



**Irish Taxation  
Institute**

Educating, Developing & Representing

# **The Irish Appeals System**

The Rules and Procedures  
Governing Irish Tax Appeals

March 2008





# The Irish Appeals System The Rules and Procedures Governing Irish Tax Appeals

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Irish Tax Appeals

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# The Irish Appeals System

## The Rules and Procedures Governing Irish Tax Appeals

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# **Irish Taxation Institute**





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### **1. The Irish Taxation Institute**

The Irish Taxation Institute (ITI) is the leading representative body for taxation affairs in Ireland. Our membership comprises qualified tax advisers, accountants, lawyers, and other corporate and business professionals. Our mission is to support an efficient, fair and competitive tax system that promotes an understanding of and expertise in taxation and encourages economic and social progress. Our 5,000 members work with corporate leaders, Government, State agencies, representative groups, professional organisations and the general public. Through our membership of the Confédération Fiscale Européenne, we monitor and influence legislation and tax policy developments in the EU and internationally.

For 40 years, ITI has been Ireland's foremost provider of qualified tax advisers through our three-year (AITI) and one-year (TMITI) tax qualification courses. Our professional development programme provides continued education, appropriate advice, specialist seminars and other support services for members. This ensures qualified tax advisers remain professionally competent throughout their working lives. Through our nationwide branch network and comprehensive committee structure, our members are actively involved in developing and advancing research on taxation, economic and social policy. Drawing on this expert team, ITI produces a comprehensive suite of taxation publications covering the full range of tax topics.

ITI is governed by a Council made up of senior business executives and managed by a dynamic executive team.





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# **Executive Summary**





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### 2. Executive Summary

The promotion of constructive dialogue on the operation of the Irish Appeals System is one of the key goals of the Irish Taxation Institute (ITI).

ITI believes that the vital attributes of a good tax administration system are simplicity, transparency, efficiency and effectiveness. A tax administration system should deliver equal treatment for all taxpayer groups at low compliance costs. It should also ensure proper accountability to the taxpayer by the authorities regarding administration of the tax system. An appeals mechanism is an intrinsic part of any equitable tax administration. With these key attributes in mind, ITI believes a review of the Irish appeals system is timely with a view to making it more efficient and effective for all participants.

While this body of work has been initiated by ITI, it ties into work being carried out by the Department of An Taoiseach on Regulatory Appeals. In July 2006, the Department issued a consultation paper on regulatory appeals, which includes a commitment to develop an enhanced approach to the means by which the decisions of Irish regulators can be appealed. ITI believes that this report will be a significant contribution towards the Department's work in this area by reference to the Appeal Commissioners.

Work in the area of the Irish appeal system has previously been carried out by the Law Reform Commission (LRC) and through the deliberations of the Public Accounts Committee (PAC).

The approach taken by ITI in preparing this report is summarised at Section 3 and the methodology is further expanded on at Section 4. Appendix I is a research report into the rules and procedures governing Irish tax appeals, the body of which is based on research commissioned by the ITI and carried out by Mr John Gallagher, BL.

The key outcomes of the methodology used by ITI in this report have been summarised into "Comprehensive ITI Recommendations for Action" that needs to be taken as soon as possible to improve the efficiency and effectiveness of the service. They are included at Section 5 of this report.

We have also selected our top five legislative and administrative recommendations for action. They are as follows:

#### **Top 5 Administrative Recommendations**

A common theme runs through all of the above recommendations; namely the necessity that the Office of the Appeal Commissioners be adequately funded.

1. **Procedures Manual for the Office** – the Appeal Commissioners should be responsible for drawing up a procedures manual for all aspects of the appeals system, including timing issues. This manual should be published on the Appeal Commissioners' website<sup>1</sup>.

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<sup>1</sup> [www.appealcommissioners.ie](http://www.appealcommissioners.ie)



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2. **Process of Appointment of the Appeal Commissioners** - the process could be made more transparent through the use of an appointments system similar to that of the “Top Level Appointments Committee” (TLAC).
3. **Minimum of 3 Appeal Commissioners** - a minimum of three Appeal Commissioners should be appointed to deal with the number and complexity of cases involved.
4. **Independence of the Appeal Commissioners** – the actual and perceived independence of the Appeal Commissioners from Revenue, and others, must be enforced. Independence could be reinforced by, for example:
  - Direct submission of the Form AH1 (notification of an appeal) by the taxpayer to the Appeal Commissioners;
  - Independent recruitment of adequately qualified staff to manage the office and caseload and to document proceedings. This could include recruitment of a stenographer.
5. **Re-design and re-launch of Appeal Commissioners’ website** – The current website is hosted by ITI. Perhaps this arrangement should be reviewed in order to enhance the office’s independence. ITI believes the website should be redesigned into a comprehensive information source for all stakeholders in the appeals system. The website could include background information on the office, the procedures manual, published determinations, password protected case progress reports and other useful tools.

### **Top 5 Legislative Recommendations**

1. **Time limits for all aspects of an appeal** – there should be a comprehensive review of all time limits relating to an appeal with a view to drawing up legislative limits at all stages. These time limits should be comparable and practical across all tax heads and all stages of an appeal.
2. **Legislative requirement to publish an Annual Report** - An Annual Report should be produced by the Office of the Appeal Commissioners covering, amongst other issues:
  - a. The number of cases heard in the year
  - b. Tax heads covered
  - c. Successful parties i.e. number won by Revenue and number won by the taxpayer
3. **Harmonisation of legislation** – harmonisation of legislation regarding appeals under all tax heads is required.
4. **Legislative requirement for Written Decision** - The receipt of a written decision from the Appeal Commissioners is obviously critical to both parties. Legislation should provide that a written decision must issue in all dispute cases.



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5. **Legislative obligation to Publish Decisions** - as well as issuing written decisions in all argument cases, ITI seek a change to the existing legislation in Section 944A Taxes Consolidation Act 1997 (TCA) which provides the Appeal Commissioners with the option to publish written decisions where taxpayer identity is protected. ITI believes there should be a legislative obligation to publish all decisions of an argument nature on the website of the Appeal Commissioners within a reasonable time limit. This should be possible in an adequately resourced office.

**Dermot O'Brien**

*Past President, Irish Taxation Institute*

*March 2008*





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# **Introduction and Background**





## The Irish Appeals System The Rules and Procedures Governing Irish Tax Appeals

### **3. Introduction and Background**

The promotion of constructive dialogue on the operation of the Irish Appeals System is one of the key objectives of the Irish Taxation Institute.

While ITI has taken the initiative in respect of this report, it is very much hoped that the document will prompt valuable discussions with the Appeal Commissioners, the Revenue Commissioners (“Revenue”) and the Department of Finance towards a common objective of reforming and improving the system for all concerned.

The approach taken in this body of work was to use a number of research tools to create a comprehensive report. These research tools included:

- Direct discussions with members on their experiences of the appeals system
- The convening of a Roundtable Forum to discuss the Irish appeals system with members, to compile proposals for reform, etc. (see Section 4.1)
- A survey of practitioners with experience of the Irish appeals system (see Section 4.1)
- The commissioning of a detailed research report by an independent barrister, Mr John Gallagher, BL on the rules and procedures governing the appeals system in Ireland (see Appendix I)

The approach taken and methodology used is described in more detail at Section 4 of this report.





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# **ITI Research Methodology**





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#### 4. ITI Research Methodology

The methodology used in this report can be divided into two main categories:

1. **Feedback** from members and practitioners with experience in the area, including:
  - A Roundtable Forum
  - Direct discussion with members
  - A Survey of members/practitioners
2. **Research** into the rules and procedures governing Irish tax appeals, which forms the body of the report at Appendix I.

Each of the two categories is described in further detail below. The information gathered from all of the research tools used contributed towards the recommendations included in Section 5 of this report.

##### 4.1. Feedback from Members and Practitioners

The ITI held a Roundtable Forum in order to gather feedback from members and practitioners on their experience with the Irish appeals system. The Roundtable Forum was held at ITI in December 2006 and was composed of taxation and legal practitioners, from both small and large firms, and practising barristers. It was also attended by ITI President, Mr Dermot O'Brien, ITI research personnel and Mr John Gallagher.

The members of the Roundtable Forum have experience in dealing with the Irish appeals system over many years. The main aims of the Roundtable were to:

- get the members' views on the discussion points from the research report;
- discuss the various options for improving the appeals system;
- prioritise issues of concern in reforming the system;
- conclude on the key recommendations to be made in this report.

As mentioned above, the matters discussed at the Roundtable Forum were documented and are reflected in the recommendations made at Section 5 of this report. The feedback received from the Roundtable also contributes towards the understanding of the practicalities of the Irish appeals system, as detailed throughout Mr Gallagher's research, which forms the body of the report at Appendix I.

In addition to gathering feedback through the Roundtable Forum and other discussions with members, the ITI carried out a survey on the Irish appeals system amongst all members and other visitors to its website<sup>2</sup>. While ITI would have hoped for a greater number of respondents, there were a number of results which were consistent with the issues raised both at the Roundtable Forum and in the research reflected at Appendix I. Some of the key results are reflected below, while further analysis is provided at

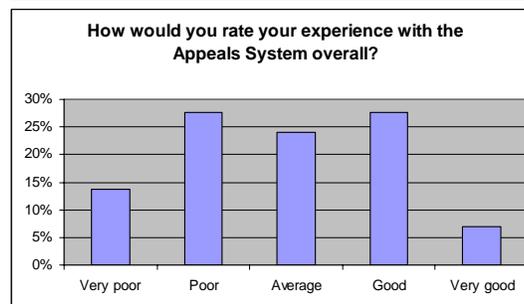
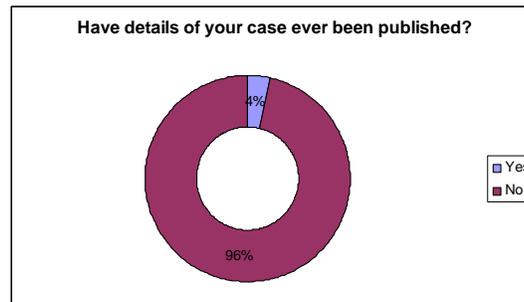
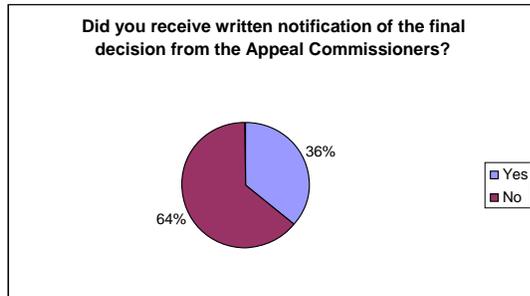
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<sup>2</sup> [www.taxireland.ie](http://www.taxireland.ie)



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Appendix VI. 54% of those surveyed had been involved in an appeal to the Appeal Commissioners in the last 5 years.



The results contribute towards the recommendations made in Section 5 of this report.



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#### **4.2. Commissioned Research**

The ITI commissioned John Patrick Gallagher, BL, AITI, to carry out detailed research into the rules and procedures governing tax appeals in the Irish taxation system and to report thereon. The results of this research form the body of the report at Appendix I.

In commissioning this research, ITI was seeking an examination of both the detail of the legislation governing appeals and the practicalities at play in the system. As well as researching the legislative background, Mr Gallagher spoke to a number of practitioners with significant experience of dealing with the appeals system in order to gain a first-hand, detailed insight into the practical realities of taking an appeal through the Irish appeals system. Their feedback has been consolidated into Mr Gallagher's research.

The main issues which this report deals with are as follows:

- the structure of the Appeal Commissioners office and issues of appointment, qualification, removal and administration
- pre-appeal procedures and the making of a valid appeal
- the conduct of the appeal hearing
- post appeal dissemination of information
- re-hearings, cases stated to the High Court and other reviews
- underlying issues of costs, timing, independence





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# **Comprehensive ITI Recommendations for Action**





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## **5. Comprehensive ITI Recommendations for Action**

Based on the all of the research tools used in this report, ITI has compiled the following recommendations for action to be taken as soon as possible so as to improve the efficiency and effectiveness of the Irish appeal system for all participants.

### **5.1 Appointment and Training**

- 5.1.1 The process for appointment of Appeal Commissioners could be made more transparent through the use of an appointment system similar to that of the “Top Level Appointments Committee” (TLAC).
- 5.1.2 Appointments would ideally be for a maximum seven year fixed term with an option for renewal.
- 5.1.3 A minimum of three Appeal Commissioners should be appointed to deal with the number and complexity of cases involved.
- 5.1.4 Of these three, ITI would like to see one Commissioner with specific responsibility for Indirect Taxes.
- 5.1.5 A legal qualification might be considered for at least one of the ACs.
- 5.1.6 Part time appointments should be considered, as happens in the UK.
- 5.1.7 Initial training should be provided for new appointees to the office and ongoing professional training should be provided for all Appeal Commissioners.
- 5.1.8 It is critical that the Office is adequately funded to ensure that it can organise its own internal administration adequately and independently.
- 5.1.9 An Annual Report should be produced by the Office of the Appeal Commissioners covering, amongst other issues:
  - The number of cases heard in the year
  - Tax heads covered
  - Successful parties i.e. number won by Revenue and number won by taxpayer.

### **5.2 Areas of Remit**

- 5.2.1 The competency of the Appeal Commissioners should extend to penalties under the tax code.
- 5.2.2 There should be a right of appeal against publication as a tax defaulter and the imposition of the surcharge for late returns under Section 1084 TCA .
- 5.2.3 Harmonisation of legislation regarding appeals under all tax heads is required.
- 5.2.4 The issue of whether the decisions of the Appeal Commissioners ought to have legal precedent should be considered, particularly if (as we hope will be the case) comprehensive details of their decisions are to be published going forward.



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### **5.3 Making the Appeal**

- 5.3.1 Where a taxpayer disputes and is appealing a notice of assessment, Revenue should provide a more detailed assessment so that the taxpayer knows exactly what grounds they have for raising such an assessment. This will enable the taxpayer to make an informed appeal.
- 5.3.2 Clear procedures need to be published as to the steps the taxpayer must take before an appeal can be lodged i.e. the information that must be lodged, the extent to which the tax must be paid, etc. Consideration should be given to what form and legal status these procedures should have e.g. primary legislation, secondary legislation, statements of practice, etc. They may need to be accompanied by explanatory notes published by the Appeal Commissioners so as to ensure the system is easily understood by taxpayers.
- 5.3.3 Clear guidance is also required on the form which the appeal must take i.e. in writing, on a particular form to the Appeal Commissioners, the level of detail that must be included as to grounds for appeal, etc. Again consideration should be given to the form and status of these procedures and to the publication of easily-understood guidance notes for taxpayers.
- 5.3.4 Harmonisation of time limits for all aspects of the appeals process is required. This applies to both the period of the time limit allowed and the point at which the time limit is triggered e.g. a 30 day time limit for all aspects of appeals from the date of notification.
- 5.3.5 There should be a mechanism for amending the grounds of an appeal.

### **5.4 Pre-Hearing**

- 5.4.1 In order to preserve the independence of the Office of the Appeal Commissioners, appeal notifications should be submitted directly to the Appeal Commissioners and not to Revenue.
- 5.4.2 Legislation should provide that a date for hearing is set by the Appeal Commissioners within a specific time limit of receiving the appeal notification e.g. three months.
- 5.4.3 Procedures on written submissions need to be published and the provision of a submission should not delay the setting of an appeal date by the Appeal Commissioners. These procedures could provide for a deadline to be imposed for the receipt of written submissions from both sides e.g. 30 days before the appointed hearing date.

### **5.5 The Hearing**

- 5.5.1 Procedures should be drawn up and published by the Office of the Appeal Commissioners on the conduct of a hearing. This is not intended in any way to interfere with the flexibility needed for smaller appeal cases, but would be very helpful for taxpayers who wish to take an appeal and can feel intimidated as to the process that will be applied. Clearly laid out procedures would benefit both taxpayers and practitioners who do not use the process on a regular basis and are not in a position to pay for additional professional expertise in taking a case.



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- 5.5.2 A case tracking service should be funded and introduced into the Office of the Appeal Commissioners so that either party could establish exactly what stage their appeal is at, ideally through an on-line facility with appropriate password protections.
- 5.5.3 Consideration should be given to allowing for discovery of documents by either side in an appeal case, as currently happens in the UK.
- 5.5.4 An official stenographer should be appointed by the Office of the Appeal Commissioners and transcripts made available to either side on payment of a fee. This is a critical matter to be addressed, given the primary role of the Appeal Commissioners in the establishment of the facts in a tax case.

## **5.6 The Decision**

- 5.6.1 The receipt of a written decision from the Appeal Commissioners is obviously critical to both parties. Legislation should provide that the Appeal Commissioners must issue a written decision in all dispute cases.
- 5.6.2 Both sides should have a reasonable expectation of receiving this written decision within a certain timeframe and therefore legislation should provide a maximum time limit for the issuing of a written decision e.g. six months from the date of the final hearing. Alternatively, a register should be published of outstanding decisions so that tracking of decisions can be applied. Such a practice has already been introduced in relation to decisions of the Courts by virtue of Section 46 of the *Courts and Court Officers Act 2004*, which applies a 2 month time limit on reserved judgements and which creates a Register of Reserved Judgements.
- 5.6.3 Legislation needs to set out clearly the provisions for payment of tax and interest in cases where an assessment was originally issued but also in cases where the original appeal was not an appeal against an assessment e.g. an appeal against the refusal by Revenue to grant an RCT C2 certificate of authorisation.
- 5.6.4 As well as issuing written decisions in all argument cases, ITI seeks a change to the existing legislation in Section 944A TCA which provides the Appeal Commissioners with the option to publish written decisions where taxpayer identity is protected. Of the many hundreds, if not thousands of cases that have been decided over the last 10 years, details have been published of only 32 cases. On the basis that Revenue are party to all cases and therefore have information on all decisions taken by the Appeal Commissioners, the taxpayer is left at a distinct disadvantage which breaches one of the basic tenets of a good tax system – that it is equitable to all sides. Clearly, the existing resources in the Office of the Appeal Commissioners could not deal with the drawing up and publication of all decisions taken and therefore the resourcing matter needs to be addressed, in conjunction with the change in legislation, so that the full-time legal services of say, a barrister could be employed to record decisions. Since the publication of decisions is such an inherent part of the effective functioning of the system, and needs in this regard are not currently being met, ITI sees reform of this area as a priority. ITI seeks a specific timeframe for urgent implementation of change in the area e.g. that within two years, a barrister would be appointed and all decisions of an argument nature



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would be reported on the website of the Appeal Commissioners within a week of the decisions being handed down to the parties. The identity of the taxpayer and the amounts involved should not be disclosed as part of any such reporting.

