dollars and not more than twelve thousand dollars, plus three times the amount of all damages, including consequential damages, which the state or local government sustains because of the act of that person.

2. The court may assess not more than two times the amount of damages sustained because of the act of the person described in subdivision one of this section, if the court finds that:

(a) the person committing the violation of this section had furnished all information known to such person about the violation, to those officials responsible for investigating false claims violations on behalf of the state and any local government that sustained damages, within thirty days after the date on which such person first obtained the information;

(b) such person fully cooperated with any government investigation of such violation; and

(c) at the time such person furnished information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation.

3. A person who violates this section shall also be liable for the costs, including attorneys' fees, of a civil action brought to recover any such penalty or damages.

4.(a) This section shall apply to claims, records, or statements made under the tax law only if

(i) the net income or sales of the person against whom the action is brought equals or exceeds one million dollars for any taxable year subject to any action brought pursuant to this article;

(ii) the damages pleaded in such action exceed three hundred and fifty thousand dollars; and

(iii) The person is alleged to have violated paragraph (a), (b), (c), (d), (e), (f) or (g) of subdivision one of this section; provided, however, that nothing in this subparagraph shall be deemed to modify or restrict the application of

such paragraphs to any act alleged that relates to a violation of the tax law.

(b) The attorney general shall consult with the commissioner of the department of taxation and finance prior to filing or intervening in any action under this article that is based on the filing of false claims, records or statements made under the tax law. If the state declines to participate or to authorize participation by a local government in such an action pursuant to subdivision two of section one hundred ninety of this article, the qui tam plaintiff must obtain approval from the attorney general before making any motion to compel the department of taxation and finance to disclose tax records.

## **§ 190. CIVIL ACTIONS FOR FALSE CLAIMS**

### 1. Civil enforcement actions.

The attorney general shall have the authority to investigate violations under section one hundred eighty-nine of this article. If the attorney general believes that a person has violated or is violating such section, then the attorney general may bring a civil action on behalf of the people of the state of New York or on behalf of a local government against such person. A local government also shall have the authority to investigate violations that may have resulted in damages to such local government under section one hundred eighty-nine of this article, and may bring a civil action on its own behalf, or on behalf of any subdivision of such local government, to recover damages sustained by such local government as a result of such violations. No action may be filed pursuant to this subdivision against the federal government, the state or a local government, or any officer or employee thereof acting in his or her official capacity. The attorney general shall consult with the office of medicaid inspector general prior to filing any action related to the medicaid program.

### 2. Qui tam civil actions.

(a) Any person may bring a qui tam civil action for a violation of section one hundred eighty-nine of this article on behalf of the person and the people of the state of New York or a local government. No action may be filed pursuant to this subdivision against the federal government, the state or a local government, or any officer or employee thereof acting in his or her official capacity. For purposes of subparagraphs (i) and (iv) of paragraph (a) of subdivision eight of section seventy-three of the public officers law, any activity by a former government employee in connection with the securing of rights, protections or benefits related to preparing or filing an action under this article shall not be deemed to be an appearance or practice before any agency.

(b) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the state pursuant to subdivision one of section three hundred seven of the civil practice law and rules. Any complaint filed in a court of the state of New York shall be filed in supreme court in camera, shall remain under seal for at least sixty days, and shall not be served on the defendant until the court so orders. The seal shall not preclude the attorney

general, a local government, or the qui tam plaintiff from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action, on relevant state or local government agencies, or on law enforcement authorities of the state, a local government, or other jurisdictions, so that the actions may be investigated or prosecuted, except that such seal applies to the agencies or authorities so served to the same extent as the seal applies to other parties in the action.

If the allegations in the complaint allege a violation of section one hundred eighty-nine of this article involving damages to a local government, then the attorney general may at any time provide a copy of such complaint and written disclosure to the attorney for such local government; provided, however, that if the allegations in the complaint involve damages only to a city with a population of one million or more, or only to the state and such a city, then the attorney general shall provide such complaint and written disclosure to the corporation counsel of such city within thirty days. The state may elect to supersede or intervene and proceed with the action, or to authorize a local government that may have sustained damages to supersede or intervene, within sixty days after it receives both the complaint and the material evidence and information; provided, however, that if the allegations in the complaint involve damages only to a city with a population of one million or more, then the attorney general may not supersede or intervene in such action without the consent of the corporation counsel of such city.

The attorney general shall consult with the office of the medicaid inspector general prior to superseding or intervening in any action related to the medicaid program.

