New York County Clerk's Index No. 103917/11

Court of Appeals
State of New York

PEOPLE OF THE STATE OF NEW YORK, by Eric T. Schneiderman, Attorney General for the State of New York, and STATE OF NEW YORK, ex rel. EMPIRE STATE VENTURES, LLC,

Appellant,

– against –

SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC., and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC.,

Respondent.

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for the Chamber of Commerce of the United States of America
One Liberty Plaza
New York, New York 10006
Telephone: 212-225-2000
Facsimile: 212-225-3999

Dated: July 21, 2015

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF FACTS 7

ARGUMENT 9

I. THE NYFCA IS RESERVED FOR CASES OF A KNOWINGLY FALSE CLAIM, STATEMENT OR RECORD AND IS NOT THE PROPER MECHANISM FOR ADDRESSING INTERPRETATIONS OF THE TAX LAW THAT ARE NOT OBJECTIVELY UNREASONABLE 8

A. New York Has A Carefully Calibrated Administrative Apparatus To Resolve Questions Regarding The Proper Legal Interpretation Of The Tax Law 8

B. The NYFCA Is Intended To Punish Fraud, Not To Serve As A Vehicle For Resolving Good Faith Interpretive Disagreements........14

C. The NYFCA Cannot Be Stretched To Apply To Objectively Reasonable Interpretations Of The Tax Law 17

II. ALLOWING THE ATTORNEY GENERAL TO USE THE NYFCA'S TREBLE DAMAGES REGIME TO COMBAT OBJECTIVELY REASONABLE INTERPRETATIONS OF THE LAW WOULD CHILL THE RIGHTS OF CITIZENS TO CHALLENGE THE VIEWS OF THE STATE AND UNDERMINE DEVELOPMENT OF THE LAW...23

A. The Attorney General's Position Is Inconsistent With The Rule Of Law 23

B. The Attorney General's Position Unfairly Punishes The Taxpayer's Exercise Of Her Rights 28

C. The Attorney General's Position Threatens The Integrity Of The Law...29

TABLE OF CONTENTS
(continued)

Page

III. RETROACTIVE LIABILITY UNDER THE NYFCA IS NOT COMPATIBLE WITH THE EX POST FACTO CLAUSE 33

CONCLUSION 40

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Allison Engine Co., Inc. v. U.S. ex rel. Sanders,
553 U.S. 662 (2008) 15

American Net & Twine Co. v. Worthington,
141 U.S. 468 (1891) 24

Chapman v. Office of Children & Family Services,
423 F. App'x 104 (2d Cir. 2011) 19

Cook County v. U.S. ex rel. Chandler,
538 U.S. 119 (2003) 34

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 29

Dobson v. Commissioner of Internal Revenue,
320 U.S. 489 (1943) 30

Doe v. Pataki,
120 F.3d 1263 (2d Cir. 1997), as amended on denial of reh'g,
(Sept. 25, 1997) 35

Gold v. Morrison-Knudsen Co.,
68 F.3d 1475 (2d Cir. 1995) 15

Hagood v. Sonoma County Water Agency,
81 F.3d 1465 (9th Cir. 1996) 19

Landgraf v. USI Film Products,
511 U.S. 244 (1994) 34, 36

Law v. National Collegiate Athletic Association,
134 F.3d 1438 (10th Cir. 1998) 35

Louis Vuitton S.A. v. Spencer Handbags Corp.,
765 F.2d 966 (2d Cir. 1985) 36

TABLE OF AUTHORITIES
(continued)

Page(s)

Marbury v. Madison,
5 U.S. 137 (1803)....23

Rainwater v. United States,
356 U.S. 590 (1958)....16

Safeco Insurance Co. of America v. Burr,
551 U.S. 47 (2007).... 18-19

Sanders v. Allison Engine Co.,
703 F.3d 930 (6th Cir. 2012) 34

U.S. ex rel. Bilotta v. Novartis Pharmaceutical Corp.,
50 F. Supp. 3d 497 (S.D.N.Y. 2014) 35-36

U.S. ex rel. Lamers v. City of Green Bay,
168 F.3d 1013 (7th Cir. 1999) 19

U.S. ex rel. Miller v. Bill Harbert International Construction, Inc.,
608 F.3d 871 (D.C. Cir. 2010)....34

U.S. ex rel. Hixson v. Health Management Systems, Inc.,
613 F.3d 1186 (8th Cir. 2010) 19

United States v. Rogan,
517 F.3d 449 (7th Cir. 2008) 34

United States v. Sforza,
326 F.3d 107 (2d Cir. 2003) 28-29

Vermont Agency of Natural Resources v. U.S. ex rel. Stevens,
529 U.S. 765 (2000)....15

State Cases

Commonwealth v. Kearns,
896 A.2d 640 (Pa. 2006)....33

TABLE OF AUTHORITIES
(continued)

Page(s)

Debevoise & Plimpton v. Department of Taxation & Finance,
80 N.Y.2d 657, 661 (1993) 24

Dreyfus Special Income Fund, Inc. v. New York State Tax Commission,
134 Misc. 2d 679, 682 (Albany Co. 1986); aff'd,
126 A.D.2d 368 (3d Dep't 1987); aff'd,
72 N.Y.2d 874 (1988) 25

In the Matter of the Petition of Helio LLC,
Decision No. 82510 (N.Y. Tax Appeals Trib., July 2, 2015).......................13, 26

International Game Technology, Inc. v.
Second Judicial District Court of the State of Nevada,
127 P.3d 1088 (Nev. 2006) 20

Lorillard Tobacco Co. v. Roth,
99 N.Y.2d 316 (2003) 24

Manhattan Cable Television, Inc. v. New York State Tax Commission,
137 A.D.2d 925 (3d Dep't 1988) 25

Matter of Council of City of New York v. Bloomberg,
6 N.Y.3d 380 (2006) 23

Matter of Gaied v. New York State Tax Appeals Tribunal,
22 N.Y.3d 592, 598 (2014) 25

Matter of Plato's Cave Corp. v. State Liquor Authority,
68 N.Y.2d 791 (1986) 18

Matter of Quotron Systems Inc. v. Irizarry,
48 N.Y.2d 795 (1979) 24

Matter of SIN, Inc. v. Department of Finance of City of New York,
71 N.Y.2d 616 (1988) 24

TABLE OF AUTHORITIES
(continued)

Page(s)

Matter of Thomas S. v. Robin Y.,
209 A.D.2d 298 (1st Dep't 1994) 33

New York State Cable Television Assocation v. State Tax Commission,
59 A.D.2d 81 (3d Dep't 1977) 24-25

New York State Society of Enrolled Agents v.
New York Division of Tax Appeals,
161 A.D.2d 1 (2d Dep't 1990) 10, 32

Price v. High Pointe Oil Co.,
828 N.W.2d 660 (Mich. 2013) 32

Raemart Drugs, Inc. v. Wetzler,
157 A.D.2d 22 (3d Dep't 1990) 25

State ex rel. Beeler Schad & Diamond, P.C. v. Ritz Camera Centers, Inc.,
878 N.E.2d 1152 (Ill. App. Ct. 2007) 21-22

State ex rel. Seiden v. Utica First Insurance Co.,
96 A.D.3d 67 (1st Dep't 2012), lv. denied 19 N.Y.3d 810 (2012) 16

Stevens v. State,
127 So. 3d 668 (Fla. Dist. Ct. App. 2013) 17

Trump Village Section 3, Inc. v. City of New York,
24 N.Y.3d 451 (2014) 24

Constitutional Provisions

U.S. Const. amend. V 5

Federal Laws

42 U.S.C. § 1396h 16

Page(s)