## **5.7 Further Appeals**

- 5.7.1 A time limit must be introduced in legislation for the agreement of the Case Stated to the High Court to prevent a repetition of the situation such as arose in the Erin Executors Trust case where nine years passed from when an appeal was lodged. If the parties cannot reach agreement within that timeframe then the Appeal Commissioners would provide the content for the Case Stated.
- 5.7.2 The Law Reform Commission recommended that one year for agreement of a case stated was reasonable.
- 5.7.3 As part of this process, Revenue may seek the facility for a full rehearing at the Circuit Court as currently they can only appeal a determination of the Appeal Commissioners by way of case stated to the High Court (save in Capital Acquisitions Tax appeals).

## **5.8 Costs**

- 5.8.1 Part of the “raison d’etre” of the Appeal Commissioners has been to make a relatively informal appeals system open to the taxpayer. In support of this, ITI agrees with the current principle that the Revenue will not seek costs from the taxpayer if Revenue wins at the Appeal Commissioners (as is the case in the UK, unless the case was spurious in nature). The UK system also provides that the taxpayer’s costs are covered where the taxpayer wins. We would welcome further discussion of this principle with a view to opening the accessibility of the system to more taxpayers with a genuine matter to settle.
- 5.8.2 Costs currently cannot be claimed for the work of qualified tax advisers on a case whereas costs for very similar work carried on by solicitors can be claimed. This is a related matter that we would also like to see amended as it is inequitable.



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## **Appendices**





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## **Appendix I**

# **Research Report**

## **The Rules and Procedures Governing Irish Tax Appeals**

**Research compiled by John Gallagher BL and edited by ITI**





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## Commissioned Research Report – The Rules and Procedures Governing Irish Tax Appeals

### Author’s Scope and Introduction to the Review

“**Deputy Ardagh:** Accountability, does it exist in the appeal commissioners?”

**Mr. O’Callaghan:** *Well, is a District Court judge accountable? Everything we do is appealable through the courts. We’re also subject to judicial reviews and the Revenue sit in on every case. The Institute of Taxation have a great interest in what we do. I think we’re accountable in lots of different ways.”*<sup>3</sup>

### Scope of the Review

The first aspect of the present review is a narrative of the law and practices governing the appeals process, which is based on the chronology of a typical appeal. Many of the provisions concerning the commencement and determination of tax appeals are unremarkable or of a technical nature and so the narrative focuses on a number of key issues which are of concern or where current practices are found to be wanting, in particular the following aspects of appeals are examined in particular detail:

- The qualifications for appointment to the position of Appeal Commissioner and the procedures by which candidates are selected, appointed and removed.
- The administration of the Office of the Appeal Commissioners and the possible overlap with the Office of the Revenue Commissioners
- Record keeping and reportage of the work and work-load of the Commission.
- Time-limits for appeals
- The current procedures for fixing hearing dates and notifying them to the taxpayer.
- The preparation and exchange of extensive written submissions prior to the oral hearing.
- Whether published rules are required in relation to the conduct of appeals.

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<sup>3</sup> Page 21 of the Report of the Hearings of the Public Accounts Committee, 2001



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- The provision of written decisions at the conclusion of the appeal and the publication of previous determinations as precedents.
- The issue of whether ‘costs’ should be awarded in tax appeals.

While the focus of this exercise is the Office of the Appeal Commissioners, in so far as an assessment of the effectiveness of the tax appeals procedure would be partial if it were to ignore the larger context in which the Appeal Commissioner operate, the further appeals and reviews which may arise out of an appeal hearing are also examined.

Where it is appropriate the procedures described in the relevant provisions of the Taxes Consolidation Act 1997 (“TCA”) (and elsewhere) have been compared to what actually occurs in practice, with particular emphasis on the time which it takes for the appeal to progress through the various stages - delay in the appeals process is one of the issues which is most commonly identified as problematic by taxpayers, practitioners and the Revenue alike.

The second aspect of the review process is a compilation and indexation of the law governing appeals, both statutory and non-statutory, so that these materials are readily available for reference from a single source. This is addressed by way of the appendices to the narrative, which consolidate the various sources of law for appeals.

Finally, most of the descriptions as to how things operate in practice are based on discussions with practitioners with experience of the appeals process as it operates in practice, as well as on previously published articles and papers. Of course, such experiences are not the whole picture and I would welcome any comments in relation to experiences which practitioners have had in their encounters with the appeals process.

**John Gallagher BL**



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## 1. Appointment, Administration & Areas of Competence

### 1.1 Appointment

Pursuant to Section 850 TCA, an unspecified number of Appeal Commissioners shall be appointed by the Minister of Finance with authority to execute such powers and perform such duties as assigned to them by the *Income Tax Acts*.

There is no upper limit on the number of Appeal Commissioners which the Minister may appoint: the lower limit may be taken as two, as this is the minimum number required for an act of the Commissioners to be a valid one.<sup>4</sup> This rule that at least two Commissioners act in a given matter is subject to the important qualification that it may be otherwise where expressly so stated and in fact appeals are generally heard by only one Commissioner - a practice which is supported by reference to Section 933(5) TCA which provides that one Commissioner is competent to hear an appeal against an assessment, or exercise any of the other powers enumerated in Part 40 of the Act. Furthermore, as the provisions governing appeals against assessment apply to the great majority of appeals, one Commissioner will be sufficient to hear most cases. There are a small number of appeals which are not governed by these rules, and where two commissioners would seem to be required for a valid hearing: an example being an appeal against registration pursuant to Section 988<sup>5</sup> TCA. As this specific appeal is not governed by the rules pertaining to appeals against assessment<sup>6</sup>, it would fall back to the default position i.e. two Commissioners would be required to hear it. It is conceivable that an appeal may inadvertently be heard by an insufficient number of Commissioners (i.e. one) owing to a mistaken assumption as to the application of Section 933 TCA to the appeal.

Between 1978 and 1993 there were three acting Commissioners and it was previously the convention that one Commissioner came from a Revenue background, one from practice at the Bar and one from a tax-professional background. When asked at the Public Accounts Committee in January 2001 about the possibility of appointing a third Commissioner from a Revenue background, one of the current incumbents stated:

**“Mr. O’Callaghan:** *It seems like a silly idea to us, to speak frankly [..] If that were the case then if somebody was going to Killarney for an appeal, you might have the taxpayer saying “well, I do not want the inspector of taxes commissioner; I want the other fellow.”*<sup>7</sup>

Since 1993 the number of acting Commissioners has been two. One possible reason which is given for the diminution in the number of acting Commissioners is the introduction of self-assessment which has greatly reduced the number of assessments subject to appeal. It was recommended by the Steering Group on the Review of the Office

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<sup>4</sup> Section 850(4) TCA 1997

<sup>5</sup> The right of appeal being set out in Subsection 2.

<sup>6</sup> For some reason, Section 992 does not encompass Section 988

<sup>7</sup> <http://www.irlgov.ie/committees-01/c-publicaccounts/010118/default.htm>



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of the Revenue Commissioners in their Report<sup>8</sup> that a review be carried out of the adequacy of the resources of the Office, including the number of Appeal Commissioners and a report on the outcome be made to the Minister for Finance.

Although it is seldom if ever done the Minister may appoint a Commissioner on a temporary basis, which might be necessary if either or both of the permanent appointees were conflicted in relation to a particular appeal.

### 1.2 Qualifications

Although the appointees to date have all had some previous experience in the fields of finance or taxation, no such credentials are required for the appointment to be a valid one. Section 850 TCA requires that the appointment and details of salaries should be laid before the Dáil within 20 days of the appointment, and this formal requirement is the only statutory condition concerning the validity of the appointment.

The lack of formality evident in the processes of appointment and removal has been commented on by the various bodies who have examined the function and operation of the Office of the Appeal Commissioners. In its *Final Report*, the DIRT Inquiry recommended that some degree of expertise in the separate areas of accountancy, taxation, law and public administration should be held between the Commissioners collectively<sup>9</sup>. However, while considering whether vacancies should be filled by reference to the qualification status of the departing Commissioner (i.e. replacing the designated legal specialist with another legal specialist, and so on), the *Law Reform Report on a Fiscal Prosecutor & A Revenue Court* notes<sup>10</sup>, that in any event the Commissioners rarely sit together and so would be unable to benefit from divisional areas of expertise (although for particularly large or difficult cases where the attention of more than one Commissioner might be required some amount of specialisation might be of benefit). Accordingly the Report did not recommend that appointments be made on this basis.

By way of comparison, in the United Kingdom legal qualifications are afforded a particular priority. An appointee to the *Special Commissioners* must have 10 years qualification as a lawyer, the requirement being 7 years for appointment to the *VAT & Duties Tribunal*. Having considered the arguments for a minimum legal qualification, including the increasing prevalence of appeals concerning the interpretation of legal concepts, the *Law Reform Commission* decided against recommending such a course and instead favoured the requirement that a candidate possess a minimum professional qualification in any of the areas of tax, law or accountancy and be otherwise well qualified<sup>11</sup>.

The present procedure affords the Minister for Finance a very broad discretion in deciding on the appointment of Commissioners. It is important that the process through which such appointments are made are seen to be transparent. A model which has found

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<sup>8</sup> At Page 5, Report of August 2000

<sup>9</sup> Chapter 2 of the *Final Report of Committee of Public Accounts, Sub-Committee in Certain Revenue Matters* (Government Publications 2001)

<sup>10</sup> At page 91

<sup>11</sup> At Paragraph 7.29 of the Report



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favour elsewhere in the public arena is that of appointment based on a ‘short-list’ compiled by a group of independent experts. Such a process has been used for over 20 years to decide on high-level public service appointments, through the aegis of the *Top Level Advisory Committee* (“TLAC”). TLAC is a non-statutory body composed of senior civil servants who are themselves selected by the Taoiseach in consultation with the Minister for Finance. In practice TLAC usually makes only one recommendation, although it can be a list of three in the case of high level appointments, such as appointments to the position of *Secretary General of Department*.

To take an example, a similar process is also used to select the Chairperson of *An Bord Pleanála*, although the composition of the committee in this case is statutorily determined, and comprises of seven senior figures in the planning field, representing various sectional interests. The committee compiles a list of three candidates and informs the Minister of reasons why each is thought to be suitable. From these three one is then chosen by the Minister for the position.

### 1.3 Tenure & Removal

In terms of tenure and removal, there is no procedure currently set out in law for the removal of a Commissioner from office and a Commissioner may be either appointed or removed solely at the discretion of the Minister for Finance. That there is some uncertainty in relation to the procedures or grounds for removal of a Commissioner is demonstrated by the following exchange during the course of a hearing of the Public Accounts Committee<sup>12</sup>:

**“Deputy Ardagh:** *The question of the appeal commissioner, how can the appeal commissioner be actually removed or can an appeal commissioner...are you there for life?*

**Chairman:** *You hope so*

**Mr. R. Kelly:** *The appointment is from the date of appointment up to normal retirement age, whatever that may be in the general service. I am not sure in law what the position is for removal, but I am sure it is possible. I have not explored it.*

[...]

**Chairman:** *There is no clear provision about it?*

**Mr. Considine:** *There is in the sense that they are normal civil servants.*

**Chairman:** *In that case, they could be replaced by the Minister or dismissed by the Minister. Surely that itself compromises independence?*

<sup>12</sup> Page 28 & 29 of the record of the PAC hearing dated 18 January 2001



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**Mr. Considine:** *It would have to be for the type of reasons that you are talking about [illness or incapacity] or for some misbehaviour or whatever. It is not something that would happen just like that”.*

The matter would appear to rest entirely on the discretion of the Minister, which is in contrast with many comparable offices where security of tenure is underpinned by means of a fixed-term and/or a prescribed procedure for removing the holder from office.

Judges of the District and Circuit Courts may only be removed from office by virtue of stated misbehaviour or incapacity<sup>13</sup>. Perhaps a position more closely comparable with the role of Appeal Commissioner is that of Chairperson of *An Bord Pleanála*, who may only be removed for reason of incapacity arising from ill-health or if they have committed a ‘stated misbehaviour’ - the Minister must lay before each House of the Oireachtas a statement in writing setting out the appropriate reasons<sup>14</sup>.

Another measure which is felt to be conducive of independence, while also allowing for some Ministerial supervision of the appointee, is a fixed term of office. At present the Chairperson of *An Bord Pleanála* is appointed for 7 years, and this term may be renewed as the Minister sees fit<sup>15</sup>. The Parliamentary Ombudsman is appointed for renewable terms of 6 years, again with certain safeguards as to incapacity or misbehaviour, as well as bankruptcy<sup>16</sup>.

In relation to the appointment and tenure of the Appeal Commissioner, the *Final Report of the DIRT Inquiry*<sup>17</sup> recommended that vacancies be advertised, that there be minimum qualification criteria and new selection procedures. It also recommended that there be a fixed mechanism or procedure for the removal of a Commissioner. In a similar vein, in relation to the issues of qualification, appointment, tenure and removal as they affect the Appeal Commissioners, the *Law Reform Commission* make the following recommendations in their Report<sup>18</sup>:

1. That the Minister should decide the certain minimum qualification criteria in law, accounting or taxation which a person should have in order to be eligible for appointment as a Commissioner. This would not necessarily have to reflect the same expertise as was held by the departing Commissioner.
2. That the Minister would appoint an expert group to compile a short-list of three candidates who are eligible and who meet the given criteria. This short-list would be submitted to the Minister who would make the final selection (a second list could be compiled if the Minister was not satisfied with the first).

<sup>13</sup> Section 20 of the Courts of Justice (District Court) Act 1946 and Section 39 of the Courts of Justice Act 1924, respectively

<sup>14</sup> Section 105(15) of the Planning and Development Act 2000)

<sup>15</sup> Section 105(12) of the Planning and Development Act 2000)

<sup>16</sup> Section 2(3) of the Ombudsman Act 1980

<sup>17</sup> Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters (Gov. Publications 2001)

<sup>18</sup> At page 95 of the Report.



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3. That the appointed Appeal Commissioner should take office for a fixed term of 7 years, which term would be renewable on the advice of the expert committee, and which could be prematurely terminated only upon grounds similar to those which apply to other office-holders as set out above i.e. incapacity or stated misbehaviour.

#### 1.4 Resources & Independence

Although the function of the Appeal Commissioners is independent of the Office of the Revenue Commissioners, in practice the Appeal Commissioners rely to a certain extent on the Revenue for the operation and administration of their office. In so far as the Appeal Commissioners are the main forum for appeal against determinations of the Revenue Commissioners it would seem that this appeal mechanism would be subject to the independence and impartiality requirements contained at *Article 6* of the *European Convention of Human Rights*. When evaluating whether indeed the Appeal Commissioners are properly independent for the purpose of meeting the obligations of the Convention, it is important to consider that impartiality and independence are to be judged both in terms of subjective and objective criteria, in other words there must be neither actual partiality, *nor* a state of affairs which might lead an observer to apprehend that there was partiality.

There are no reported cases where actual bias has been maintained as against the Appeal Commissioners, and such a charge is unlikely ever to be made out. However the *Law Reform Commission* has expressed concern that the independence of the Appeal Commissioners could be undermined by the institutional connection with the Office of the Revenue Commissioner: in other words that there might be issue of apparent or perceived bias. The following are some of the more obvious examples of this “institutional overlap”<sup>19</sup>:

- Most of the information technology used by the Office Appeal Commissioners is provided by the Office of the Revenue Commissioners.
- In terms of maintaining the appearance of independence, it is probably unhelpful that the email addresses of many of the personnel in the Office of the Appeal Commissioners are suffixed by “@revenue.ie”.
- Although it might be seen as a trivial point, the shared designation of “Commissioner” (Revenue & Appeal) is felt by some to be suggestive of a connection and might be changed in the context of wider reforms.
- Revenue has sole and full access to the completed *Forms ASI* which record the various decisions of the Commissioners.

These factors lead to a perceived lack of independence within the appeals system, which is a matter of the utmost seriousness. It is critical that the Office is adequately funded to

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<sup>19</sup> A term used by the *Law Reform Commission* at Page 92 their Report



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ensure that it can organise its own internal administration adequately and that it uses these funds to ensure that such a reorganisation takes place.

The issuing of funding the Office of the Appeal Commissioners arose at the Public Accounts Committee (PAC) on 7 December 2006. The following is a question posed by Dan Boyle T.D. in the context of discussing the Annual Report of the Comptroller and Auditor General for 2005:

*“In 2005, the Office of the Appeal Commissioners received €607,000 and it spent €399,000. It, therefore, returned to the Exchequer €208,000 or just over one third of its budget. This was the third year in a row that the commissioners had done so. In 2004, it returned 37% of its budget and in 2003 it returned 39%. It appears that in each of these years the office made attempts to increase its number of staff. Mr. O’Callaghan indicated that this is still the intention. What factors are preventing people from being employed?”<sup>20</sup>*

The following is the response of Mr John O’Callaghan, Appeal Commissioner:

*We encountered a degree of difficulty in that the kind of people we need must have excellent reporting skills. We want people who will be able to assist us in reporting on the cases on which we are working and perhaps to maintain files, etc. They need good legal qualifications and reporting skills. The difficulty was that we were informed that we were obliged to recruit within the Civil Service. To be blunt, we have encountered a number of problems in terms of dealing with red tape. That is why, as the Deputy correctly pointed out, each year we have returned to the Exchequer a financial provision in respect of employing staff to fill gaps relating to the reporting of cases and the preparation of an annual report. The actual functioning of the office on a day-to-day basis is not compromised but there are difficulties in respect of the additional matters to which I refer<sup>21</sup>.*

## 1.5 Resources & Reporting

One observation which is often made is that it is impossible to verify the number of cases heard by the Appeal Commissioners and the trends in their decision-making, as they produce no report or statistics in relation to the function of their Office.

