To Tax Gross Up Or Not To Tax Gross Up?

By Robert W. Wood[1]

I. INTRODUCTION

How and when we are paid, whether for services or property, can influence the amount of tax we have to pay. That seems so obvious that no one would need to say it, much less prove it. Nevertheless, in civil litigation, the extent to which you can get damages for adverse tax consequences has been a thorny subject. We all know that tax consequences dramatically impact the value of what we receive. Yet, many courts have been loath to gross up the amount of a plaintiff's damages by the amount of corresponding taxes the plaintiff must pay.

This is a damages question not a tax question, though it is undeniable that you must be tax conversant to prove and quantify your claim for "tax damages." One of the commonly voiced reasons for the traditional reluctance of courts to award such damages has been the fact that the plaintiff would have had to pay taxes in any event, regardless of the activity of the defendant. Of course, this explanation is inapposite if the lump sum nature of a jury verdict or settlement payment itself causes the tax problem. By definition, that problem would not have existed had payments been made over time as they should have been.

Thus, one of the primary arguments for a tax damage gross-up is where the defendant's breach (of an agreement or of the law) itself causes additional taxes. This is a kind of but-for causation reminiscent of tort actions. 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.

II. FIRST IMPRESSION

Recently, the Third Circuit Court of Appeals considered such issues and said yes. The court came down resoundingly in favor of awarding a plaintiff additional damages in such a circumstance. In the Third Circuit, this was a case of first impression. In *Eshelman v. Agere Systems, Inc.*,[2] Joan Eshelman had sued her former employer for discrimination under the Americans with Disabilities Act (ADA). The jury found in her favor, and awarded her back pay and compensatory damages of $200,000.

Upon Eshelman's motion, the court added damages to cover the extra taxes Eshelman would have to pay because of the lump sum nature of her award. Eshelman argued that additional damages were warranted, because the taxes she would have to pay on a lump sum back pay award would be higher than what she would have paid had she received the pay over the normal course of employment.

Predictably, Agere opposed the motion, arguing that there was no statutory or case law to support it. The District Court nevertheless agreed with Eshelman and granted the additional damages to offset the tax consequences of the lump sum back pay award. On appeal, Agere argued that the District Court had improperly granted Eshelman's motion to augment the jury's award. In the process of affirming the District Court, the Third Circuit spoke with a clear and fervent voice that is likely to influence tax damage claims in the future.

III. "MAKING WHOLE" DAMAGES

The court in *Eshelman* began its discussion of this issue by noting the remedial purposes of the employment discrimination statutes such as the ADA. Such statutes are designed to remediate, to make persons whole for injuries caused by unlawful employment discrimination. To do that, Congress armed the courts with broad equitable powers to effectuate a "make-whole" remedy.[3] District Courts have wide discretion to apply a just result regarding the specific relief granted under the circumstances in each case.

Noting that it had discretion to fashion a remedy, the Third Circuit saw the trial court as endeavoring to restore the employee to the economic status quo that would exist but for the employer's unlawful conduct. Clearly, back pay is an equitable remedy designed to put the employee back in the position he would have been in but for the proscribed discrimination. Of course, we all know that back pay awards are taxable.[4]

Not only are they taxable, but they are taxable in the year paid.[5] That plainly leads to employees paying higher taxes when they receive a lump sum. The effect of a lump sum pushing an employee into a higher tax bracket, and therefore a greater tax burden, was the essence of Eshelman's argument.

IV. OTHER CASES

The Third Circuit in Eshelman noted that it had not previously addressed this issue, at least not directly. Yet the court also said that it did not write on a completely clean slate. The court noted its decision in *Gelof v. Papineau*.[6] There, the employer did not contest the conclusion that it would be liable for additional amounts to compensate the employee for additional taxes she would be required to pay on her back pay award. That is, the employer did not contest the idea, but disagreed about the appropriate amount of that additional award.