State Laws

Del. Code Ann. tit. 6, § 1201 17

740 Ill. Comp. Stat. 175 .... 17, 21

Ind. Code § 5-11-5.5-2(a) 17

N.H. Rev. Stat. Ann. §§ 167:58, 167:61-b 17

122 Nev. 132 (2006) 20-21

Nev. Rev. Stat. § 357 .... 17, 20

N.Y. C.P.L.R. §§ 7803 12

N.Y. Comp. Codes R. & Regs. tit. 20
- §§ 536.1-536.4 10
- § 2375 27
- § 2376 27
- § 2392.1(g)(2)(i) 12

N.Y. Exec. Law § 63 14

N.Y. Penal Law
- § 15 35
- § 80.10 .... 35, 36

1986 N.Y. Sess. Laws 2114, 2120-29 10

N.Y. Stat. Law
- § 221 17-18
- § 313 24

N.Y. State Fin. Law
- § 194 14
- § 188 .... 14, 17

TABLE OF AUTHORITIES
(continued)

Page(s)

§ 189 .... 14, 18
§ 190 14
§ 192 14

N.Y. Tax Law
§ 80 35
§§ 601-1150 9
§§ 681, 689 & 690 9
§ 998 9
§ 1089 9
§ 1090 9
§ 1105 .... passim
§ 1132 27
§ 1135 11
§ 1136 11
§ 1138 .... 9, 12
§ 1139 .... 9, 12, 27
§ 1140 .... 12, 30
§ 1141 12
§ 1142 11
§ 1145 .... 9, 11, 12
§ 1146 31
§ 1147 .... 11, 14
§ 1801 35
§ 2006 12
§ 2008 .... 9, 12
§ 2016 .... 9, 12, 30
§§ 3000-3013 10

9 R.I. Gen. Laws § 9-1.1-3(d) 17

Wash. Rev. Code § 74.66.010 17

Wis. Stat. § 20.931 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

101 N.Y. Jur. 2d Taxation and Assessment § 1949 8

Amendments Affecting the Application of the Sales and Use Tax and Excise Tax Imposed on Mobile Telecommunications Service, N.Y. State Dep't of Tax. and Fin. Mem. No. TSB-M-02 (July 30, 2002) 24

Assembly Mem. in Support, Bill Jacket, L 2010, ch. 379 17

H.R. Conf. Rep. 109-362 (2005), reprinted in 2006 U.S.C.C.A.N. 3 16

Michael Morse et al., Protecting the Empire: A Practitioner's Primer on the New York False Claims Act, 82-Feb N.Y. St. B.J. 22 (2010) 16

Press Release, Senator Eric. T. Schneiderman Shepherds Historic Anti-Fraud Taxpayer Protection Measure Through Legislature (July 1, 2010), http://www.nysenate.gov/press-release/senator-eric-t-schneiderman-shepherds-historic-anti-fraud-taxpayer-protection-measure- 15, 17, 28

S. Rep. No. 99-345, at 9 (1986), reprinted in 1986 U.S.C.C.A.N. 5266 15

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Chamber is interested in this dispute between a New York taxpayer, Sprint Nextel Corp. and its affiliates (together "Sprint"), and the New York Attorney General over the meaning of a complex provision of the New York Tax Law—Section 1105(b)—because the case will define the powers of the Attorney General to use the New York False Claims Act as the vehicle to challenge taxpayers' interpretation of the law in the first instance.

The Attorney General's position in this case fundamentally undermines the interests of the Chamber and its members in preserving their traditional rights to disagree with the State's interpretation of the law in good faith, and to have those disputes raising issues of legislative intent regarding the tax laws resolved in the first instance through established administrative tax procedures and,

if the taxpayer does not follow the administrative determination, through the courts, rather than through penal proceedings alleging fraud before courts of general jurisdiction.

The Chamber and its members also have an interest in a tax regime that is predictable, in which liability turns on laws in effect at the time of conduct, and in which punitive penalty regimes are not brought into effect *ex post facto*, as the Attorney General seeks to do here.

SUMMARY OF THE ARGUMENT

This case involves a commonplace dispute over the meaning of a provision of the Tax Law—Section 1105(b)—and tax filings and statements made in accordance with a taxpayer's objectively reasonable interpretation of that law. The Attorney General argues that Section 1105(b) imposes an undifferentiated sales tax on mobile voice services sold as part of a fixed monthly charge. Sprint, on the other hand, argues that the New York legislature intended to tax only intrastate, not interstate, mobile telecommunications services.

Ordinarily, such a dispute would be resolved initially before the New York State Department of Taxation and Finance (the "Department"), with its attendant expertise and in a procedure that affords the taxpayer privacy and other protections, with recourse to the courts of law if the taxpayer disagreed with the determination of the Department. In this instance, however, the Attorney General

has wrenched this case from the administrative process of assessment and adjudication that the Legislature has prescribed for resolving such disputes, and instead charged Sprint with making a knowingly false claim actionable under the New York False Claims Act ("NYFCA"), asking that this dispute be resolved in first instance before a court of general jurisdiction in the public eye.

The supposed knowing falsity alleged here is none other than that Sprint filed tax statements premised on an interpretation of the Tax Law that, although objectively reasonable, is not the Department's interpretation. Through that artifice, the Attorney General seeks not only to pursue claims that would be stale if brought under the Tax Law, but also seeks to effectively prosecute supposedly "false" statements that were made before the NYFCA was amended in August 2010 to even apply to tax claims—*i.e.*, at a time when the statute under which the Attorney General sues explicitly prohibited the very claims that he brings in this action.

Whether or not Sprint's interpretation of the law is correct, this case is not properly brought under the NYFCA. There is a procedure in this State for assessing and collecting taxes from taxpayers who fail to report their obligations or who rely on erroneous interpretations of what the law requires them to pay. The procedure is prescribed by the Tax Law—a statute specifically crafted and carefully calibrated by the Legislature to balance competing objectives of

collecting revenue while protecting taxpayers against arbitrary or excessive penalties. The Tax Law requires the taxpayer to file tax returns, makes the taxpayer's returns subject to audit, and—if the taxpayer takes a position that turns out to be incorrect—imposes penalties: a merchant who, without reasonable cause, does not collect sales tax, is personally liable for the amount of tax due, plus a penalty of up to thirty percent of taxes due, plus interest at a penalty rate of at least fourteen and one-half percent. That law is intended to protect the public fisc while also ensuring that the taxpayer has the ability to obtain a judicial interpretation of a disputed tax provision. It places the risk of an incorrect interpretation on the taxpayer: if the taxpayer underreports, it not only has to personally pay the tax due and owing but also has to pay an incremental amount designed to protect the government against underreporting and to offset the cost of collection. If the taxpayer wants to avoid the risk of penalties, she has the option, but not the obligation, to pay the disputed tax under protest and claim a refund, or to seek advance guidance.

The NYFCA has a different function and serves a different purpose. It is designed not to assess and adjudicate tax disputes or determine tax law in the first instance, but to prosecute those who commit knowing fraud. Thus, to state a claim under the NYFCA—unlike the requirement to recover taxes under the Tax Law—the Attorney General must show that the defendant relied on a "false claim,

record or statement" and that it did so "knowingly." NYAG Br. 53.[1] The statute imposes treble damages penalties and, accordingly, it is reserved for circumstances where the taxpayer makes a claim or a statement that is false and that it *knows* to be false—not where the underreporting is the result of a reasonable tax position that turns out to be erroneous. The imposition of NYFCA liability for statements that are not "knowingly false," but merely erroneous, would undermine New York's carefully calibrated tax regime, and fundamentally transform the NYFCA from a statute directed at fraud into one that can be used to adjudicate ordinary legal disagreements.