*“Regarding the number of cases heard, we note in the steering committee report a reference to an estimate of 250 cases, but that is extrapolated from a number of cases where an audit is involved, roughly 125 appeals. We think it is a good bit more. We do not actually have the exact number ourselves because we have not been collating the number of cases, but we think that there are probably quite a lot more than that. For instance this week we had 14 cases scheduled – subcontractor’s tax cases, people looking for certificates. We think there are probably a lot more, but time will tell ...”*

<sup>20</sup> Page 6 of 9 of PAC Transcript of Vote 8: Office of the Appeal Commissioners, 2006  
<http://debates.oireachtas.ie/DDebate.aspx?F=ACC20061207.xml&Node=H3&Page=6>

<sup>21</sup> <sup>21</sup> At page 6 of 9 PAC Transcript of Vote 8: Office of the Appeal Commissioners, 2006  
<http://debates.oireachtas.ie/DDebate.aspx?F=ACC20061207.xml&Node=H3&Page=6>



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[Appeal Commissioner O'Callaghan at the PAC hearings, 2001]<sup>22</sup>

In fact it would seem that all concerned parties agree that an Annual Report in one form or another is required and the lack of one is simply an issue of resources. It is submitted, that the following valuable information should be included:

- The number of appeals notified to the Appeal Commissioner during the year
- The average waiting period between notifying an appeal and having it heard
- The number of Appeals actually heard during the year
- The number of cases awaiting hearing (estimated by Revenue Commissioner to be 500 as of 18 January 2001<sup>23</sup>).
- The number of cases awaiting decision
- The number of appeals in which the taxpayer and Revenue respectively were successful (although as pointed out by Commissioner O'Callaghan during the PAC hearings, many cases are settled at the last minute)
- The total budget allocated to the Office for the year
- The actual total expenditure of the Office for the year

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<sup>22</sup> At page 12 of the PAC report, 2001

<sup>23</sup> At page 43 of the PAC hearing of that date



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## 2. The Appeal Commissioners - Areas of Competence & Appeals Generally

### 2.1 Competence of the Appeal Commissioners

Section 850 TCA provides that the persons appointed as Appeal Commissioners shall “*have authority to execute such powers and to perform such duties as are assigned to them by the Income Tax Acts*”. Curiously the appointment deems them competent for the purposes of the ‘*Income Tax Acts*’ only. Perhaps for this reason, the solemn *Declaration*<sup>24</sup> which the Appeal Commissioners must make before entering into office is confined only to “*the Acts relating to Income Tax*”. This *Declaration* underpins some of the important ethical obligations which govern the office, such as confidentiality, and in the context of any possible legislative reform this might need to be addressed so that what effectively amounts to the ‘oath of office’ would cover all tax heads.

However the fact that they are appointed to act under the *Income Tax Acts* is of little real significance, as their competence is specifically extended by the other tax acts in which they have an appellate function. For example, Section 25 of the VAT Act 1972 (as amended) (“VATA”) makes the Appeal Commissioners competent with respect to those appeals under the Act for which they are not otherwise specifically given a role. In a similar vein, the Appeal Commissioners are deemed to be the first-instance venue for appeals under each of the following tax heads: Capital Gains Tax; Capital Acquisitions Tax; Stamp Duty; VRT; VAT; Residential Property Tax; Tonnage Tax; Customs Classification; and Excise Duty.

### 2.2 Application of the Income Tax Act to other Appeals

It is a common feature of appeals concerning taxes other than income tax/corporation tax that the procedures contained in the TCA governing appeals against assessments to income and corporation tax are extended or adopted to appeals under the other tax heads. *Appendix I* contains a table listing the provision(s) grounding the appellate jurisdiction of the Appeal Commissioners for each of the principal taxes, with notes as to the modifications to the standard appeals procedure, if any, which apply to the respective taxes.

Furthermore, within the various taxes there may be very specific matters which are afforded a particular right of appeal – for example within the VAT Acts there is special provision made for appealing against a decision of the Revenue Commissioners to apply a particular rate of VAT to a category of goods or services (Section 11(1B), VATA). However, as is the case with many other specific rights of appeal, the provisions of the *Income Tax Acts* are adopted in relation to the conduct of an appeal in tandem with the rules particular to the VAT appeal under S11(1B) VATA.

In these situations, where the procedures of the *Income Tax Acts* are extended to operate within another tax area, it is sometimes less than clear whether a given rule will apply in the new tax environment. So, to return to the previous example, does a *taxable person*

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<sup>24</sup> Section 855 & Schedule 27, Part 1



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who is appealing against the determination of a particular rate of VAT have to state their reasons for the appeal when it is being notified to the Revenue Commissioners? This is a precondition for a valid appeal against an assessment under the self-assessment system, pursuant to Section 957(4) TCA. While the provisions of the Income Tax Acts are adopted for the purpose of VAT appeals<sup>25</sup>, this is only for a finite list of matters,<sup>26</sup> and the notification of the appeal is not one of them. On the other hand, the final matter listed as being extended from Income Tax appeals to VAT appeals is “*the procedures for appeal*”. Does this mean *all* of the “procedures for appeal”? In which case, one might wonder what the point was of listing the previous 13 items which were specifically mentioned.

Generally it is unclear whether the provisions of Section 957 TCA are applicable when the procedures which are said to apply in respect of a given appeal are described as being, “*as for an appeal against an assessment to income tax*”. Section 957 TCA applies to *some* appeals under the Income Tax Act i.e. those falling within the self-assessment regime - but not all of them. As this section contains some very important rules in relation to the valid invocation of an appeal (for example, the rule that all outstanding returns must be furnished before an appeal may be made) the fact that there is some doubt as to its application is not ideal.

These kinds of difficulties arise from the way in which the appeals procedure is grafted from the income tax/corporation tax setting onto other taxes, whether in its entirety or by reference to a finite list of matters. The Appeal Commissioners themselves have acknowledged the fact that not all of the powers which they enjoy in relation to appeals against income tax/corporation tax assessments apply to appeals in the context of other tax areas, and have called for harmonisation in this regard<sup>27</sup>.

### 2.3 Taxation Matters not Within the Ambit of the Commissioners

Having noted that the Appeal Commissioners have a function in all of the main tax areas, it is worth emphasising that in the legal sense the jurisdiction of the Appeal Commissioners is a ‘limited’ jurisdiction. Therefore, unless a specific matter is stated in legislation to come within the competence of the Appeal Commissioners it does not fall within their ambit. In other words, the Appeal Commissioners do not enjoy a *general* appellate or supervisory jurisdiction in the area of taxation, such as would give them jurisdiction over any tax-related dispute. That noted, the relevant legislation does grant a specific right of appeal in relation to the great majority of assessments, determinations, decisions etc. which can be made under the various tax acts, and there are few significant acts or decisions of the revenue authorities which cannot be appealed to the *Appeal Commissioners*.

A rare example of such a situation is the transitional provision concerning settled income contained in *Schedule 32, Paragraph 27* of the TCA. Under this provision the Revenue may suspend the application of Section 13 of the Finance Act, 1995 and may do so to the

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<sup>25</sup> Section 25(2), VATA 1972

<sup>26</sup> Including the appointment of times and places for the hearing of the appeal, the publication of determinations of the appeal commissioners, the rehearing of an appeal in the Circuit Court... etc.

<sup>27</sup> Page 16 of the transcript of the Public Accounts Committee hearing, 18 January 2001



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extent that they “consider just”. As such relief is not “measured”, it would seem that there is no appeal to the Appeal Commissioners should the Revenue make a decision which is not to the satisfaction of the taxpayer. The same would be true of any relief granted on a basis the Revenue Commissioner deem ‘just’, unless a specific right of appeal is reserved under the relevant provision.

### **2.4 Competence to mitigate penalties**

One area of taxation law which can be very contentious, but which does not currently seem to fall within the competence of the Appeal Commissioners, is the issue of penalties. Revenue can mitigate penalties based on their “care and management” responsibilities, both specifically under the legislation in Section 1065 TCA but also in practice under the terms of the Revenue Audit Code of Practice. However, with some inconsequential exceptions<sup>28</sup> the Appeal Commissioners have no role in deciding whether penalties should properly apply, nor indeed the appropriate level of mitigation for any penalties which do arise.

It is a key principle of EU law that penalties must be proportionate to the matter at issue and therefore it is clear that there should be a mechanism for appealing the quantum of penalties to the Appeal Commissioners, if it is felt by the taxpayer to be disproportionate.

In this regard it is worth noting that the present incumbents have recognised that there should be some mechanism for reviewing Revenue practice with regard to the imposition of penalties, and indeed in relation to concessions generally, although they reserved judgement as to whether the Appeal Commissioners is the appropriate venue for same.<sup>29</sup> In light of the Article 6(1) of the European Convention on Human Rights, which requires an independent and impartial hearing in relation to civil disputes, the Law Reform Commission recommends that an Appeal should lie to the Appeal Commissioner in respect of the imposition of penalties, not necessarily including the power to mitigate same in cases of hardship.

### **2.5 The Status of the Appeal Commissioners**

Occasionally a question arises as to the status of the Appeal Commissioners or the nature of the decisions they make. The process of hearing an appeal, whereby evidence is heard and the respective parties direct representations and arguments in favour of their case to an independent adjudicator, is similar to many court proceedings. However the Appeals Commission does not have the status of a court of law - it derives all of its powers and jurisdictions from statute and is limited in what it may do by the specific provisions from which it derives its existence (unlike say the High Court which is said to have a full and original jurisdiction in all matters unless its jurisdiction is confined by law).

In so far as the status of the Appeal Commissioner has been judicially considered it would appear that their role is one of valuers or assessors whose function is to decide the correct

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<sup>28</sup> One such exception to this general rule is the right of appeal against the imposition of a 2% surcharge under Section 1082(2) TCA.

<sup>29</sup> At pages 36 & 37 of the transcript of the Committee of Public Accounts hearing, 18 January 2001



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amount of tax payable in a given period – it was this interpretation that was favoured by the High Court in the case of **State v Michael Smidic 1 ITR 577**. There is some debate<sup>30</sup> as to whether the Appeal Commissioner operate as an inquisitorial, adversarial or hybrid tribunal. This issue is not entirely academic and may have significant practical consequences for the appeal. The following consequences flow from the nature of the status of the Appeal Commissioners:

- Their decisions do not have the binding force of judicial determinations, so a decision in relation to one taxpayer may not necessarily be relied upon by another taxpayer, or even by the same taxpayer in relation to a later period.<sup>31</sup>
- When hearing an appeal, the Appeal Commissioners are not determining an issue *inter partes*, they are establishing the correct amount of tax payable for the benefit and on behalf of the wider public. Therefore, they may take into consideration issues or arguments which were not necessarily raised by either side if they feel them to be relevant to the liability<sup>32</sup>.
- There is no right of “discovery” by either party during an appeal as there would be in the Circuit Court, High Court and Supreme Court and as there currently is in the UK appeals system.
- They may raise an assessment upwards as well as downwards, even where the Revenue has not actively argued for a raising of the assessment.
- The taxpayer’s right of recourse to the Appeal Commissioner is an independent statutory entitlement and may not be circumvented by judicial proceedings relating to the same disputed liability. An example of such a conflict of jurisdictions occurred in the case of **The State (Calcul International Ltd and Solatrex International Ltd) v The Appeal Commissioners and the Revenue Commissioners**<sup>33</sup> where the Revenue unsuccessfully sought to injunct the bringing of a tax-appeal where High Court proceedings had already been commenced in relation to the recovery of the tax. The primacy of the role of the Appeal Commissioner in determining the liability to tax was confirmed by the Supreme Court in the case of **CAB v Sean & Rosaleen Hunt**.<sup>34</sup>

In relation to possible reform it might be asked whether, in the present-day circumstances where a relatively sophisticated market economy requires certainty and consistency in relation to the interpretation of the tax code (and where many tax cases never reach the superior courts), the decisions of the Appeal Commissioner should be afforded some value as a precedent beyond the particular assessment to which they relate?

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<sup>30</sup> On this point see Frank Carr’s article “The Role of the Appeal Commissioners” 1996 Irish Tax Review 142

<sup>31</sup> Bourke v Lyster 2 ITR 374

<sup>32</sup> Elmhurst v IRC 21 TC 381, which was approved of in the *Smidic* case

<sup>33</sup> High Court decision of Barron J, 18 December

<sup>34</sup> Supreme Court, 19 March 2003. Reported at page 559 of the Irish Tax Reports, Volume VI



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### 3. The Making of a Valid Appeal

#### 3.1 General

For the purposes of discussion the making of an appeal might be broken down into a number of distinct stages.

- Firstly, there is the occurrence of an ‘event’ which gives rise to an appeal. Most commonly this is the **raising of an assessment**, but as is discussed below there are a variety of occurrences other than the raising of an assessment which may trigger the right to an appeal. When an assessment is raised, Revenue will state their grounds for that assessment. These grounds must be stated in sufficient detail so that the taxpayer knows exactly the matter that Revenue have taken issue with.
- The next stage is that taxpayer must invoke the right of appeal by way of the appropriate procedure. A common feature of such procedure is that the **appeal must be notified** to the Revenue in writing within certain prescribed time-limits. The written notification and the operation of statutory time-limits are two very important features of the appeals process and each of these will be examined in detail below.
- Finally, there are a number of formalities such as the **payment of outstanding taxes** which must be complied with before an appeal will be validly invoked and these are examined also.

To say that the law in relation to the commencement of an appeal is complex is perhaps an understatement. As well as the variety of time limits which operate, and the fact that the taxpayer must be fully up to date with their affairs before an appeal will be considered, there is the fact that some of the provisions contradict others. A lot of confusion can arise about the interaction of the different time limits, even for those dealing with these issues every day.

#### 3.2 Matters giving Rise to Appeal

##### a) Assessments

The taxpayer does not have a general right to appeal an act or decision of the Revenue Commissioners with which he or she disagrees. There are a finite number of what might be called tax ‘events’ which can form the subject matter of an appeal to the Appeal Commissioners. The tax event which most commonly gives rise to an appeal is the raising of an *assessment* and the rules for appealing *assessments* to income tax and corporation tax are, for the most part, contained in *Part 40, Chapter 1* of the TCA. Indeed, allowing for some modifications, these rules form the basis for tax appeals under all the main tax heads.



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b) Other triggering events

In addition to the raising of assessments, there are many other events which are subject to a right of appeal to the Appeal Commissioners. In general these are ‘determinations’ or ‘decisions’ which do not constitute an *assessment* to tax, but which will sooner or later affect the taxpayer’s overall liability, or perhaps even the manner in which it is collected. A good example of the former category is the right of appeal against any decision of the Revenue Commissioners in relation to the residence of an individual (Section 824 TCA). Another frequently occurring category of ‘tax event’ is a decision to grant or refuse a certificate, for example the decision to grant a certificate of authorisation (C2) to a sub-contractor for Relevant Contracts Tax under Section 531 TCA. *Appendix I* contains a schedule of the miscellaneous triggering events specified within the TCA alone. It will become apparent from reading this list that even within the TCA there is a wide variety of very specific matters which may be the subject of an appeal to the Appeal Commissioners, and that many of these provisions specify their own particular procedures and time-limits for appeal.

Although there are a number of rights of appeal against “determinations” and “decisions” which may be made by the Revenue, there is no guidance in the Acts as to what formally constitutes a “determination” or “decision” for the purpose of triggering an appeal. Although it is generally Revenue practice to indicate when a formal decision has been made, it is conceivable that in some cases the relevant ‘tax event’ could have occurred without the taxpayer necessarily being aware of the fact. Take for example a situation where there is protracted correspondence in relation to a taxpayer’s residence for income tax purposes. During the course of the correspondence the Revenue express their view that their understanding of the situation is that the taxpayer is tax-resident in Ireland. How is the taxpayer to know whether this written statement constitutes the “decision” for the purposes of triggering the 2 months time-limit within which they must appeal<sup>35</sup>, or whether it is merely an interim conclusion which might change subject to further correspondence? The issue of whether the Revenue may have a duty to advise the taxpayer of such rights of appeal is discussed below in relation to time-limits.

### 3.3 Notification of the Appeal and the Time-Limits for Same

As well as providing the very subject-matter of the appeal, the importance of correctly identifying the triggering event is that once it has occurred the clock will begin to run against the tax-payer for the purpose of making any appeal. Once the triggering event has occurred it is generally incumbent on the taxpayer to notify the fact of appeal to the Revenue within specified relevant time limits. The point in time from which the time limit begins to run can vary depending on the specific provision under which the appeal arises. Appeals against assessments to income tax and corporation tax must be brought “*within 30 days after the date of the notice of assessment*” (Section 933(1)(a) TCA). This means the date on the notice, rather than the date on which it is sent or received. This time-limit is a very significant time-limit in the arena of appeals for, as we noted above, the procedures in relation to income tax appeals are adopted for appeals against assessments under the majority of the other tax heads.

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<sup>35</sup> Under Section 824(1)



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Where the person is a ‘chargeable person’, and the assessment is made under the self-assessment regime, Section 957(2) TCA specifies that the 30 days does not start to run until a return has been submitted and tax paid according to that return. While this would appear to suggest that an appeal could be made within time so long as it was made within 30 days of these conditions being satisfied, in **Terence Keogh v Criminal Assets Bureau**<sup>36</sup> the Supreme Court decided that a literal interpretation of this provision would have the consequence that a person could prevent an assessment from ever finalising by neglecting to submit a return or pay tax. Accordingly they interpreted the provision in a purposive manner, deciding that the 30 day limit specified in S933 effectively overrides Section 957(2) TCA. The consequence of this interpretation is that where a return is not submitted or the tax is not paid within the 30 days of the date of the notice of assessment, then the taxpayer will have run out of time for an appeal even if these conditions are satisfied some time later.

As was noted above, there are a number of matters which may be appealed other than the raising of an assessment to income tax or corporation tax. While the 30 day time-limit for notification applies to most tax appeals, there are a variety of appeals under various tax headings which command their own specific time limits. So, for example<sup>37</sup>, an appeal against a determination regarding a claim for loss relief must be given in writing to the Revenue ‘*within 21 days after notification to that person of the determination*’<sup>38</sup>. Where a person is registered as an employer for the purposes of PAYE regulations, they have only 14 days ‘*from the service of the notice*’ informing them that they have been so registered<sup>39</sup>. On the other hand, 2 months are afforded in which to appeal against a decision concerning domicile or ordinary residence for the purposes of CGT. In the VAT Act 1972, there is a 21 day time limit in which to appeal an *assessment* made under Section 23, but a different 14 day limit in which to appeal against an *estimation* made under Section 22 of the same Act. Perhaps one of the most troublesome time limits arises in the context of VRT where, in circumstances where the Revenue have failed to give the taxpayer a determination within the specified time, the clock will start to run from the date the decision should have issued.<sup>40</sup>

This bewildering variety of time-limits is made all the more difficult by the fact that the clock-starting and clock-stopping events may also vary depending on precisely how the time-limit is described. In some cases the clock begins to run from the date the notifying document comes into existence – for example it is “the *date of the notice of assessment*” which triggers the 30 day limit for appealing against the raising of an assessment under Section 933 TCA. In other cases it is only on the date when service to the taxpayer is actually achieved that the clock begins to run, as would seem to be the case for an appeal under Section 990(2) TCA where the appeal can be made within, “*30 days from the service of the notice*”.

