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Collecting Gross-Up Damages For Taxes In Litigation Gets Easier

Can plaintiffs collect damages in litigation for additional taxes they owe because of the defendant's actions? Historically, some courts have been reluctant to 'gross-up' a plaintiff's damages for taxes. One reason is a lack of precision in tax calculations. Another is that the plaintiff must pay taxes in *any* event, regardless of the activity of the defendant. Sometimes, though, the lump-sum nature of a verdict or settlement *itself* causes a tax problem, where payments *should* have been made over time but were not. In such a case, shouldn't a plaintiff who can prove that but-for link be able to recover for such an item of damage? It would seem so, and the Ninth Circuit in [Arthur Clemens, Jr. v. Centurylink Inc. and Qwest Corporation](#), 2017 WL 5013661 (9th Cir. 2017), recently said yes, at least in Title VII employment cases.



The case started when Arthur Clemens, Jr., sued his employer (Qwest) for [Title VII violations](#). A jury awarded him damages for back pay, emotional distress, and punitive damages. Clemens also asked for extra damages for taxes. He claimed that a lump

sum would cost him more in taxes than if Qwest had paid him over time, as it

should have. But the trial court denied his request for a tax enhancement. Accordingly, Clemens appealed to the Ninth Circuit, which said that Clemens was right. Taxes as an element of damages may be easier to recover, at least in Title VII cases.

Yet the impact could be broader still. Some other courts have considered this question in Title VII cases. The Third, Seventh, and Tenth Circuits have all held that district courts have the discretion to “gross up” an award to account for income-tax consequences. See *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 440–43 (3d Cir. 2009); *EEOC v. N. Star Hosp., Inc.*, 777 F.3d 898, 903–04 (7th Cir. 2015); *Sears v. Atchison, Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451, 1456–57 (10th Cir. 1984). In contrast, the D.C. Circuit has ruled against such gross ups. See *Rann v. Chao*, 346 F.3d 192, 197–98 (D.C. Cir. 2003).

The party seeking a gross-up bears the burden of justifying any adjustment. How about tax gross ups in other kinds of cases? There may well be a practical impact, an expansion of the concept generally. Still, tax gross ups are often hard to obtain in any context. Yet they can be both appropriate and available in a variety of cases. In another recent case, *Sonoma Apartment Associates v. United States*, 2017 WL 5078032 (Court of Federal Claims, Nov. 3, 2017), the plaintiff in a complex suit against the federal government, sought various damages.

Among the damage claims and calculations was a tax neutralization payment. The plaintiff asked for an additional \$2,136,681, representing compensation for the increased federal and state income taxes the plaintiff’s partners would owe. Not unlike in a Title VII case, the plaintiff claimed that it (and its partners) were receiving a lump-sum in lieu of a twenty-four-year-long stream of market-rate rental income. That meant more taxes on the lump sum, just like Mr. Clemens argued in his Ninth Circuit Title VII case. In *Sonoma Apartment Associates*, the federal government admitted liability, so the only question was the extent and calculation of damages.

Timing and precision are also important. When a tax claim might be appropriate should be considered in virtually any context. An expert witness on tax issues and/or damage calculations is often appropriate. You may need to show by clear and convincing evidence that these *specific* taxes were caused *solely* by the defendant, and that you would not have paid them otherwise.

For alerts to future tax articles, email me at Wood@WoodLLP.com. This discussion is not legal advice.