

## **Is seeking redress for negligent tax advice worth the effort?**

*Tax can be complicated and mistakes happen, but taxpayers who face issues with HMRC due to bad advice should consider their options, says Matthew Sharp*

Tax advisers provide a valuable service. They have advanced knowledge of, and training on, tax laws and are qualified to help clients handle and manage their taxes, ensuring they meet all their tax obligations without stress or fear of making errors and incurring penalties.

Unfortunately, while the vast majority of tax advisers – including accountants – do an excellent job, things do not always work the way they should.

Tax advisers sometimes give inaccurate advice, such that a tax irregularity arises – resulting either in expensive, time-consuming litigation with HMRC or, if there is no reason to litigate, a costly disclosure of tax irregularities to HMRC.

While nothing will absolve the client of paying money rightfully owed to HMRC, if the tax adviser's mistake was due to negligence on their part, aggrieved clients have the option of pursuing them for compensation.

Sometimes, clients who have been through a painful legal process with HMRC are understandably reluctant to engage in further litigation against their tax adviser.

However, clients in this position often fail to realise that successfully litigating against the tax adviser who got it wrong can improve their prospects of reaching an improved resolution with HMRC. Specifically, litigating against a demonstrably negligent tax adviser can:

- reduce the overall amount payable to HMRC;
- save the client money on professional fees; and
- even result in a financial recovery, going some way to put the client back in the position they should have been but for the negligent tax advice.

A poorly served client will generally seek refuge with a new tax adviser, who can help them pick up the pieces and decide on the best course of action.

### **Reducing the amount payable to HMRC**

For intermediaries tasked with helping clients that were negligently advised by previous advisers, in certain circumstances, disclosure to HMRC that your client is pursuing a tax professional negligence claim against a previous adviser can assist in negotiations with HMRC.

It can even be valuable to disclose to HMRC a copy of the Letter of Claim that has been sent to the negligent adviser. Importantly, a Letter of Claim does not commit a client to litigation – it is simply a pre-action letter outlining the circumstances of a claim.

The value in this is demonstrating to HMRC that even though your client's tax affairs may be inaccurate, they themselves are not to blame. This can assist in building a more constructive dialogue with HMRC and in reducing or eliminating the prospect of penalties.

Take for example tax geared penalties under the harmonised penalty regime (applicable to direct tax irregularities under the Finance Act 2007).

Under the harmonised regime, the standard penalty for an irregularity caused by carelessness is 30% of the tax underpaid.

One way to mitigate such a penalty is to demonstrate to HMRC that:

- The irregularity was caused by the taxpayer's previous adviser; and
- The taxpayer took reasonable care to avoid the inaccuracy (see paragraph 18, Schedule 24, Finance Act 2007).

In *Mariner v HMRC* [2013] UKFTT 657 (TC) the First-tier Tribunal said a taxpayer was not careless where she relied on an adviser acting in a “truly professional advisory capacity and had no reason to believe the advice was wrong or unreliable”.

A professional negligence claim can also assist in respect of penalties threatened by HMRC by reference to the ‘Failure to Correct’ (FTC) penalty regime (under the Finance (No. 2) Act 2017).

FTC penalties are tax geared and start at 200% of the tax underpaid. They arise by reference to offshore tax non-compliance that existed prior to 6 April 2017 and were not ‘corrected’ by 30 September 2018.

HMRC’s discretion is far more limited under the FTC regime, but under the legislation, penalties can be avoided if “there is a reasonable excuse for the failure”.

In some cases, HMRC has accepted negligence on the part of a professional adviser can be a ‘reasonable excuse’, with the result that no penalties are payable.

For example, if a taxpayer is facing a £1 million tax liability under FTC, a well-deployed professional negligence Letter of Claim alone could save the client £2 million in penalties – a very worthwhile investment.

Just sending a Letter of Claim to the negligent professional and correctly deploying that letter in dialogue with HMRC can achieve this outcome.

Clearly, the Letter of Claim needs to be credible and persuasive, but the key incentive to stress here is that the client can deploy this tactic to reduce sums payable to

HMRC, without taking the professional negligence claim all the way to trial if they don't want to.

### **Saving money on professional fees**

One of the biggest deterrents to pursuing professional negligence claims is cost.

Clients are already paying for support to resolve their position with HMRC and shelling out more fees to pursue a claim is a step many are not prepared to take. However, when handled correctly, professional negligence litigation can result in lower overall professional fees.

A copy of a Letter of Claim that has been sent to a negligent professional can be enclosed with a client's outline disclosure to HMRC – a course of action which, experience shows, can result in HMRC accepting that no penalties should be levied against the client.

Further, this approach establishes a constructive dialogue whereby HMRC can be helped to understand the client's position and respond appropriately. This can be followed with a streamlined and cost-effective disclosure to HMRC, saving the client time and fees overall.

There are also different options for professional negligence claims that clients can investigate, including third party funding and 'no-win no-fee' structures. Professional negligence claims are particularly well suited to funding because there are good prospects of financial recovery from an insured professional.

### **Is it worth pursuing a claim?**

Practice suggests that even preliminary steps taken under a professional negligence claim (such as sending a Letter of Claim) can assist a client in lowering their overall tax bill and professional costs.

A Letter of Claim does not commit a client to litigation and does not expose a client to the risk of having to pay adverse costs if they change their mind and do not want to pursue the claim further.

The aim of a professional negligence claim is of course also to seek financial compensation. For a client who embarks on a professional negligence claim with a view to assisting their position with HMRC, settlement could be the cherry on the top of the cake.

Successfully executed, a professional negligence claim could recover a proportion of the tax owed by the client to HMRC from the negligent professional, in addition to the cost of their professional fees incurred in resolving matters with HMRC and reasonable legal costs.

In all circumstances, a tax professional negligence claim can be a very worthwhile investment.

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