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<sup>36</sup> Supreme Court, 17 May 2004. The case is reported at page 635 of Volume VI of the Irish Tax Reports

<sup>37</sup> For a full listing of the variations refer to the columns headed ‘*Time-Limits & Notice Requirements*’ in Appendices I & II

<sup>38</sup> Section 381(6) TCA

<sup>39</sup> Section 988(2) TCA

<sup>40</sup> Section 146, Finance Act 2001



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In interpreting the different formulations Section 18(h) and Section 25 of the Interpretation Act, 2005 are relevant:

*“18. (h) Periods of time. Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period;*

*25.—Where an enactment authorises or requires a document to be served by post, by using the word "serve", "give", "deliver", "send" or any other word or expression, the service of the document may be effected by properly addressing, prepaying (where required) and posting a letter containing the document, and in that case the service of the document is deemed, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.*

The potential for drawing semantic distinctions within these provisions is evidenced in the decision in the case of **Criminal Assets Bureau v PMCS**<sup>41</sup>. When interpreting the words “giving...notice” in Section 933(1) TCA, Kearns, J. contrasted them with the words “notice given” as used in Section 956 TCA, the latter requiring that the notice actually be received by the Revenue within the relevant period. The judge suggested that for the purposes of deciding when the clock stops under Section 933 TCA, a valid notification will be deemed to have been made by the taxpayer where the notice is sent by registered post in circumstances such that it could be expected “in the ordinary course” to arrive before the expiry of the thirtieth day.

### 3.4 Informing Taxpayers of the Right of Appeal

The Supreme Court decision in **Terrence Keogh v CAB & Others**<sup>42</sup> suggests that the Revenue are obliged to indicate to the taxpayer the consequences of a particular statement in terms of triggering the time-limits for the lodging of an appeal. In that case the Criminal Assets Bureau, acting as the taxpayer’s Inspector of Taxes, refused his right of appeal but failed to bring to the taxpayer’s attention his further right to appeal against that refusal. Referring to the Revenue’s own Charter of Rights (now withdrawn and replaced by the “Revenue Customer Service Charter”) – in which they undertake to provide “full, accurate and timely information in relation about revenue law and...entitlements and obligations under it”<sup>43</sup> - the Supreme Court held that while the Revenue were under no general obligation to advise the taxpayer as to his or her tax affairs, such a failure to notify the tax-payer as to his rights as in the case at hand was at variance with both the letter and spirit of the Charter. It should be borne in mind that this conclusion was made against the background of the particular facts of that case, where a confusion of letters and faxes had been exchanged between the parties concerning the validity of the appeal. While it is now Revenue practice to advert to the 30 day limit on the face of assessments,

<sup>41</sup> [2002] ITR 57

<sup>42</sup> Supreme Court, 17 May 2004. The case is reported at page 635 of Volume VI of the Irish Tax Reports

<sup>43</sup> Quoted at page 664 of the Report



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this practice may not be so well established with regard to all of the less commonplace decisions and determinations which may be appealed under the various tax heads.

The great variety of time-limits and the varying interpretations as to when they begin has been variously criticised by the Courts (the present Chief Justice describing as “*clumsily worded*”<sup>44</sup> the tax code as it refers to the time-limits for appeals). The pitfalls of this system are likely to trap taxpayers and practitioners alike and it is an area which might benefit considerably from standardisation and reform.

### 3.5 Interaction of the Various Rights of Appeal

A point of some importance which can arise in relation to time limits is the issue of how specific appeal mechanisms interact with the general right of appeal against the raising of an assessment, set out in Section 933 TCA. To put it this way, where there is a specific time-limit fixed in relation to a particular decision or determination and that time has passed, can the taxpayer effectively shunt or avoid the limitation period by appealing against an assessment which follows later and which implements the earlier decision or determination in calculating the liability to tax? An example of this might occur where a taxpayer is refused rent relief under Section 473 TCA and fails to appeal within the required period (i.e. 30 days from the notice of the decision). If sometime later the same taxpayer is assessed to income tax and appeals against the assessment within the prescribed time, can he or she validly dispute their entitlement to rent-relief in as much as that entitlement will affect the assessment?

In this regard it is interesting to note that Section 1094(7) TCA specifically states that an appeal against the refusal to issue a tax clearance certificate cannot be used to appeal an amount of tax or interest due under the Acts. No such anticipation of a collateral appeal is specified elsewhere and by implication it might be said that where an appeal against an assessment is within time, the taxpayer is entitled to challenge any matter relevant to the calculation of that assessment. As against this view, it might be argued that “piggybacking” on an assessment to avoid a specific time-limit set down in statute would constitute an abuse of process.

### 3.6 Extending Time for Notification of the Appeal

Section 933(7)(a) TCA contains a saver clause whereby the time in which an appeal may be made is extended to a maximum of 12 months where the Revenue is satisfied that the applicant was prevented from giving notice within the relevant time-limits by reason of “*absence, sickness or other reasonable cause*” and the application is made thereafter without unreasonable delay. In the case of CAB v D(K)<sup>45</sup> the High Court examined the operation of this saver clause. The words “other reasonable cause” were narrowly interpreted as being *ejusdem generis* with ‘absence’ and ‘sickness’, in other words the other reasonable cause must be similar to absence or sickness. It was accepted that the fact the applicant was incarcerated in prison *did* constitute a reason falling within the terms of the saver. However the Court held that the taxpayer could not rely on the saver

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<sup>44</sup> At page 662 of his decision in *Terrence Keogh v CAB & Others*, cited above.

<sup>45</sup> [2002] ITR 79



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for reasons of form - he had failed to explicitly invoke the provision or to specify the reasons for delay in his notification of appeal. If the taxpayer is dissatisfied with a decision not to apply the saver clause, then the refusal may be appealed to the Appeal Commissioner within 15 days.

While the reasonable excuse saver generally cannot operate after one year has expired, the 12 month outer limit may be further extended if two conditions are met<sup>46</sup> – broadly, that sufficient returns and information have been submitted so that the matter may be determined by agreement<sup>47</sup>, and that all assessed tax and interest (including the disputed amounts) have been paid in full.

Finally, where an assessment is amended under the provisions of Section 955<sup>48</sup> TCA the chargeable person may appeal against the amended assessment by reference to renewed time-limits which start at the date of the notice of the amended assessment. However, the extended right of appeal is confined to the alterations, and matters encompassed by the original assessment remain subject to the earlier time-limits.

It is evident from the judgement of Kearns J. in **CAB v PMcS**<sup>49</sup> that enforcement proceedings may not be commenced by the Revenue or Collector General in relation to any taxes owing under the assessment until the fifteen days in which to challenge the refusal to accept an appeal have expired, as it would not be until then that the assessment would become final and conclusive. Once enforcement proceedings have commenced, Section 533(9) TCA terminates the operation of the saver clauses, so that it is not possible to derail enforcement proceedings by invoking a late appeal to the Appeal Commissioner.

### 3.7 The Form of the Notification of Appeal

It would now appear to be settled that there is no particular form which the notice must take and that any written notice which purports to affect the appeal will be sufficient, provided the intention to appeal is made clear.<sup>50</sup> It was suggested by Kearns J in **Criminal Assets Bureau v PMcS**<sup>51</sup> that once a notice of appeal is accepted or treated by the Revenue as such then they may be precluded from later challenging its validity<sup>52</sup>. But there is a contrary rule of public law to the effect that a public officer cannot acquiesce or agree to something which is *ultra vires* or outside his power. It may be that if an appeal was clearly time-barred or outside the limits fixed by statute, that Revenue would simply have no power to accept it.

While there is no prescribed format, in terms of content, Section 957(4) TCA requires that the notice of appeal shall specify:

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<sup>46</sup> Section 933(7)(2) TCA

<sup>47</sup> See **Division 4.1** below in relation to determination of appeals by agreement

<sup>48</sup> Which relates to assessments under the self-assessment system only

<sup>49</sup> [2002] ITR 57

<sup>50</sup> CAB v PMcS [2002] ITR at page 72

<sup>51</sup> [2002] ITR 57

<sup>52</sup> Strictly speaking was not part of the rationale for his decision which was decided on other grounds



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- (a) each amount or matter in the assessment with which he disagrees and
- (b) the “grounds in detail” for the appeal as respects each such amount or matter.

As noted above<sup>53</sup>, it is unclear whether this requirement applies outside of the context of the self-assessment system and to appeals under other tax headings where it is not specifically stated to apply. But leaving that aside, there is a very substantial issue as to how detailed the grounds must be. As the stated reasons are presumably intended to assist the relevant Inspector of Taxes in determining whether the appeal is a valid one, it would seem likely that the information would have to be sufficiently detailed for this purpose at least. And Section 957(6) TCA states that the taxpayer may not rely on a ground of appeal which was not specified in the notice, unless the Appeal Commissioners are satisfied that it could not reasonably have been stated at the time. Therefore, to ensure that a favourable argument is not lost to them the taxpayer should err on the side of caution and enumerate even the most exiguous grounds for his or her appeal.

Formerly it was accepted practice with respect to appeals that the grounds were stated in somewhat general terms e.g. “*I wish to appeal against the assessment on the grounds that it is estimated and excessive*”. The current practice of the Appeal Commissioners seems to be that they will list appeals on the basis of outline grounds, but will not hear them until full written submissions are furnished by the taxpayer: setting out the relevant statutory provisions and the authorities on which the appellant intends to rely. However this would seem to confuse two separate matters, as arguably the appeal does not even come into being unless the grounds are properly stated in the first instance. Any later submissions on the case are a separate matter and the requirement to furnish written submissions is discussed at Division 4.5 below.

### **3.8 Other Preconditions for a Valid Appeal**

As well as the notification in writing there are a number of other preconditions which may have to be satisfied before an appeal will be a valid one.

#### **(1) The Furnishing of Outstanding Returns**

In relation to persons who are *chargeable persons* under the self-assessment system, where the appellant has defaulted in delivering a return, then Section 957 TCA, Subsection 2 restricts the right to appeal until such time as the chargeable person has submitted all outstanding returns.

#### **(2) The Payment of Tax**

In accordance with Section 957 TCA, before an appeal may be validly made the appellant must also pay all outstanding taxes *and* interest<sup>54</sup> which arise by reference to the particulars contained in the taxpayer’s returns. In other words, the taxpayer must pay an amount at least equal to the tax and levies that would be

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<sup>53</sup> At Division 2.2

<sup>54</sup> Interest arising under S1080 TCA



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payable if Revenue had raised the assessment without departing from the information included in the return. In addition to the interest which must be paid, there is also a requirement to pay any costs incurred in the collection of the tax.

Changes introduced in Finance Act 2007 impact upon the procedures for the payment of tax, or repayment by Revenue, during the course of an appeal. This is dealt with separately at Section 7.2 below.

The combined effect of the provisions of Section 957(2) TCA and the decision in the **CAB v Keogh**<sup>55</sup> is that within 30 days of the date of the notice of assessment the chargeable person must furnish any late returns, organise the funds to pay all outstanding taxes & interest due, formulate the grounds of the appeal and notify them in writing to the Revenue.

Whether these two requirements (to have all returns and undisputed taxes up to date) will apply under other tax headings depend on the degree to which the procedure for appeals under the Income Tax Acts are adopted, as well as the particular rules which apply to that appeal. For example Section 68 of the CATCA 2003 stipulates that before a valid appeal can be made the party who wishes to appeal must make a full return, *as if they were deemed the person primarily liable* for the tax under Section 45 of the same Act. If that is the extent of the requirement, then it would appear that the payment of the tax arising is not a precondition for the appeal. Section 25 of the VAT Act 1972 on the other hand requires the payment of tax not in dispute before an appeal can be made<sup>56</sup>.

**(3) The Appeal can only be made to the extent that the assessment differs from the details on the Return**

This general rule<sup>57</sup> is subject to the exceptional situations falling within Section 865(2) TCA which applies where the taxpayer has made a mistake in relation to the facts or particulars stated on the return, which in turn has given rise to an overpayment of tax. In those circumstances a claim must first be made in relation to the overpaid tax and within the specified periods. If this claim is refused by the Revenue that refusal may be appealed subject to the requirements of Section 949 TCA.

**3.9 The Decision whether to Accept an Appeal as Valid**

Upon receiving the notification of the appeal the Revenue will then decide whether the taxpayer is actually entitled to make the appeal. If the Revenue refuses to allow the application to appeal, he or she must notify the taxpayer in writing, stating the grounds for the refusal<sup>58</sup>. Following the decision in the case **CAB v Keogh**, discussed above, the time-limits set out in this section must now be read as being subject to a requirement that

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<sup>55</sup> Discussed in Division 3.3 above

<sup>56</sup> Section 25(2)(j) of the VAT Act 1972.

<sup>57</sup> Section 957(1)(b) TCA

<sup>58</sup> S933(1)(b)



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when notifying the refusal the Revenue should also notify the taxpayer of their right to appeal against the Revenue's decision in this regard. The taxpayer has 15 days from the date of issue of the notice of the refusal to appeal the refusal directly to the Appeal Commissioners<sup>59</sup> – the manner in which this is phrased means that in fact the taxpayer will usually have less than 15 days, as it will take some time for the notice to arrive.

Once they have received an appeal against a refusal, the Appeal Commissioners must then do one of three things, either:

- (a) Refuse the application for appeal, or
- (b) Allow the application for appeal, or
- (c) Fix a hearing date to enable them to hear arguments from either side as to whether the appeal should be allowed.

It seems that the Commissioners receive approximately six to ten of these appeals annually. Presumably, if the matter of the refusal goes to hearing and the taxpayer is successful the appeal proper is not heard until some time later.

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<sup>59</sup> S933(1)(c)



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#### **4. Pre-Hearing Procedures**

Once a notice of appeal has been validly served and accepted (or the refusal successfully appealed), a number of preliminary steps must be taken before the matter can be heard. The following are the main features of the pre-hearing procedure, listed in the order in which they will usually occur:

- 1. Securing a date for hearing**
- 2. Settlement, where appropriate**
- 3. The issue of precepts and schedules**
- 4. The fixing of a venue and date for hearing**
- 5. The preparation and exchange of written submissions in relation to the arguments of the parties**

##### **4.1 Securing a date for hearing**

Once the taxpayer has notified the appeal to the Revenue, it is then for the Revenue to notify the Appeal Commissioners and obtain a date for hearing. However there is no time-limit specified in the legislation within which this must be done. In fact the communication of the fact of the appeal to the Appeal Commissioners is not actually mentioned in legislation at all, it may only be inferred.

A practice has arisen by way of the *Form AHI*<sup>60</sup> procedure whereby the points at issue in the appeal are agreed between the respective parties prior to notifying the Appeal Commissioner of the fact of the appeal.

The form prompts the following information:

- The name of the appellant,
- The type of tax and the legislative provisions in dispute,
- The relevant years of assessment,
- The grounds for appeal as formulated by the appellant;
- The points at issue,
- Tax cases which are likely to be cited,
- Whether counsel will appear for either side,
- The estimated time for the case, and
- Any other relevant comments.

This form is completed by the Revenue who then sends it on to the taxpayer, together with a blank copy which they can complete in the event that they differ as to the subject matter of the appeal. It is usually only when the issues are largely determined that it will

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<sup>60</sup> The name is derived from 'Appeal Hearing 1'



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be submitted to the Appeal Commissioners. The *Form AHI* procedure is an administrative innovation and has no basis in statute; it was implemented with a view to providing information from which upcoming appeals could be timetabled.

Although it is not prescribed in the legislation the process is a *de facto* precondition to having the appeal listed. The first instance in which the Appeal Commissioners will hear of the appeal is when they receive the completed *Form AHI* from the Revenue, together with a request for a hearing date. On the basis of a survey carried out by the ITI (See Appendix V), it would appear that it will usually take up to 6 months from the notification of the appeal to the Revenue to the conclusion of the *Form AHI* procedure.

Where the taxpayer is dissatisfied with the time it is taking to list an appeal they may apply directly to the Appeal Commissioners for a hearing date (Section 933(2)(c)) TCA. Of course a taxpayer who is not familiar with the system may not be aware of the reasons for the delay or know whether it is attributable to the Revenue, or to some problem at Office of the Appeal Commissioners.

As well as actually being independent, an appeals system has to be seen to be independent. It has been argued that the current system whereby Revenue secures the date for hearing directly from the Appeal Commissioners can lead to undue influence being exercised by Revenue over hearing dates. On the other hand there can be advantages to channelling the appeal through the Revenue. As Revenue are familiar with the case, they are in the best position to determine whether the appeal is a valid one, in terms of notifications and the other preconditions. Also, it is the Revenue official who instructs the Collector General to desist from collecting the tax subject to the appeal and Revenue who are best positioned to determine whether a settlement may be possible, and the appeal avoided altogether.

Ultimately, while the fears over impartiality may or may not be justified, it seems undeniable that the present system for listing appeals at the very least lacks the outward appearance of an independent process. Having examined this issue, the *Law Reform Commission* recommended that the first point of contact for the taxpayer should be the Clerk or Registrar of the Appeal Commissioner, to whom appeals would be notified, and that “*responsibility for listing appeals [...] to the Appeal Commissioner should lie with the Appeal Commissioners*”.

The ITI would also advocate that the appeal list is managed directly by the Office of the Appeal Commissioners which is appropriately resourced to carry out this task.

#### **4.2 Settlement by Agreement**

Section 933(3) TCA sets out a procedure whereby the taxpayer and Revenue may come to an agreement in relation to the assessment under dispute. If agreement is arrived at the assessment will stand good in its original form or with whatever changes are negotiated, as if it were never appealed. Such an agreement will not have force unless recorded in writing by one of the parties and notified to the other. If notified by one party, the other has 21 days from the giving of such notice to repudiate the agreement.



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The taxpayer may withdraw the appeal unilaterally, in which case his written notice informing the Revenue of his intention to withdraw the appeal operates in the same manner as if it were an agreement to that effect.

### 4.3 The Setting of Venue & Date

Once they have received the completed copy of *Form AHI*, the Appeal Commissioner will decide the time and place for the appeal. The appointment of date, time & place for the hearing of appeals are all matters within their sole preserve, although this may not necessarily be apparent to the taxpayer who will receive all information concerning these matters via Revenue. The Clerk to the Appeal Commissioners communicates the chosen date to the taxpayer, via the Inspector of Taxes who is most concerned with the appeal (Section 933(2) TCA).

The Appellant has no formal role in this aspect of the appeal and there is no statutory time-limit within which the matter must be “put down” or listed for hearing following receipt of the Notice of Appeal, although it might be expected that the time will vary according to the size and complexity of the case.

Where a date is fixed which is not convenient to the taxpayer, Revenue will usually arrange with the Clerk to have it rescheduled. However this is not guaranteed and the fact that the Revenue has primary access to the Appeal Commissioners may mean that he is in a more favourable position with regard to the scheduling of the hearing. In practice, however, there do not seem to be difficulties for a taxpayer who wishes to obtain a change in the listing date.

In general it has been noted that there appear to be discrepancies between the length of time which it takes to have different cases listed, even where the cases are of similar size or complexity. Owing to the lack of transparency or consistency in the listing procedure it is not at possible to say for sure what criteria apply. However in large cases, especially those where a repayment is sought by the appellant, the time between the notification of the appeal and the hearing of same can be as much as several years.