Unsure how the District Court in that case had calculated the additional award, the Third Circuit vacated it and remanded the case for further findings. Thus, the Third Circuit in *Gelof* was not squarely presented with the question whether an award for taxes was proper. The court next looked to its sister circuits, noting the now famous case of *Sears v. Atchison Topeka & Santa Fe Railroad Co.*[7]

In that case, a District Court in a Title VII case awarded amounts for the additional tax liability incurred as a result of receiving 17 years of back pay in a lump sum. The Tenth Circuit had found that the trial court had wide discretion to fashion remedies to make victims of discrimination whole. The Tenth Circuit in that case noted that such awards might not be appropriate in typical cases, but that it was appropriate where Sears was paying 17 years of back pay. Perhaps the tax issues there were simply too large and too pronounced to ignore.

Apart from the leading *Sears v. Atchison* case, a smattering of other courts has reached the same kind of result.[8]

In *Eshelman*, the Third Circuit squarely held that a District Court may, pursuant to the broad equitable powers under the ADA, award a prevailing employee an additional sum of money to compensate for the increased tax burdens a back pay award may create. Without such an equitable remedy, said the court, it would not be possible to restore the employee to the economic status quo.

Interestingly, apart from the tax cases noted, the Third Circuit drew support from what it called the now universal acceptance of another form of equitable relief, prejudgment interest on back pay awards. The Third Circuit quoted *Loeffler*[9] for the proposition that Title VII authorizes prejudgment interest on back pay awards, and that prejudgment interest serves to compensate a plaintiff for the loss of the use of money the plaintiff would otherwise have earned had he not been unjustly discharged.

In much the same way, said the court, an award to compensate a prevailing employee for an increased tax burden as a result of a lump sum award will (in appropriate cases) help to make the victim whole. Along with prejudgment interest, such an award represents a recognition that the harm to a prevailing employee's pecuniary interest may be broader in scope than just the loss of back pay.

Having concluded that a District Court could permissibly award a prevailing employee an additional sum of money to compensate for the increased tax burden on back pay, the Third Circuit went on to consider whether the District Court erred in granting this specific relief under Eshelman's particular facts. This part of the opinion should certainly interest trial lawyers, as it may represent a roadmap for what to do from now on.

In support of her motion for the additional tax damages, Eshelman had submitted an affidavit from an economic expert who calculated the amount of tax-effect damages based upon the back pay award, the applicable tax rates, and Eshelman's income tax returns for the appropriate years. The District Court had granted an additional $6,893 to Eshelman to compensate her for the negative tax consequences. Agere did not rebut the affidavit, and even on appeal, did not dispute the accuracy of the figure awarded by the District Court.

In fact, Agere's sole argument in the Third Circuit was that the District Court had no legal authority to award this additional amount. That argument failed, for the Third Circuit held that the District Court did not abuse its discretion in awarding Eshelman compensation for negative tax consequences. The Third Circuit concluded its opinion by noting that:

> "We do not suggest that a prevailing plaintiff in discrimination cases is presumptively entitled to an additional award to offset tax consequences above the amount to which she would otherwise be entitled. Employees will continue to bear the burden to show the extent of the injury they have suffered."[10]

V. HISTORY LESSON

The Third Circuit in *Eshelman* may have enunciated a new benchmark, but it is not the first court to go down this path. The case law has continued to bumble along, and whether a plaintiff can obtain tax damages is often unclear. For example, *Judith K. Kelley v. City of Albuquerque*[11] arose out of an employment dispute in which Kelley alleged violations of the New Mexico Human Rights Act, and Title VII of the Civil Rights Act of 1964. Before trial, Kelley sought to exclude testimony concerning tax benefits she derived from the losses that formed the basis of her claims.

The court excluded this testimony, but allowed Kelley to offer evidence of the tax consequences of the resulting verdict. The jury had awarded $172,174.90 for back pay and $200,000 for loss of future retirement or pension benefits. After final judgment, Kelley moved to amend the judgment to take into account the increased federal taxes she would have to pay because of the award. Specifically, Kelley asked the court for $37,297.49, plus an additional 10 percent of the attorney's fee award, all to compensate for additional federal tax effects. The court denied the motion, noting that the Seventh Amendment to the U.S. Constitution generally prohibits *additur*. Put simply, damages were the *jury's* province, not the *court's*.