The Attorney General's interpretation would have still more profound implications. The legal system of New York—and that of the United States and each of the fifty States—is founded on the postulates that it is the province of the judiciary (and not of any of the offices of the Executive) to declare what the law is and that any person is free to challenge the government's interpretation of the law. There is no requirement that a person who disagrees with the government's interpretation of the law, and who therefore relies on a contrary interpretation, alert the government that it has done so. Cf. U.S. Const. amend. V. Failure to do so is

---

[1] The New York Attorney General's Brief in this appeal is cited as "NYAG Br. __." Sprint's Brief in this appeal is cited as "Sprint Br. __," and its Reply as "Sprint Reply Br. __."

not fraudulent, particularly where the legal interpretation in question is objectively reasonable.

If adopted, the Attorney General's interpretation of the NYFCA would punish taxpayers for fraud based on the exercise of their right to disagree in good faith with the State's interpretations of the law. Under the Attorney General's proposed approach, a taxpayer who adopts an interpretation of law different from the State's—if that interpretation is a minority view—is subject not just to penalties but to the extraordinary remedy of treble damages and to having its dispute adjudicated in a proceeding intended to be punitive, rather than the ordinary administrative process prescribed by the Legislature for adjudicating tax disputes. Were that approach the law, rational taxpayers would find it difficult to ever adopt an interpretation different from the government's and risk incurring treble damages. Finally, by arguing that an alleged erroneous legal interpretation is tantamount to fraud and punishable with treble damages under the NYFCA, even with respect to tax filings that were made before the NYFCA was expanded to tax matters in 2010, the Attorney General runs afoul of the *Ex Post Facto* Clause of the United States Constitution.

For these reasons, the decision below should be reversed.

STATEMENT OF FACTS

The basic facts of this case are straightforward and not in dispute. Sprint sells its New York customers bundled wireless voice services that include both intrastate and interstate telephone calling capability. Sprint Br. 7. It bills these services as part of a fixed periodic charge in which the customer is not separately allocated an interstate and intrastate charge. Sprint Br. 7; NYAG Br. 19-20. Sprint believes that New York's legislature did not intend the sales tax on voice communications, Section 1105(b)(2) of the Tax Law, to apply to the interstate component of the voice services that it sells. Sprint bases this interpretation both to Section 1105(b)(2) and on another provision, Section 1105(b)(1)(B), which for decades expressly excluded—and continues today to exclude—interstate telecommunications services from sales tax. Sprint Br. 12-14. It argues that because its books and records allow it to disaggregate the interstate component of its service, Sprint is not required to collect sales tax on the interstate component of its services. Sprint Br. 22-25.

The Attorney General disagrees. He argues that the undisputed exclusion of interstate telecommunications services from the sales tax imposed under Section 1105(b)(1)(B), which remains in effect, does not apply to "voice" communications that are sold as part of a fixed monthly charge, and that Section 1105(b)(2) imposes sales tax on the entire price charged to customers for bundled

flat rate wireless voice services. NYAG Br. 37-39. As a result, he argues, the legislature intended Sprint to collect and pay to the State taxes on the entire amount charged for wireless voice services.

While the Chamber takes no position on this dispute, it is impossible to read the parties' submissions to this Court without concluding that Section 1105(b) is susceptible to multiple objectively reasonable interpretations as to the proper taxing of mobile voice services.

ARGUMENT

I. The NYFCA Is Reserved For Cases Of A Knowingly False Claim, Statement Or Record And Is Not The Proper Mechanism For Addressing Interpretations Of The Tax Law That Are Not Objectively Unreasonable

A. *New York Has A Carefully Calibrated Administrative Apparatus To Resolve Questions Regarding The Proper Legal Interpretation Of The Tax Law*

New York has in place a carefully calibrated administrative system adopted by its Legislature to address the failure by a taxpayer to collect and remit sales tax that the government alleges it was required to collect and remit, based on a reasonable and good faith interpretation of the applicable provisions of the Tax Law. See 101 N.Y. Jur. 2d Taxation and Assessment § 1949 ("Questions regarding sales and use tax liability are generally resolved either by the assessment of tax against a person sought to be held liable, or by the filing of an application for a refund of taxes by a person who has previously paid them.").

With respect to each of the various taxes that the Legislature has enacted—including those on personal income, corporations, estates, and sales—the Legislature has prescribed a corresponding enforcement regime. See N.Y. Tax Law §§ 601-1150. The administrative regime for assessing, enforcing, and collecting monies due under the Tax Law—a procedure captained by the Department—has been carefully crafted to balance the differing interests of taxpayers and the State in resolving such a dispute through each step. The Department's role in this process is that of an interested party, empowered to assess and seek to collect taxes, but not empowered to itself finally adjudicate whether in fact they are due. While there are differences between the enforcement regimes applicable to different types of taxes, these procedures uniformly evidence an intent to protect individual liberty, the right to judicial review, and the separation of powers: A person who disagrees with an administrative position is permitted to assume the risk of an incorrect position, and if the Department determines to challenge her position, she has the right to appeal an unfavorable judgment, and to seek judicial review if desired. Id. §§ 681, 689 & 690 (personal income tax); id. § 998 (estate tax); id. §§ 1089, 1090 (corporate tax); id. §§ 1138, 1139 (sales tax); id. §§ 2008, 2016 (tax appeals). Availing oneself of that right is not punishable as, and should not be equated with, tax fraud. These procedures afford the Department robust powers to investigate and adjudicate failures to

collect sales tax, and to impose substantial penalties when the State prevails, which compensate the State for the risks of under-enforcement and underpayment (while not being so great as to deter judicial review). See, e.g., id. § 1145; see also N.Y. Comp. Codes R. & Regs. tit. 20, §§ 536.1-536.4. But, importantly, these procedures are tempered by obligations of confidentiality and procedural protections specifically tailored by the Legislature for proceedings on the tender ground of taxation. See N.Y. Tax Law §§ 3000-3013 (taxpayers' bill of rights), 3038(a) (confidentiality).

When it overhauled the Tax Law in 1986, the Legislature specifically intended that the administrative procedures described above would serve as checks against the State's tax assessment power. Prior to the amendments, the power to resolve tax disputes rested in a bureau that answered directly to the body charged with administering and collecting taxes, and involved a process that was perceived to be "biased and inherently unfair." N.Y. State Soc'y of Enrolled Agents v. N.Y. Div. of Tax Appeals, 161 A.D.2d 1, 6 (2d Dep't 1990). By establishing a process "for the resolution of tax disputes . . . that is quasijudicial in nature," the Legislature explicitly intended to remedy the "perceived bias" of that system, preferring instead to vest an independent tax tribunal within the Department with the power of assessing tax liability in first instance, subject to independent judicial review. Id. at 6-7; see also 1986 N.Y. Sess. Laws 2114, 2120-29.

The current Tax Law envisions an iterative process through which revenue or income is reported, taxes are assessed, disputes are resolved, and liability is fixed. The government's power to collect sales tax begins with the obligation of a citizen to report tax obligations. See, e.g., N.Y. Tax Law § 1136 (requiring at least quarterly returns showing receipts from sales and "such information as [the tax commission] may deem necessary"). It continues with the Department's authority to audit the accounts of entities like Sprint that are required to collect sales tax. Id. § 1142(5). This includes the power to review the records of every sale, the amounts charged, and the taxes collected—records that by statute Sprint was required to retain. Id. § 1135(a)(1).

