Special assessment amount. In about 40% of the cases, the defendants—both individuals and corporations—were also required to pay a special assessment. This special assessment amount was usually set as a specific amount per count charged against the defendant. For example, a defendant could be asked to pay $400 for each count. For individuals, the total assessment owed ranged from $100 to $1,900, and for corporations, the range was $400 to $11,200. The assessment is usually due immediately.

Insights for Boards of Directors, Management, and Auditors

An examination of the FCPA cases from 1998 to 2010 is useful both for the management of organizations that operate on a global basis (public and private) and for the auditors of those organizations. If a company is going to do business in a foreign country, management must comply with the FCPA, as well as with international antibribery legislation, to avoid serious penalties and sanctions. Both the boards of directors and management of companies need to consider the risk of noncompliance with the FCPA prior to entry into a foreign country. Using the number of FCPA cases from 1998 through 2010 and the CPI, the authors' findings show that the risk of noncompliance with the FCPA is heightened in the following countries: Nigeria, Iraq, China, Azerbaijan, Kazakhstan, Mexico, Thailand, and Saudi Arabia. The boards of directors and management are responsible for the oversight and establishment of internal controls to effectively prevent illegal payments from being made and going undetected.

To address the risk of illegal payments, the authors suggest the following considerations in order to set the proper tone and establishment of internal controls:

- Evaluate the risk of noncompliance with FCPA and global antibribery legislation through a risk committee at the board level.
- Implement a management process of risk of noncompliance with the FCPA and antibribery legislation—identification of the risk, assessment of the risk, and management of the risk.
- Conduct frequent communication and training programs for the FCPA and other global antibribery legislation, such as the 2010 U.K. Bribery Act.
- Create whistleblowing policies and procedures, including communication and training.
- Designate a risk officer dedicated to testing compliance with the FCPA and global antibribery legislation or compliance testing by internal audit.
- Establish appropriate controls for transactions initiated by upper-level management; findings show that the majority of the bribes were perpetuated by a president or officer, vice president, or director.

While auditors' primary responsibility is to express an opinion on the financial statements, not to detect fraud or illegal acts, they are required to plan and perform an audit to provide reasonable assurance of detecting material misstatements due to fraud and those illegal acts that have both a direct and material impact on the financial statements. For those countries where the risk of noncompliance with the FCPA and other global antibribery legislation is greater—such as Nigeria, Iraq, and China—the auditor will need to consider how such risk impacts the planning and conduct of the engagement.

For example, the authors' findings show that the majority of bribes were perpetuated by upper-level management. The auditor will need to consider the tone at the top of those clients, the internal controls for transactions initiated by upper management, risk assessment process of the client, and the policies and procedures of the client to monitor the effectiveness of those controls. The focus on the internal controls related to transactions initiated by upper management with foreign countries is particularly important, because the authors' findings show that most perpetuators of the FCPA spent two years or less incarcerated in a minimum security facility. An argument can be made that the fine, length of imprisonment, and type of facility might not be a sufficient deterrent. While investigations have primarily focused on pharmaceutical, defense, and nonfinancial companies, the SEC has indicated it will begin investigating financial firms for corruption abroad (*BoardIQ*, 2011, June 21, pp. 1–12). As auditors consider whether to accept or continue working with a client, they should carefully examine the countries where that potential client conducts business, and how the organization evaluates and controls the risk of doing business in those foreign countries.

Both the number of FCPA cases and the sanctions imposed for violations of the FCPA have increased dramatically in recent years. The Department of Justice and SEC have taken steps to investigate these cases more rigorously. Organizations need to realize the seriousness of the actions taken in an effort to obtain business in foreign countries and develop programs to minimize the risk of occurrence. The tolerance for fraud and corruption both in the United States and internationally is increasingly lessening as more countries, such as the United Kingdom, develop antibribery legislation. ❑

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EXHIBIT 7
Fine Amounts for Individuals

Fine Amount	Number of Cases[1]
$ 0 to 50,000	29
$ 50,001 to 100,000	2
$ 100,001 to 250,000	1
$ 250,001 to 500,000	1
$ 500,001 to 1,000,000	1

[1] The number of cases doesn't equal 146 because there are cases where sentencing is pending or sufficient documentation was not available.

