Protecting your reputation

Julian Hickey explains how tax specialists can avoid that most painful and worrisome aspect of their profession – claims against them for negligence

The law of negligence is an area of law that needs to be considered on an active basis by any professional tax adviser. An understanding of the law of negligence will hopefully assist the adviser in never being the subject of a claim for loss arising from their advice (or if a claim is made, then the adviser is in a position to defend against the allegations).

Unfortunately, for some practitioners there will be errors in the advice (whether through innocent or negligent error) provided to a client, and on the basis of that advice the client incurs an economic loss (e.g. a tax liability, interest and penalties). In these circumstances there will be an allegation that the advice was negligent and that the adviser is liable for the loss.

In any negligence claim the relevant question is whether a reasonably competent specialist tax adviser (whether lawyer, ICAEW, CTA, TEP, etc.) at the time in question, with particular expertise in the relevant area of tax, applying proper skill and care, could have advised as the adviser did regarding the particular planning or other tax issue (e.g. the availability of entrepreneurs' relief or substantial shareholding relief). If the answer to that question is 'yes', there is no negligence just because other reasonably competent tax professionals of equivalent expertise would have taken a different view or advised in different terms. In other words, was the advice within the spectrum of advice that a reasonably competent tax professional could have properly given?

All of the professional bodies expressly impose specific standards on their members. For example, The Chartered Institute of Taxation (CIOT)/Association of Taxation Technicians (ATT): The Professional Rules and Practice Guidelines (effective from 9 November 2018) states:

"1.6 A member owes a duty to their clients (including those clients for whom they act on a reduced fee or no fee basis) to act with reasonable care and skill, honesty, integrity, impartiality and professionalism. These obligations are also owed to a member's employers, employees, partners, co-directors and generally.

5.1 Duty of care

5.1.1 A member has a duty of care to their client which is recognised in law. A member must exercise reasonable skill and care when acting for a client. An engagement letter or other correspondence with the client may limit or define a member's duty of care.

5.6 Consultation and second opinions

5.6.1 A member is encouraged to consult with fellow professionals when advising clients, where appropriate, such as where they are giving significant opinion/advice, to ensure that relevant skill and judgement is applied. This may be obtained by requesting an independent view from a colleague, or by instructing another member or tax counsel. In addition, in any case where the risks for a member (assessed in terms of professional reputation or financial exposure of their practice) of giving wrong advice are high, a member should consider taking a second opinion. It is a matter of judgement for a member whether a second opinion is necessary in any particular situation. If a member relies on a second opinion, evidence of it should be retained on the client file. Client confidentiality rules, especially those concerning consent, must be taken into account. A significant opinion/advice is one in respect of which either:

- The amount of tax at stake, or potentially at stake, in relation to the matters advised on is significant for a client and there is a real risk that a contrary view to that taken by a member on those matters could be reached; or
- The matters advised on are, for some other reason, of sufficient importance to a client to merit obtaining a second opinion.

5.7 Form and content of advice

5.7.1 On deciding on the form of advice provided to a client, a member should exercise professional judgement and should consider such factors as the following:

- The importance of the transaction and amounts involved;
- The specific or general nature of the client's enquiry;
- The time available for development and submission of the advice;
- The technical complications presented;
- The existence of authorities and precedents;
- The tax sophistication of the client;
- The need to seek other professional advice.

5.7.2 Advice should normally be given in writing. If a member gives advice in meetings or by telephone, a member should consider carefully whether to confirm in writing. This will allow a client the chance to correct any mistaken assumptions set out in the note and to have a written record of the advice given.

5.7.3 Unless set out in a separate document (such as terms and conditions or an engagement letter) an advice communication should normally set out:

- The purpose for which the advice is required and the client's objectives;
- The background facts and assumptions on which the advice is based and whether or not the facts have been verified by the adviser;
- The alternatives open to the client;
- The risks associated with the advice;
- Relevant caveats and exclusions.

