



MULTISTATE TAX COMMISSION

Maximizing the synergies of multi-state tax cooperation

To: MTC Class Action and False Claims Act Workgroup

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Subject: New York State Tax False Claims and Qui Tam Statute

I. Introduction

As of 2011, the New York False Claims Act (FCA), State Finance Law, Art. XIII, was amended to add state tax *qui tam* actions to the statute. Tax actions under the FCA may be filed if the net income or sales of the defendant equals or exceeds one million dollars for any taxable year subject to the action and the damages pleaded in such action exceed \$350,000.¹ FCA, §189 4(a)(i) and (ii). The Act is structured such that the New York Attorney General has primary responsibility for the management of state tax false claims actions, subject to the statutory requirement that he shall consult with the commissioner of taxation and revenue prior to filing or intervening in any such action. FCA, §189 4(b).

II. The Knowing and Knowingly Standard

Actions under the False Claims Act are not limited to instances of actual fraud. The Act applies whenever a person has acted “knowingly.” The statute defines “knowing and knowingly” to mean

...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 information; and

[Knowing and knowingly] require no proof of specific intent to defraud.

FCA, §188 3. However, acts occurring by mistake or as a result of mere negligence are not covered by the statute. FCA, §188 3(b).

¹ Notice that the \$350,000 threshold is a pleading requirement, not a jurisdictional requirement. It is therefore possible that a tax FCA action could result in a judgment of less than \$350,000.

The following knowing actions create liability under the FCA for tax purposes.

1. Presenting or causing to be presented, a false or fraudulent claim for payment or approval (i.e., a knowingly false claim for refund).
2. Making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim (i.e., a knowingly false tax schedule).
3. Having possession, custody or control of property or money used, or to be used, by the state or a local government and delivering, or causing to be delivered, less than all of that money or property (i.e., knowingly collecting but not remitting 100% of sales tax collected).
4. Making or delivering a document certifying receipt of property used, or to be used, by the state or a local government without verifying that the information on the receipt is true (i.e., knowingly presenting a resale certificate attesting that the property is being purchased for resale to the government, without verifying that the statement is accurate).
5. Buying or receiving 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 (this would appear to include cases where an official of the tax department conspires with the person to reduce a tax obligation lawfully owed to the state or to approve a refund without any basis to do so, or in a greater amount than the facts and/or the law warrant).
6. Makes, uses, or causes to be made or used, a false record or statement material to pay money or property to the state or to a local government (i.e., falsifying tax schedules or other documents in support of a claim to reduce a tax obligation or to establish or increase a tax refund claim).

FCA §189 1 (a) through (g).²

Conspiring to commit a violation of these provisions is a separate basis for liability under the FCA. FCA, §189 1(c).

III. Attorney General Enforcement Actions and Private Qui Tam Actions

The state attorney general, and local governments, have the authority to investigate violations of Section 189 and to bring a civil action against any person alleged to have violated the section. FCA, §190 1. In addition, any person can bring a qui tam civil action for a violation of Section 189 on behalf of himself and the people of the state of New York or a local government. FCA, §190 2. A copy of the qui tam complaint and all supporting documentation must be served on the state and the complaint is to be filed in camera and shall remain under seal for at least 60 days. Furthermore, the complaint is not served on the defendant until ordered by the court. FCA, §190 2(b).

² There is another provision of Section 189, subdivision one that imposes a civil penalty and provides for treble damages when a person knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a local government. FCA §189 1(h). However, this paragraph does not apply to tax cases. FCA §189 4(a)(iii). This is probably because the tax laws provide for their own penalties and do not allow for the recovery of damages.

Within the 60 day period, or any extensions thereof, the attorney general is to notify the court that he will take one of the following actions in respect to the complaint.

1. File a false claims action and be substituted for the qui tam plaintiff.
2. Intervene in the qui tam action, as of right.
3. Grant a local government permission to file and serve a false claims complaint, if the action involves an alleged false claim involving that local government, or
4. Intervene in a local government qui tam action, as of right.

FCA, §190 2(c).

If the attorney general intends to file a complaint or to intervene in the qui tam action, he must do so within 30 days of the notification to the court. FCA, §190 2(d) and (e). If the state declines to participate in the action, the qui tam action may proceed and the plaintiff is required to provide the state, or local government, copies of all documents and orders filed in the case. FCA, §190 2 (f). In either event, the complaint is then unsealed and served on the defendant. FCA, §190 3.

If the attorney general converts the qui tam action into an attorney general enforcement action, or if he intervenes in the qui tam action, the attorney general has primary responsibility for prosecuting the action. In no event is the state or local government bound by an act of the person bringing the original action. FCA, §190 5(a). The state may move to dismiss the action notwithstanding the objections of the qui tam plaintiff. FCA, §190 5(b)(i). The state may settle the action without the qui tam plaintiff's consent. FCA, §190 5(b)(ii). The participation of the qui tam plaintiff in the action can be restricted on motion of the attorney general. FCA, §190 5(b)(iii).

IV. Awards

Qui tam plaintiffs may recover an award of between 15 and 25% of the proceeds recovered in the action or settlement, if the plaintiff substantially contributed to the prosecution of the action. However, if the action was based primarily on public information not provided by the qui tam plaintiff, the court may limit the award to no more than 10% of the proceeds. FCA, §190 6(a). If the attorney general does not participate in the qui tam action, the amount of the award is increased to between 25 and 30% of the proceeds recovered. FCA, §190 6 (b). The court may reduce any award if the qui tam plaintiff planned or initiated the violation of Section 189. If such person is convicted of a crime arising from his role in planning or initiating the violation, he shall be removed from the action and is entitled to no award. FCA, §190 8. The statute also provides for an award of costs, expenses or attorneys fees to the qui tam plaintiff. FCA, §190 6(b). In such cases, all costs, expenses or attorneys' fees are in addition to the proceeds recovered. FCA, §190 6(c). Defendants may recover their reasonable attorneys' fees and costs if the qui tam plaintiff's claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment. FCA, §190 6(d).

V. Whistleblower Protections

The statute also provides whistleblower remedies for current or former employees, contractors or agents 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 because of lawful acts of the employee in furtherance of an action under the False Claims Act. FCA, §191.

VI. Regulations

The Attorney General has promulgated regulations to implement the False Claims Act. 13 NYCCR 400.4. Pursuant to these regulations if the state has elected to participate in a qui tam action, the qui tam plaintiff may not pursue the action on a pro se basis unless he is an attorney eligible to practice before the court in which the qui tam action is proceeding. Section 400.4(d).