The attorney general may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under this subdivision. Any such motions may be supported by affidavits or other submissions in camera.

(c) Prior to the expiration of the sixty day period or any extensions obtained under paragraph (b) of this subdivision, the attorney general shall notify the court that he or she:

(i) intends to file a complaint against the defendant on behalf of the people of the state of New York or a local government, and thereby be substituted as the plaintiff in the action and convert the action in all respects from a qui tam civil action brought by a private person into a civil enforcement action by the attorney general under subdivision one of this section;

(ii) intends to intervene in such action, as of right, so as to aid and assist the plaintiff in the action; or

(iii) if the action involves damages sustained by a local government, intends to grant the local government permission to:

(A) file and serve a complaint against the defendant, and thereby be substituted as the plaintiff in the action and convert the action in all respects from a qui tam civil action brought by a private person into a civil enforcement action by the local government under subdivision one of this

section; or

(B) intervene in such action, as of right, so as to aid and assist the plaintiff in the action. The attorney general shall provide the local government with a copy of any such notification at the same time the court is notified.

- (d) If the state notifies the court that it intends to file a complaint against the defendant and thereby be substituted as the plaintiff in the action, or to permit a local government to do so, such complaint, whether filed separately or as an amendment to the qui tam plaintiff's complaint, must be filed within thirty days after the notification to the court. For statute of limitations purposes, any such complaint filed by the state or a local government shall relate back to the filing date of the complaint of the qui tam plaintiff, to the extent that the cause of action of the state or local government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the complaint of the qui tam plaintiff.
- (e) If the state notifies the court that it intends to intervene in the action, or to permit a local government to do so, then such motion to intervene, whether filed separately or as an amendment to the qui tam plaintiff's complaint, shall be filed within thirty days after the notification to the court. For statute of limitations purposes, any complaint filed by the state or a local government, whether filed separately or as an amendment to the qui tam plaintiff's complaint, shall relate back to the filing date of the complaint of the qui tam plaintiff, to the extent that the cause of action of the state or local government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the complaint of the qui tam plaintiff.
- (f) If the state declines to participate in the action or to authorize participation by a local government, the qui tam action may proceed subject to judicial review under this section, the civil practice law and rules, and other applicable law. The qui tam plaintiff shall provide the state or any applicable local government with a copy of any document filed with the court on or about the date it is filed, or any order issued by the court on or about the date it is issued. A qui tam plaintiff shall notify the state or any applicable local government within five business days of any decision, order or verdict resulting in judgment in favor of the state or local government.

### 3. Time to answer.

If the state decides to participate in a qui tam action or to authorize the participation of a local government, the court shall order that the qui tam complaint be unsealed and served at the time of the filing of the complaint or intervention motion by the state or local government. After the complaint is unsealed, or if a complaint is filed by the state or a local government pursuant to subdivision one of this section, the defendant shall be served with the complaint and summons pursuant to article three of the civil practice law and rules. A copy of any complaint which alleges that damages were sustained by a local government shall also be served on such local government. The defendant shall be required to respond to the summons and complaint within the

time allotted under rule three hundred twenty of the civil practice law and rules.

#### 4. Related actions.

When a person brings a qui tam action under this section, no person other than the attorney general, or a local government attorney acting pursuant to subdivision one of this section or paragraph (b) of subdivision two of this section, may intervene or bring a related civil action based upon the facts underlying the pending action; provided, however, that nothing in this subdivision shall be deemed to deny persons the right, upon leave of court, to file briefs amicus curiae.

#### 5. Rights of the parties of qui tam actions.

(a) If the attorney general elects to convert the qui tam civil action into an attorney general enforcement action, then the state shall have the primary responsibility for prosecuting the action.

If the attorney general elects to intervene in the qui tam civil action then the state and the person who commenced the action, and any local government which sustained damages and intervenes in the action, shall share primary responsibility for prosecuting the action.

If the attorney general elects to permit a local government to convert the action into a civil enforcement action, then the local government shall have primary responsibility for investigating and prosecuting the action. If the action involves damages to a local government but not the state, and the local government intervenes in the qui tam civil action, then the local government and the person who commenced the action shall share primary responsibility for prosecuting the action.

Under no circumstances shall the state or a local government be bound by an act of the person bringing the original action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (b) of this subdivision. Under no circumstances shall the state be bound by the act of a local government that intervenes in an action involving damages to the state.

If neither the attorney general nor a local government intervenes in the qui tam action then the qui tam plaintiff shall have the responsibility for prosecuting the action, subject to the attorney general's right to intervene at a later date upon a showing of good cause.