Nevertheless, the court had to deal with several tax gross-up cases Kelley cited. The first was *Sears v. Atchison, Topeka and SFR Co.*,[12] where the Tenth Circuit upheld damages paid to class members for additional tax liabilities they faced because the lump sum covered 17 years of back pay. The Tenth Circuit recognized that tax components of damages may be atypical, but found special circumstances given the protracted nature of that protracted litigation. Plus, *Sears v. Atchison* was tried before a judge not a jury, so an increase in the award did not interfere with the jury's province. Kelley also cited *Carter v. Sedgwick Co.*,[13] another bench trial.

More pertinent was *Blaney v. International Association of Aero. Workers*,[14] which held that Washington state's anti-discrimination statute allowed an increased award to compensate for taxes. Yet, *Blaney* was a Washington state case, so the Seventh Amendment to the Constitution was inapplicable. It was also a bench trial, with no jury to overstep. In any event, recognizing this as an equitable matter, the court denied Kelley's gross-up for taxes.

VI. OTHER TAX GROSS-UPS

At least one case involving the allowability of damages for tax effects, *Randall v. Loftsgaarden*,[15] reached the U.S. Supreme Court. The plaintiffs were limited partners in a motel, marketed as a tax shelter to offset other income. The plaintiffs sued to recover their investment, alleging violations of the federal securities laws. The Supreme Court held that tax benefits the plaintiffs received should not be offset against their recovery.

Failing to enunciate a general rule about tax-based damages, the Court actually suggested that if taxes were *central* to the investment a different result might apply. Such waffling about the ability to obtain tax-based damages seems to be the norm. Employment cases like *Eshelman* represent the most fertile ground for tax gross-ups, particularly given the 1996 tax law amendments requiring physical injury or physical sickness for excludability.

Yet plainly, employment cases are not the only ones in which this tax-as-damages issue arises. Often, courts are unsympathetic to such attempts, even where the nature of the dispute *itself* revolves around tax issues. Thus, in *Gaslow v. KPMG, LLP*,[16] the plaintiff could not recover taxes and interest from an accounting firm, even though it allegedly induced him to invest in the tax shelter. The premise seems to be that he would have paid taxes anyway.

This dividing line is also suggested by *Eckert Cold Storage Inc. v. Behl*.[17] There, although a claim for tax damages was permitted, the court admonished that the plaintiffs would have to establish with reasonable certainty that other investments available at the time would have shielded the same tax dollars, and that they would have made those alternative investments. That means the burden of proof is high.

Most plaintiffs cannot meet this high standard. Thus, in *Lewin v. Miller, Wagner and Co.*,[18] the court disallowed a claim for taxes, calling the claim speculative. Similarly, in *DCD Programs, Ltd v. Leighton*,[19] the court denied a claim for tax damages, noting that everyone has to pay taxes. Taxes are imposed by the Internal Revenue Code, said the court, not by the defendant.[20]

When taxes are payable in any event, a tax claim against the defendant may seem spurious. But it is often not so clear whether taxes *would* be payable (and if so, to the same *magnitude*) if not for the defendant's conduct. This can lead to complex calculations and alternative positions some courts call "speculative."

Oddly, many authorities considering taxes as an item of damage arise in tax malpractice cases, where the plaintiff sues a tax lawyer or accountant for malpractice. In *Pytka v. Hannah*,[21] the plaintiff sued his attorney for malpractice, arguing that he paid tax on short term stock gains. Pytka claimed the defendant's actions caused him to pay an extra $284,468 in federal and state income because the sales were not long term capital gains. However, because the damages to reimburse him for the $284,468 in taxes would also be taxable, he sought a gross-up of $222,605 *on top* of the tax. Pytka had an expert testify that he would be taxed on the judgment and would need a tax gross-up to make him whole, but the Massachusetts court denied the gross-up.

VII. TAX COMPETING OFFSETS

Sometimes both parties invoke tax consequences, seeking offsets. For example, in *Pham vs. Seattle*,[22] the plaintiffs sued for discrimination based on race and national origin. The jury awarded $430,000 in front and back pay, and $120,000 in noneconomic damages. Plaintiffs' counsel sought attorneys' fees under the Washington Law Against Discrimination, calculating a loadstar amount at $347,588. The trial court reduced the loadstar to $297,532.

The plaintiffs requested supplemental damages to cover the adverse tax consequences of the verdict. The trial court awarded $168,000 in additional damages for adverse tax consequences. Notably, this amount accounted only for tax on the economic damages, and did not include an offset for tax on the $120,000 of noneconomic damages. Thus, the plaintiffs received a tax gross-up on only part of their award.