EXHIBIT 8
Fine Amounts for Corporations

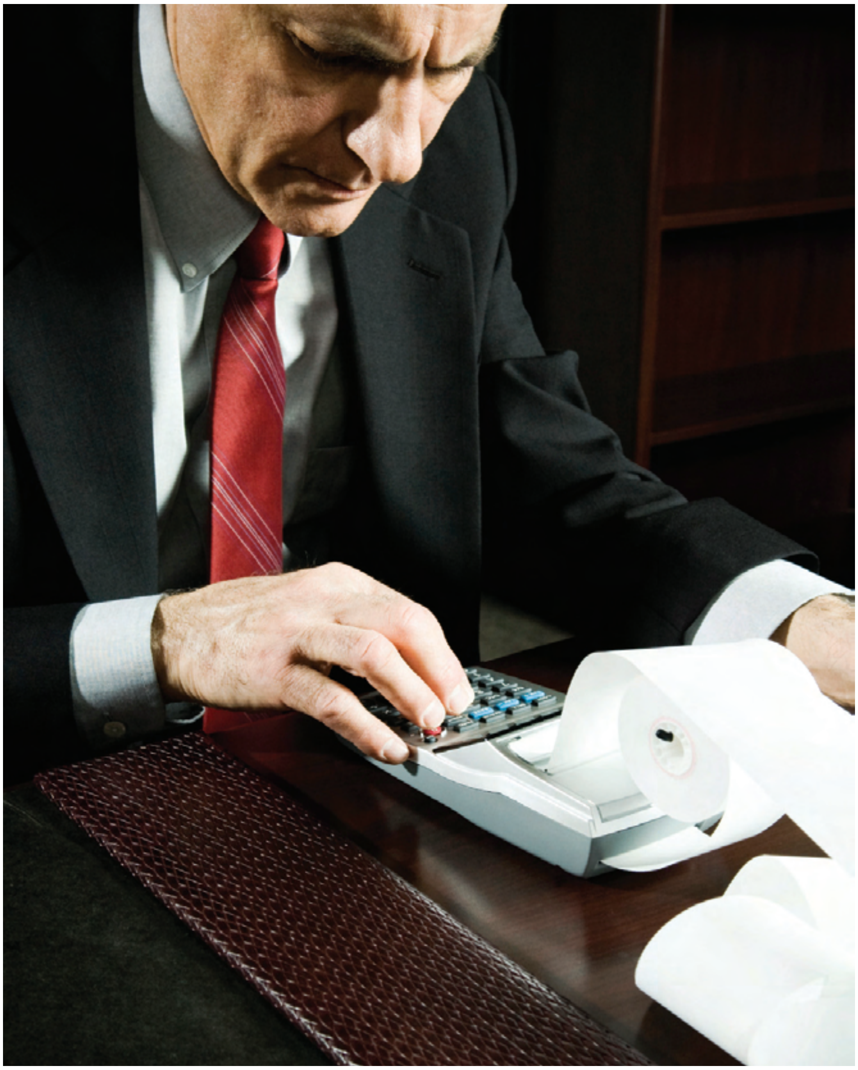
Fine Amount	Number of Cases[1]
$ 0 to 1,000,000	13
$ 1,000,001 to 5,000,000	19
$ 5,000,001 to 10,000,000	11
$ 10,000,001 to 100,000,000	16
$ 100,000,001 or more	5

[1] The number of cases doesn't equal 146 because there are cases where sentencing is pending or sufficient documentation was not available.

Tax Preparers' Liability for Incurred Interest Charges

Eckert *Decision in California Could Lead to Reduced Taxpayer Recovery*

By Brandon Reif and Steven Buha



There has been a recent increase in lawsuits brought by taxpayers claiming that their tax preparers gave them negligent tax advice or created tax reporting errors that resulted in an audit by the tax authorities or, worse yet, the issuance of tax assessments. Often, a taxpayer blames the tax preparer and seeks compensation for a variety of damages that he claims were proximately caused by the tax preparer's misconduct.

A taxpayer's alleged damages claim against a tax preparer usually rests on four theories of damages: First, the parties dispute the unpaid taxes that are owed to the tax authorities. Second, the parties dispute the penalties assessed by the tax authorities. Third, the parties dispute the corrective costs incurred by the taxpayer to respond to the audits and cure the deficiencies. Fourth, the parties dispute the interest charges incurred on the unpaid taxes. Some of these damages theories are seldom recoverable by the taxpayer, while others are and fuel the litigation. This article focuses on the fourth damage theory—that is, the interest charges incurred—because it is subject to an important, yet often overlooked, jurisdictional split over this issue.

A Spectrum of Viewpoints

Most states have adopted the view that the interest incurred on unpaid taxes is recoverable from a negligent tax preparer. The leading cases rely on the logic that the interest paid by the taxpayer flows directly from the tax preparer's misconduct and would not have been owed had the tax return been properly prepared (see *Dail v. Adamson*, 570 N.E.2d 1167, 1169, Ill. App. Ct. 1991; and *King v. Neal*, 19 P.3d 899, 902, Okla. Civ. App. 2001). Other states have simply awarded interest to a taxpayer without discussing the underlying merits of the issue, such as in *Warmbrodt v. Blanchard* (692 P.2d 1282, 1284 n.2, Nev. 1984) and *Hall v. Gill* (670 N.E.2d 503, 506, Ohio Ct. App. 1995).