The Appeal Commissioners travel around the country, sitting in a variety of locations. In their Consultation document the *Law Reform Commission* note that the Appeal Commissioners:

*“[Sit] in about 14 different locations. Hearings are held in Dublin, Dundalk, Letterkenny, Sligo, Castlebar, Galway, Athlone, Limerick, Tralee, Killarney, Cork, Thurles, Waterford, Wexford, and Kilkenny. In Dublin, hearings are held in the Appeal Commissioners’ offices, and outside Dublin they typically sit in Circuit Court buildings”*



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#### 4.4 The Issue of Precepts

In the context of tax appeals a precept is a written direction, requiring certain information relevant to the taxpayer's tax liabilities to be provided. Pursuant to Section 935(1) TCA, the Appeal Commissioners may demand particulars in relation to all or any of the following:

- the property held by the appellant,
- the trade, profession or employment carried on by the appellant,
- the amount of the appellant's profits or gains, separated according to source and
- the deductions made in determining profits or gains.

The Appeal Commissioners are afforded full discretion as to when a precept shall issue – from the terms of the relevant provision it would appear that it may occur at any stage prior to the conclusion of the appeal, although in practice it will usually occur before the hearing. Further or additional precepts can be served on the taxpayer until such point as the Commissioners are satisfied that they have the particulars which they need, and in each case the time limit in which the precept must be returned is determined by the sender i.e. the Appeal Commissioners.

While the precepts are requisitioned for the benefit of the Appeal Commissioners, an appointed officer of the Revenue may inspect and copy from the schedule provided by the taxpayer, and under the procedure set out in *Section 936 TCA*, may object to the content of same “*within a reasonable time*”.<sup>61</sup> Such objection must be notified to the taxpayer by notice in writing and the taxpayer may then appeal against the objection. In many cases the resolution of the dispute concerning the schedule will effectively determine the main issue and *Section 937 TCA* confirms this view, in so far as it permits the Appeal Commissioner to either confirm or alter the assessment solely on the basis of their view as to the adequacy of the schedule.

Finally if the Appeal Commissioners are not happy with the information provided in a schedule, or need more information, they may put questions in writing to the taxpayer, which must be answered within 7 days. They may also put questions orally to the taxpayer as to the content of a schedule furnished to them, on oath if deemed necessary, although the taxpayer may decline to answer. It is not clear whether it is the taxpayer who can choose to answer the questions orally or in writing, or whether it is a matter entirely at the discretion of the Appeal Commissioners.

One perceived deficiency in the current system of issuing precepts is that they cannot be issued to third persons. So, if the Appeal Commissioners wish to verify a claim made by the taxpayer that he has paid a certain amount for goods, or given a certain amount in refunds, the Appeal Commissioner may not requisition his suppliers or customers to verify if this is true. The *Law Reform Commission* have recommended that the power be extended to include such situations. A reform of this kind has also been advocated at various times by the Appeal Commissioners, who have stated that without such third

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<sup>61</sup> Section 936 (1), TCA 1997



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party information they are confined in their ability to gather all necessary facts on which to make their determination.

#### 4.5 The Furnishing of Written Submissions

A further step has developed in practice between the notification stage and the hearing itself - particularly for appeals of a technical nature. In recent years the Appeal Commissioners have evolved a practice whereby the respective parties are required to prepare full written submissions of the arguments and authorities on which they intend to rely. Usually such submissions are exchanged between the parties before the appointed date for hearing. The written submissions provide the Appeal Commissioners with details of the technical arguments that will be made by both sides and also ensure that the parties are aware of one another's arguments, thereby minimising requests for adjournments in the course of proceedings. As the appeal provided for in legislation is an appeal by way of an oral hearing, and bearing in mind that the appellant should already have stated their grounds for the appeal, it has been suggested that this practice should not be obligatory and that the taxpayer may not wish to provide a written submissions prior to the hearing of their case.

As against this interpretation, the legitimacy of written submissions is implicitly acknowledged in the TCA. Albeit in the context of adjournments, Section 944 TCA refers to "*affording the appellant an opportunity of submitting in writing further evidence or argument*". Also Section 934(2), permits any barrister or solicitor to submit written pleadings to the Appeal Commissioners (whereas accountants and recognised tax practitioners would appear, on a very narrow interpretation of the provision, to be confined to making oral submissions only). Even aside from these passing references, one would anticipate that a court would be reluctant to interfere with the procedures adopted by the Commissioners for the effective operation of their tribunal. Most litigation involves some amount of prior pleading or disclosure, which helps narrow the issues and save on unnecessary argument. Therefore, although there are no reported cases on the issue it may be that the current practice of *seeking* written submission may be justified by the residual power enjoyed by the Appeal Commissioners to implement measures for the effective running of their court. The same conclusion might not pertain were the Appeal Commissioners to refuse to hear an appeal for failure to furnish submissions, thereby denying a taxpayer their statutory right of appeal.

A separate issue arises in connection with the manner in which the submissions are exchanged. The best practice in this regard would appear to be that the parties should exchange their submissions at the same time, via the Clerk of the Appeal Commissioners. However it frequently occurs that one party prepares their submissions well in advance of the other and a considerable delay ensues while the second party finishes theirs. As this is an *ad hoc* procedure there are no statutory time-limits to encourage compliance. Also, there is some experience amongst taxpayers of their submissions being shown to Revenue in advance of sight of Revenue's, which can be felt to be disadvantageous. The risk in such cases would be that the party who has delayed may benefit by drafting their own case with the other party's submission to hand – tailoring their arguments accordingly.



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Such occurrences would be less likely to occur if there were in place formalised rules governing (amongst other things) the time-limits and procedures for submitting and exchanging submissions.



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## 5. The Conduct of the Hearing

### 5.1 Parties Present

**For the Appellant** – The Appellant is entitled to be represented in the hearing by any of the following: a barrister, a solicitor, an accountant who is a member of an incorporated society or a member of the Irish Taxation Institute (Section 934(2) TCA). In addition to these persons who may appear as of right, the Appeal Commissioners may, at their discretion, allow any other person to plead before them<sup>62</sup>. It is nowhere stated that the appellant is entitled to argue his or her own case, however this right might be presumed and there would be strong constitutional grounds for suggesting that a person would be entitled to argue their own case, particularly if they could not afford to engage a professional to do so.

However the situation is not so clear-cut where the appellant is a company. The most likely candidate to represent a company in person would be one of its directors. Where the director is a professional falling within in one of the specified categories then this would not be an issue. The Act does not make provision for directors appearing on behalf of their companies, and it would seem that in general directors have no automatic right of audience in respect of companies in which they hold that position.

In their decision in the case of **Battle v Irish Art Frontiers Centre Ltd [1968] IR 252** the Supreme Court held that in the absence of some specific statutory authority, a director has no right to represent a company in litigation. While this decision referred to court proceedings, the rationale – the separate identity of the company – would apply to hearings before the Appeal Commissioners also.

*“This survey of the cases indicates clearly that the law is, as we apprehended it to be when this application was first made to us, viz. that, in the absence of statutory exception, a limited company cannot be represented in court proceedings by its managing director or other officer or servant. This is an infirmity of the company which derives from its own very nature. The creation of the company is the act of its subscribers; the subscribers, in discarding their own personae for the persona of the company, doubtless did so for the advantages which incorporation offers to traders. In seeking incorporation they thereby lose the right of audience which they would have as individuals; but the choice has been their own.”*

Of course such a hypothetical person might be able to avail of the saver clause whereby the Appeal Commissioners may allow any person to plead before them where they are satisfied that it would be appropriate.

**For the Revenue** – An Inspector or authorised officer may appear before the Appeal Commissioners on behalf of the Revenue, as indeed may any of the same categories of professionals who are entitled by right to appear on behalf a taxpayer<sup>63</sup>.

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<sup>62</sup> Subsection 2, paragraph (b)

<sup>63</sup> Section 934(1) & (2)



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**For the Appeal Commissioners** – As noted in the section dealing with appointment, the vast majority of appeals under the various tax heads may be validly heard by one Commissioner and indeed most appeals are. Occasionally both Commissioners will sit where the amount of tax in dispute is very large, or the issue in dispute is one of particular importance or complexity. So, for example, both Commissioners sat in the Tara Mines case. Where two Commissioners sit, one is agreed to sit as chairperson and has a casting vote in the event that they disagree amongst themselves. Rarely though it may occur, this method of arriving at a decision would appear to have arisen from practice and does not derive any support from the Acts. In contrast in the United Kingdom, the Rules governing the tribunals specify how decisions are to be made in the case of disagreements and Commissioners in the UK would rarely sit alone, particularly to hear an argument case.

### 5.2 The Conduct of the Hearing

There are no formal or published rules governing the actual conduct of tax appeals, either in terms of what happens before the hearing at the ‘submissions’ stage, or during the oral hearing itself. This is in contrast with the UK where the relevant tribunals are regulated by published procedures<sup>64</sup>. In this jurisdiction, therefore, there is no ‘roadmap’ or rules to determine the order in which parties are called, the matters which may be introduced in evidence, the form in which the decision issues or any of the other matters which are not addressed in primary legislation.

Indeed to some extent the format of the hearing may vary according to the matter under appeal. For small cases or purely quantum appeals the procedure may be quite informal, and an appeal may be settled by reference to a couple of primary documents without recourse to sworn evidence or detailed argument. However, the ‘textbook’ format of an appeal hearing would be as follows:

1. The representative of the Applicant taxpayer makes their opening submissions;
2. The representative of the Applicant taxpayer calls the taxpayer’s witnesses (possibly including the taxpayer) and examines them;
3. Revenue may then cross-examine the taxpayer and/or the taxpayer’s witnesses;
4. If necessary, the representative of the Applicant taxpayer re-examines the taxpayer and the taxpayers witnesses;
5. Revenue make their opening submissions;
6. Revenue call their witnesses (if any) and examine them.
7. The representative of the Applicant taxpayer may cross-examine Revenue’s witnesses;

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<sup>64</sup> Appendix III contains the Rules governing both the *VAT & Duties Tribunal* and the *Special Commissioners*



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8. Revenue may re-examine his or her witnesses;
9. The representative of the Applicant taxpayer makes their final submissions;
10. Revenue makes their final submissions.

In practice this format is quite flexible and in complex cases it would not be uncommon to have one or more adjournment for the purpose of preparing further written submissions or adducing additional information – whether at the suggestion of the litigants or at the behest of the Appeal Commissioners. Such adjournments can add considerably to the time it takes to complete an appeal and again there are no rules governing the grounds under which a case may properly be adjourned.

### 5.3 The Burden & Onus of Proof

The *onus of proof* refers to the fact that one of the two parties has the task of convincing the judge or commissioner of their case, or otherwise their cause will fail. In other words, if neither party adduced any evidence or made any arguments, then the person on whom the onus of proof rests would lose.

In the typical appeal in which a taxpayer seeks to challenge the raising of an assessment, or the estimation of a return, then it is for the Appellant to satisfy the Appeal Commissioners that the assessment was incorrect in some way i.e. the onus rests on the appellant. That this is the case is clear from the terms of Section 934(3) TCA, which specifies that the assessment must stand unless the Appeal Commissioners are convinced by the evidence before them that it is incorrect.

### 5.4 The Rules of Evidence

Section 934(3) TCA stipulates that the Appeal Commissioners shall base their decision on the sworn evidence of the appellant, or “other lawful evidence”. It is generally accepted therefore that the rules of evidence – which govern the admittance of documents as well as the oral evidence given by witnesses – have some application to hearings before the Appeal Commissioners. It is also generally accepted that these rules may be relaxed somewhat in the hearing of tax appeals, as is the case for many other inferior tribunals.<sup>65</sup>

Interesting in this regard is the decision in the case of **CAB v Hunt**. There the designated *Inspector of Taxes* sought to admit in support of the assessment evidence contained in certain bank statements which had not been formally proven (which would usually be done by means of the oral evidence of the person who compiled them or had first-hand knowledge of the process by which they were compiled). The Court applied the hearsay rule to the benefit of the taxpayer and his wife and ruled that these documents should not have been admitted in evidence. Although it will be noted that the forum for the hearing of this case was the High Court, the subject matter was one which might exercise the Appeal Commissioners on occasion.

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<sup>65</sup> In this regard see the article by B H Giblin “Rules of Evidence and Procedure at Tax Appeals” – Irish Tax Review May 1995



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## 5.5 Adjudgments & Decisions Made in Default

The general rule is that if the appellant (or their representative) does not appeal at the appointed place and time then the assessment becomes final and conclusive as if the appeal was never made<sup>66</sup>. However the seeming harshness of this rule is mitigated by the fact that the taxpayer/appellant may apply for an adjournment of the hearing on a number of grounds.

- The appellant is automatically entitled to an adjournment if the hearing takes place within 9 months of the earlier of: the date of the notice of assessment and the end of the year of assessment/accounting period which is the subject of the appeal.<sup>67</sup>
- If he can show that he was unable to attend owing to absence, sickness or other reasonable cause and makes his application without delay<sup>68</sup>.
- Otherwise, where an application is made in writing and the Appeal Commissioners see fit to grant a postponement.

It should be noted that these provisions refer only to the person who has given notice of appeal, and do not therefore apply to the Revenue. The Acts do not seem to address the issue of an application for adjournment made at the request of the Revenue, although it may be that this is less likely to arise owing to the role which the Revenue will have in fixing the date in the first place. While there is no statutory provision dealing with such a request, there is also no corollary measure to Section 933(6)(b)TCA, in other words if the Revenue fails to appear, the assessment does not automatically stand appealed.

The Appeal Commissioners must dismiss an appeal by default where any of the following occurs:

- (a) Any of the information demanded before or during the appeal is not provided, including the information demanded by way of precept, or if the applicant has failed to answer any questions put to him<sup>69</sup>.
- (b) If the appellant has failed to provide all statements of profits and gains, schedules and other evidence relating to the return.
- (c) The appellant does not appear at the appointed date (unless excused by virtue of one of the exceptions set out in Section 933(8))TCA

## 5.6 The Summoning of Witnesses & the Administration of the Oath

The Appeal Commissioners may summons any person they think able to give evidence in relation to an assessment<sup>70</sup>. There is a €50 fine in the event of default. The Appeal

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<sup>66</sup> Section 933(6)(b) TCA

<sup>67</sup> Section 933(6)(d) TCA

<sup>68</sup> Section 933(8)(c) TCA

<sup>69</sup> Section 933(6)(c)(ii)(II)



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Commissioners also enjoy the prerogative of administering an oath<sup>71</sup> to persons who appear before them. By their own account this power is rarely enough used; usually it is employed only if the evidence being given is of a disputed or controversial nature. Revenue Inspectors are very rarely required to take an oath, which has been criticised as a partial exercise of the power. The *Law Reform Commission* has therefore recommended that the Appeal Commissioners should specify (in something akin to a procedures manual), “*that in appropriate and defined circumstances, an Appeal Commissioner may administer an oath to any witness including a taxpayer or an Inspector of Taxes*”<sup>72</sup>.

In the event that a person is found to have lied under oath then they are liable to the same criminal penalties as would apply had they committed perjury in a court of law, although there are no recorded cases of such charges ever being brought.

### **5.7 Discovery**

Current legislation and practice does not allow for the “discovery” of documents: a matter which is allowed in the UK system.

### **5.8 The Recording of Proceedings**

Generally, there is no official record or transcript of proceedings. Occasionally in larger cases and particularly cases which are likely to be appealed or brought before the High Court on a point of law the parties may agree to utilise the services of a stenographer. In this regard the Revenue will usually only permit the taxpayer to avail of the record if the taxpayer agrees to defray half of the cost. The lack of a reliable record as to what was said during a hearing, particularly as to what was said by the Appeal Commissioners in giving their decision, could cause difficulties in the event that a case is to be stated to the High Court as such appeals rely on a set of agreed facts.

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<sup>70</sup> Section 939(1) TCA

<sup>71</sup> Section 939 TCA. ‘Oath’ for these purposes refers also to ‘an affirmation’.

<sup>72</sup> At Paragraph 7.49 of their Report





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## 6. The Decision

### 6.1 The Timing of the Decision

In most “quantum cases” where no substantial technical argument arises the Appeal Commissioners (or Commissioner) will make known the decision at the conclusion of the hearing, by simply announcing it to the respective parties. In larger cases, or cases where there are extended submissions or argument, deliberation may be required and the Appeal Commissioners are entitled to postpone their decision in order to consider the issue. As we noted above the parties are sometimes requested to make further written submissions or attend for a further hearing to address the Appeal Commissioners on a particular point which may be causing them some doubt. Both the postponement and the request for further submissions are specifically contemplated by Section 944 TCA and in those cases where the decision is postponed to allow for consideration, the Appeal Commissioners may give their decision by posting it to the respective parties.

There is no time-limit within which such processes must be concluded and there is no time-limit within which a decision must be made<sup>73</sup>. Conceivably, where the delay was inordinate, a party to the appeal could bring an application for judicial review to the High Court seeking an order of *mandamus* compelling the Appeal Commissioners to deliver their decision, although this might be seen by the taxpayer as a counter-productive measure. It has been suggested that there should be a statutory time-limit by which decisions must be provided, or alternatively a register of outstanding decisions such as currently exists in respect of reserved court judgements, so that the delays could be monitored.

### 6.2 The Effect of the Decision

Finance Act 2007 introduced changes to the legislation governing the payment, or repayment, of tax and interest on foot of the Appeal Commissioners decision. These changes are detailed in Section 7.2 below.

While the TCA describes in a very comprehensive fashion the effects of the decision in relation to the due dates for the payment of tax and interest where an assessment has been appealed, there is little or no legislation on payment of tax and interest for appeals other than appeals against assessments. It is not clear, for example, whether a successful appeal against a refusal to grant an RCT certificate would take effect from the date the appeal was notified, the date of the decision was announced or from some other date – perhaps the date the right of appeal lapses?

### 6.3 The Giving of Reasons for a Decision

Under the present system, the Appeal Commissioners are required to record their decision on the “prescribed form” at the time it is made, and to transmit same to the Revenue within 10 days<sup>74</sup>. The practical manifestation of this requirement is that the decision of

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<sup>73</sup> The LRC has recommended a rule that decisions should be made within 3 months.

<sup>74</sup> As required by Section 935(7) of TCA 1997



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the Appeal Commissioners is recorded on what is known as *Form ASI*. This form records the appellant's name and address, the type of tax, the relevant accounting period, the amount of the assessment and the determination or decision. It does not contain any description of the facts found to be proven, or the reasons why one argument was favoured over the other. It would be better described as a record of the decision than a judgement.

