

NY Expands Whistleblower Tax Law, State's Appeal Rights

By **Sanjay Talwani**

Law360 (May 3, 2023, 6:30 PM EDT) -- New York will allow tax-related whistleblower claims to be brought against entities that knowingly fail to file tax returns under a budget bill signed Wednesday by Democratic Gov. Kathy Hochul that also allows the state to appeal adverse tax tribunal rulings.



The expansion of tax cases that can be brought under New York's False Claims Act applies retroactively to May 1, 2020, providing a shorter window for claims than in previous proposals vetoed by Gov. Kathy Hochul. (AP Photo/Manuel Balce Ceneta)

Hochul signed **S.B.4009/A.B.3009** into law, amending the state's False Claims Act to allow whistleblower tax cases against people or corporations that don't file returns. Under previous law, such lawsuits could only be filed if a taxpayer filed a return with false information.

The bill also allows the state Division of Taxation and Finance to appeal adverse rulings from the Tax Appeals Tribunal. Previously, only taxpayers could appeal adverse decisions.

Randall Fox, a partner at Kirby McInerney LLP, said it was hard to say what the effect would be of closing the "loophole" that allowed nonfilers to dodge whistleblower claims, noting that nonfilers are notoriously difficult to find.

If tax audits are akin to finding a needle in a haystack, "here, you don't even have a haystack," he told

Law360.

Under previous law, it took an existing false record to create a case.

"But if they happened not to create that false record, then the person apparently would be off scot-free," Fox said.

The new law, he said, empowers whistleblowers to bring forward information that the state tax agency would not likely find on its own.

It's hard to predict how many such cases could arise from the change, Fox said. In the 10 years that the state False Claims Act has applied to tax matters, only about 200 such cases have been brought, or about 20 per year, he said. Those have resulted in about \$585 million in recovered taxes.

But the principle of the matter, he said, may be more important than the quantity of cases.

Hochul has **twice vetoed** expansions of the False Claims Act. Fox noted that the measure in the budget bill is somewhat different, applying retroactively to May 1, 2020, instead of all the way back through the entire 10-year statute of limitations.

Justin Henry, a spokesperson for Hochul, told Law360 the governor "fully supports efforts to ensure that individuals and businesses who avoid their tax obligations are held accountable, and we are pleased to have reached an agreement with the Legislature on this issue."

The provision in the bill allowing the state **to seek judicial review** of adverse tribunal rulings applies to cases concerning constitutional issues, federal or international law, or topics that are not under the authority of the state Legislature. The measure was opposed by Senate Finance Committee Chair Liz Krueger, D-Manhattan, who also supported the whistleblower expansion bills vetoed by Hochul. Krueger did not respond to a request for comment.

The state's new appeal right "certainly may create new hurdles for taxpayers that win a case at the tribunal," said Michael Hilkin, counsel at McDermott Will & Emery LLP.

If the state appeals a loss, the taxpayer could have to defend a case to an appellate court and then the state's highest court, and potentially even the U.S. Supreme Court, Hilkin said.

"This will inevitably cause many taxpayers to have to incur additional time and expense to defend a win before the tribunal," Hilkin told Law360.

The bill also extends a temporary increase in the state's corporate franchise tax rate. The rate was increased from 6.5% to 7.25% in 2021, and the boost was set to expire in 2024 but will now extend through 2026.

The bill also boosts the statewide aggregate cap on New York's film tax credit from \$420 million to \$700 million and expands New York City's musical and theater production credit.

Republican leaders in the House and Senate did not respond to requests for comment.

--Additional reporting by Paul Williams. Editing by Aaron Pelc.