5.7.4 The advice and associated working papers should be consistent with PCRT and in particular, the standards for tax planning.

5.7.5 When formulating advice, a member should refer to the relevant taxation legislation and the practice of HMRC. Due regard should also be given to case law.

5.7.6 A member should make it clear that the advice given is current and may be affected by subsequent changes in the law. To reduce the risk of misunderstanding, a member may wish to make it clear in the engagement letter that no responsibility is accepted to inform a client automatically that advice previously given, by either a member or a predecessor, has been affected by a change in the law but that they are willing to receive instructions to reconsider such advice."

An adviser is subject to the law of negligence if a duty of care is owed to a person. That person will usually be the client who is the recipient of the advice. However, it is also likely that a duty of care is owed to a third party in circumstances where the adviser can foresee that damage will be caused to a third party by negligence advice.

In cases involving pure economic loss, a duty of care will be imposed if three criteria are met. There must be:

- reasonable foreseeability of damage;
- a relationship of sufficient 'proximity' between the party owing the duty and the party to whom it is owed; and
- the imposition of the duty of care contended for should be just and reasonable in all the circumstances.

The starting point in considering breach of duty by a professional is the terms of the professional's terms of engagement (i.e. the retainer). A retainer is a contract and as such the terms of the contract will be relevant in determining the liability of the adviser. If the contract is silent on the nature of the standard of service to be provided, it will be an implied term of such retainer that the adviser will exercise reasonable skill and care in giving their advice. As such, the professional adviser's duty of care in negligence can be co-extensive with the duty in contract to the client and third parties.

It is well established that a solicitor in providing tax services owes his client a duty to exercise the skill and care reasonably to be expected of an experienced specialist tax solicitor. If the retainer does not exclude tax, a solicitor may be considered negligent if their advice does not address relevant tax matters that arise in relation to the transaction.

The same standard will be applied to any tax adviser (whether regulated via CIOT, STEP, ATT, ICAEW). The relevant question is to ask, 'whether reasonable practitioners professing the expertise of the adviser could properly have given advice in the terms they did'.

In Saif Ali v Sidney Mitchell & Co [1980] AC 199, concerning a barrister's liability in negligence, Lord Diplock observed, at 220: "No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turns out to have been errors of judgment unless the error was such as no reasonably well informed and competent member of that profession could have made."

The standard of the advice is to be determined by reference to the nature of the skills which the adviser professes to have in the particular area of expertise.

A professional adviser must not only provide non-negligent advice, but must also where relevant ensure that the client is aware of the risks associated with relying on the adviser's advice (e.g. it cannot be guaranteed that HMRC will accept the adviser's interpretation of the legislation, and the consequences of HMRC failing to accept the adviser's interpretation – i.e. additional tax, possible penalties).

As to risk warnings, the question is whether a reasonably careful practitioner with the degree of expertise claimed by that practitioner should warn the client of the risk that the advice will fail to deliver the intended tax advantages.

The general principle, under the laws of negligence, is that the court should award that 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.

A claim for negligence must be issued within six years from the date on which the cause of action accrued (Limitation Act 1980, s.2) (Limitation Act 1980). This effectively means that the claim must be brought within six years from the date on which the damage/loss is suffered. However, such a claim may be made in respect of latent damage in circumstances where the claimant does not have knowledge of all material facts within the six-year period.

To minimise the risk of any allegation of tax negligence, it is essential that the tax professional:

- enters into clear written terms of engagement with the client which identifies the scope and nature of the service being provided and what is excluded from the retainer; and caveats any advice by reference to assumptions which are brought to the attention of the client as part of the terms and conditions of engagement;
- understands the facts relevant to the client and the objectives of the client;
- only advises on an area of law where the tax professional is a specialist;
- keeps up-to-date in the adviser's specialist area of practice;
- complies with relevant professional standards imposed by a professional body.

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