Plaintiffs appealed, arguing for a tax offset on all of their award. Citing *Blaney v. International Association of Machinists and Aerospace Workers*[23] (where the Washington Supreme Court determined that damages for adverse federal income tax consequences could be awarded), the Court of Appeals agreed. This seems consistent with the Third Circuit's recent *Eshelman* opinion.

Notwithstanding these developments, many courts continue to scrutinize grossing up damage awards due to adverse tax consequences. In *O'Neill v. Sears, Roebuck and Company*,[24] the court addressed damages for front and back pay, compensatory and liquidated damages under the Age Discrimination in Employment Act (ADEA). Receiving front and back pay in a lump sum produced higher taxes, so the court allowed a supplemental award for taxes on the front and back pay component. To be made whole, Plaintiff was entitled to an award for negative tax consequences.

VIII. NON-WAGE CASES

Although employment cases may be the most obvious setting for tax gross-ups, the cases can be much more complex. For example, the Court of Federal Claims in *LaSalle Talman Bank FSB v. U.S.*,[25] considered a tax gross-up in a complicated breach of contract case against the U.S. government. The plaintiff argued that to be put back in the position he would have been in had there been no breach of contract, damages had to be calculated on a pre-tax basis.

Alternatively, the plaintiff argued, its damages should be grossed-up for future taxation.[26] The court relied on *Home Savings*,[27] which ruled damages as foreseeable if they follow from a breach of contract in the ordinary course of events. If you injure someone, it is foreseeable that money damages may not make them whole because of tax issues. Thus, in *Home Savings*, the award was adjusted assuming it would be taxable.

In *LaSalle Talman Bank*, the court noted that dividends were paid from net earnings <u>after</u> taxes. The government argued that the award would not be subject to tax, so the court had to address the tax impact and what the plaintiff would or would not report as income. In considering a tax gross-up, the court stated that: "Clearly, if we make the adjustment, plaintiff would be estopped from disputing the taxability of the award."[28] This suggests that plaintiffs who <u>receive</u> tax gross-ups are actually going to report and pay tax on the damages they receive.

Alternatively, it may reflect a lack of perception about the parties and the dynamics of tax issues involved. After all, without any sharp practice, the plaintiff may or may not know what its tax reporting position will ultimately be. The taxing agencies will by definition not be parties to the case, and plaintiff and defendant will develop their tax reporting positions based on the best information they have available at the time, long after the settlement is achieved or the verdict is paid.

The tax reporting position they ultimately take may be inconsistent with the tax posture they have described in seeking damages. In fact, plaintiffs commonly ask for a tax gross-up based on one set of assumptions, but take a different tax return reporting position. For example, a plaintiff's damage study may calculate taxes based on the *entire verdict* being taxed at ordinary income rates.

That may be the perfectly appropriate conservative view of the matter. That same plaintiff may later take the position on his tax return that the recovery is capital gain, or even a recovery of basis. This may sound duplicitous, but how a verdict will be taxed is often complex and involves difficult factual and legal judgments.

Put another way, in seeking damages, a plaintiff may make pessimistic tax assumptions about how the verdict will be taxed. Nine months or a year later, the same plaintiff may take a more aggressive tax return posture. Besides, even if such a dual-pronged approach is expressly contemplated when the plaintiff asks the court for a tax gross-up, it seems appropriate for the plaintiff to assume the worst tax result when seeking damages.

IX. EXPERT OPINIONS?

Most judges in civil disputes may have taken an introductory tax class in law school, but they hardly have the tax expertise of, say, a Tax Court judge. That can make this an ideal subject for expert testimony. Indeed, it seems almost inevitable that a court facing claims for taxes as an item of damages must actually determine what taxes are payable. If the taxes have already been paid, the court may need to <u>determine</u> whether the payor took appropriate tax positions.

This is sticky, and may account for some part of the frustration courts seem to evince when they discuss tax issues. For example, the court in *LaSalle Talman Bank* had to consider whether the award would be considered a return of capital. The court referenced testimony from several expert witnesses. Ultimately, the court concluded that "we have no reason to believe that the Internal Revenue Service would treat the reimbursement of this cost item as a replacement of a capital asset."[29]

Based on that, the court concluded that "justice" required increasing the plaintiff's award for tax consequences.