California, however, has adopted the minority viewpoint, holding that interest incurred on unpaid taxes is not recoverable from a negligent tax preparer (see *Eckert Cold Storage, Inc. v. Behl*, 943 F. Supp. 1230, 1235, E.D. Cal. 1996). In *Eckert,* the court held that interest "represents a payment for the plaintiffs' use of the tax money during the period after the taxes came due and before they were paid … to the extent that the IRS charges the market rate, interest is not a proper element of damages." This view is analogous to federal securities fraud claims (i.e., those made under SEC Rule 10b-5), where interest paid to taxing authorities is also viewed as compensation for the taxpayer's "use of the money" and is not recoverable for identical reasons (see *DCD Programs v. Leighton*, 90 F.3d 1442, 1451, 9th Cir. 1996). California's jurisprudence presumes that a taxpayer has benefited from the use of the money, receiving what amounts to an interest-free loan for the period during which the taxes were owed. Whether a taxpayer subjectively benefited from the use of the money is not considered. The state of Washington, another jurisdiction adhering to the minority viewpoint, has determined that a taxpayer's rate of return from the unpaid taxes results from his independent judgment, and "damages from poor investing are too speculative to blame" on the tax preparer, according to *Leendertsen v. Price Waterhouse*, 916 P.2d 449, 451–452 (Wash. Ct. App. 1996).

There also exists a third, intermediate viewpoint that some states have adopted as a compromise between the two stances described above. This intermediate viewpoint allows parties to introduce evidence to demonstrate whether the taxpayer subjectively benefited from the use of the tax money. New Jersey introduced this intermediate viewpoint in *Ronson v. Talesnick* (33 F. Supp. 2d 347, D.N.J. 1999). The *Ronson* court, citing *Eckert* as the leading example of the minority position, rejected the minority viewpoint because it cannot be reconciled with the theory that "a tortfeasor should not benefit from the ingenuity of a harmed plaintiff." The *Ronson* court also rejected the majority viewpoint, reasoning that the law does not entitle a taxpayer to receive a double-recovery due to a tax preparer's negligence. At least four states (including Nebraska, Pennsylvania, South Dakota, and Texas) have adopted the *Ronson* approach in varying degrees. The key distinction among the states rests upon which party must bear the burden of proof—that is, whether the tax preparer must prove that the taxpayer benefited from the use of the tax money or the taxpayer must prove that he did not benefit from the use of the tax money.

Despite the emergence of *Ronson* and its progeny, the minority viewpoint still controls taxpayer–tax preparer disputes in California; for example, *Eckert* was followed in *Fallon v. Locke, Liddell & Sapp, LLP* (No. C-04-03210, 2008 U.S. Dist. Lexis 67708, N.D. Cal. Sept. 1, 2008). It is worth noting that the *Eckert* and *Fallon* decisions are federal district court opinions. The California state judiciary has not rendered a published opinion on this narrow issue, which makes the federal district court opinions all the more persuasive. In addition, the *Eckert* rationale comports with well-established California tort principles—namely, that a plaintiff's damages award must not place the plaintiff in a better position than had the misconduct not occurred.

Practical Considerations

While *Eckert*'s impact on California's jurisprudence cannot be overstated, attorneys representing tax preparers must actively cultivate a wider acceptance of this minority viewpoint and prevent taxpayers from inducing movement toward *Ronson*'s intermediate viewpoint in those jurisdictions that have adopted a more preparer-friendly viewpoint.

Sometimes the trier of fact will be charged with rendering a verdict on the issue of interest charges. It is prudent to engage an expert witness to run simulations to substantiate that a taxpayer actually used (or had the opportunity to use) the tax money to his financial advantage. Comprehensive simulations source the taxpayer's funds and then trace them to reveal the actual returns that could have been received by the taxpayer. It is also prudent to compare actual returns with prevailing market rates, as well as the interest rates charged by the IRS. Often, the simulations reveal that the taxpayer actually benefited (or could have benefited financially) more handsomely because the government typically assesses interest at rates lower than the prevailing market.

Tax preparers should take care not to make representations to any client with an active or expected audit. One Louisiana court found that a tax preparer "unconditionally guaranteed" his taxpayer client that he would pay all interest assessed in the event of an audit (*Slaughter v. Roddie*, 249 So. 2d 584, 586 [La. Ct. App. 1971]). The court ruled that the tax preparer's statement that he would indemnify the taxpayer following an audit gave rise to an agreement to do so. ❑

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