Technical Group Discussion

The "Right"s (and "Wrong"s) in Negligence Claims

- Safeguard Your Professional Reputation

30 July 2013, Tuesday

Participants listened attentively as Accredited Tax Advisor Tan Kay Kheng, Head of the Tax Practice at WongPartnership LLP enlightened participants on safeguarding one's professional reputation in negligence claims.

Armed with experience, entrepreneurial aspirations and a dash of *gungho* attitude, many professionals leave the corporate world to set up their own practices and chart their own journeys. In tax, in accounting, in law or medicine, such moves are aplenty.

With increasingly discerning clients, challenging market pressures and operational issues such as staff turnover, tax professionals in practice, for example, may find themselves face-to-face with negligence claims arising from careless omissions, errors due to incorrect understanding of the tax statutes or a failure to advise when required.

How should one manage his client relationships? What happens when client relationships go awry? Do *you* know the "rights" – your rights and the right (also known as "best") practices – in managing *your* own professional reputation and mitigating the risk of negligence claims?

These were some of the issues tackled in a recent technical discussion by Accredited Tax Advisor Tan Kay Kheng, who is Head of the Tax Practice at WongPartnership LLP. The discussion was organised by the Singapore Institute of Accredited Tax Professionals (SIATP) for tax professionals in practice.

Duty of Care
In understanding the law of negligence, the starting point is determining the duty of care which must exist in a relationship between the defendant and plaintiff, and that there are no policy considerations to negate or reduce the scope of this duty.

For professionals in practice, the duty of care would typically arise from the existence of a contract, usually a written one. However, it was highlighted that should advice be provided *before* a contract is entered into, the duty of care is evident then – even in the absence of a legal agreement. Professionals should be aware that duty of care is not negated just because fees are not charged for the advice given.

A claim may be sought *only if* there is a breach of this duty of care. Examples of breaches by tax agents may be a wrongful advice, inaccurate tax computations or failure to implement instructions, among others.

Breach of Duty
In claiming for negligence, the plaintiff has to prove there is a breach of duty owed. However, obviously, if the scope of work does not cover the duty of care in question, there is no breach of duty.

Situations may arise from complex scenarios which may easily implicate professionals where a breach of duty is subsequently established. For example, in major transactions, there may be multiple advisers involved in different areas of taxation, such as corporate tax, goods and services tax and stamp duties. Tax professionals involved in such situations should be mindful to ensure the scope of engagement and responsibilities are clear to both parties – the client and the tax professional – to protect the professional(s) against any breach beyond the agreed scope of engagement.

Separately, in other situations, professionals may be approached to provide consultations to multiple clients in a particular transaction as a possible cost saving measure, for example. Tax professionals should take caution in such situations as there may be conflict or a difference in interests. This will put the tax professional in a vulnerable position to provide and ensure sufficient care is provided when advising each client. Such situations should be avoided. Separate and independent advisers should be appointed for each client instead.

When a breach of duty is proven, the resulting damage must be determined. If there is no damage suffered, there is no basis for a claim. However, one's reputation may still be adversely affected. Professionals should then mitigate the risk of damage materialising.

Defences
Knowing what constitutes duty of care and breach of duty, how then does one defend one's professional position and/or practice?

When faced with an unhappy client, it is advisable to bring the matter to the attention of one's insurers as soon as circumstances which may give rise to a claim are known. If insurers are only told after a negligence claim is actually made, the insurers may deny the claim. Professionals should arrange through their insurers to consult a lawyer.

In some cases, the blame for negligence may not lie entirely on the professional. There may be situations where the client, for example, contributed to the damage suffered as well. In *Pech v Tilgals (1994)*, the tax agent failed to make inquiries and omitted a transaction the client needed to declare which was subjected to tax. The client signed the tax returns without checking. The tax agent was later found liable but with a reduced 80% of the penalties while the client bore the remaining 20%.

It must be noted that where the client is found to be making a claim based on an illegal or immoral act, the courts will not assist the plaintiff. This is the *ex turpi causa* rule. To illustrate, in *United Project Consultants v Leong Kwok Onn (2005)*, directors' fees were declared by the taxpayer but corresponding taxes were not paid. The *ex turpi causa* rule was initially found to be applicable but on appeal, the appeals court disagreed since the taxpayer had not connived to cheat the Inland Revenue Authority of Singapore.

In addition, exemption and limitation clauses should also be considered in the tax professional's defence. However, such clauses need to be reasonable and relevant factors including the relative bargaining power of the adviser and client, and the availability of insurance coverage that may be taken by the adviser are taken into consideration in determining the "reasonableness" of the clause.

Another key consideration to note is the limitation period. A claim cannot be made if it falls beyond the period (time bar). In Contract Law, the maximum period a taxpayer may claim for negligence is six years after the date of breach. However, in the Law of Negligence, the time bar is six years from the date on which the damage occurred. As such, as damage typically occurs later than the breach, the time bar would therefore end later and this may benefit the client in bringing forth a law suit.

To illustrate, if there is an omission of taxable items during the year of assessment 2012 for income tax and the assessment was made on 1 August 2012, the period of six years, under the Law of Negligence, begins from 1 August 2012 – the date the damage occurred.

However, in the case of GST with a similar assessment date of 1 August 2012, relating to the accounting period January to March 2011, the time bar of six years starts from end April 2011 – the end of the month after the accounting period for which GST must be accounted for to IRAS.

Ideas exchanged and perspectives shared as participants mingled during the tea break.

Best Practices

Going back to the basics, nobody wants to spend valuable time and resources dealing with negligence issues. To avoid or minimise these, there are various initiatives professionals should consider putting in place in their practices.

To begin with, all professionals should arm themselves with insurance coverage.

One key consideration is the engagement letter. A well-crafted engagement letter comprises a clear scope of advice with assumptions clearly stated, including appropriate caveats and qualifications to the advice.

It may seem obvious but it is not advisable for professionals to be rendering advice to multiple parties in a single transaction.

In addition, while the focus is generally placed on complicated areas, negligence may result from the simpler and seemingly routine aspects of compliance work, often delegated to junior staff. Tax professionals, particularly those in practice, are advised to review their work processes for gaps.

Needless to say, professionals should always continually keep abreast of industry updates and developments, particularly for tax matters, as changes occur annually. Other than joining the Singapore Institute of Accredited Tax Professionals to be clued in on these, continuing professional development is essential.

Special attention must also be given during any transitioning of advisers. Critical timelines should be highlighted and taken note of.

As work pace quickens and clients are more discerning, a workshop on this area is certainly a timely reminder to professionals in practice to pause and reflect on how they are running their professional practices. Sometimes, tax agents are all too caught up serving and protecting their clients – many forget to protect themselves.

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About SIATP's Technical Discussions

SIATP's technical discussions have continually been very well received by accredited tax professionals. Unlike the run-of-mill Continuing Professional Educational courses which typically cover tax fundamentals, SIATP's interactive technical discussions are designed to cover tax issues that do not have clear-cut solutions or situations that may have different interpretations. Over time, these discussions contribute in boosting the overall tax standards in Singapore.

About Mr Tan Kay Kheng

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Kay Kheng heads the Tax Practice in law firm WongPartnership LLP and sits on the Board of Directors at the Tax Academy of Singapore and the Singapore Institute of Accredited Tax Professionals. His areas of practice cover both contentious and advisory/transactional work relating to income tax, stamp duty, property tax and goods & services tax. He also practises in the areas of commercial litigation and arbitration.

This technical event commentary is written by SIATP's Senior Manager, Joanna Wong.