(b) (i) The state may move to dismiss the action notwithstanding the objections of the person initiating the action if the person has been served with the motion to dismiss and the court has provided the person with an opportunity to be heard on the motion. If the action involves damages to both the state and a local government, then the state shall consult with such local government before moving to dismiss the action. If the action involves damages sustained by a local government but not the state, then the local government may move to dismiss the action notwithstanding the objections of the person initiating the action if the person has been served with the motion to dismiss and the court has provided the person with an opportunity to be heard on the



motion.

(ii) The state or a local government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after an opportunity to be heard, that the proposed settlement is fair, adequate, and reasonable with respect to all parties under all the circumstances. Upon a showing of good cause, such opportunity to be heard may be held in camera.

(iii) Upon a showing by the attorney general or a local government that the original plaintiff's unrestricted participation during the course of the litigation would interfere with or unduly delay the prosecution of the case, or would be repetitious or irrelevant, or upon a showing by the defendant that the original qui tam plaintiff's unrestricted participation during the course of the litigation would be for purposes of harassment or would cause the defendant undue burden, the court may, in its discretion, impose limitations on the original plaintiff's participation in the case, such as (A) limiting the number of witnesses the person may call; (B) limiting the length of the testimony of such witnesses; (C) limiting the person's cross-examination of witnesses; or (D) otherwise limiting the participation by the person in the litigation.

(c) Notwithstanding any other provision of law, whether or not the attorney general or a local government elects to supersede or intervene in a qui tam civil action, the attorney general and such local government may elect to pursue any remedy available with respect to the criminal or civil prosecution of the presentation of false claims, including any administrative proceeding to determine a civil money penalty or to refer the matter to the office of the medicaid inspector general for medicaid related matters. If any such alternate civil remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section.

(d) Notwithstanding any other provision of law, whether or not the attorney general elects to supersede or intervene in a qui tam civil action, or to permit a local government to supersede or intervene in the qui tam civil action, upon a showing by the state or local government that certain actions of discovery by the person initiating the action would interfere with the state's or a local government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than sixty days. Such a showing shall be conducted in camera. The court may extend the period of such stay upon a further showing in camera that the state or a local government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

#### 6. Awards to qui tam plaintiff.

(a) If the attorney general elects to convert the qui tam civil action into an attorney general enforcement action, or to permit a local government to convert the action

into a civil enforcement action by such local government, or if the attorney general or a local government elects to intervene in the qui tam civil action, then the person or persons who initiated the qui tam civil action collectively shall be entitled to receive between fifteen and twenty-five percent of the proceeds recovered in the action or in settlement of the action. The court shall determine the percentage of the proceeds to which a person commencing a qui tam civil action is entitled, by considering the extent to which the plaintiff substantially contributed to the prosecution of the action. Where the court finds that the action was based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil or administrative hearing, in a legislative or administrative report, hearing, audit or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than ten percent of the proceeds, taking into account the significance of the information and the role of the person or persons bringing the action in advancing the case to litigation. Any such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, reasonable attorneys' fees, and costs pursuant to article eighty-one of the civil practice law and rules. all such expenses, fees, and costs shall be awarded against the defendant.

(b) If the attorney general or a local government does not elect to intervene or convert the action, and the action is successful, then the person or persons who initiated the qui tam action which obtains proceeds shall be entitled to receive between twenty-five and thirty percent of the proceeds recovered in the action or settlement of the action. The court shall determine the percentage of the proceeds to which a person commencing a qui tam civil action is entitled, by considering the extent to which the plaintiff substantially contributed to the prosecution of the action. Such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, reasonable attorneys' fees, and costs pursuant to article eighty-one of the civil practice law and rules. all such expenses, fees, and costs shall be awarded against the defendant.

(c) With the exception of a court award of costs, expenses or attorneys' fees, any payment to a person pursuant to this paragraph shall be made from the proceeds.

(d) If the attorney general or a local government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

#### 7. Costs, expenses, disbursements and attorneys' fees.

In any action brought pursuant to this article, the court may award any local government that participates as a party in the action an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees, plus costs pursuant to article eighty-one of the civil practice law

and rules. All such expenses, fees and costs shall be awarded directly against the defendant and shall not be charged from the proceeds, but shall only be awarded if a local government prevails in the action.

