TAX MANAGEMENT

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Tax Policy

William J. Comiskey, former deputy commissioner for tax enforcement with the New York State Department of Taxation and Finance, recently joined the law firm of Hodgson Russ LLP. Mr. Comiskey was New York's top tax enforcement officer, overseeing the work of 2,500 auditors, collectors, and criminal investigators. During his tenure, New York ramped up its data mining efforts and enacted legislation to put more tools in the hands of investigators. In this interview, Mr. Comiskey talks with BNA about trends in tax law enforcement in the state and throughout the nation.

New York's Aggressive Pursuit of Tax Scofflaws Gains Teeth, Gathers Momentum as State Pursues Creative New Strategies

William J. Comiskey, interviewed by Dolores W. Gregory

BNA: While you were with the department of taxation, New York enacted a state version of the federal False Claims Act—and modified it in 2010. What does this legislation do?

COMISKEY: In 2007, the state adopted its False Claims Act, which essentially paralleled the federal act. In 2009, the federal False Claims Act was amended, and in 2010, the state essentially adopted the same changes. But New York went one step further. Under the federal False Claims Act, claims under the tax law are specifically exempted. In New York now—and I think it's the only state in the nation to do so—such claims are expressly permitted if certain monetary thresholds are met.

BNA: So, if someone is working for a company and they know they are evading taxes, they can bring a whistle-blower suit.

COMISKEY: Yes, if the thresholds are met and if the evasion was based on a false statement that was made knowingly. And if the suits are successful, the whistleblowers will be richly rewarded. The False Claims Act is viewed by many as the most powerful tool government has for exposing false claims and fraud against the government. It allows the whistle-blowers to sue those who defraud the government for three times the amount of damages the government has sustained and to collect up to 30 percent of the amounts recovered. This is an area where there's been an explosion of activity and litigation, especially in connection with cases where individuals or companies have allegedly falsely

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billed for health-care services or with respect to pharmaceuticals paid for by the federal government.

BNA: What prompted the state to extend the False Claims Act to taxes? Is it a function of the fiscal crisis?

COMISKEY: When the bill was enacted, its sponsors made pretty clear that given current economic conditions, the state has to take strong measures to make sure it is not subjected to false claims or fraud.

BNA: The bill was enacted in August. Have there been any results from that yet?

COMISKEY: It is obviously early in the process, but it is worth observing that the primary proponent of the legislation expanding the act to tax fraud, Sen. Eric Schneiderman, is going to be attorney general and he has expressly said he is going to use it to investigate and pursue claims of inappropriate credits obtained by businesses and individuals with respect to empire zones. He's made it clear that the law he championed is one he intends to use aggressively, and as attorney general, he will have the primary role in developing and pursuing cases under the act.

BNA: New York has also recently expanded funding for district attorneys to pursue tax fraud—a 300 percent increase, I believe.

COMISKEY: Correct. There's a program that's been operating for half a dozen years called the Crimes Against Revenue Program, which provides funding for district attorneys in the large population centers of New York to underwrite their costs for investigating and prosecuting crimes against the public fisc. Mainly the monies have been used to provide them with a way to build a capability for handling tax crimes. For its investment, it brings in two and a half to three times its cost. The department in the last four years has really ramped up its criminal enforcement effort in tax cases. The number of criminal investigations related to tax fraud has increased 400 percent; referrals from the Civil Audit Division to the criminal side are up about 1,000 percent in four years. There's also been an increase in the number of referrals to prosecutors. It's created a sort of bubble in the system. Prosecutors had some resources, but not enough to handle the growing number of cases, and the Legislature decided to increase the money available.

BNA: Again I would ask what's driving that increased activity. Is it that there's more tax evasion going on, or that the state decided it was time to clamp down on it?

COMISKEY: It's the latter, for sure. The department's strategic and practical approach to the tax gap, which it articulated going back to 2007, is a multifaceted attempt to bring it under control. It's a multibillion dollar problem—no one knows exactly how many billions are involved. The department expressly said that while there are lots of different causes of that gap, the reality is that a substantial portion is directly attributable to people making a choice.