Recognizing that there may be some doubt on the tax assumptions, the court stated that:

> "It is only a possibility, and not a high one in our view, that the award will not be taxed. We cannot ignore the fact that, as a general proposition, amounts received as damages in litigation are taxable as income."[30]

This is a sophisticated comment, recognizing that tax rules are often about probability, and that black and white answers are often not available. After reaching this watershed decision, the court discusses applicable tax rates, consolidated groups, regular tax rates, state tax rates, the corporate alternative minimum tax, etc.

Although *LaSalle Talman Bank* supports viewing taxes as a foreseeable element of contract damages, many plaintiffs still fail to win tax damages. Take *Porter v. U.S. Agency for International Development*.[31] After a jury award for employment discrimination, the plaintiff sought supplemental damages for tax liabilities associated with attorneys' fees. The plaintiff requested indemnity against any tax consequences from the attorneys' fee award, or in the alternative, asked the court to "gross-up" his award to cover the tax liability.

The court denied the petition for indemnification or a supplemental award for the tax liability, but the plaintiff was not ultimately responsible for the tax liability associated with attorneys' fees. Creatively, the court tried to insulate the plaintiff from tax liability on the attorneys' fees by making the fee award payable directly to counsel. Plus, the court explained the award clearly, so the plaintiff and his tax advisor could refer to the explanation when preparing income tax returns. Presumably, the court also hoped the IRS would consider the explanation before attempting to tax the plaintiff on the fee award.

X. SUMMARIZING ANARCHY

Summarizing case law here is no simple task. Much of the authority suggests that tax benefits should not be considered in computing economic loss damages.[32] For example, in *Danzig v. Jack Greenberg & Associates*,[33] the defendant argued that damages in a class action for fraud should be reduced by the tax benefits to class members claimed on their investments. The court disagreed, concluding that tax benefits were irrelevant to the amount of restitution to be awarded.

Similarly, *DePalma v. Westland Software House*[34] involved a buyer's suit for breach of contract for computer equipment and software. The seller tried to reduce the damages by arguing that the buyer had received investment tax credits and depreciation. The court found it was inappropriate to mitigate the damages awarded by such tax benefits.

Even more colorful is *Coty v. Ramsey Associates*,[35] where the plaintiff sued a neighboring pig farm for nuisance. One of the plaintiff's damage claims was air conditioners the plaintiff installed to try to mitigate the noxious odor. The defendant replied that the cost of the air conditioners had to be reduced by depreciation tax benefits. The court disagreed, finding tax consequences irrelevant.

Perhaps defense tax arguments are simply scrutinized more carefully, and that may be true even in the U.S. Supreme Court. In *Hanover Shoe, Inc. v. United Shore Machinery Corp*,[36] an antitrust case where the plaintiff sued for lost profits, the defendant argued that the plaintiff's damages should be reduced for taxes it would have had to pay absent the violation. In other words, the defendant argued that the lost profits had to be computed *after tax*. Had the antitrust violation not occurred, the defendant argued, the plaintiff would have received profits, and those profits would have been taxable.

This argument seemed vapid (after all, the damage award would *also* be taxable when received, thus making the plaintiff worse off), but the Court of Appeals agreed. Reversing the Court of Appeals, the Supreme Court held the award should not be reduced for taxes. The plaintiff would be taxed when it recovered damages, so reducing the damages by taxes would be deducting tax twice, said the Court.

Yet, the Supreme Court also made the more sophisticated observation that accounting for taxes in the year when damages are received (rather than when profits were lost) can change the amount of tax due.[37] The Court even noted that the statute of limitations may bar the IRS from recomputing tax due in earlier years. The Supreme Court characterized this as a "rough result."

You don't take taxes into account for the year of injury, but you tax the recovery when received. The Supreme Court laid down this rough result as a satisfactory one in *Hanover Shoe*, an approach that seems to be followed in many cases.[38] Essentially, it takes the view that there should not be a double deduction of taxes, and that the plaintiff needs to be put in the position he *would* have occupied prior to the suit.