Where the Department finds that a taxpayer has not appropriately collected sales taxes due, it has the statutory authority to "assess, determine, revise and readjust" the taxes imposed. Id. § 1142(6). In the case of sales tax assessments, absent willful falsity or fraud, that power is subject to a three-year limitations period. Id. § 1147(b). The Tax Law also permits the Department to collect interest and penalties in certain circumstances in the event that a taxpayer's position is determined to be incorrect; thus, an entity that fails to collect sales tax that it is required by law to collect does so at peril of extremely burdensome penalties. Id. § 1145(a)(1)(i)-(ii). If the taxpayer does not have reasonable cause, she is subject to a strict and immediate penalty of ten percent, with additional

penalties for each month a return remains unfiled or tax unpaid, up to thirty percent. There is also a penalty rate of interest (14.5%) in cases where the underpayment is unreasonable. Id. But, reflecting the fact that tax disputes arise frequently because of disagreement on the law, those penalties are partially abated in cases where the underpayment is "due to reasonable cause" and "not due to willful neglect," id. § 1145(a)(1)(iii), including where an underpayment results from "an honest misunderstanding of fact *or law*."[2] N.Y. Comp Codes R. & Regs. tit. 20, § 2392.1(g)(2)(i) (emphasis added).

The law preserves the right to judicial review. A taxpayer who believes a tax has been incorrectly determined or wrongfully assessed may either seek a refund, N.Y. Tax Law § 1139, or appeal by petition to the Division of Tax Appeals for a hearing before an administrative law judge. Id. § 1138(a)(1). Proceedings under Sections 1138 and 1139 are the "exclusive remedies available to any person for the review of [sales] tax liability." Id. § 1140. A taxpayer who receives an unfavorable determination before the Division of Tax Appeals may seek review of the decision by the Tax Appeals Tribunal. Id. § 1138(4); id. § 2006(7); id. § 2008(1). A taxpayer who is disappointed by a decision of the Tax

---

[2] Where a taxpayer fails to pay taxes due or penalties and interest assessed by the Department, the Department may request that the Attorney General bring an action in any court in New York State, or in any other state or in federal court. Id. § 1141(a). The Department may also issue a warrant commanding a sheriff to levy upon and sell the taxpayer's property. Id. § 1141(b).

Appeals Tribunal may obtain judicial review of the determination through an Article 78 proceeding against the Department before a single Appellate Division, the Third Department. Id. § 2016; N.Y. C.P.L.R. §§ 7803. And, if the Article 78 proceeding is unsuccessful in the Appellate Division, review is available in the New York Court of Appeals based on the rules and considerations that the Court of Appeals applies in all other cases.

The efficacy of this procedure is illustrated in a very recent determination of the Tax Appeals Tribunal in a case brought by the Department against another taxpayer—Helio, LLC ("Helio")—that adopted the same interpretation of Section 1105 as Sprint.[3] See In the Matter of the Petition of Helio LLC, Decision No. 82510 (N.Y. Tax Appeals Trib., July 2, 2015). While the Tax Appeals Tribunal ultimately rejected Helio's interpretation, the case illustrates the proper route for adjudicating legitimate tax disputes—assessment of taxes due, adjudication in an administrative proceeding subject to a right of appeal, and finally, enforcement of an order to pay taxes and appropriate penalties where they are found due. This is how the Legislature intended underpayments of sales tax to be remedied.

---

[3] While Helio became a subsidiary of Sprint Nextel Corporation in November 2009, it adopted its interpretation of the Tax Law several years before.

The Attorney General's approach in this case is at odds with this carefully balanced structure. By leaping from an allegation of underpayment of taxes to an assertion of liability under the NYFCA, the Attorney General undermines the structure that the Legislature expressly provided to address tax disputes and vests the executive with virtually unfettered authority over the interpretation and administration of the tax laws.

B. ***The NYFCA Is Intended To Punish Fraud, Not To Serve As A Vehicle For Resolving Good Faith Interpretive Disagreements***

The NYFCA performs a different function from the tax assessment regime prescribed by the Tax Law. It is directed to knowingly false claims, statements, or records, *i.e.*, it is directed to the taxpayer who makes a claim or a statement or record knowing it to be false. N.Y. State Fin. Law § 188(1)(g). It is designed to deter. It imposes penalties of "three times the amount of all damages, including consequential damages," plus attorneys' fees and costs. Id. § 189(1), (3). It also permits claims to be brought—and treble damages penalties imposed—for up to ten years after a violation is committed, id. § 192(1), in contrast to the Tax Law, which gives repose after three years for unpaid taxes. N.Y. Tax Law § 1147(b). While enforcement under the Tax Law is vested, in first instance, with the Department, the authority to pursue claims under the NYFCA is charged either to a law enforcement office—the Attorney General, N.Y. State Fin. Law §§ 190(1),

194, a political office holder, whose primary charge is to "prosecute . . . all actions and proceedings in which the state is interested," N.Y. Exec. Law § 63—or to private parties motivated by the prospect of windfall recoveries.[4] N.Y. State Fin. Law § 190(2). Unlike the Tax Law, the NYFCA simply is not implicated when a taxpayer's conduct is objectively reasonable—as evidenced by the fact that the Tax Law, but not the NYFCA, specifically addresses "reasonable" conduct, providing for the abatement of penalties in such cases.

These widely differing procedures are explained by the differing functions of the Tax Law as compared to the NYFCA. The objective of the FCA is to root out and deter knowingly false statements, not to deter taxpayers from taking novel or unpopular positions different from those of the State. See, e.g., Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1476-77 (2d Cir. 1995) ("It is self-evident that the FCA is an anti-fraud statute."); S. Rep. No. 99-345, at 9 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274 ("The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services."); Allison Engine Co., Inc. v. U.S. ex rel. Sanders, 553 U.S. 662, 672 (2008) ("[I]t must be shown that the conspirators intended to

---

[4] Indeed, New York is the *only* state in the country to permit *qui tam* actions based on an underpayment of taxes. N.Y. Tax Law §§ 189(1)(d), (g), 189(4); Press Release, Senator Eric. T. Schneiderman Shepherds Historic Anti-Fraud Taxpayer Protection Measure Through Legislature (July 1, 2010), http://www.nysenate.gov/press-release/senator-eric-t-schneiderman-shepherds-historic-anti-fraud-taxpayer-protection-measure- (hereinafter "Schneiderman Press Release").

'defraud the Government.'"); Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 793 (2000) ("[T]he Act was intended to reach all types of fraud . . . ." (quoting United States v. Neifert-White Co., 390 U.S. 228, 232 (1968))); Rainwater v. United States, 356 U.S. 590, 592 (1958) ("It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims.").