So the department made a conscious choice to narrow that gap by engaging in enhanced enforcement, by increasing investments in technology—data analysis, data mining, predictive software—a whole host of things that make for smart enforcement, and they've increased substantially the number of enforcement people working at the department. It's all driven by a desire to close the tax gap. Whether times are flush or not, it's unacceptable and it's unfair to those paying their full freight. When the economy took a nosedive, the need to ensure uniform compliance with the tax law sparked even greater interest from the department and the Legislature.

BNA: How much revenue have those extra efforts generated in the last couple of years?

COMISKEY: The audit collections and criminal enforcement activity of the department—the number they are bringing in now is in the vicinity of about $3 billion a year, and that's a substantial jump. At one point, the number of audits conducted—whether desk or field audits—was in the area of 700,000 or so. While I was at the department, it increased to well over 1 million.

BNA: New York has been in the news recently because of the ruling in the Amazon tax case. Is that something we can expect to see more of from New York—more ''creative thinking'' or alternative enforcement?

COMISKEY: Do I think that states like New York will be looking for ways to ensure that their tax base remains stable? They clearly will. The law New York wrote on the Amazon side has been, from their perspective, successful. There have been 30 or so remote vendors that have registered to collect sales tax, and they are expecting additional revenue of $70 million or so now. That's a lot of money, and it's additional money without a new tax.

BNA: Can we expect New York to follow Colorado in adopting reporting requirements for remote vendors?

COMISKEY: I would be very surprised if New York did not look at the Colorado efforts and say ''that's a good idea.'' Data acquisition and utilization is central to modern tax administration and New York has taken the lead in that area. They passed pretty impressive laws in 2009, requiring a variety of businesses to provide information with respect to the business they conduct in the state. For example, every franchisor—wherever they are located—that has a franchise in New York state is required to provide New York with an annual statement of the sales activity of that franchisee. We saw from audits that very often the franchisee was telling the franchisor one set of numbers as to their sales and telling the state a different and—you won't be surprised by this—lesser number.

BNA: So you're looking at businesses that report not only to the state but also to another entity.

COMISKEY: Absolutely. You have the same information reporting requirements for beer, alcohol, and liquor wholesalers. You have it for insurance companies that pay for car repairs. The department will get an annual report of the amount of money paid by the insurance company to these repair shops. And in an area where compliance is challenging, having access to this information is going to lead certain taxpayers to change their reporting behaviors. And that's really the goal of any enforcement program—not to conduct a lot of audits or drive everybody crazy, but to affect behavior.

BNA: And you'll see more revenue come in as compliance improves and less being caught on the audit side.

COMISKEY: Any state or government that isn't investing heavily in the development of that capability is just missing the boat, in my opinion. It's only relatively recently that the department really began comparing in-

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formation internally. It's only recently that the department is comparing what you say in an income tax return with what you say in a sales tax return. And when they do that comparison, what the department finds is often pretty staggering. There is often information in the corporate returns—not just in the income returns, but in the expenses and in other reported data—that provide pretty powerful clues as to whether the sales tax returns are accurately capturing and reporting true sales. The department is building algorithms to figure it out, and when they get that picture, then the goal is to do real-time scoring of returns as they come in, so they can select the right place to devote their resources and leave alone businesses that there is no reason to be bothering. When businesses learn these comparisons with internal and external data are being made routinely and that they greatly increase the chance of an audit or an examination, they will change their reporting behavior.

BNA: Where might we end up with the issue of taxation of electronic commerce? Do you think we'll reach a point where the physical presence standard is no longer relevant?

COMISKEY: I don't know that I'd go that far. I think states will race to create or find alternative mechanisms that are consistent with due process limitations. But if government is going to maintain its ability to fairly treat all businesses selling products, it must find a way so that the tax obligation is uniformly applied to people who purchase tangible property in the state. You can't have [local] businesses obliged to impose the sales tax when more and more people are turning to electronic means for buying where taxes are not imposed. Until that disparity is addressed, all local businesses are operating at a competitive disadvantage, and the state is losing its tax base—and a lot of money.