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Lawsuits Over Higher Taxes? They're No Joke

In many lawsuits, plaintiffs claim the defendant caused them to pay higher taxes. It makes sense, since taxes have an impact on just about everything. Even so, whether a plaintiff can actually **collect** damages for adverse tax consequences varies widely.

In fact, many courts are reluctant to allow tax-based damages. Tax-based damages can be broken into [several categories](#). Some plaintiffs claim a defendant's action (say, preventing a sale), triggers higher taxes. This is a direct and offensive claim.

A second type is defensive. Thus, a defendant may say that tax benefits the plaintiff enjoyed should **reduce** damages the defendant pays. Defensive claims can be dangerous from a strategic viewpoint unless all the tax issues are out in the open.

A third type of claim is a gross-up of the plaintiff's damages by the taxes the plaintiff will pay on the verdict. Each of these three types of tax claims is distinct. They are really damages questions, but they presuppose some tax knowledge and calculations.



(Photo credit: wikipedia)

One reason courts are reluctant to award these tax damages is that we all have to pay taxes. Since taxes are ever-present, the theory goes, the plaintiff would pay taxes regardless of the defendant's activity. Of course, this ignores the fact that actions have consequences.

As with other damages claims, if the defendant actually **caused** the additional taxes, a plaintiff who can prove it should be able to recover. Still, whether a plaintiff or defendant can convince a court to increase or decrease damages for tax effects varies. It can depend on the jurisdiction, venue, applicable law, and other details. Even the judge's discretion. That is so with many remedies questions.

Furthermore, although tax effects should be **evaluated** in every case, there may be tactical reasons not to raise them. For example, a defendant may choose not to request discounting a plaintiff's damages to reflect tax benefits the plaintiff received. Why? If the plaintiff hasn't raised tax issues, the defendant may worry that the benefits may be outweighed by larger tax claims the plaintiff will make once the tax door is opened.

In general, though, asking a court to take taxes into account rarely has a downside. Moreover, the case law suggests that tax gross-up claims are more favored today than in the past. Here are a few suggestions:

- **The burden of proof is high.** Since everyone pays taxes, try to show by clear and convincing evidence that these **specific** taxes were caused by the defendant and that you **would not** have paid them otherwise.
- **Tax issues can be complex.** Try to keep tax calculations straightforward. You are more likely to prevail if your argument is understandable. An expert witness on taxes, damages or both can spell the difference between success and failure.
- **Make your tax claim early.** Ask early, before you get to trial. Raising it during trial or in post-trial motions has many disadvantages.
- **Be prepared.** Your particular court or judge may have a track record on tax-based damages. Read the judge's decisions and be ready.

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.