Moreover, when the New York Legislature determined that existing provisions of the Tax Law were insufficient to deter fraudulent conduct in the tax realm and passed the 2010 amendments to the NYFCA to extend the statute's reach to tax matters, it did so against the backdrop of New York's administrative tax regime as well as the legislative landscape of FCA statutes nationally.[5] It plainly did not intend its extension of liability to false statements of tax filings to *sub silentio* displace the intricate and carefully-calibrated provisions of the Tax Law. Rather, the Legislature was appropriately mindful that it was the *first state in*

[5] Until 2007, New York had no state law equivalent to the FCA, although such legislation had been repeatedly introduced. See Michael Morse et al., Protecting the Empire: A Practitioner's Primer on the New York False Claims Act, 82-Feb N.Y. St. B.J. 22 (2010). In 2006, however, Congress undertook to promote the use of the federal FCA and similar state legislation to combat Medicaid fraud. It did so, in part, by enacting a provision entitling States to retain a greater portion of any recovery by the State under the federal FCA, but *only if* the State itself enacted "a law relating to false or fraudulent claims that meets certain requirements." H.R. Conf. Rep. 109-362, at 304 (2005), reprinted in 2006 U.S.C.C.A.N. 3, 122; see also 42 U.S.C. § 1396h. The NYFCA was New York's response to that Congressional direction and, as the Attorney General acknowledges, it was "closely modeled on the federal False Claims Act." NYAG Br. 16; see also State ex rel. Seiden v. Utica First Ins. Co., 96 A.D.3d 67, 71 (1st Dep't 2012), lv. denied 19 N.Y.3d 810 (2012) ("The NYFCA was enacted as part of a federal incentive to limit Medicaid fraud.").

the nation to explicitly extend the reach of its FCA to tax matters,[6] see N.Y. State Fin. Law § 188(3), and was well aware of the substantial deterrent consequences of the statute's treble damages penalty. See Schneiderman Press Release. Accordingly, the Legislature made clear that its object in doing so was "to authorize actions under the False Claims Act *alleging tax fraud*…." Assembly Mem. in Support, Bill Jacket, L 2010, ch. 379 at 5 (emphasis added).

C. ***The NYFCA Cannot Be Stretched To Apply To Objectively Reasonable Interpretations Of The Tax Law***

The New York Legislature could not have been clearer that the NYFCA is intended to sanction those who make representations to the government that are "false," not as a substitute for the administrative tax assessment process in cases involving *bona fide* tax liability disputes.

The NYFCA must be read *in pari materia* with the Tax Law, such that neither displaces the other and each performs a distinct function. See N.Y. Stat.

---

[6] All but ten states explicitly exclude tax matters from FCA liability, and of these, only five states in addition to New York currently have false claims legislation in place that potentially reaches claims arising in the tax context. See Del. Code Ann. tit. 6, § 1201; Nev. Rev. Stat. §§ 357.10-357.250; 740 Ill. Comp. Stat. 175/3(c); Ind. Code § 5-11-5.5-2(a); 9 R.I. Gen. Laws § 9-1.1-3(d). Three of the nine States aside from New York that do not explicitly exclude tax matters from FCA liability—New Hampshire, Washington, and Wisconsin—define liability under their respective statutes in the context of medical services payments or claims to the state health department or equivalent agency responsible for Medicaid programs, and thus would not apply to matters arising in the tax context. N.H. Rev. Stat. Ann. §§ 167:58, 167:61-b; Wash. Rev. Code § 74.66.010; Wis. Stat. § 20.931. With respect to a fourth—Florida—a Florida appellate court held that a claim for monetary recovery under the Florida FCA was precluded by the State's Tax Act, which "creates a mandatory administrative process when taxes are involved." See Stevens v. State, 127 So. 3d 668, 669-70 (Fla. Dist. Ct. App. 2013).

Law § 221 (doctrine of "*in pari materia*" applies to "statutes or general laws, usually enacted at different times but with reference to the same subject matter"); Matter of Plato's Cave Corp. v. State Liquor Auth., 68 N.Y.2d 791, 793 (1986) ("[S]tatutes which relate to the same or to cognate subjects are in pari materia and to be construed together unless a contrary intent is clearly expressed by the Legislature."). In contrast to the Tax Law, the scope of the NYFCA is thus expressly limited to claims against the State premised on a "*knowingly . . . false* record or statement." N.Y. State Fin. Law § 189(1)(g) (emphasis added).

This distinction is consonant with the interpretations given analogous statutes under federal law. As the parties acknowledge in their respective Briefs, federal courts apply the Supreme Court's analysis in Safeco Insurance Co. of America v. Burr, 551 U.S. 47, 69 (2007), to determine whether a claim is willfully false, as opposed to merely erroneous. See Sprint Br. 48-52; NYAG Br. 69-71; Sprint Reply Br. 26. Contrary to the Attorney General's arguments in this case, however, the analysis under Safeco does not turn on whether the defendant believed that the government might challenge its interpretation of the law. The government enjoys no monopoly on interpretation of the tax laws, as it may be presumed that the government will adopt the interpretation of the law that most increases tax collections. Accordingly, Safeco teaches that the violation of a

statute is not "willful" unless the party violating the statute acts in reliance on an interpretation of the statute that is "objectively unreasonable." 551 U.S. at 69.[7]

Applied to the FCA context, the Safeco analysis rightly focuses not on whether the defendant believed its interpretation of the law was susceptible to challenge, but on whether that interpretation was an objectively reasonable reading of the statute. See, e.g., U.S. ex rel. Hixson v. Health Mgmt. Sys., Inc., 613 F.3d 1186, 1191 (8th Cir. 2010) ("[W]e need not decide whether the defendants correctly interpreted § 147.136 since a statement that a defendant makes based on a reasonable interpretation of a statute cannot support a claim under the FCA if there is no authoritative contrary interpretation of that statute."). Courts have repeatedly held that relying on even questionable—but not objectively unreasonable—legal interpretations does not lead to liability in the context of federal FCA claims. See Chapman v. Off. of Child. & Fam. Servs. of the State of N.Y., 423 F. App'x 104, 105 (2d Cir. 2011) (holding that allegations of claims premised on "debatable" legal interpretations did not state an FCA claim); U.S. ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[D]ifferences in interpretation growing out of a disputed legal question are similarly not false under the FCA."); Hagood v. Sonoma Cty. Water Agency, 81 F.3d 1465, 1478 (9th Cir. 1996) ("[T]o

[7] Notably, the Supreme Court placed the burden on the government to show that the defendant's interpretation was objectively *un*reasonable (rather than imposing an obligation on the defendant to prove the reasonableness of its interpretation). Safeco, 551 U.S. at 69; Cf. NYAG Br. 64-67.

take advantage of a disputed legal question, as may have happened here, is to be neither deliberately ignorant nor recklessly disregardful."). So too here: the NYFCA penalizes fraud, not potentially erroneous, but objectively reasonable, legal interpretations.

Other state courts that have reached the issue in the tax context have likewise affirmatively rejected the view that analogs to the NYFCA support liability for reasonable misinterpretation of the tax laws. In International Game Technology, Inc. v. Second Judicial District Court of the State of Nevada, 127 P.3d 1088 (Nev. 2006), for example, the Nevada Supreme Court considered whether Nevada's False Claims Act, Nev. Rev. Stat. § 357, permits a relator to pursue claims against, among others, various internet retailers for failing to collect Nevada sales tax on internet sales. Id. at 1095-96. Nevada's FCA, like the NYFCA, permits claims premised on false or misleading tax statements and records. Id. at 1104-05. Nonetheless, the Nevada court held that there were limits to the scope of liability under the Nevada FCA: in particular, that liability does not extend to cases in which the taxpayer's liability is at least arguable. The court held:

> [A] claim that cannot be resolved without evaluating the facts of a particular case under the revenue statutes—for example, when there exists a legitimate dispute on whether taxes are actually owed under Title 32—does not fall within the FCA's definition of fraudulent acts or its purpose to expose specific instances in which a person

> "lies" to the government, and it is not properly resolved by the courts in the first instance.

