Interview With William Comiskey, Former New York State Tax Official

by Billy Hamilton

The movie *Star Wars* has given us a generation's worth of cultural references that are useful for all sorts of purposes, including tax administration. In the tax agency where I worked, we used to say that our fellow employees that went to work for private tax firms had gone over to the dark side. Little did we know that on those rare occasions when someone ventured in the other direction, private firms referred to that as going over to the dark side.

William Comiskey prefers not to think of either side as the dark side. He has worked on the government side as an attorney for 30 years, most recently as deputy commissioner of the Office of Tax Enforcement with the New York Department of Taxation and Finance. Recently, he left government to work for Hodgson Russ LLP, a 200-attorney law firm that practices in many legal areas, including state and local tax practice in New York and nationwide. An interesting point of trivia — former presidents Millard Fillmore and Grover Cleveland used to work at Hodgson Russ, giving you a sense of how long it's been around. Comiskey's experience tells him that both sides have their part to play in the tax world. He said:

> We need to ratchet down the drama so the process doesn't become adversarial. The state is trying to make sure that all of the taxes that are owed are paid, and the vast majority of taxpayers are trying to pay what they owe. Everyone has an interest in seeing that taxpayers pay what's owed and no more.

Well, maybe not everyone shares the interest that was the focus of Comiskey's attention for the three-and-a-half years that he headed the state's tax enforcement efforts. One of his most visible successes was an investigation of tax return preparers that he described in *State Tax Notes*[1] last January. The article reported on the results of an ongoing two-year-old program that involved undercover New York agents, outfitted with recording devices, posing as taxpayers with questions, who had visited 177 preparers to that point. The sting discovered that 57 of the preparers — 32 percent — either coached the undercover agents on how to cheat on their returns or urged them not to file a return at all.

"We were amazed at how comfortable they [the tax return preparers] were talking about this to total strangers who were paying them just a few hundred dollars," Comiskey said in an interview. He said the dishonesty on the part of the preparers wasn't limited to unlicensed preparers. Seventeen of the 57 "fraud coaches," as one article put it, were licensed CPAs. One CPA, for example, bragged that he specialized in creating "plain vanilla" returns that would allow the agent to cheat without triggering an audit. According to one report, another CPA generated draft tax returns that gave the agent a choice of paying 25 percent, 50 percent, 75 percent, or all the taxes owed.

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The sting on dishonest preparers drew a lot of publicity, which Comiskey said helps to make the system work better for most taxpayers and preparers who are trying to comply with the tax law. "Effective tax administration," he said, "requires a commitment to aggressive and visible enforcement." He said that the Holy Grail of enforcement is to encourage voluntary compliance. "If you can get

[1]"Taking Aim at Tax Professionals Who Coach Their Clients to Cheat," *State Tax Notes*, Jan. 4, 2010, p. 33, *Doc 2009-25532*, or *2010 STT 1-1*.

people to understand the law and understand the consequences for not complying, then enforcement becomes less important. That's the goal."

Comiskey developed this view of aggressive enforcement through an unusual career that has ranged well beyond tax administration. He began his law career as an assistant district attorney in New York City, the first important step in a career he didn't consciously set out to create. Coming out of law school, he worked for a judge for two years and then was headed to work for a private law firm. In the course of his work for the judge, though, he ran into a lawyer from the Manhattan District Attorney's Office. "He invited me for coffee. He told me if I wanted to have fun, try cases and argue in court, I should give him a call and maybe come to work for the DA. I did, and that conversation changed the path of my career for 30 years," Comiskey said.

Here's another bit of trivia. In the Manhattan district attorney's office, Comiskey worked for famed district attorney Robert Morgenthau. For those of you who, like me, are fans of the long-running television show *Law and Order*, District Attorney Adam Schiff in the series was loosely based on Morgenthau. I asked Comiskey just how true-to-life the series was and whether the assistant district attorneys were all as insufferably self-righteous as Assistant District Attorney (later District Attorney) Jack McCoy, played by Sam Waterston. "You know, in the early years of the series — and this was awhile after I left — I thought it was surprisingly accurate, although I don't remember quite that many good-looking people running around the offices. The character Jerry Orbach played [detective Lennie Briscoe] was probably closer to reality. I thought he nicely captured the essence of the smart and dedicated New York cops that I had the pleasure of working with." After four years, Comiskey joined a white-collar defense firm in New York, but he was drawn back to public service before long, joining the New York State Organized Crime Task Force for 10 years. There followed a rapid succession of jobs — to the Department of Health as chief prosecutor of physician misconduct cases, to the Attorney General's Office to prosecute white-collar crime and official misconduct. In 2003 he became deputy attorney general in charge of the Medicaid Fraud Control Unit under then-Attorney General Eliot Spitzer. It was Spitzer's office that asked Comiskey to join the Finance and Taxation Department when Spitzer became governor in 2007. "If you look at my résumé," Comiskey said, "you might think I can't hold a job, but they all have one thing in common — enforcing the state's laws."