Nevertheless, underlying *Hanover Shoe* is the notion that there are considerable uncertainties in our tax rules, and these uncertainties represent a good reason *not* to deal with this tax subject. The Supreme Court noted that the proper amount of tax liability ultimately depends on a plethora of factors; tax determinations under our system are hardly simple. That is one of the main reasons this entire tax damages area often causes courts to be unwilling to reflect tax consequences in their awards.

Many courts don't apply the throw-up-your-hands "speculative" moniker, but there is nevertheless an almost palpable fear about nailing down tax issues. Rough justice often prevails. For example, some courts have said that when current tax rates are higher than the prevailing tax rates for the year in which the losses occurred, that also should be disregarded.[39] The tax impact of a case is important, and some courts are willing to consider taxes in determining what will make the plaintiff whole.

XI. WHAT TO DO NOW/CONCLUSION

Despite the traditional conservatism of courts on this issue, *Eshelman* may be a watershed case, ushering in a new era of tax sensitivity. A kind of tax-damages renaissance may portend an easier time for plaintiffs to recover such damages. Like many remedies questions, whether a particular plaintiff or a particular defendant will have their version of the tax impact adopted by a court (increasing or decreasing damages because of tax affects) is likely to vary substantially. It may depend on the jurisdiction, venue, applicable law and other variables.

Nevertheless, it is not hyperbole to suggest that tax affects should be evaluated in every case. After all, tax issues are often central to the overall outcome. Yet, that does not mean one will always ask for tax damages. There may occasionally be tactical reasons not to raise tax matters.

For example, a defendant may choose not to argue for discounting a plaintiff's damages to take tax benefits into account that the plaintiff received from an investment that went bad. A defendant might make that tactical decision where the plaintiff has not raised tax issues of its own, and where the defendant is worried that the benefits it might achieve from its own tax argument will be outweighed by the risk the plaintiff will raise *bigger* tax issues in response. The defendant may not want to open the door to such issues. Such circumstances aside, however, asking the court to take into account the tax impact on the case will rarely have a downside.

But raising the issues and counting on their application are two different things, and predicting how the court will respond is not easy. The most traditional answer is that tax issues are likely to get lost on the cutting room floor. However, the more modern trend of the case law suggests that tax gross-up claims are more favored today than in the past. *Eshelman*, the recent Third Circuit case, may signal just that.

Notwithstanding this latest expansion of tax damages as a concept, one must be realistic. Here are a few suggestions:

- Consider making your claim for taxes as part of your case as early as you can. A motion *in limine* is a good place to address such evidencing matter. On the other hand, some lawyers will want to wait. Eshelman made her motion past verdict.
- Since tax issues can be complicated, do your best to keep the tax assumptions and tax calculations you are making straightforward. You are more likely to prevail if you make it credible and understandable. That doesn't mean you shouldn't use expert testimony. An expert witness on tax damages, by declaration or by testimony, can spell the difference between success and failure. Yet getting into nuances can be a mistake. Try to keep it simple.
- Be cognizant that in federal cases, the jury is going to have to decide the tax damage claim. You are unlikely to succeed if you ask the court to gross-up the claim after the fact. That means your timing of the tax damage claim will almost surely be influenced by the nature of the case as a bench or jury trial. The particular court's, and even the particular judge's, track record on such claims may also be important.
- In state or federal cases, you must carry a significant burden of proof. Many of the cases suggest that "everyone pays taxes." 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.

ENDNOTES

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2. 05-4895 (Jan. 30, 2009, 3rd Cir.), Tax Analysts Doc. No. 2009-2478, 2009 TNT 23-7 (3rd Cir. 2009).

3. See 42 USC § 2000e-5(G)(1). See also *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976).

4. *See Comm'r v. Schleier*, 515 U.S. 323 (1995). See also *U.S. v. Burke*, 504 U.S. 229 (1992).

5. *See Robinson v. Southern Pacific Transportation Authority*, 982 F.2d 892 (3rd Cir. 1993).

6. *Gelof v. Papineau*, 829 F.2d 452 (3d Cir. 1987).

7. *Sears v. Atchison Topeka & Santa Fe Railroad Co.*, 749 F.2d 1451 (10th Cir. 1984).

8. *See O'Neill v. Sears Roebuck & Co*, 108 F. Supp. 2d 443 (E.D.