Id. at 1106. The court grounded its decision on the underlying public policy rationales that led to the adoption of the Nevada FCA, explaining that "the [Nevada] FCA is meant to encourage private persons to reveal instances when a person has cheated or attempts to cheat the government by submitting documents containing manufactured or omitted facts or data." Id. Accordingly, the Court reasoned that, because the claim "require[d] the factual determination of whether the retailers were indeed entities subject to Nevada sales tax under the states and the resolution of arguable legal issues regarding whether the sales of the retailers in question had sufficient nexus with Nevada to hold the retailers liable," the claim did not fall within the scope of the Nevada FCA. Id. at 1108.

Likewise, in State ex rel. Beeler Schad & Diamond, P.C. v. Ritz Camera Centers, Inc., 878 N.E.2d 1152 (Ill. App. Ct. 2007), an appellate court in Illinois held that its Whistleblower Reward and Protection Act, 740 Ill. Comp. Stat. 175/1 et seq., patterned on the federal FCA, did not support liability for erroneous legal interpretations. Id. at1162. A relator brought suit alleging that the defendant's records, tax returns, and statements claiming that no use tax was due on sales to Illinois consumers through catalogues or over the internet were knowingly false within the meaning of the Act. Id. at 1156. Like Sprint, the defendants in Ritz Camera argued that "whether they were required to collect use

tax is a disputed question of law and assuming *arguendo* that the alleged violations could be proved, the State could not prove that defendants had the requisite 'knowledge' required under the Act." Id. at 1158. The Illinois court determined that it was of little import that its state's Department of Revenue had promulgated general guidelines for making such determinations. Id. at 1159. Rather, it held that a sales tax receipt that disclosed the sale and the amount of tax paid was not "false" where it was premised on a reasonable, albeit incorrect, reading of the tax statute. Id. at 1162 ("[A] document reflecting that no tax is being collected and the document reflects that use tax due is '$0.00' cannot be considered false for purposes of the Act.").

This case is directly analogous to those considered in the decisions above: it concerns a dispute regarding the interpretation of the law, not a misrepresentation (or even alleged misrepresentation). The Attorney General's bald assertion that Section 1105(b) is "unambiguous[]," NYAG Br. 31, does not make it so. Whatever one's view of what Section 1105(b) actually requires, the Attorney General does not dispute that Sprint believed in good faith that the Legislature did not intend to tax the services it provides. Instead, he alleges only that Sprint's interpretation differed from that of the State and from Sprint's competitors—*i.e.*, it was novel and controversial. For Sprint to select an interpretation most favorable to its customers from among competing plausible

interpretations of the law is certainly not fraud; indeed, it is responsible corporate behavior.

II. Allowing The Attorney General To Use The NYFCA's Treble Damages Regime To Combat Objectively Reasonable Interpretations Of The Law Would Chill The Rights Of Citizens To Challenge The Views Of The State And Undermine Development Of The Law

A. *The Attorney General's Position Is Inconsistent With The Rule Of Law*

The Attorney General argues that his allegations satisfy the requirements of the NYFCA because Sprint's position regarding the interpretation and application of Section 1105(b) differs from the interpretation of that law by the Department and by certain other similarly affected taxpayers. NYAG Br. 56-58. He also proffers that, if Sprint desired to adopt an interpretation different from that of the Department, Sprint could have "sought review, rather than silently engaging in a course of conduct" in accordance with its interpretation of Section 1105(b). NYAG Br. 60. The Attorney General's position violates fundamental postulates upon which our legal system is built.

In a society of laws, it is the province of the Judiciary—and not of the Executive (and not of the Department)—to declare what the law is. See, e.g., Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Matter of Council of City of N.Y. v. Bloomberg, 6 N.Y.3d 380, 399 (2006) (same). The Department is not

the judiciary and its interpretation of the Tax Law is not entitled to deference. See, e.g., Lorillard Tobacco Co. v. Roth, 99 N.Y.2d 316, 322 (2003) (holding that the Department was not entitled to deference on interpretation of provision of Tax Law related to sale of cigarettes because issue was "a matter of statutory interpretation"); Matter of SIN, Inc. v. Dep't of Fin. of City of N.Y., 71 N.Y.2d 616, 620 (1988) ("[T]here is little reason to defer to a contrary interpretation given by the [Department].").[8] Only the judiciary has the power authoritatively to interpret the tax laws and, even then, when it comes to interpreting ambiguous revenue statutes, the long-established rule is that they are to be construed *against the State* and in the taxpayer's favor. See, e.g., Matter of Quotron Sys. Inc. v. Irizarry, 48 N.Y.2d 795 (1979) ("[A]mbiguities in tax statutes are to be construed *most strongly in favor of the taxpayer* and *against the government*.") (emphasis added).[9] Indeed, courts have often disagreed with the Department—including in the context of *this very statute*. See N.Y. State Cable Television Ass'n v. State Tax

---

[8] All the more so here where the Department's "guidance" was not contained in any formal rulemaking, but rather in an informal memoranda not subject to notice and comment or even purporting to have the force of law. See Amendments Affecting the Application of the Sales and Use Tax and Excise Tax Imposed on Mobile Telecommunications Service, N.Y. State Dep't of Tax. and Fin. Mem. No. TSB-M-02 (July 30, 2002); see also NYAG Br. 22, 56; Sprint Reply Br. 16 n.7.

[9] See also American Net & Twine Co. v. Worthington, 141 U.S. 468, 474 (1891) ("[W]ere the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of congress to impose a higher duty should be expressed in clear an unambiguous language."); Trump Village Section 3, Inc. v. City of N.Y., 24 N.Y.3d 451, 456 (2014) ("doubts concerning [a taxing statute's] scope and application are to be resolved in favor of the taxpayer" (quoting Debevoise & Plimpton v. N.Y. State Dep't of Taxation & Fin., 80 N.Y.2d 657, 661 (1993))); N.Y. Stat. Law § 313.

Comm'n, 59 A.D.2d 81 (3d Dep't 1977) (holding that an Opinion of Counsel issued by the Department interpreting Section 1105(b) was not supported by legislative intent and was incorrect); see also Manhattan Cable Television, Inc. v. N.Y. State Tax Comm'n, 137 A.D.2d 925, 927 (3d Dep't 1988) (noting that "[t]he validity of the . . . opinion of counsel . . . [was] successfully challenged.").[10]

Thus, while the Department's guidance is useful to taxpayers struggling to understand the Tax Law, it is not the law and the taxpayer who disagrees with the Department's guidance based on an objectively reasonable interpretation of the law is both entitled to its view and to file its taxes on the basis of its view—subject only to the risk that, if the taxpayer is wrong, penalties and interest may accrue; not that the taxpayer will be effectively prosecuted for fraud.

Nor does it add to the Attorney General's allegations for him to claim that "none of [Sprint's] major competitors … had adopted such an interpretation of the Tax Law." NYAG Br. 2-3. First, the Attorney General's premise is belied by the recent determination involving Helio, which adopted effectively the same

---

[10] In other cases too, New York courts have rejected various interpretations of the Tax Law put forward by the Department. See Matter of Gaied v. N.Y. State Tax Appeals Tribunal, 22 N.Y.3d 592, 598 (2014) (reversing the Tax Appeals Tribunal and holding that there was "no rational basis for [the Department's] interpretation."); Raemart Drugs, Inc. v. Wetzler, 157 A.D.2d 22 (3d Dep't 1990) (holding the Department's interpretation of its own regulation concerning the maintenance of sales records for tax purposes was erroneous and that its application of that interpretation to deny taxpayer's application for a refund was "irrational."); Dreyfus Special Income Fund, Inc. v. N.Y. State Tax Comm'n, 134 Misc. 2d 679, 682 (Albany Co. 1986) (declaring a regulation promulgated by the Department to be "invalid and contrary to the plain meaning" of the applicable section of the Tax Law), aff'd, 126 A.D.2d 368 (3d Dep't 1987); aff'd, 72 N.Y.2d 874 (1988).

interpretation of the Tax Law. See supra at 13. Indeed, it is telling that, although the Tax Appeals Tribunal ruled against Helio's position on the law, it imposed minimum interest finding that "reasonable cause existed" for its position. See In the Matter of the Petition of Helio LLC, Decision No. 82510, ¶ 66. Second, the Attorney General does not know whether Sprint's competitors subjectively disagreed with Sprint on the law, or instead agreed with Sprint but nonetheless decided to collect that tax based on the fear that the State would challenge its failure to collect. More fundamentally, however, the law is not made based on a poll of affected parties. That a person reasonably challenging the government's interpretation of the law is in the minority—or is even a lone voice in the wilderness—does not limit that person's right to do so.

