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# Tax Appeals: Institute Response to TAC Consultation – September 2017



## Introduction

Tax appeals entered a new era on 21 March 2016. After many years of debate on reform of the appeals regime, a new independent body, the Tax Appeals Commission (TAC), was established to handle all aspects of the tax appeals process. This was accompanied by new legislation, forms and procedures for taking an appeal. The setting up and first year

of operation of the TAC have been detailed in previous issues of *Irish Tax Review*.<sup>1</sup>

On announcing the introduction of the new regime, the then Minister for Finance, Michael Noonan TD, stated that its objective was “to ensure an enhanced and cost effective appeal mechanism for tax cases, providing transparency and certainty for taxpayers”.

<sup>1</sup> Dearbhla Cunningham, “Tax Appeals Commission: Shaping Jurisdiction, Procedure and Substantive Tax Law”, *Irish Tax Review*, 29/3 (2016); Gráinne Duggan, “The Tax Appeals Commission: The First Year”, *Irish Tax Review*, 30/1 (2017).

Almost 20 months later, the evidence shows that the regime has not yet delivered on this objective. According to recent figures, there is a heavy build-up of cases in the system, with:

- over 4,387 appeals before the TAC,<sup>2</sup>
- €1.5bn of tax in dispute and<sup>3</sup>
- only 45 determinations published by the end of October 2017.

Against this backdrop, the launch of a public consultation by the TAC in September 2017 was a welcome development. The tax appeals regime has been at the forefront of the Institute's representations agenda over the last 10 years. On the announcement of the consultation, we immediately set to work gathering members' views and experiences of the regime to prepare our response. This article summarises the issues that members raised with us and the key recommendations in our submission to the TAC.

## Background to Our Submission

In September, members from across the country responded to our call for their feedback and provided us with real-life examples of clients' experiences of the appeals process. These case studies formed a core part of our submission to the TAC and were invaluable in helping us to convey the issues being experienced and their impact. Some common issues highlighted by the case studies were:

- lengthy delays in obtaining a hearing date and in many cases subsequent delays in receiving a determination once the case has been heard,
- uncertainty about where an appeal is in the "queue" or when it may be heard,
- uncertainty about Revenue's grounds for raising the assessment, making it difficult to prepare counter-arguments or even to

decide whether to take an appeal in the first instance,

- cases proceeding to appeal when the taxpayer believed that there was scope to reach agreement with Revenue before the issue of an assessment,
- the requirement to incur costs on preparing legal arguments when it is not clear if or when the appeal may be heard and
- limited information on the determinations made to date, impacting on taxpayers' ability to make an informed decision on whether to pursue an appeal.

However, the biggest concern by far was the high cost of taking an appeal, in particular the high cost of interest if the taxpayer is ultimately unsuccessful. The rates of interest in Ireland (8% and 10%) are particularly high when compared with other jurisdictions, such as the UK, which has a rate of 2.75%.<sup>4</sup> The combination of these high interest rates and the sheer length of time to progress through the appeal process is a cause of huge anxiety for taxpayers. In some of the case studies that members supplied, taxpayers were waiting five years (or more) to get a hearing date. Many members cited instances where clients decided not to challenge Revenue's assessment even when they had a strong case due to the fear of escalating interest costs. In other cases, clients felt they had no option but to pay the disputed tax upfront to minimise the risk of a high interest bill.

Drawing on members' feedback and input from our Tax Appeals Expert Group, the Institute prepared a detailed response to the TAC consultation. Our submission outlined the myriad issues that members raised and included 15 recommendations for improvement. In this article, we focus on a number of our key recommendations. You can read the full list of recommendations in the Executive Summary of our submission, which is available on our Tax Appeals webpage.

2 Parliamentary PQ number 39468/17.

3 Ibid.

4 As at 31 October 2017

## Our Key Recommendations for Reform

### A “stop” on interest

Fundamentally, taxpayers are not responsible for the delays that have accumulated in the appeals regime, yet they are being unfairly penalised as the “interest clock” continues while their appeal is stuck in the process. We recommended that statutory interest should be stopped on all cases in our congested appeals process, until such time as the current congestion has been dealt with and taxpayers can have a clear understanding of the timeline to have their case resolved.

### Resourcing

Adequate resourcing of the TAC is critical to ensure that the tax appeals regime can operate as intended. Currently, there are only two permanent Appeal Commissioners and one Temporary Appeal Commissioner, who is tasked with progressing the 2,731 legacy appeals transmitted from Revenue. It is very clear to us that such a large workload cannot be dealt with by any three individual Commissioners and that more resources are urgently required to unlock the €1.5bn of tax in dispute.