Until the enactment of the Freedom of Information Act 1997, there was no statutory duty on the Appeal Commissioners to give reasons in support of their decision or to state the findings of fact upon which those decisions were based. It will sometimes be the case that reasons are given informally when the Appeal Commissioners are informing the parties of their decision. However, it is conceivable that in certain cases the Appeal Commissioners could omit to give any reasons to justify their conclusion, or give reasons which are so abbreviated as to be of little assistance to either party in determining the true basis for the decision. It seems very likely that a complete refusal to give any explanation for a decision would be contrary to natural and constitutional justice (and possibly the requirements of Article 6 of the European Convention of Human Rights). Certainly this has been successfully argued in relation to various other courts and tribunals<sup>75</sup>. For example, in the case of **O'Mahony v Ballagh [2002] 2 IR 410** the Supreme Court held that a District Court judge is obliged to give his or her reasons for refusing an application for a "direction" during the course of a hearing, as such reasons would affect the manner in which the defendant conducted their case thereafter. Although there would not appear to be any cases concerning the Appeal Commissioners, the same reasoning would seem to apply as a litigant could not properly assess whether further appeal, or even judicial review, is appropriate without knowing the basis for the decision that was made.

The position of appellants with regard to the seeking of reasons is somewhat strengthened by virtue of the provisions of the Freedom of Information Act 1997 and in particular Section 18 thereof. Under this section the various public bodies who fall within the remit of the Act are required to give a statement of reasons for the decisions which they make, where requested to do so by a request in the prescribed form. The Appeal Commissioners are included in the list of public bodies covered by the Act<sup>76</sup> and it would appear therefore that they would be obliged to provide an appellant with a statement of the reasons for a decision, and must do so within a period of 4 weeks from the date of the request.

*"18.—(1) The head of a public body shall, on application to him or her in that behalf, in writing or in such other form as may be determined, by a person who is affected by an act of the body and has a material interest in a matter affected by the act or to which it relates, not later than 4 weeks after the receipt of the application, cause a statement, in writing or in such other form as may be determined, to be given to the person—*

*(a) of the reasons for the act, and*

<sup>75</sup> The State (Creedon) v Criminal Injuries Compensation Tribunal [1988] IR 51. The legal status and role of the Criminal Injuries Compensation Tribunal in so far as it was concerned with making quantitative assessments within a statutory framework, are comparable to that of the Appeal Commissioners.

<sup>76</sup> As listed in the First Schedule to the Freedom of Information Act, 1997. The relevant provision reads "the Office of the Appeal Commissioners for the purposes of the Tax Acts".



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- (b) *of any findings on any material issues of fact made for the purposes of the act.”*

As can be seen from the terms of the section the duty extends to both the reasons for the decision and the facts upon which it was based. It is not known whether the Appeal Commissioners accept this provision as applying to their rulings or whether they have considered any requests under this provision.

Where there is a duty to provide reasons, whether deriving from statute or otherwise, the extent of this duty and the level of detail required to satisfy it will vary according to the forum and the subject matter being considered. In general it is safe to say that the law does not require a comprehensive written justification or judgement for every decision that is made. In relation to the general principles which are applicable where there is an established duty to furnish reasons, the following comments of Macken J in the High Court are illustrative<sup>77</sup>.

*“The principles to be found in the case, can be summarised as follows:*

*(a) Where there is a statutory obligation to provide reasons, these should be of a character mentioned in the case of Great Portland Estates Plc, supra, that is to say, proper intelligible and adequate;*

*(b) It should be possible for the party to whom the reasons are particularly relevant, to ascertain the reasons without undue difficulty or detailed research;*

*(c) The reasons do not have to be set out in significant detail but should be sufficiently clear to permit the party affected by them to make appropriate use of them*

*(d) The Court should be able, by reference to the reasons, come to a view when exercising its supervisory role, as to whether the stated reasons are sufficient or justifiable;*

*(e) The degree of particularity which is to be given will depend always on the particular circumstances of the case;”*

Following these guidelines one would have thought that entirely generalised statements such as, “I am convinced by the arguments of the taxpayer” or “I prefer the evidence of the Revenue” would be unlikely to satisfy the requirement. But provided the stated reasons are sufficiently detailed so that the basis for the decision is discernable, both in terms of facts found and arguments favoured, then under the present jurisprudence they would probably suffice although they perhaps do not address every single argument or fact in the case.

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<sup>77</sup> Per Macken J in *Orange Communications Limited v Director of Telecommunications Regulation and Another* [1999] IEHC 254, Unrep. High Court decision, October 4, 1999



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Related to the question of providing reasons is the issue of whether *written* reasons or determinations should be produced by the Appeal Commissioners when they arrive at a decision. Such a practice is sometimes advanced on the grounds that “*a decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been thought out*”<sup>78</sup>. Under the provisions of the TCA, the Appeal Commissioners are under no statutory duty to furnish any written determination other than the record of the decision referred to above - which is in reality little more than a record of the outcome, who had won and by how much. By way of comparison with other tribunals of a similar kind, in the UK the *Special Commissioners* are obliged to give a written account of their decisions:

**18. (4)**

*“The final determination may be given orally by a Tribunal at the end of the hearing or may be reserved and in either event shall be recorded forthwith in a document which, subject to paragraph (7) below [concerning interim rulings] shall contain a statement of the facts found by the Tribunal and the reasons for the determination and shall be signed and dated by the Tribunal”<sup>79</sup>.*”

In practice, the fact that the Appeal Commissioners do not produce a written determination as a matter of course can often lead to considerable delays when a case is being stated to the High Court, as subsequent to the decision the parties must piece together an agreed version of the facts found, as well as the legal reasoning which was applied to these facts.

It is this latter approach which is recommended by the Law Reform Commission in their final Report. Mindful of the risk that such a procedure might just lead to further delays in the conclusion of appeals - with parties awaiting indefinitely a written decision – the Commission also recommends a statutory timeframe within which such a determination must be published. Such a practice has already been introduced in relation to decisions of the Courts by virtue of Section 46 of the *Courts and Court Officers Act 2004*, which applies a 2 month time limit on reserved judgements and which creates a Register of Reserved Judgements. The Law Reform Commission has recommended as follows<sup>80</sup>:

*“The Commission recommends that the Appeal Commissioners should issue a concise written reasoned determination in appropriate cases within a short period (ideally 3 months) of the determination, including a summary of the facts and giving reasons for the decision”.*

#### **6.4 The Publication of Determinations**

Since Finance Act 1998 the Appeal Commissioners have had the discretion to publish reports of their determinations, with the proviso that they must be in a form which protects the identity and confidentiality of the taxpayer (Section 944A TCA). Under this

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<sup>78</sup> Originally taken from the Franks Report (1957, Cmnd. 218 at paragraph 98) this passage is cited by the Law Reform Commission at page 121 of their consultation document.

<sup>79</sup> S18(4) of the *Special Commissioners (Jurisdiction and Procedure) Regulations 1994*, see Appendix III

<sup>80</sup> At Paragraph 7.62



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power, the Appeal Commissioners maintain a nominal register of their previous determinations on their website [www.appealcommissioners.ie](http://www.appealcommissioners.ie) (which facility was set up by the Irish Taxation Institute). At the time of writing only 32 decisions were published on this site, 25 of which were made in the year 2000. After these initial publications, 5 were published in 2003, none in 2004, one in 2005 and one in 2007. As the provision for the publication of decisions contained in Section 944A TCA only enables the Appeal Commissioners to publish without requiring them to do, it is of little use to taxpayers or professional bodies who are dissatisfied with the level of publication. Also, the right to seek the information set out in Section 18 of the Freedom of Information Act 1997 is confined to persons affected by and having a material interest in the decisions in question, and for this reason the Act could probably not be used to seek information relating to decisions made in respect of other persons.

In contrast, in the UK the *Finance and Tax Tribunal* website<sup>81</sup> publishes most of the recent decisions of the various tax tribunals and has a full database of hundreds of recorded decisions made in or after 2003 as well as a selection of decisions that cannot be searched for using the web facility.

As well as requiring a change in the practice of the commissioners themselves (in so far as the giving of written determinations is a precondition for a database of decisions), there are also issues of funding and information technology expertise. In the course of the Public Accounts Committee hearing, Appeal Commissioner O’Callaghan explained the paucity of published determinations on the Appeal Commissioner website as being “a resource issue”, and felt that the provision of a research assistant might help in addressing this problem.<sup>82</sup>

It is arguable that the lack of a comprehensive register places the Revenue at an comparative advantage as they are more likely to be familiar with previous decisions than the average taxpayer (being a party to virtually every case) and that this advantage is exacerbated by the exclusive access enjoyed by the Revenue in relation to the records of the Appeals i.e. forms AH1 and AS1. The manner in which such an advantage could be used is demonstrated in the following Section 16 FOI response, where the Revenue Commissioners stated<sup>83</sup>:

*“[t]he copies of forms AH1 sent to Head Office (together with the subsequent notes of the hearings) will be retained centrally and indexed under the relevant headings. The copies of forms AH1 as they are received in Head Office will be checked against the index. Where the check shows that a case on a similar or related topic has appeared on a previous AH1, the Inspector will be advised of the details on that AH1. The Inspector may then obtain the papers relating to the previous case and may consult with the Inspector who argued the case with a view to preparing his own case to deciding whether to continue the case. It is again*

<sup>81</sup> ([www.financeandtaxtribunals.gov.uk](http://www.financeandtaxtribunals.gov.uk))

<sup>82</sup> At page 25

<sup>83</sup> The Revenue Commissioners TCA 1997 Part 40 Appeals Publication under Section 16, Freedom of Information Act 1997 Rules, Procedures, Practices, Guidelines & Interpretations. Revised October 2001, paragraphs 5.1-5.2.



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*stressed that the purpose of the procedure is not to enable Inspectors to quote previous decisions in argument. The citing before the Appeal Commissioners or Circuit Court Judges of what are, in effect, unreported cases would not prove acceptable. The purpose of the procedures is to enable an Inspector to benefit from the experience of other Inspectors in framing his own argument or in determining where a particular line of argument is sustainable.”*

As was noted above in relation to appeals generally, a body of accessible tax precedents to which all persons may refer should improve compliance and will be to the benefit of both compliant taxpayers and the Revenue, in that it will assist the former in establishing their lawful obligations where there is room for doubt, and it will assist the latter in so far as errant taxpayers can not so readily use differences of interpretation as an excuse where there is a published precedent dealing with the issue.



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## **7. Rehearings, Cases Stated and Other Reviews**

### **7.1 Introduction**

The nature of the decision making jurisdiction conferred on the Commissioners was examined earlier, and it was observed to be a limited one. It is not surprising therefore that this jurisdiction is supervised by way of further appeals to the Courts, both as to matters of fact and of law. Where the taxpayer is aggrieved as to a determination of fact, for example a calculation of the profits he or she has earned in a given period, the appropriate remedy would usually be to appeal to the Circuit Court for a full rehearing of the matter. If the issue in dispute would be more properly described as a point of law, then the case-stated mechanism to the High Court will address it.

In fact, where the dispute involves an issue of law the taxpayer will have a choice – they may appeal to the Circuit Court for a full rehearing, confident that the further ‘appeal’ by case-stated will still lie. Or they may bring the matter directly to the High Court by way the case-stated procedure. Whether the appellant will take the High Court or Circuit Court route is a matter which may be determined by various practical considerations, including costs.

The third remedy available to a disgruntled litigant, whether taxpayer or Revenue, is to seek judicial review. As we will see, judicial review is appropriate only when there is some error or want of due process concerning the manner in which the decision was made. It does not generally concern the subject matter of the decision itself.

The main features of each of these different categories of further appeal are examined in turn below.

### **7.2 Finance Act 2007 changes**

Some changes to the Irish appeals system were introduced by Section 20 of Finance Act 2007. The section provides that where a determination of the Appeal Commissioners is to be reheard by a Circuit Court Judge, or a case is to be stated for the opinion of the High Court, the Revenue will not be obliged to amend the assessment under appeal until the appeal process has been fully completed. As a result, in those circumstances, tax will be neither collected nor repaid by the Revenue Commissioners on the basis of the Appeal Commissioners determination. In the past the taxpayer had to pay the amount of tax deemed by the Appeal Commissioners decision to be due (on the standing or amended assessment) in order to appeal against their decision.

These amendments apply to appeals determined by the Appeals Commissioners, or by a judge of the Circuit Court, on or after the date of the passing of Finance Act 2007.

The practical implications of the Finance Act changes can be best described by way of example.



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- A taxpayer self-assesses for income tax and pays the amount of tax that they believe to be due based on the return they have completed.
- Revenue raises a notice of assessment which indicates that a further balance of tax is due, bringing the total amount of tax to more than the taxpayer believes to be due.
- The taxpayer decides to appeal the assessment raised by Revenue to the Appeal Commissioners.
- The taxpayer does not need to pay any further amount of tax in order to go to appeal.
- Revenue will not amend the original assessment they have raised until the appeal has been ultimately determined either at the Appeal Commissioners, the Circuit Court or the High Court.
- The taxpayer does not have to pay any further amount of tax in order to appeal to the Circuit Court or High Court by way of a case stated. Nor does the Revenue have to repay any amount of tax until the ultimate decision is made.
- If the taxpayer loses at any stage in the appeals process interest on the tax due will be payable and will run from the date of the assessment raised by Revenue.

### 7.3 Rehearing by a Circuit Court Judge

If the taxpayer is dissatisfied with a determination of the Appeal Commissioner, he or she may appeal to a judge of the Circuit Court for a rehearing of their case using the procedure set out in Section 942 TCA. Rehearings are relatively rare, at the date of their report, August 2000, the Steering Group on the Review of the Office of the Revenue Commissioners estimated the number at between 10 and 15 annually.<sup>84</sup>

### 7.4 The Procedure for Seeking a Rehearing

In terms of notification the taxpayer must notify Revenue in writing “*within 10 days after such determination*”<sup>85</sup>. There is no requirement to state immediate dissatisfaction (as for the case-stated procedure), nor is the taxpayer required to state in the written notification the reasons for the appeal. Where the Appeal Commissioners have adjourned the hearing so that they may deliberate on their decision (as they are entitled to do) and have notified the parties of the final decision in writing, the relevant time-limit is “*within 12 days after the day the determination is so sent to the person [...] giving the notice.*”<sup>86</sup> Bearing in mind the dicta of Kearns J in **Criminal Assets Bureau v PMcS**<sup>87</sup>, the manner in which this provision is worded would suggest that the critical date is the date of posting, and that it is irrelevant when this determination, or notice of it, was actually received. It is not difficult to imagine situations where, by the time the taxpayer becomes aware of a decision sent by post, the time for seeking a rehearing would have passed. In such situations the taxpayer might be able to avail of the general power which the Circuit Court has to extend time in all matters in which they have jurisdiction, although in the absence of any clear authority on this point it is conceivable that the Circuit Court might

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<sup>84</sup> At Paragraph 7.27, page 73

<sup>85</sup> Section 942(1)

<sup>86</sup> Section 944(2)

<sup>87</sup> [2002] ITR 57, discussed at **Division 3.4** above.



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decline to extend a time-limit fixed by statute, and this time-limit could be found to be absolute in a way in which the limits for notifying appeals to the Appeal Commissioners are not.

### 7.5 Revenue Have No Right to a Rehearing

Somewhat anomalously the Revenue have no right to such a Circuit Court appeal in the event that they are unsuccessful in the Appeal Commissioners - except in capital acquisitions tax cases where such a rehearing can be requested by Revenue<sup>88</sup>. It was this right of rehearing, exceptional to CAT, which allowed the Revenue to appeal the decision of the *Appeal Commissioners* in Charles Haughey's case, wherein the Appeal Commissioners had found resoundingly in Mr. Haughey's favour. As the decision of the Appeal Commissioner had been made largely on the basis of findings of fact concerning the domicile of the respective parties (findings which were subsequently overturned in the Circuit Court) arguably this decision could not have been addressed by way of appeal to the High Court by way of case-stated.

It has been suggested that the decision to provide for an appeal mechanism which was available to one side only might be justified by the fact that meeting the cost of an appeal would generally be more of a hardship for a private citizen than for the Revenue. In any event the *Law Reform Commission* have recommended that the Revenue should now enjoy the same right of appeal as taxpayers do, although with the caveat that the recommendation should be implemented as one of a number of measures designed to ensure that the Appeal Commissioners are generally more independent of the Revenue Commissioners.<sup>89</sup> This issue was referred to by Frank Daly, Chairman of the Revenue Commissioners at the PAC in December 2006, as follows:

*“As Commissioner O’Callaghan has mentioned, we have only the right of rehearing in the Circuit Court in respect of capital acquisition tax cases but the Law Reform Commission has recommended that Revenue should have a right of rehearing in all cases to put us on a level playing field with the taxpayer but that has not been implemented.”<sup>90</sup>*

In considering whether such a right of appeal is required by the Revenue, the Law Reform Commission considered it important that the case-stated and judicial review procedures offer Revenue no way of challenging factual determinations made by the Appeal Commissioners, unless they are findings which no reasonable commissioners could have made (this aspect of the review procedures is addressed below), or those rare cases where it can be shown that the findings of fact were based on fraudulently presented evidence<sup>91</sup>.

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<sup>88</sup> Again provided the other party is notified of the intention to appeal within 10 days of the determination, Section 67(5)(b), CAT Consolidation Act 2003

<sup>89</sup> At Paragraph 7.96 of their Final Report

<sup>90</sup> Page 6 of 9 of Vote 8 on the Office of the Appeal Commissioners, PAC 7 December 2006, <http://debates.oireachtas.ie/DDebate.aspx?F=ACC20061207.xml&Node=H3&Page=6>

<sup>91</sup> Tassan Din v Banco Ambrosiano SPA [1991] 1 IR 569



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## 7.6 Venue for and Listing of the Rehearing

The country is divided into seven *Circuits* for the purpose of legal business – the Northern, North-Western, Eastern, South-Eastern, Western, South Western & finally the Dublin Circuit - and judges are appointed to a particular Circuit at any given time. The general rule is that the rehearing should be heard by a judge of the Circuit Court in whose Circuit the place to which the assessment was addressed is situate; i.e. by reference to the taxpayer's address. In cases where the person is a non-resident, deceased, incapacitated or a trust, then the Circuit will be determined by reference to the place where the assessment was made i.e. where the relevant Revenue office is situate (Section 942(1) TCA).

It is not entirely clear how the venue should be decided where the appeal is not an appeal against an assessment, for example an appeal against a determination by the Revenue that a person is resident for the purposes of income tax. Nor does the section address the issue of who would/should determine the question, in the event that such a dispute arises. In most situations such conundrums should be resolved by virtue of the commonly used condition that the rules applicable to appeals against assessments are to be modified “as necessary” in other contexts.