The Attorney General argues that Sprint must have behaved with a sinister motive because, had its interpretation of the law been genuine, it would have:

(a) "Paid the tax and then claimed a refund,"

(b) "[P]etitioned for a declaratory ruling or advisory opinion from the Commissioner," or

(c) "[A]ttempted … to persuade the Tax Department to change its position."

NYAG Br. 60-61. The New York legislature has provided those alternatives to the taxpayer as an option to avoid the risk of interest and penalties if it guesses wrong about a court's interpretation of the law; if the taxpayer desires to know the

position the courts will take before it files a return based on its own interpretation of the law, the taxpayer can pay the tax and claim a refund or petition for a declaratory ruling or seek an advisory opinion. See N.Y. Tax Law § 1139; N.Y. Comp. Codes R. & Regs. tit. 20, §§ 2375.3(a)(1), (c), 2376.2. Doing so pretermits the risk of any penalty. See, e.g., N.Y. Comp. Codes R. & Regs. tit. 20, § 2375.3(a)(1)(iii) (explaining that declaratory rulings are generally promulgated "for prospective planning purposes").

But the law does not require that the taxpayer exercise that option. It permits the taxpayer to take the position she believes is right, subject to a ten percent penalty if the courts ultimately determine that the taxpayer was incorrect. Sprint's behavior was the normal and ordinary behavior of any taxpayer who is confident enough in its interpretation of law to risk the statutory penalties if the State audits the returns and disagrees. Thus, while Sprint presumably *could* have taken the steps that the Attorney General outlines and avoided the risk of penalties in the event that its interpretation of the law was found to be incorrect, New York law does not provide that disagreement with the Department constitutes fraud. Cf. NYAG Br. 59-61.[11]

---

[11] Moreover, because the taxes in question here were not to be *paid* by Sprint, but rather were to be *collected* by Sprint from its customers on behalf of the State, NYAG Br. 61; see also N.Y. Tax Law § 1132(a), this is not the simple case of an individual taxpayer who may endorse his tax return "under protest" and later seek a refund. Rather, the Attorney General appears to

B. *The Attorney General's Position Unfairly* *Punishes The Taxpayer's Exercise Of Her Rights*

The New York State Tax Law already imposes harsh penalties on the taxpayer who—based on an objectively reasonable view of the law—underreports her taxes: an immediate ten percent penalty, with additional penalties monthly, up to thirty percent, plus a penalty rate of interest. Those penalties are designed to compensate the State for underreporting of taxes and the delay and costs of audits and administrative proceedings to enforce the Tax Law and collect taxes due without deterring the right to judicial review. Because the State cannot audit every taxpayer, these penalties exist to ensure that the taxpayer's decision on a disputed tax issue is based on a reasonable interpretation of the law, not calculations of the odds of being caught.

The highly punitive treble damages provision of the NYFCA has a wholly different objective: deterrence and punishment of would-be fraudsters. See Schneiderman Press Release ("The stronger provisions—a 'false claims act on steroids'—include . . . [e]nacting triple damages and mandatory civil penalties for tax fraud . . . ."). Punishment and deterrence are at the heart of the NYFCA's purpose—but with respect to *fraud*, not to legitimate challenges based on objectively reasonable legal interpretations of the law. See, e.g., United States v.

---

suggest that Sprint should have charged thousands of customers for taxes that it believed were not actually due.

Sforza, 326 F.3d 107, 113 (2d Cir. 2003) ("The FCA does allow . . . for the deterrence of fraud by including treble damages.").

Thus, by definition, the position advocated by the Attorney General would more than compensate the State for the lost revenue from underreporting. It is designed to—and will—deter taxpayers from taking positions different from those of the State for fear that, if they do not agree with the State's position, they will be subject to treble damages. That position threatens the right of all taxpayers to disagree with the interpretations of the State. If accepted, it would make the law whatever the State says the law should be, substituting a government of men for a government of laws. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 408 (1990) (explaining that punitive penalties "would be likely to chill all but the bravest litigants" from engaging in legitimate litigation, and noting that threats of penalties should not be used to deter such litigation).

C. *The Attorney General's Position Threatens The Integrity Of The Law*

New York's administrative tax regime permits, and indeed encourages, development of the law through the resolution by the Tax Court of disputes between the taxpayer and the State. The statutory enforcement mechanism under the Tax Law clearly prefers this procedure to litigation before courts of general jurisdiction, labeling such specialized proceedings "the exclusive remedies available to any person for the review of tax liability imposed by this

article." N.Y. Tax Law § 1140. This is a sound policy judgment by the Legislature, reflecting what the Supreme Court, in Dobson v. Commissioner of Internal Revenue, 320 U.S. 489 (1943), recognized as an area of law uniquely suited to specialization:

> [The Tax Court] deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer.

Id. at 498-99.

The Attorney General's litigation strategy in this case short-circuits this process, and does so in a highly arbitrary way. In place of a procedure that fosters uniform interpretation of the tax laws through a centralized re-assessment process, followed by appeals to a centralized Tax Appeals Tribunal, and thereafter to a single specialized department of the Appellate Division (the Third Department), N.Y. Tax Law § 2016, the Attorney General asserts that claims challenging a taxpayer's interpretation of the law can—subject only to the whim of the Attorney General or a private relator—proceed immediately to supreme courts spread across this State's sixty-two counties, with appeals to four different Appellate Divisions and essentially only discretionary review by this Court.

Likewise, in place of a confidential tax assessment process, id. § 1146, the Attorney General proposes that tax disputes (which often involve sensitive business and competitive information) be conducted in the public spotlight. And in place of a proceeding that is initiated by the Department after careful review and consideration of all relevant facts, in light of its expertise, the Attorney General proposes substitution of a process by which private relators initiate tax enforcement proceedings based on their own interpretations of the law and private financial interests. As is illustrated by the different tracks taken in this case and in the case against Helio, see supra at 13, the Attorney General's approach invites arbitrariness – resolving some tax disputes through the procedure designed by the Legislature while, absent any distinguishing principle, others (like this case) fall subject to a procedure that, if successful, may result in far more draconian penalties for the same conduct.

Moreover, such a scenario would undermine the purpose for which the Division of Tax Appeals and the Tax Appeals Tribunal were created:

> The objective of the legislation, as evidenced by the Governor's supporting memoranda, was to remove any perception of unfairness or inequity in the tax appeals hearing system as it then existed arising from the power of the former New York State Tax Commission to collect, assess and enforce the taxes it administered, as well as to adjudicate controversies arising from its administration of taxes. . . . For more than a quarter of a century [prior to 1986], objections had been voiced to New York's tax dispute resolution process on the ground that the former

> Tax Appeals Bureau operated within the New York State Department of Taxation and Finance and reported to the New York State Tax Commission, which is the body charged with administering and collecting taxes. Thus, the former system of tax dispute resolution provided an overlap of regulatory and adjudicatory functions, giving rise to criticism that the system was biased and inherently unfair.

