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Tax Nonfilers Face Potential Liability Under New York FCA

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A recent, little-noticed decision in the New York Supreme Court has confirmed that the tax provisions of New York's False Claims Act apply not only to persons and companies that cheat on the tax returns they submit, but also to those who knowingly skirt their obligations by entirely failing to file any New York tax returns.[1]

New York's False Claims Act

When the New York False Claims Act was amended in 2010, it became the first, and still the only, state false claims act to explicitly extend liability to knowing violations of the full slate of state and local tax laws.[2] Most applicable to tax-related violations, many expected, was the FCA provision that imposes liability where a person knowingly made or used false statements or records that were material to an obligation to pay money to the government. Some assumed that those "false statements or records" would typically be tax returns on which a taxpayer listed fake income figures or took improper deductions.

One question raised was how the act applies to nonfilers: persons or businesses that owe taxes in New York but don't file any returns or pay any of the taxes at all. For them, the nonexistent tax returns could not be the "false statement or record" necessary to alleging the cause of action.

In two settlements with nonfilers, the Office of the New York Attorney General made clear its position that the "false statements or records" need not be tax returns filed in New York. In 2014, the attorney general settled an FCA case filed by a whistleblower against Lantheus Medical Imaging Inc. The $6.2 million settlement was premised on the company's failure to file New York corporate franchise tax returns and to pay taxes owed despite its tax nexus with New York.[3] Later that year, the attorney general settled another whistleblower case against New Jersey appliance retailer Topline Appliance Center for $1.56 million for similar misconduct.[4]

The Supreme Court Adopted the Attorney General's Position

Now a court has concurred with the attorney general's view. In New York ex rel. Campagna v. Post Integrations Inc., the New York County Supreme Court ruled that liability for tax violations under the New York FCA can extend to a nonfiler. (The New York attorney general had previously declined to take over the case.)

The whistleblower (also called the "relator") had filed suit on behalf of New York state and New York City, claiming that Arizona-based credit card processing company Post Integrations had a tax nexus to New York and owed New York taxes. The relator alleged that Post Integrations had failed to file New York tax returns — and therefore had not made any false statements or records directly to New York state or New York City. The relator alleged, however, that Post had made various false statements in communications with customers, credit card networks, and others that were material to its obligation to pay New York taxes.[5]

The defendants — Post Integrations and related persons and entities — moved to dismiss. They argued, among other things, that they could not be liable under the New York FCA because Post Integrations did not file any New York tax returns. The FCA, they claimed, required that the false claims or records at issue had to have been presented to the government. They argued, further, that the act applies only to a "fraudulent filing case," and not to a "nonfiling case" like this one.[6]

The court rejected defendants' presentment and nonfiler argument. For the FCA cause of action at issue, it held that the act "does not require that any false statement or record be made or presented to a government agency," so there was no requirement that the defendant had to have filed tax returns.[7] The court looked to the plain language of the relevant "reverse false claims" provision (Subsection (g)), which contains no "presentment" requirement in holding liable anyone who "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."[8]

The court also contrasted the language of reverse false claims in Subsection (g) with the different elements set forth in the section of the FCA that addresses direct false claims, where contractors or others seek payment from the government, under Subsection (a).[9] Subsection (a) explicitly includes a presentment element because it establishes liability for a person who "knowingly presents" a false claim for payment to the government. The absence of presentment language from the reverse false claims subsection demonstrates that no such element was required.[10]

Thus, the defendants' attempt to add an extratextual filing requirement failed because, quite simply, it ran counter to the FCA.

Tax Nonfilers Face Liability Under the FCA for Tax Violations

In upholding the plain meaning of the New York FCA, the court confirmed that nonfilers can face liability under the act for tax-related violations. Such nonfilers might include persons or businesses in New York that fail to file tax returns and pay taxes due, or persons or businesses outside of New York that nevertheless have an unfulfilled obligation to pay taxes in New York. Because the New York FCA also applies to people who knowingly caused another to make or use false statements or records material to an obligation to pay the government, liability can also extend to those who support the nonfilers in violating the act, such as tax preparers.

Historically, nonfilers may have felt they could remain under the radar and avoid detection. But the New York FCA financially incentivizes whistleblowers to come forward with allegations of tax fraud. This empowerment of whistleblowers, who often have direct knowledge and evidence of wrongful conduct, dramatically increases the likelihood that nonfilers who violated the act will be caught and made to pay for their fraud. They can no longer count on remaining under the radar.

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DISCLOSURE: Adam Pollock, while serving at the New York attorney general's office, was directly involved in the Post Integrations matter described in this article. He left the office in April 2017 and since has had no involvement.

[1] Slip Op., New York ex rel. Campagna v. Post Integrations, Inc., Index No. 100516/2014 (Sup. Ct., N.Y. Cty. Oct. 12, 2017) ("Campagna Slip Op.")

[2] 2010 N.Y. Sess. Laws (McKinney's), Ch. 379.

[3] Press Release, "A.G. Schneiderman Announces $6.2 Million Settlement with Lantheus Medical Imaging & Bristol-Myers Squibb For Failing To Pay New York Corporate Income Taxes," Mar. 14, 2014, available at https://ag.ny.gov/press-release/ag-schneiderman-announces-62-million-settlementwith-lantheus-medical-imaging-bristol.

[4] Press Release, "A.G. Schneiderman Announces $1.56 Million Settlement With New Jersey Appliance Retailer For Failing To Pay New York Taxes," Aug. 22, 2014, available at https://ag.ny.gov/press-release/ag-schneiderman-announces-156-million-settlement-new-jersey-appliance-retailer-failing.

[5] Campagna Slip Op. at 2-3.

[6] Defendant's Memorandum of Law in Support of Motion to Dismiss, Index No. 100516/2014 (Sup. Ct., N.Y. Cty.), June 8, 2015, at 6-11.

[7] Campagna Slip Op. at 7.

[8] N.Y. State Fin. Law § 189(1)(g). The court also pointed to analogous federal precedent in support of its conclusion that reverse false claims causes of action to not have presentment as an element of an offense. Campagna Slip Op. at 7 (quoting U.S. ex rel. Matheny v. Medco Health Sols., Inc., 671 F.3d 1217, 1224 n.12 (11th Cir. 2012)).

[9] N.Y. State Fin. Law § 189(1)(a).

[10] Campagna Slip Op. at 6.
