

Negligent Tax Advice – What are the Damages?

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Where a party has received negligent tax advice, recovery through the courts involves two main key components: 1) proving that the tax advice was negligent, and 2) proving the Plaintiff's damages. This short article focuses on how to focus on the quantification of damages.

When to quantify damages? It is often helpful to prepare a preliminary quantification early on to allow the Plaintiff to weigh up the projected costs, against the likely recovery. A preliminary quantification allows for a more focused discovery process, and avoids having to request needed information later.

How are damages quantified? When you ask someone what they lost, there are as many answers as there are people. However, it is the courts that award damages and they are quite specific as to what is to be included in damages, and what is not.

Damages are generally defined as:

“the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

Livingstone v. Rawyards Coal Co. (1880) 5 App. Cas. 25 at 39

This can be broken down into:

The Actual Case: The financial position that the Plaintiff is in, having received the negligent professional advice.

The Expected Case: The financial position that the Plaintiff would have been in, but for the negligent professional advice.

The Difference = Damages

Where a Plaintiff has received negligent professional advice, they often fail to understand the damages that flow from it. If the advice given had been true, the Plaintiff would have received a tax refund in the \$millions. Therefore, the Plaintiff asserts that their damages are \$millions. However, the test for damages in professional negligence cases is based on the financial position the Plaintiff would be in, if the Plaintiff had received competent professional advice.

Here is an example. If, as the professional advisor represented, the tax shelter had been accepted by CRA the Plaintiff would have saved \$millions in taxes. However, if the Plaintiff had received competent professional advice, they would have been told that the tax shelter would not be accepted by CRA and they would not have proceeded with the tax shelter. Therefore, the actual and expected cases are similar, hence very limited damages.

Alternatively, if the Plaintiff bought or sold a property based on negligent tax advice, and suffered a financial loss as a result, then they may have substantial claim for damages. That is to say, had they received competent professional advice, they would not have entered into the money-losing transaction. Therefore, the difference between the actual and expected cases gives rise to a claim for damages.

Who should quantify damages? The Plaintiff and their counsel are often the first to quantify damages. Early in the process it can be beneficial to engage an expert in damage quantification, to ensure that calculations are well founded. Later in the process, a report from an expert can support the case.

In conclusion, where a party has received negligent tax advice, and proposes to seek recovery through the courts, taking the time to understand their damages – as the courts will assess them – will allow them to make better decisions all the way through the process.