### Ways to resolve cases more effectively

Although appropriate resourcing of the TAC is critical, it is only one part of the solution to alleviate the current backlog of cases. In the Institute’s view, better case management procedures are required to deal effectively with the diverse range of appeals in the system. Some appeals will involve highly complex technical points and large amounts of tax, whereas in other appeals it may only be the facts that are in dispute and/or the sums in question are relatively small. According to recent figures, more than half of the cases before the TAC concern sums of less than €10,000. At the upper end of the scale, 50 cases account for nearly €1bn in tax.<sup>5</sup>

A way needs to be found to effectively deal with this diversity without disadvantaging either

group of taxpayers. One approach is to develop alternatives to an appeal hearing for appropriate cases. We recommended two alternatives in our submission.

### *Alternative dispute resolution*

Many jurisdictions have developed a range of approaches to resolve disputes without the need for litigation. There is widespread recognition that alternative dispute resolution (ADR) mechanisms such as arbitration and mediation can work well in resolving disputes efficiently. The UK, for example, has a well-developed mediation-based ADR whose role in assisting with tax disputes is recognised by the UK equivalent of the TAC – the UK Tax Tribunals. In fact, the UK First-tier and Upper Tribunals are required to bring the parties’ attention to alternative ways to resolve the dispute.

In the UK regime, an independent mediator works with the parties in dispute to assist them to reach agreement. This approach is commonly used in tax disputes where, for example, there is disagreement on the facts, there is no clear “right” answer, or it is not possible to resolve the dispute fully by mediation but agreement on the issues requiring a legal ruling would help to reduce the costs of litigation for both parties to the dispute.

In our submission, we recommended the introduction of an independent ADR mechanism, which could assist in reducing the current congestion in the appeals process and the associated costs for taxpayers. It would also reduce the flow of cases into the appeals system.

### *A “small claims court” model*

We know from the published statistics that half of the appeals at the TAC are for amounts of less than €10,000, with 70% relating to amounts of less than €50,000. In a number of jurisdictions, such as the US, there are mechanisms to deal with straightforward disputes where the quantum of tax is small.

5 Ibid.

On many occasions, we have called for a separate forum to deal with relatively small, straightforward cases, and we recommended the introduction of a “small claims court” model to resolve these cases promptly and efficiently.

### Certainty for taxpayers on Revenue’s grounds for an assessment

Members’ feedback clearly illustrated that, in many cases, taxpayers are unclear on Revenue’s basis for raising an assessment until a very late stage in the appeals process. There is no obligation on Revenue to outline its grounds until the point at which legal arguments are exchanged. This makes it very difficult to prepare counter-arguments to Revenue’s position, and even to decide whether to appeal the assessment in the first instance.

In the UK Tax Tribunal regime, HMRC is required to provide a statement of case that includes the technical basis for the tax assessment. The taxpayer then has 42 days to consider HMRC’s position and to respond. This process ensures that all parties are clear on the issue in dispute at an early stage in the appeals process. We recommended that a similar approach be adopted by the TAC.

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### Reducing the flow of cases into the appeals system

The current congestion in the appeals process is being exacerbated by the high volume of cases that continue to enter the appeals regime. The development of an ADR mechanism and a “small claims” model, as outlined above, should go some way to reducing the volume of cases requiring an appeal hearing. However, they do not displace the need for a focus on the process of reaching a settlement with Revenue. Members’ feedback reinforces the importance of settlement as a conclusion, where possible and appropriate, where relatively small sums are in question, for example.

As noted in the TAC’s Annual Report, 2,731 legacy appeals were transmitted from Revenue to the TAC last year. Revenue invited taxpayers to engage in settlement discussions before transmission of these cases, while disappointingly, less than 10% of the cases concluded in a settlement.

Settlements are a normal part of a functioning tax administration regime. It is important that cases do not proceed unnecessarily to appeal when there is scope to reach agreement or where the basis of Revenue’s assessment is unclear. We recommended that:

- an external mechanism is introduced to ensure that assessments without sufficient Revenue from stateable grounds do not enter the appeals process and
- the Comptroller and Auditor General publishes an analysis of the fees incurred by Revenue in taking an appeal versus the tax ultimately recovered.

### Next Steps by the Institute

The Institute will continue to press for improvements to the tax appeals process. In October, our Policy Director, Cora O’Brien, addressed the Oireachtas Joint Committee for Jobs, Enterprise and Innovation on the high rate of interest and the lengthy delays experienced, and we will continue to work to ensure that members’ views on the process are understood by all stakeholders. It is recognised that the TAC, in holding a consultation, wishes to effect refinements to the new tax appeals process, thereby facilitating the effective implementation of the new provisions.

Read more on **taxfind** From Irish Tax Institute Response to the Consultation on the Rules & Procedures of the Tax Appeals Commission, September 2017