Pa. 2000) (where the plaintiff was entitled to an award for negative tax consequences). See also *EEOC v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364 (S.D. Fla. 1998) (also noting that a District Court in exercising its discretion may include a tax component in a lump sum back pay award to compensate prevailing Title 7 plaintiffs).

9. 486 U.S. at 557.

10. *Id.* at p. 23 (slip opinion).

11. Tax Analysts Doc. No. 2006-9776, 2006 TNT 98-7 (D.N.M. 2006).

12. *Sears v. Atchison, Topeka and SFR Co.*, 749 F.2d 1451 (10th Cir. 1984).

13. *Carter v. Sedgwick Co.*, 36 F.3d 952 (10th Cir. 1954).

14. *Blaney v. International Association of Aero. Workers*, 87 P.3d 757 (2004).

15. *Randall v. Loftsgaarden*, 478 U.S. 647 (1986).

16. *Gaslow v. KPMG, LLP*, 797 NYS 2d 472 (Appellate Division 1st Dept. 2005).

17. *Eckert Cold Storage Inc. v. Behl*, 943 F.2d 1230 (D.C. California 1996).

18. *Lewin v. Miller, Wagner and Co.*, 725 P.2d 736 (Az. Ct. of App. 1986).

19. *DCD Programs, Ltd v. Leighton*, 90 F.3d 1442 (9th Cir. 1996).

20. The same motion appears in *Thomas v. Cleary*, 768 P.2d 1090 (Alaska 1989) (a case noting that plaintiffs are under a legal duty to pay taxes). *See* also *Alpert v. Shea Gould Climenko and Casey*, 559 NYS 2d 312 (App. Div. 1st Dept. 1990) (investors were not allowed to recover taxes paid to the IRS after deductions attributable to their investment were disallowed).

21. *Pytka v. Hannah*, 15 Massachusetts Law Reporter 451 (Mass. Sup. Ct. 2002).

22. *Pham v. Seattle*, Washington Court of Appeals No. 52356-2-I December 20, 2004.

23. *Blaney v. International Association of Machinists and Aerospace Workers*, 87 P.3d 757 93 FEP Cases 1529 Washington 2004.

24. *O'Neill v. Sears, Roebuck and Co.*, 108 F. Supp.2d 443 (E.D. Pa. 2000).

25. *FSB v. U.S.*, 2005 U.S. Claims LEXIS 32 (Ct. Cl., 2005).

26. *See Centex Corp. v. United States*, 55 Fed. Cl. 381 (2003).

27. *See Home Savings of America, FSB v. United States,* 57 Fed. Cl. 694 (2003).

28. *LaSalle Talman Bank, F.S.B. v. United States*, 2005 U.S. Claims LEXIS 32 (Ct. Cl., 2005).

29. *LaSalle Talman Bank, F.S.B. v. United States*, 2005 U.S. Claims LEXIS 32 (Ct. Cl., 2005).

30. *LaSalle Talman Bank, F.S.B. v. United States*, 2005 U.S. Claims LEXIS 32 (Ct. Cl., 2005).

31. Civil Action No. 00-1954 (JR), 2003 U.S. Dist. LEXIS 21358 (November 23, 2003).

32. *See Kalman v. Berlyn Corp.*, 914 F.2d 1473 Fed. Cir. (1990). See also *DePalma v. Westland Software House*, 225 Cal. App. 3d 1534 (1990).

33. *Danzig v. Jack Greenberg & Associates*, 161 Cal.App.3d 1128 (1984), *cert. denied* 474 U.S. 819 (1985).

34. *DePalma v. Westland Software House*, 225 Cal.App.3d 1534 (1990).

35. *Coty v. Ramsey Associates*, 546 A.2d 196 (1988), *cert. denied* 487 U.S. 1236 (1988).

36. *Hanover Shoe, Inc. v. United Shore Machinery Corp.*, 392 U.S. 481 (1968).

37. *See Hanover Shoe, Inc. v. United Shore Machinery Corp.*, 392 U.S. 481 (1968).

38. *See Orchard Container Corp. v. Orchard*, 601 S.W.2d 299 Missouri Appeals (1990).

39. *See McLaughlin v. Union–Leader Corp.*, 127 A.2d 269 (1956), cert. denied 353 U.S. 909 (1957).