He has a point. Comiskey came to the job with the tax department with wide experience in enforcement and a sure sense that just throwing people at the complexities of modern government was no longer enough. He said that modern enforcement includes, inevitably, not only investing in "boots on the ground" but also the strategic application of technology. "You just can't make tax administration work today without an investment in technology," he said. "In the old days, the state could only look at a tiny portion of returns. Technology today makes it possible to look at all of them."

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Comiskey said that New York, a state that hasn't been a stranger to budget problems lately, has been a leader in applying sophisticated analytical techniques to tax enforcement. "In the last 10 years, the state has spent a lot of money building up its technical capabilities," he said, the point being to use technology to more effectively direct tax enforcement efforts where they are most needed and can be most effective. "In the 1990s, the state installed its first tax administration data warehouse. It brings together data from all sorts of sources to use in the audit process," he said.

The system is called the Case Identification and Selection System (CISS, pronounced "kiss"). The audit division wanted a better way to select cases and manage its inventory. Priorities were to reduce screening time on individual returns by focusing on the common features of noncompliant returns, to identify the characteristics of successful and unsuccessful audits, to identify the types of returns that historically have produced successful audits, and to better direct limited audit time.

Comiskey said the technology has proven of greatest value in sifting through the thousands of personal and corporate income tax returns the department receives annually. "The system really proves its worth during the tax refund season. The day a refund request lands in the agency, it's pumped into the warehouse and pushed up against the data in the system to check its probable validity," he said. "Returns are scored to ascertain if they are seeking questionable refunds — and it all begins on the day the return hits the agency." He said returns are sorted into different "buckets," with some passed along in the process and others set aside for greater scrutiny.

The system doesn't stop there, though. The department's analytics not only look at returns for possible issues but also factor in staffing levels to determine the best use of resources. The computer helps audit and enforcement staff determine where it should focus its efforts to have a maximum effect on collections. The program has, he said, yielded big dividends for the state. "The program has saved the state more than $1 billion since its inception. Today, it saves the state about $300 million a year in questionable refunds alone," Comiskey said. He said it also helps the department make the best use of its limited staff resources by helping with case identification and selection.

The technology also learns as it goes along and has the capacity to make adjustments as it discovers new patterns of taxpayer behavior. Adjustments can be made on the fly if necessary, using math that Comiskey probably went to law school at least partly to avoid. "They showed me one of the algorithms used in the model," he said, laughing. "I couldn't make heads or tails of what it meant, but I had it put on slide and would show it when I made speeches. I'd offer to buy dinner for anyone who could explain it. I didn't get any takers."

The department has recently applied the same system to help with collections as well as audits. There the system is used in a predictive manner, again with the goal of making the most effective use of agency resources. "The system looks at a delinquent account, examines the obligation, and determines the right next step that's most likely to produce a good collection result — whether it's a simple phone call, a field visit, or some other option," he said. "It basically churns out a listing of the next best thing to do on any given case."

Comiskey said the department has been pleased with the results to date. "They are on target for collecting about an additional $30 million a year using the technology. Who knows? Results could continue to improve. The machine learns as it goes along, and it's difficult to predict the possibilities. I do know that this is just the tip of the iceberg for modern tax administration," he said.

William Comiskey, formerly deputy commissioner with the Office of Tax Enforcement of the New York State Department of Taxation and Finance, is now a partner with Hodgson Russ LLP.

States may need the help that sophisticated technology can provide. The taxpayer population is growing, and the issues grow more complex with each passing year. Taxpayers — and inevitably tax cheats — also become more sophisticated. I asked Comiskey if he had a sense of what sort of tax gap New York is dealing with these days. He said the state hasn't done an in-depth analysis of the tax gap like the one that the IRS occasionally prepares. In fact, most states haven't done those studies, which take time and resources and at times produce results that tax agencies aren't eager to publicize.

The IRS pioneered the idea of estimating the tax gap 40 years ago. Its estimates show that over the past 30 years the tax gap has ranged from 16 to 20 percent of total federal tax liability — that is, up to $1 of every $5 that is owed to the government can be collected only through tax enforcement efforts — and often not then. Despite vigorous enforcement by the IRS, a significant amount of revenue remains unreported and unpaid. In 2005 the IRS estimated what it characterizes as the "gross tax gap" to be approximately $345 billion or slightly more than 16 percent of tax liability. About $55 billion of that total eventually is collected through enforcement actions and other late payments, leaving a net tax gap of approximately $290 billion. Those estimates, which are the most recent available, were developed using data collected in tax year 2001 and earlier. The size of the tax gap, obviously, could have grown significantly in the succeeding years simply because of economic growth and increases in the taxpayer population.