8. Exclusion from recovery.

If the court finds that the qui tam civil action was brought by a person who planned or initiated the violation of section one hundred eighty-nine of this article upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise be entitled to receive under subdivision six of this section, taking into account the role of such person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the qui tam civil action is convicted of criminal conduct arising from his or her role in the violation of section one hundred eighty-nine of this article, that person shall be dismissed from the qui tam civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the attorney general to supersede or intervene in such action and to civilly prosecute the same on behalf of the state or a local government.

9. Certain actions barred.

(a) The court shall dismiss a qui tam action under this article if:

- (i) 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 a local government is already a party;
- (ii) the state or local government has reached a binding settlement or other agreement with the person who violated section one hundred eighty-nine of this article resolving the matter and such agreement has been approved in writing by the attorney general, or by the applicable local government attorney; or
- (iii) against a member of the legislature, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the state when the action was brought.

(b) The court shall dismiss a qui tam action under this article, unless opposed by the state or an applicable local government, or unless the qui tam plaintiff is an original source of the information, if substantially the same allegations or transactions as alleged in the action were publicly disclosed:

- (i) in a state or local government criminal, civil, or administrative hearing in which the state or a local government or its agent is a party;
- (ii) in a federal, New York state or New York local government report, hearing, audit, or investigation that is made on the public record or disseminated broadly to the general public; provided that such information shall not be

deemed "publicly disclosed" in a report or investigation because it was disclosed or provided pursuant to article six of the public officers law, or under any other federal, state or local law, rule or program enabling the public to request, receive or view documents or information in the possession of public officials or public agencies;

- (iii) in the news media, provided that such allegations or transactions are not "publicly disclosed" in the "news media" merely because information of allegations or transactions have been posted on the internet or on a computer network.

#### 10. Liability.

Neither the state nor any local government shall be liable for any expenses which any person incurs in bringing a qui tam civil action under this article.

### **§ 191. REMEDIES**

1. Any current or former employee, contractor, or agent of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or a prospective employer, because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action brought under this article or other efforts to stop one or more violations of this article, shall be entitled to all relief necessary to make the employee, contractor or agent whole. Such relief shall include but not be limited to:

- (a) an injunction to restrain continued discrimination;
- (b) hiring, contracting or reinstatement to the position such person would have had but for the discrimination or to an equivalent position;
- (c) reinstatement of full fringe benefits and seniority rights;
- (d) payment of two times back pay, plus interest; and
- (e) compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

2. For purposes of this section, a "lawful act" shall include, but not be limited to, obtaining or transmitting to the state, a local government, a qui tam plaintiff, or private counsel solely employed to investigate, potentially file, or file a cause of action under this article, documents, data, correspondence, electronic mail, or any other information, even though such act may violate a contract, employment term, or duty owed to the employer or contractor, so long as the possession and transmission of such documents are for the sole purpose of furthering efforts to stop one or more violations of this article. Nothing in this subdivision shall be interpreted to prevent any law enforcement authority from bringing a civil or criminal action against any person for violating any provision of law.

3. An employee, contractor or agent described in subdivision one of this section may bring an action in the appropriate supreme court for the relief provided in this section.

## **§ 192. LIMITATION OF ACTIONS, BURDEN OF PROOF**

(1) A civil action under this article shall be commenced no later than ten years after the date on which the violation of this article is committed. Notwithstanding any other provision of law, for the purposes of this article, an action under this article is commenced by the filing of the complaint.

(1-a) For purposes of applying rule three thousand sixteen of the civil practice law and rules, in pleading an action brought under this article the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct, or any specific records or statements used, if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section one hundred eighty-nine of this article are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government effectively to investigate and defendants fairly to defend the allegations made.

(2) In any action brought under this article, the state, a local government that participates as a party in the action, or the person bringing the qui tam civil action, shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

## **§ 193. OTHER LAW ENFORCEMENT AUTHORITY AND DUTIES**

This article shall not:

1. preempt the authority, or relieve the duty, of other law enforcement agencies to investigate and prosecute suspected violations of law;

2. prevent or prohibit a person from voluntarily disclosing any information concerning a violation of this article to any law enforcement agency; or

3. limit any of the powers granted elsewhere in this chapter and other laws to the attorney general or state agencies or local governments to investigate possible violations of this article and take appropriate action against wrongdoers.

## **§ 194. REGULATIONS**

The attorney general is authorized to adopt such rules and regulations as is necessary to effectuate the purposes of this article.



**MULTISTATE TAX COMMISSION**

*Maximizing the synergies of multi-state tax cooperation*

**To: MTC Class Action and False Claims Act Workgroup**

**From: Sheldon H. Laskin**

**Date: November 21, 2014**

**Subject: Treatment of Tax Cases in State False Claims Acts [CORRECTED MEMO]**

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The remaining states that have a False Claims Act do not provide either a full or partial exclusion from the FCA for tax cases.