In terms of the time which it will take between notification and the hearing of the case by the judge, this will largely depend on two factors. Firstly, it is Revenue who informs the Circuit Court judge of the existence of the appeal and who seeks a date for the hearing of same. There is no time-limit specified as to how promptly this must be done and no statutory procedure by which the taxpayer may directly apply in the event that there is undue delay, as there is for before the Appeal Commissioners.<sup>92</sup> The matter is entirely within the discretion of the Revenue and could, in theory, be delayed indefinitely. The *Law Reform Commission* has recommended that the taxpayer should have recourse to some mechanism for expediting the listing of a rehearing in the Circuit Court, as may be done for appeals to the Appeal Commissioners.

The second factor which will be critical in determining how long it takes to hear the appeal will be the length of the judge's own list. As the appeal is stated to be to a judge of the Circuit Court rather than the Circuit Court itself, historically tax cases have not been listed by the Courts Service in the same way as most other business which comes before the Court. In practice the Revenue will notify the judge that the appeal is pending and a date will be fixed by the judge, or in Dublin by the President of the Circuit Court (who in practice may select from the available judges a particularly suitable or qualified judge). Section 942(3) TCA does afford tax re-hearings some degree of priority, requiring as it does that the case be heard “*with all convenient speed*”. Although the waiting period may vary from circuit to circuit and from judge to judge it seems that hearings will generally be heard within 6 months from the date the taxpayer notifies his intention to have the appeal re-heard. In fact it is possibly the case that in general tax hearings are heard more expeditiously than other Circuit Court business, owing to the manner in which they are specially fixed.

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<sup>92</sup> Section 933(2)(c) TCA



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As noted above the right of rehearing is to *a judge* of the Circuit Court, rather than to the Circuit Court generally<sup>93</sup>. The importance of this distinction was greatly reduced by the decision in the *Arida*<sup>94</sup>, case where it was held that the judge still enjoys the residual powers of the Circuit Court when sitting in tax cases. However it does still have consequences for the way in which rehearings are administered and listed. The independent body known as the *Courts Service* are not involved in administering the case as they are for most other Circuit Court business. In fact it is the Revenue who maintains what amounts to the court file and who notifies the relevant parties of the arrangements.

For reasons of perceived independence, the *Law Reform Commission* recommend that tax re-hearings be listed in the usual way with the involvement of the Courts Service and the relevant County Registrars. This could be achieved simply by specifying that the appeal lies to the Circuit Court, and by employing the same notification of appeal procedures as pertain in other cases, whether civil or criminal.

### 7.7 Documents for a Rehearing

In terms of documents, it is the Appeal Commissioners who are required to send to the relevant Circuit Court judge any “*statement or schedule in their possession which was delivered to them for the purpose of the appeal*” (S942(1)). It is not clear whether this includes the full gambit of written submissions which in practice may be requested by the Appeal Commissioners to assist them in their deliberations. As the designations ‘*statement*’ and ‘*schedule*’ echo documents which are specifically mandated elsewhere in the Act, it is suggested that documents informally or extra-statutorily delivered to the Appeal Commissioners (such as written submissions) are not intended to be covered by this provision. In any event, the reuse of these submissions might impinge on the right to a full rehearing of facts and law.

The relevant Revenue official is responsible for transmitting to the judge the prescribed form in which the decision of the Appeal Commissioners is recorded (Section 942(2)) TCA – otherwise known as the ‘AS1’. This can be done either at or before the time the case is heard, and it is not a prerequisite for the listing of the rehearing.

### 7.8 The Rehearing

The same parties are granted a right of audience as for the hearing at the Appeal Commissioner stage<sup>95</sup>. One practical point which has given rise to some dispute in this regard is the issue of whether legal Counsel are going to be briefed by the respective parties. At the Appeal Commissioner stage, Form AH1 requires the taxpayer to indicate whether Counsel will be employed for the hearing, and the respective parties often assume a similar position in this regard. However there is no comparable form in the Circuit Court. Sometimes the parties may mistakenly assume that the same form of representation will be used as at the Appeal Commissioner, only to find that the other side changed their representation by adding Counsel – in at least one instance this has been

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<sup>93</sup> Section 942(1) TCA

<sup>94</sup> *Inspector of Taxes v Arida Ltd* [1992] 2 IR 155 High Court; (1995) 2 IR 130 Supreme Court

<sup>95</sup> Section 942(2) TCA



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discovered only on the appointed hearing date, leading inevitably to an application for adjournment. While in most other areas of litigation each party makes an independent decision as to representation, in the tax sphere this mutual courtesy is well established and is conducive to keeping down the costs of tax litigation. It may be the practice in the Appeal Commissioners could beneficially be extended to re-hearings in the Circuit Court.

Unlike most cases in the Circuit Court which are held in open court, tax hearings take place *in camera*<sup>96</sup>. In addition, to ensure that the confidentiality of the litigants is upheld, there is a requirement that the judge hearing the case make a *Declaration* in the same form as that which is made by the Appeal Commissioners on taking office, although judges might be expected to respect such confidentiality as a matter of course and in practice this is rarely if ever done. Incidentally, the appeal may be settled by agreement in the same way as appeals to the Commissioners<sup>97</sup>.

The re-hearing is just that –the whole case is heard again, *de novo*, without any reference to the findings of fact or law which were made by the Appeal Commissioners. Subject to the possibility of a case being stated to the High Court, the decision of the Circuit Court judge is final and conclusive<sup>98</sup>. However with regard to the payment of interest and tax, the changes to the legislation introduced by Finance Act 2007, discussed above, apply to a rehearing.

### **7.9 The Case Stated Procedure**

While a rehearing addresses anew the entire subject matter of the appeal, it may be that the dispute hinges on a net point of law in which case it may be referred directly from the Appeal Commissioners to the High Court for a ruling as to the correct interpretation of the law. Both parties enjoy the same right of referral in this regard, although for the Revenue it will usually be the only way of challenging a decision of the Appeal Commissioner, with the exception of appeals concerning Capital Acquisitions Tax.

A case may also be stated from the Circuit Court subsequent to a rehearing (Section 943 TCA effectively extends the mechanisms applicable to determinations of the Appeal Commissioner) and except where it is stated otherwise the two procedures are treated as one for the purposes of discussion below.

### **7.10 Stating a Case**

The first point which might be noted in relation to stating a case to the High Court is that in the tax context a case may only be stated at the conclusion of the case, after a determination has been made by the Appeal Commissioners. This is in contrast to other areas of the law where there exists a procedure known as the consultative case-stated<sup>99</sup>. This allows a decision maker who is in doubt as to the correct application of the law to seek an opinion during the case as to the proper interpretation, which will be applied to

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<sup>96</sup> Section 942(9) TCA

<sup>97</sup> Pursuant to Section 942(8) TCA

<sup>98</sup> Section 942(3) TCA

<sup>99</sup> As set out in Section 52 of the Courts (Supplemental Provisions) Act 1961



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the facts accordingly. In any event no such facility exists for tax cases, even in respect of intermediate determinations<sup>100</sup>

The appeal operates on the basis of an agreed set of facts, as decided by the Appeal Commissioner or Court as the case may be (if appealed to the Circuit Court, the factual determinations made by the Appeal Commissioners are superseded by those of the Circuit Court judge). The procedure operates in the following stages:

1. The Commissioner/Judge makes known his or her decision.
2. If, having heard the decision, either party wishes to state a case they must declare their dissatisfaction with the decision “immediately”. In **The State (Multiprint Labels Systems Limited) v Judge Neylon**<sup>101</sup>, where the dissatisfaction was communicated to the judge by letter the following day, it was held that failure to express it *immediately* after the conclusion of the hearing was not fatal, the stipulation being more directory than mandatory. Referring to English authority in relation to a similar provision, the judge suggested that the phrase could effectively be interpreted as meaning “*with all reasonable speed considering the circumstances of the case*”.
3. Within 21 days of the determination the dissatisfied party must then, send a written notice to the Clerk/County Registrar requesting the AC/judge to state and sign a case. This condition was disputed in the **Bairead v Carr**<sup>102</sup>, where the taxpayer had expressed their dissatisfaction at the end of the determination but had not submitted the written notice within the 21 day period (and had also failed to pay the €25 fee). Unsurprisingly, Lynch J. in the Supreme Court held that the taxpayer was not entitled to pursue the appeal some 4 years later. Interestingly, in respect of other appeals the taxpayer had indicated no dissatisfaction, until the written notice was sent some nine days later, and the Court did not consider this in itself to be fatal.
4. A written summary stating the agreed facts and setting out the questions to be determined must then be prepared by the party wishing to obtain the opinion of the High Court. It is at this point that the strict statutory time-table ends, and considerable delays can arise. The procedure as to who prepares the case, and by when, is governed in the Circuit Court by the Circuit Court Rules<sup>103</sup>. Under these rules the first draft is to be prepared by the party requesting the case, and circulated to the judge and the other party within 3 months. If it is not done on time the opposing party may prepare the draft case; if neither party drafts a case within 6 months the judge can do any of the following: prepare and sign the case himself; extend time for the case to be drafted; or treat the request as withdrawn. Where there is an irresolvable dispute as to the content or decided facts, the decision of the judge is final.

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<sup>100</sup> State v Smidic [1 ITR 577].

<sup>101</sup> 3 ITR 159. A decision of Finlay J given on the 27<sup>th</sup> February 1984

<sup>102</sup> 4 ITR 505

<sup>103</sup> Order 62 of the Circuit Court Rules and in particular Rules 6-10, which relate to tax appeals.



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However with the Appeal Commissioner no such rules exist and it may take months or even years for the parties to agree the case. The *Law Reform Commission* cites by way of an example, not necessarily unique, the case of **O'Connell v Keleghan**<sup>104</sup> where the Appeal Commissioner hearing was in March 1995, yet the case was not stated to the High Court until September 1999.

5. Once the case has been signed by the Appeal Commissioner/judge, it should be sent to the High Court by the party requesting within 7 days, and at the same time a copy sent to the other party<sup>105</sup>. Of course, once it is received by the High Court it must take its place with the rest of the Court's business and it may be another year or eighteen months before it gets heard.
6. The High Court then makes its decision. This may be to reverse, affirm or amend the determination in which case this decision would be final, in so far as the Appeal Commissioner or Circuit Court judge would have no further role to play. Alternatively the case may be remitted back, so that it may be reassessed in light of the opinion of the High Court.

### 7.11 Delays

Looking at the case-stated procedure, the greatest problem would appear to be the long delays in agreeing the case. While noting that some of these delays are common to case-stated mechanisms in all areas of the law, the *Law Reform Commission* suggested<sup>106</sup> that there might be specified time-limits in which the case should be drafted and agreed and that where the case is not completed within these limits it should automatically come back before the judge or Appeal Commissioner, as the case may be. The *Commission* also observes that these delays would be greatly reduced if written determinations - summarising the facts and reasoning behind the decision - were produced by the Appeal Commissioner and Circuit Court judges as a matter of course.

### 7.12 Judicial Review

The final avenue of appeal, and perhaps the last resort in some case, is the discretionary remedy of judicial review. Judicial review does not have a statutory basis, and it is really no more or no less than the manifestation of the High Court's jurisdiction to supervise any proceedings or processes of a judicial or quasi-judicial nature. The main remedies in judicial review are Certiorari (quashing the unlawful decision or act of the inferior tribunal), Prohibition (preventing the doing of an impugned act) and Mandamus (directing that something be done by the body).

The question in judicial review proceedings is not whether the decision is the correct one, but rather whether it was correctly made i.e. were the requirements of natural justice

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<sup>104</sup> [2001] 2 IR 490

<sup>105</sup> S941, Subsections 4 & 5. In *A & B v WJ Davis (Inspector of Taxes) Supreme Court 1924* the appellant had his appeal struck out for failing to comply with similar requirements.

<sup>106</sup> At Paragraph 3.116 of their Consultation Paper.



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satisfied, did all the parties get an audience, were all relevant matters considered, was the act or decision within the ambit of the relevant body?

The following are all textbook grounds for judicial review:

- Bias or the appearance of bias.
- Not giving concerned parties an opportunity to address the decision maker.
- Considering irrelevant matters, or not considering relevant matters
- Procedural unfairness, including an undue lapse of time
- Not being given notice of the case one has to meet (especially in criminal or disciplinary proceedings)
- Exercising a discretion in an unreasonable or arbitrary manner

One of the factors which may dissuade the court from granting this relief, which in all cases is discretionary, is the availability of an alternative remedy. Therefore, where a statutory appeal is an adequate remedy (whether it be appeal by way of rehearing or case-stated), then the applicant should be wary of availing of judicial review procedures.

Bearing this in mind, perhaps one of the areas where judicial review is most appropriate in the tax context is where there is dispute concerning the application of Revenue concessions, or the mitigation of penalties in line with published guidelines. As neither concessions nor mitigation have a statutory basis a statutory appeal cannot address such a dispute. However, as may be seen from the decision in the case of **Keogh v CAB** the Courts may hold the Revenue to the practices which it publishes where unfairness may otherwise result in their view.





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## 8. Costs & Other Issues

### 8.1 Rules Governing Costs of the Rehearing and the Costs of Litigation

As noted above, the judge of the Circuit Court effectively assumes the powers of the Appeal Commissioners in terms of the exercise of this tax-specific jurisdiction. One might have thought, therefore, that the Circuit Court would have the same discretion in terms of costs i.e. none. This was assumed to be the position until the decision in the case of **Inspector of Taxes v Arida Ltd**<sup>107</sup>. There the Circuit Court judge awarded costs to the taxpayer relying on his power and discretion under Order 58, rule 1 of the Circuit Court rules). The High Court and Supreme Court both found that the Circuit Court enjoyed all its usual powers when hearing tax cases, and that the Rules of the Circuit Court could be employed by a judge, where they are applicable. In his High Court decision, Judge Murphy referred to the usual Circuit Court practice of not awarding costs to either side, and noted that this was wholly appropriate in most cases.

In the context of civil litigation the general rule is that ‘costs follow the event’, in other words the successful party has their legal costs paid for them by the party who has lost. However, the discretion enjoyed by a judge of the Circuit Court as to costs is just that, and there is no automatic right or entitlement to costs irrespective of who wins. In theory, costs could even be awarded against the successful party if their conduct during the litigation was such that the judge felt that this was appropriate. Where costs are awarded they may include the professional costs of the solicitor, one or two counsel as appropriate, witness expenses including the cost of expert witnesses and certain fixed expenses incurred in the course of litigation (the costs of swearing affidavits, stamp duty, etc.). Where there is dispute as to the calculation of the costs the matter may be referred to the Taxing Master who will calculate the appropriate costs with reference to the number of days spent in Court, the venue (whether it was the Circuit Court, High Court etc.) as well as the length and complexity of the pre-trial litigation.

In relation to the awarding of costs in the High Court, where cases are stated or judicial review sought, the High Court has full original jurisdiction to award costs, although in practice they too are less inclined to make such orders in taxation cases than they would be in other areas of litigation. This original jurisdiction is supplemented by the provisions of Section 941(6) TCA which specifically provides for a power to award costs in the context of case-stated applications.

Looking at the issue of costs in terms of possible reforms, the main issue is whether the *Appeal Commissioners* should have the discretion to make an award of costs against unsuccessful litigants. On one hand such a power might tend to discourage smaller taxpayers from bringing appeals, fearful that they might have to pay not only their own costs, but also those of the Revenue and their legal representatives. Indeed one of the advantages of the existing mechanism for appeals is that it is a more informal and cheaper remedy for taxpayers than formal court proceedings which, given the relative position of the taxpayer, is beneficial to them in that they would not be faced with significant costs.

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<sup>107</sup> [1992] 2 IR 155 High Court; (1995) 2 IR 130 Supreme Court



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On the other hand, it might be said to be somewhat unfair that the taxpayer who has been wrongly assessed, challenges this assessment, and wins his or her case must nonetheless bear half the cost of bringing the action to a successful conclusion, where this cost may even exceed the tax in dispute.

By way of comparison, in the UK the tribunals which collectively perform the function of the Appeal Commissioners do have the power to award costs. In the case of the *VAT & Duties Tribunal* the discretion is unlimited<sup>108</sup>. The *UK Special Commissioners* may award costs to either side, although it must be by reference to their conduct in connection with the hearing.

If a taxpayer is successful in their appeal to the *VAT and Duties Tribunal* they are usually awarded their costs. Where a taxpayer's appeal is unsuccessful, they usually do not recover their own costs. However in the event of an unsuccessful appeal by a taxpayer, Her Majesty's Revenue and Customs (HMRC) will usually not pursue their own costs against the taxpayer, save in cases of misuse of tribunal procedures.

***“Orders for costs***

*21.—(1) Subject to paragraph (2) below, a Tribunal may make an order awarding the costs of, or incidental to, the hearing of any proceedings by it against any party to those proceedings (including a party who has withdrawn his appeal or application) if it is of the opinion that the party has acted wholly unreasonably in connection with the hearing in question.*

*(2) No order shall be made under paragraph (1) above against a party without first giving that party an opportunity of making representations against the making of the order<sup>109</sup>...*

In this light, tax cases can be seen to be an essential component of a healthy tax system and should be discouraged only where they are vexatious or frivolous. For this reason, it is submitted that the present practice has much to commend it, insofar as taxpayers may bring their appeal without undue fear of having to bear the costs of the Revenue in the event that they are unsuccessful.

