

Daily Journal

WHY HIRE A TAX EXPERT?

Most lawyers, like most jurors, have only a dim understanding of the tax law. That is often all they need. After all, one's primary obligation as a taxpayer is to file returns and pay. As long as you pay, understanding is really not that important. You do not even need to fill out forms—the days when most people could do their own tax returns are long gone.

In my 30-year career as a tax lawyer, I have seen a dramatic escalation in the nature and complexity of tax laws and regulations. Virtually no one (not even trained specialists) can keep up. Hyper-specialization is now the norm. Far from making tax law unimportant, though, tax law today is arguably more important than ever before.

Using tax experts in civil litigation (and sometimes in criminal litigation) is nothing new. Yet a recent District Court case suggests that using a tax expert may sometimes actually be essential. It may even be malpractice not to.

In *Baxter v. United States*, the court vacated a two-year prison sentence that had been given to a Certified Public Accountant. The Certified Public Accountant had pled guilty to obstructing and impeding the administration of the federal tax laws. Why was the sentence vacated? Ineffective assistance of counsel! The sole reason the court gave was the fact that Baxter's lawyer did not retain a tax expert.

Laura Baxter was an Illinois Certified Public Accountant who prepared tax returns for clients. Unfortunately for Baxter, it turned out that some returns involved a tax



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evasion scheme. She pled guilty, agreeing that her offense involved between

\$550,000 and \$950,000 in tax losses to the government. That was important under the federal sentencing guidelines.

However, it later developed that the *government* had produced these figures, and that Baxter's criminal lawyer did not hire a tax expert to recalculate and verify them. The IRS had computed the tax loss at \$576,000, but the correct figure was \$22,853! That meant Baxter should have received a far smaller sentence. Thus, the *Baxter* case suggests that sometimes the assistance of counsel requires hiring a tax expert. Safety may suggest hiring a tax expert in every tax case, and in every case that has significant tax components.

Much more important than the narrow holding in the *Baxter* case, though, is what it says about litigation in general. Expert testimony can be used in virtually any kind of case if it will assist the trier of fact. The expert's testimony must be based on sufficient facts or data, be the product of reliable principles and methods, and the expert must have applied the principles and methods reliably to the facts of the case. Broad discretion is granted to the trial court as to whether to admit the expert testimony.

In what kinds of cases should you consider using a tax expert? They can be useful in virtually any kind of civil dispute where tax issues are material to the case. The same goes for cases where tax issues are important in assessing and evaluating damage claims.

That means a tax expert can be appropriate in virtually any civil case. Tax issues are prevalent in virtually every business and personal decision we make. Almost any money we pay and any money we receive has tax consequences.

Sometimes tax issues are even at the root of a cause of action. For example, in tax shelter lawsuits, tax experts are needed to explain how the tax shelter was supposed to work and testify about the client's damages. There is usually a component of education and explanation for the judge and/or jury. In fact, where taxes feature in damages, the education function tax experts serve can be of enormous value.

The bulk of civil litigation involves tax issues, explicitly or implicitly. Plaintiffs today commonly seek additional damages for tax consequences. Conversely, defendants often ask for tax issues to be taken into account as a means of reducing damages the plaintiff will be awarded. Jurisdictions vary in how they regard such claims. However, if you do not request such damages, they are precluded.

For Baxter, her counsel's failure to hire a tax expert turned out to be a get-out-of-jail-free card. For most people, a decision whether to use a tax expert will not be so momentous. Still, even in regular old civil litigation, it can be surprising how helpful a tax expert can be.

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