N.Y. State Soc'y, 161 A.D.2d at 1, 4, 6-7. Enabling the Department to legislate by threat of treble damages would go even a step further than combining regulatory and adjudicatory functions.

The interpretation of the NYFCA urged by the Attorney General would be decidedly bad for the development of law in this State. The right and ability to challenge the government's interpretation of the law fulfills an important societal objective in the development of a better, clearer and more considered body of law. As this very dispute illustrates, the Tax Law is extraordinarily complex, and requires interpretation by the courts. That process is aided by parties taking opposing views, vigorously advocating their positions, and permitting the courts to reach a judgment through the benefits of that adversarial process. See, e.g., Price v. High Pointe Oil Co., 828 N.W.2d 660, 663 (Mich. 2013) ("The common law is always a work in progress and typically develops incrementally, *i.e.*, gradually evolving as individual disputes are decided and existing common-law rules are considered and sometimes adapted to current needs in light of changing times and circumstances."); Commonwealth v. Kearns, 896 A.2d 640, 647 (Pa. 2006) ("[A]n

adversarial process will best advance the interests of the parties and the development of the law.”).

Barriers to citizens exercising their rights to challenge the government’s interpretation of the law not only impede individual liberty; they retard the development of the law itself. Matter of Thomas S. v. Robin Y., 209 A.D.2d 298, 304 (1st Dep’t 1994) (“The development of the law is not aided by summary determinations of novel controversies.”).

III. Retroactive Liability Under The NYFCA Is Not Compatible With The *Ex Post Facto* Clause

Finally, the Attorney General’s retroactive use of the NYFCA to reach tax filings that were made before the 2010 amendments expanded its scope to reach tax matters is inconsistent with basic principles of fairness and with the *Ex Post Facto* clause of the United States Constitution.

There is no dispute that applying the NYFCA to tax-related statements occurring prior to August 13, 2010 would be “retroactive.” The critical question is whether NYFCA liability is “penal”—if it is, the Attorney General’s claim cannot stand.

While the Attorney General relies on a handful of federal cases that he characterizes as finding that “the federal FCA is not punitive for purpose of the *Ex Post Facto* and Double Jeopardy Clauses,” NYAG Br. 77, the reasoning of those cases does not go nearly as far as the Attorney General suggests because—to the

extent that they concern the FCA at all—the cases do not meaningfully engage with the implications of the treble damages regime, particularly as applied as a substitute for the criminal penalties already available for fraudulent tax claims. See Sanders v. Allison Engine Co., 703 F.3d 930, 945 n.13 (6th Cir. 2012) ("Our review of cases … suggests that the analysis under this factor [the nature of the penalty] is often conducted at a fairly high level of generality."); cf. U.S. ex rel. Miller v. Bill Harbert Int'l Const., Inc., 608 F.3d 871, 878 (D.C. Cir. 2010) (no discussion of treble damages); United States v. Rogan, 517 F.3d 449, 454 (7th Cir. 2008) (no issue of retroactivity; acknowledging that "[t]he False Claims Act has a penal component, no doubt," but holding that it did not implicate the Excessive Fines Clause). Where it has reached the issue, by contrast, the Supreme Court has urged caution with respect to retroactive application of treble damages regimes. Landgraf v. USI Film Prods., 511 U.S. 244, 281 (1994) ("[R]etroactive application of punitive treble damages provisions . . . would present a potential ex post facto problem.").

Whether retroactive application of a statute violates the *Ex Post Facto* clause turns not on a general construction of the statue in the abstract, but rather on its effect as applied. See Cook County v. U.S. ex rel. Chandler, 538 U.S. 119, 130 (2003) ("[T]he tipping point between payback and punishment defies general formulation, being dependent on the workings of a particular statute and the course

of particular litigation."); see also Doe v. Pataki, 120 F.3d 1263, 1275 (2d Cir. 1997), as amended on denial of reh'g, (Sept. 25, 1997) ("[W]hether a sanction intended as regulatory or nonpunitive is 'so punitive in fact' as to violate the ex post facto prohibition is a highly context specific matter."). Here, the practical effect of the Attorney General's action in this case is to take an act that is defined as a criminal offense under the laws of this State, N.Y. Tax Law § 1801 (defining tax fraud acts), attempt to lower the standard of scienter required, Cf. N.Y. Penal Law § 15.05(2) ("knowingly" requires that the defendant be "aware" of the nature of his conduct), reduce the burden of proof from beyond a reasonable doubt to a preponderance of the evidence, and increase the potential financial penalty by half, N.Y. Penal Law § 80.10(e)(providing for corporate criminal penalties "not exceeding double the amount of the corporation's gain from the commission of the offense.").[12] Both the statute, and the Attorney General's use of it, are unambiguously calculated to be punitive. See also Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1438, 1441, 1443 (10th Cir. 1998) (holding that the application of a multiplier to actual contempt damages is "not compensatory" and transforms the sanction into a criminal contempt punishment).[13]

---

[12] The Attorney General's observation that the FCA "provides for only monetary remedies" fails to distinguish the FCA from a penal statute as applied to a corporate defendant—for which all penalties for tax-related crimes are financial. See N.Y. Tax Law § 80.10.

[13] The Attorney General relies principally on the analysis of the district court in U.S. ex rel. Bilotta v. Novartis Pharm. Corp., 50 F. Supp. 3d 497 (S.D.N.Y. 2014); NYAG Br. 73, but the

Moreover, there is something especially perverse in the Attorney General's acceptance that tax claims in relation to tax filings more than three years old are barred by the statute of limitations, NYAG Br. 28 n.4, while simultaneously attempting to effectively pursue those same time-barred claims under the NYFCA. Cf. Landgraf v. USI Film Prods., 511 U.S. at 280 (legislation does not retroactively revive barred claims "absent clear congressional intent favoring such a result."). Were the Attorney General's position in this case accepted, the State would be free to retroactively increase the financial penalties available under virtually any criminal statute merely by labeling them "civil," enacting them outside of the Penal Law, and retroactively imposing such increased penalties for claims that were already time-barred when the legislation was passed. Application of the NYFCA in this case is clearly punitive and, accordingly, retroactive application is inconsistent with the *Ex Post Facto* clause. See also Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 971-72 (2d Cir. 1985) (finding "exclusively prospective application" of a civil statute that imposes treble damages "as the better course.").

---

analysis of the court in that case is distinguishable. Bilotta did not involve tax claims and therefore was not a circumstance in which the Attorney General had chosen to retroactively substitute FCA liability for criminal penalties that were in effect. See Bilotta, 50 F. Supp. 3d at 501-04 (allegations of kickback schemes proscribed by the FCA).

CONCLUSION

The Chamber respectfully submits that the decisions of the Appellate Division should be reversed, and Sprint's motion to dismiss should be granted.

Dated: New York, New York
July 21, 2015

Respectfully submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: ______________________
Lewis J. Liman
A Member of the Firm

One Liberty Plaza
New York, New York 10006
T: 212-225-2000
F: 212-225-3999
lliman@cgsh.com

Attorneys for Amicus Curiae The Chamber of Commerce of the United States of America

Of Counsel:
Nowell D. Bamberger
Robert A. Lawner