States' estimates of their own tax gaps vary, and the simple truth is that in most cases, like New York, there are no estimates. Only a handful of states have prepared these studies in the past decade, and because of the enormous amount of analysis associated with them, they appear only at irregular intervals. Most of the states that have done studies conclude that their level of noncompliance falls into the range found by the IRS in its studies, from a low of 80 percent compliance to 90 percent. Still, the numbers represent a considerable amount of lost tax revenue, and the states that have focused their attention on the issue typically have invested in efforts to close the gap. Other states proceed, presumably, with the recognition that a tax gap exists even if they haven't got an estimate of its exact size. That tax cheats are abroad in the world isn't a state secret — and it's logical to assume that their numbers are growing.

"I'm not sure of the tax gap's size, but even with the steps we've taken, I wouldn't be surprised to find that it's growing given the current economic situation," Comiskey said. "Anyone in the department probably would say that it's in the multibillions of dollars. As the economic situation has grown for all states, it's a problem that's more difficult for them to ignore."

Comiskey said that New York, aware of the need to address the problems of both inadvertent and intentional noncompliance, built a plan for addressing the tax gap into its recent strategic plans. "The tax gap is caused by a host of issues," he said. "The complexity of the tax system is a big factor. Even the most honest and compliant taxpayer can be at a loss for what to do. But the problem that I focused on was people that are determined not to pay what they owe.

"The most compelling evidence of tax evasion is the level of complicity we found among preparers," Comiskey said. He said there are many areas of the tax law in which it's difficult to identify tax evasion without detailed examination, something tax agencies have the resources to do for only a relatively small percentage of returns. "You get a sense of the scope of the problem when you see how some tax preparers would point their clients toward areas where it's easiest to cheat without much fear of getting caught," he said.

"States need to invest even more in fair but robust enforcement," Comiskey said. "You leverage that with technology that makes that enforcement smart, and you can begin to make a dint in the problem." It's the strategy he followed in New York. "If states don't target their enforcement efforts intelligently — with the resources at hand — then they'll find themselves spinning their wheels," he said

Comiskey believes this strategy ultimately benefits honest taxpayers — presumably like his soon-to-be clients and himself. "As a private citizen, I should hope that every tax system is made as fair and comprehensible as possible," he said. "When everyone is paying their fair share of taxes, then everyone is paying the fewest taxes possible."

In that sense, Comiskey doesn't see a wide gap between what he's been doing and what he'll be doing at Hodgson Russ. The firm, he said, is completely engaged in state taxes. "They paid attention to what we were doing at the agency and weighed in when they thought we were being overly aggressive, but they also help their clients to make the best tax choices," he said.

His background, Comiskey thinks, can be of benefit in that regard. "Because my background has been so diverse in working with government regulation and security," he said, "I believe I can help clients navigate through the complexity of the law to make sound decisions and to do the right thing." He said his goal will be to help taxpayers get to a point at which, if they do fall under the government's scrutiny, they can honestly say they did the right thing in complying with the law — that they made it successfully through the maze. "That feels very right and consistent with what I've done in my career," he said.

Comiskey will be working on a variety of compliance issues in his new job, not just taxes, although that will be one important role. He'll also be involved in areas such as healthcare compliance.

One of the first things Comiskey will be doing is talking to taxpayers and tax practitioners about New York's new amendments to its False Claims Act. That's certainly a subject with which large taxpayers should familiarize themselves. The act increases the protections and incentives for anyone who presents evidence of fraud against the state or one of its local governments — that is, whistleblowers. The amendments permit *qui tam* plaintiffs to bring actions for tax fraud when a defendant's net income or sales exceed $1 million and damages to the state exceed $350,000.

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Because whistleblowers are awarded 15 to 25 percent of the recovery or settlement under the act, the presumption is that employees have an incentive to report any tax law violations by their employers. The amendments also strengthen the act's retaliation provisions to protect a broad range of potential whistleblowers, including "any current or former employee, contractor, or agent of any private or public employer who [has been] discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or prospective employer." It protects employees who obtain "documents, data, correspondence, electronic mail, or any other information" in support of a whistleblower action, even if obtaining the incriminating material "may violate a contract, employment term, or duty owed to the employer or contractor." The state expects to recover more than $20 million a year from increased reporting as a result of the recent amendments.

I suspect Comiskey will have a busy first few months on the job. Having gone through a similar transition not long ago, I can sympathize with his situation. Whatever uneasiness you might have about leaving a job you know well, it's exciting to start a new chapter in your career — indeed to even have a new chapter to start in this economy. It also works better when you realize that despite the jokes and *Star Wars* references, there really is no dark side in state taxes, just two sides of the same coin with divergent yet common interests. "It's pretty exciting," Comiskey said. "It's a new chapter, and I think it's going to be very rewarding helping people out. I'm energized by the whole process. It's a shift in thinking, but I believe it won't be hard to look at things and see them from a new perspective."

When you latch onto a cliché, you might as well ride it to the end, so I asked Comiskey how he thought he'd make out on the dark side — or how he'd make out leaving the dark side for the light if you prefer. Comiskey laughed, and said, "My wife looks at me and asks if I can make the transition. I'm energized and looking forward to it. I think I can make the transition very well, but that is the million dollar question." ✰

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