1. States that entirely exclude tax cases from the False Claims Act

Cal.Gov.Code §12651(f) This section does not apply to claims, records, or statements made under the Revenue and Taxation Code.

DC ST §2—381.02(d) This section shall not apply to claims, records, or statements made pursuant to those portions of Title 47 that refer or relate to taxation.

VA Code Ann. §8.01-216.3D. This section shall not apply to claims, records or statements relating to state or local taxes.

T.C.A. §4-18-103(f). This section does not apply to claims, records, or statements made under any statute applicable to any tax administered by the department of revenue.

N.C.G.S.A. §1-607(c) Exclusion – This section does not apply to claims, records, or statements made under Chapter 105 [Taxation] of the General Statutes.

N.M.S. A. §44 – 9 – 3E. This section does not apply to claims, records or statements made pursuant to the provisions of Chapter 7 NMSA 1978 [Taxation].

MCA 17 – 8 – 403(5). This section does not apply to ... claims, records, payments or statements made under the tax laws contained in Title 15 [Taxation] or 16 [Alcohol and Tobacco] or made to the department of natural resources and conservation under Title 77 [State Lands].

M.G.L.A. 12 §5B (d). Sections 5B to 5, inclusive, shall not apply to claims, records or statements made or presented to establish, limit, reduce or evade liability for the payment of tax to the commonwealth or other governmental authority.

2. States that partially exclude tax cases from the False Claims Act

RI ST §9—1.1.—3(c). **Exclusion.** This section does not apply to claims, records, or statements made under the Rhode Island personal income tax law contained in Rhode Island general laws chapter 44—30.

IC 5—11—5.5—2(a). This section does not apply to: (1) a claim, record, or statement concerning income tax (IC 6 – 3) [individual, trust or estate taxes].

740 ILCS 175/3(c). Exclusion. This Section does not apply to claims, records, or statements made under the Illinois Income Tax Act [35 ILCS 5/101 et seq. Applies to individual, corporations, trusts and estates].

United States Code Annotated  
Title 26. Internal Revenue Code (Refs & Annos)  
Subtitle F. Procedure and Administration (Refs & Annos)  
Chapter 78. Discovery of Liability and Enforcement of Title  
Subchapter B. General Powers and Duties

26 U.S.C.A. § 7623

§ 7623. Expenses of detection of underpayments and fraud, etc.

Effective: December 20, 2006

[Currentness](#)

**(a) In general.**--The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for--

(1) detecting underpayments of tax, or

(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same,

in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

**(b) Awards to whistleblowers.**--

**(1) In general.**--If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action. The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

**(2) Award in case of less substantial contribution.**--

**(A) In general.**--In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the collected proceeds (including penalties, interest, additions to tax, and additional



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amounts) resulting from the action (including any related actions) or from any settlement in response to such action, taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

**(B) Nonapplication of paragraph where individual is original source of information.**--Subparagraph (A) shall not apply if the information resulting in the initiation of the action described in paragraph (1) was originally provided by the individual described in paragraph (1).

**(3) Reduction in or denial of award.**--If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office may appropriately reduce such award. If such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award.

**(4) Appeal of award determination.**--Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

**(5) Application of this subsection.**--This subsection shall apply with respect to any action--

**(A)** against any taxpayer, but in the case of any individual, only if such individual's gross income exceeds \$200,000 for any taxable year subject to such action, and

**(B)** if the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed \$2,000,000.

**(6) Additional rules.**--

**(A) No contract necessary.**--No contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection.

**(B) Representation.**--Any individual described in paragraph (1) or (2) may be represented by counsel.

**(C) Submission of information.**--No award may be made under this subsection based on information submitted to the Secretary unless such information is submitted under penalty of perjury.

**CREDIT(S)**

(Aug. 16, 1954, c. 736, 68A Stat. 904; Oct. 4, 1976, [Pub.L. 94-455, Title XIX, § 1906\(b\)\(13\)\(A\)](#), 90 Stat. 1834; July 30, 1996, [Pub.L. 104-168, Title XII, § 1209\(a\)](#), 110 Stat. 1473; Dec. 20, 2006, [Pub.L. 109-432, Div. A, Title IV, § 406\(a\)\(1\)](#), 120 Stat. 2958.)

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[Notes of Decisions \(44\)](#)

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