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<sup>108</sup> Rule 29 of the Value Added Tax Tribunal Rules 1986 (as amended)

<sup>109</sup> Special Commissioners (Jurisdiction & Procedure) Regulations 1994. *SI 1994 No. 1811*



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## Appendix II

### Specific Appeal Provisions in the TCA 1997

TCA Section	Heading	Effect of the Provision	Time Limit & Notice Requirements	Procedures
S29	Persons chargeable to CGT	Appeal against any decision of the Revenue Commissioner's concerning domicile or ordinary residence	Notice in writing within <b>2 months</b> of the date on which notice of the decision is given	As for the Income Tax Acts
S35	Securities of foreign territories	Appeal against any decision of RC's concerning residence	Notice in writing within <b>2 months</b> of the date on which notice of the decision is given	As for the Income Tax Acts
S63	Exemption of dividends of non-residents	Appeal against any decision of RC's concerning residence	Notice in writing within <b>2 months</b> of the date on which notice of the decision is given	As for the Income Tax Acts
S85	Deduction for certain industrial premises	An apportionment of the rateable value of 'premises' may be amended by the Appeal Commissioners	The appeal is taken by way of appeal against the assessment made on the basis of the apportionment	As for assessments. Certificate of Commissioner of Valuation is evidence of the valuation stated therein
S195(6)	Artists, composers, & writers	The taxpayer may make an appeal to the Appeal Commissioners seeking a determination that work has cultural or artistic merit	Notice to Revenue in writing within <b>30 days of the end of the "relevant period"</b> , which is six months from the date the claim for was first made to Revenue	Procedures for appeal are those for appeals against assessment of income tax
S211	Friendly Societies	Appeal against any determination of the Revenue Commissioners under the section	As for appeal against assessment to income tax	As for Income Tax Acts
S231(1)	Stallion fees	Satisfying Appeal Commissioners as to reasons for ownership of part-share	Not specified, most likely to be <b>30 days</b> under S864 & S949	Not specified, likely to be as for appeals against assessment under S864 & S949
S233	Stud greyhound service fees	Passing reference to satisfying Appeal Commissioners as to reasons for ownership of part-share	Not specified, most likely to be <b>30 days</b> under S 864 & S949	Not specified, likely to be as for appeals against assessment under S864 & S949
S305(2) & S305(3)	Capital allowances	There is an appeal to the Appeal Commissioners against a determination in relation to an allowance under Part 9 of the TCA	Notice in writing to Revenue <b>within 21 days</b> of the notification of the decision to the taxpayer	Procedures for appeal are those for appeals against assessment of income tax



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<b>TCA Section</b>	<b>Heading</b>	<b>Effect of the Provision</b>	<b>Time Limit &amp; Notice Requirements</b>	<b>Procedures</b>
S372AT	Appeals (re lessors and owner-occupiers)	Appeal lies in relation to any question arising under Chapter 11, except matters appealable under s18 of Housing Act, 1979	As for an appeal against an assessment of income or corporation tax	As for CT or IT appeals.
S381(6)	Loss relief and repayments	Appeal against a determination of the Revenue regarding a claim for loss relief under the section	Notice in writing to the Revenue within <b>21 days</b> after notification to that person	As for appealing against an assessment to Income Tax
S389	Terminal loss relief	Appeal in relation to a decision under S385	Within 21 days of the notification of the decision	As for an appeal against an assessment to income tax
S408	Restriction on tax incentives on property investment	Appeals against a determination under the section	As for appeals against an assessment of income tax under the Income Tax Acts	As for appeals against an assessment of income tax under the Income Tax Acts
S444(3)	Exclusion of mining and construction	Passing reference to appeal to Appeal Commissioners regarding apportionment for construction operations	See S447	See S447
S447	Appeals	An appeal lies in relation to any question arising under Part 14, except SS445 and 446	As for appeal against assessment to Corporation Tax	As for appeal against assessment to Corporation Tax
S473	Rent relief	Appeal against a decision regarding the giving of rent relief	As for an appeal against an assessment of income tax	As for an appeal against an assessment of income tax
S481(4)	Relief for investment in films	Appeal to the Appeal Commissioners concerning determination of proportion of relief where aggregate investments exceed the specified maximum	None specified	None specified. Appeal Commissioners to apply 'just and reasonable' test
S486B	Relief for investment in renewable energy	Appeal to the Appeal Commissioners concerning determination of proportion of relief where aggregate investments exceed the specified maximum	None specified	None specified. Appeal Commissioners to apply 'just and reasonable' test



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<b>TCA Section</b>	<b>Heading</b>	<b>Effect of the Provision</b>	<b>Time Limit &amp; Notice Requirements</b>	<b>Procedures</b>
S531(17) to (20)	Payments to Subcontractors	Appeals in relation to RCT certificate decisions	Within <b>30 days</b> from the date of refusal/ cancellation /issue of the cert as the case may be	As for Income Tax Acts, but Appeal Commissioners shall have regard to the same factors which the Revenue must consider under the section
S621(6) to (8)	Depreciatory transactions in a group	Inspector, Appeal Commissioner or judge (as the case may be) must reduce loss/gain according to what is “just and reasonable”	None specified, S864 and S949 presumably do not apply as the relief is not measured	None specified, S864 and S949 presumably do not apply as the relief is not ‘measured’
S658(7) & S658(8)	Farming: allowances for capital expenditure	Appeal against Revenue’s decision concerning claim for farm buildings allowance	Notice in writing to Revenue <b>within 21 days</b> of being notified of the decision	As for the Income Tax Acts
S659(6) & S659(7)	Farming: allowances for farm pollution control	Appeal against Revenue’s decision concerning claim for farm pollution control allowance	Notice in writing to Inspector within <b>21 days</b> of being notified of the decision	As for the Income Tax Acts
S669(5)	Supplementary provisions	Appeal against Inspector’s decision concerning value of trading stock for farmers	None specified	None specified. Appeal Commissioners to apply ‘just and reasonable’ test
S670	Mine development allowance	An appeal lies in relation to any question arising under Section 670	As for appeal against an assessment to Income Tax	Income Tax Acts rules apply
S697G	Tonnage tax	Appeal against the giving of a notice under S697E or S697F	Notice in writing to the Revenue within <b>30 days</b> from the date of the giving of the notice	None specified
S787D	PRSA Claims	Appeals against any determinations under Chapter 2A	Notice in writing within <b>21 days</b> of notification of the Revenue’s decision	As for appeals under the Income Tax Acts
S789	Purchased life annuities supplementary provisions.	Appeal against a determination as to whether annuity is a purchased life annuity and capital element thereof	Within “the prescribed time.”	Regulations may be made to apply Income Tax Acts.
S806(9)	Transfer of assets abroad	Appeal against a decision of the Revenue as to whether assets were transferred for bona fide reasons	No specific limits specified, as for appeals against assessment to tax	As for appeals against assessment to tax



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TCA Section	Heading	Effect of the Provision	Time Limit & Notice Requirements	Procedures
S811	Anti-Avoidance	Appeal against an opinion that a transaction is a tax avoidance transaction	Notice in writing within <b>21 days</b> of the date of the notice of opinion	As for the Income Tax Acts, except grounds confined to matters specified in S811(7)
S824	Appeals, residence	Appeals for all issues arising under Part 34	Notice in writing to the authorised officer within <b>2 months</b> of the date notice was given to the individual	As for an appeal against an assessment
S864	Making of Claims	Where there is no specific mechanism set out in relation to: (1) <i>claims</i> for exemption, allowance, deductions (2) claims for repayment (3) claims for a <i>measured</i> relief - Revenue may prescribe manner & form of the original <i>claim</i> . Appeal to Appeal Commissioners arises separately, under S949	Time limits as set out in S949 i.e. notice in writing within <b>30 days</b> of notification of the determination	As for an assessment of income tax under S933, per S949
S865	Repayment of tax	Appeals referable to this section are dealt with under S949	Time limits as set out in S949 i.e. notice in writing <b>within 30 days</b> of notification of the relevant determination	As for an assessment of income tax under S933
S897(6) & S897(7)	Returns of employee emoluments	Appeal against reapportionment of expenses	Notice in writing to Revenue <b>within 21 days</b> of being notified of the apportionment	As for the Income Tax Acts
S949	Claims against determinations of certain claims etc	Catch all appeal for all matters covered by S864 (also adopted to cover S865)	Notice in writing within <b>30 days</b> of notification of the relevant determination	As for appeal against assessment under S933
S988(2)	Registration of certain persons as employers	<i>Referral</i> to the Appeal Commissioners in relation to the registration of a person as an employer under PAYE regulations	Notice in writing to Revenue <b>within 14 days</b> from the service of the notice to the person	<i>Referral</i> specified to be final and conclusive. Why are appeals under this section not covered by S992?
S989(3)	Estimation of tax due for income tax months	<i>Referral</i> to the Appeal Commissioners against an estimation of tax for an income tax month under PAYE regulations	Notice in writing to Revenue within <b>14 days</b> from the service of the notice to the person	As for IT Acts per S992 but the referral is specified to be final and conclusive.



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<b>TCA Section</b>	<b>Heading</b>	<b>Effect of the Provision</b>	<b>Time Limit &amp; Notice Requirements</b>	<b>Procedures</b>
S990(2)	Estimation of tax due for year	<i>Appeal</i> to the Appeal Commissioners against estimation of tax against employer for tax year	Notice in writing to Revenue or other officer with <b>30 days</b> of the service of the notice	Having submitted a Regulation 31 return is a precondition to appeal
S992	Estimates under S989 and S990	Applies income provisions to appeals under these sections, with the modifications noted above	See above	As for IT, except that the <b>Appeal Commissioner decision is final</b> for S989(3) appeals
S1012	Modification of provisions as to appeals	Appeal against determinations re the assessment of partnerships under S1008(3) and S1010(6)	Appeals timetable started by delivery of notice to the precedent partner, thereafter as for assessments to Income Tax	Usual Income Tax rules for appeals, when concerning apportionment of partnership trade affected persons must be notified, and are entitled to appear
S1037	Charge on % of turnover	Where the true profits are not readily ascertainable, allows the Revenue or on appeal the Appeal Commissioners to assess tax on a non-resident person, through a resident, based on a % of turnover. Then a further appeal to a Board of Referees	For the appeal to the Referees, <b>4 months</b> from the date the of determination	Specifically excluded from rehearing provisions by S949(3)
S1094(7)	Tax clearance certificate	Appeals in relation to tax-clearance certificate decisions	Notice in writing to Collector General within <b>30 days</b> of the refusal	As for Income Tax Acts, although cannot act as a collateral appeal in relation to tax or interest.
Schedule S19(16)	Certification of Distributing Funds	An appeal to the Appeal Commissioners lies against a refusal to certify, or notification that accounts are not properly disclosed	By notice specifying the grounds of the appeal given to the RC's within <b>30 days</b> of the notification	May be made by the fund or by a trustee or officer of the fund. General procedures as for Income Tax appeals





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### Appendix III

#### Provisions governing the Appellate Jurisdiction of the Appeal Commissioners, as included in legislation other than the Taxes Consolidation Act 1997 (TCA)

Tax Heading	Grounding Provision	Procedures	Notification Requirements	Notes
Capital Acquisitions Tax	Section 67, CAT Consolidation Act 2003	As for appeals under the Income Tax Acts, with necessary modifications. Revenue have a right to request a rehearing in the Circuit Court	Written notice to Revenue within 30 days of the date of the assessment	No right of appeal concerning the value of real property, this must be done under S33 Finance (1909-10) Act 1910.
Value-Added Tax	Section 23 of the VAT Act 1972 covers 'assessments' and appeals against same.  Section 25 covers most other "determinations".	As for appeals under the Income Tax Acts, with necessary modifications (Section 25)  Section 11(1B) provides a specific appeals mechanism for a VAT rate determination	Generally, within <b>21 days</b> of the date the taxpayer being notified. But there are only <b>14 days</b> in which to appeal an estimation made under Section 22	Separately mentioned appeals under S11, S22, S23 & S23A
Capital Gains Tax	Section 945, TCA 1997	As for the provisions Income Tax Acts in relation to a specified list of matters	Within <b>30 days</b> of the notice of assessment	As for CAT there is a power to make regulations to allow notification to affected 3 <sup>rd</sup> parties
Stamp Duty	Section 21 & S121, SDCA 1999	As for appeals under the Income Tax Acts, with necessary modifications	Written notice to Revenue within 30 days of the date of the <i>assessment</i>	No right of appeal concerning the value of real property, this must be done under S33 Finance (1909-10) Act 1910
VRT	Section 146, Finance Act 2001	One must first appeal the decision to the Revenue Commissioners. As for appeals under the Income Tax Acts, with necessary modifications	Within 30 days of the date of the determination of the Revenue, or of the expiry of time for a determination	No right of rehearing in the Circuit Court





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## Appendix IV

### The Special Commissioners (Jurisdiction and Procedure) Regulations 1994 – Summary of Headings

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#### STATUTORY INSTRUMENTS

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**1994 No. 1811**

**INCOME TAX**

**INHERITANCE TAX**

**TAXES**

The Special Commissioners (Jurisdiction and Procedure) Regulations  
1994

*Made* 6th July 1994  
*Laid before Parliament* 14th July 1994  
*Coming into force* 1st September 1994

#### ARRANGEMENT OF REGULATIONS

##### PART I

##### INTRODUCTORY

1. Citation, commencement and application.
2. Interpretation.

##### PART II

##### PREPARATION FOR A HEARING

3. Listing and notice of hearing.
4. General power to give directions.
5. Summoning of witnesses.
6. Agreement of documents.
7. Proceedings to be heard together or in succession.
8. Joining of additional parties.
9. Preliminary hearing.
10. Power of Special Commissioners to obtain information.
11. Postponements and adjournments.



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12. Expert evidence

PART III

HEARING AND DETERMINATION OF PROCEEDINGS

13. Constitution and sittings of Tribunal.

14. Representation at hearing.

15. Hearings in public or private.

16. Failure of parties to attend hearing.

17. Procedure and evidence at hearing.

18. Decisions of Tribunal.

19. Review of Tribunal's decision in principle or final determination.

20. Publication of decisions in principle and final determinations.

21. Orders for costs.

PART IV

SPECIAL PROCEDURE

22. Proceedings relating to tax on chargeable gains.

23. References of questions of value to other tribunals.

24. Penalty for failure to comply with Tribunal direction.

PART V

MISCELLANEOUS

25. Irregularities.

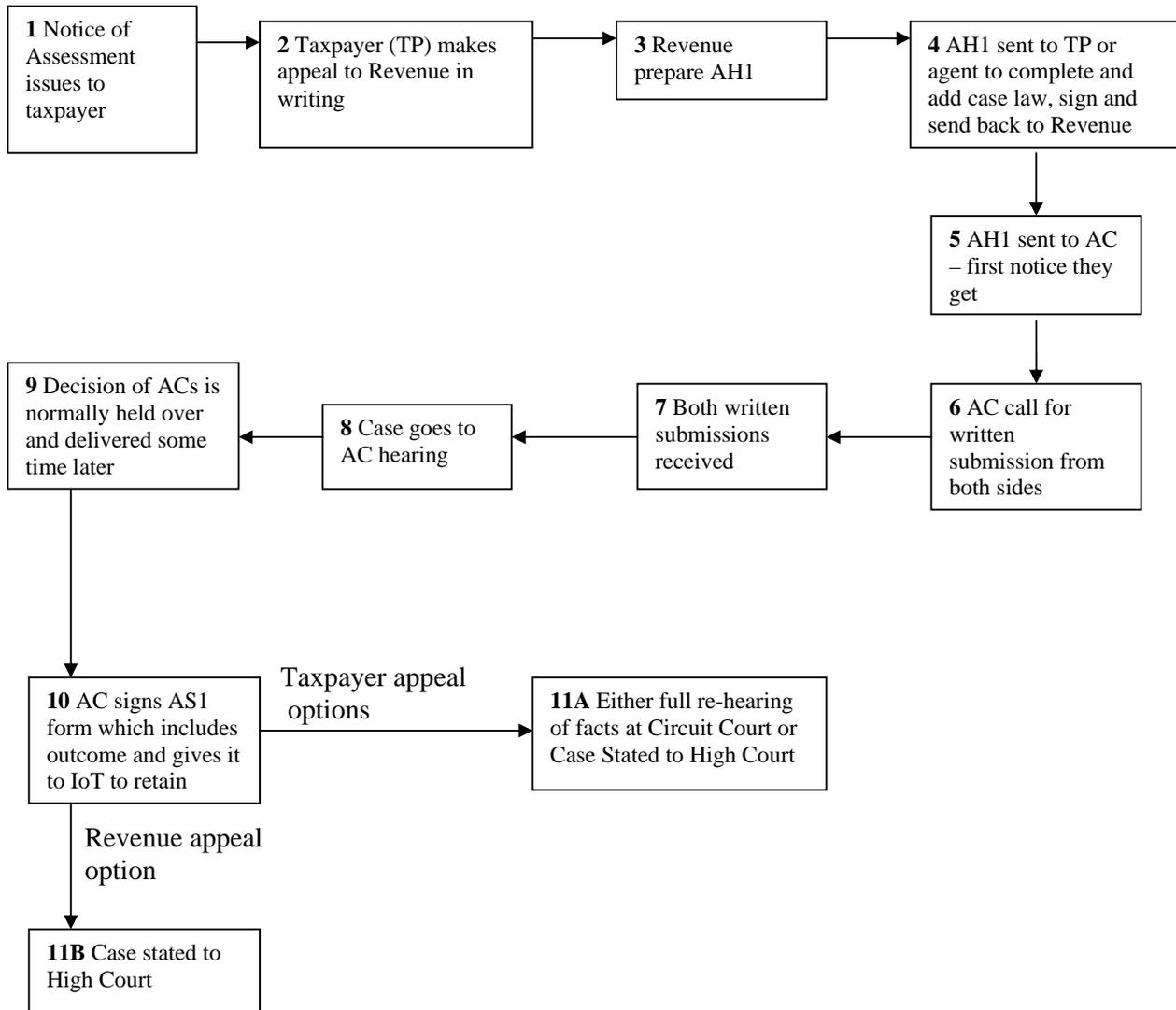
26. Notices.

27. Service.

28. Substituted service.

## Appendix V

### Process for taking a Tax Appeal







## Appendix VI

### ITI Survey of Practitioners on the Irish Appeals System

#### Results Summary

Number of respondents: 52

**Question 3: If you have not taken an appeal within the last 5 years, did you pursue other means of resolving the situation e.g. settlement?**

57% of respondents reached settlement with Revenue.

14% of respondents pursued Internal Review

14% of respondents did not pursue other means

15% either did not respond or responded that the question was not applicable to them

**Question 4: Have you taken an appeal case after going for Internal Review and, if so, did the outcomes differ?**

No, did not take an appeal case after Internal Review: 83%

Yes and yes, the result was different: 14%

Yes and no, the result was not different: 2%

**Question 6: How long did it take for the Form AH-1 to be completed and submitted to the Appeal Commissioners?**

Up to (months)	1 mth	2 mths	3 mths	4 mths	6 mths	12 mths	24 mths
% of respondents	26%	16%	5.5%	21%	21%	5%	5.5%

**Question 7: How long did it take to receive a date for the hearing?**

Up to (months)	1 mth	2 mths	3 mths	4 mths	6 mths	12 mths	18 mths	24 mths	60 mths
% of respondents	32%	28%	12%	4%	8%	4%	4%	4%	4%

**Question 13: Would you sometimes engage counsel, depending on the issue in question?**

Yes: 76%

No: 24%

**Question 15: Did you receive a decision on the day of the hearing or was the decision adjourned?**

Yes: 19%

No: 81%

**Question 19: In your view, would the decision reached have been of important precedent value that could usefully have been published?**

Yes: 82%

No: 18%





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**TaxFax**

5 July 2006

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South Block, Longboat Quay, Grand Canal Harbour, Dublin 2. Tel: + 353 1 6631700

Fax: + 353 1 6688387 E-mail: [reps@taxireland.ie](mailto:reps@taxireland.ie) Website: [www.taxireland.ie](http://www.taxireland.ie)

**SPECIAL TAXFAX ...**

**ITI SURVEY ON THE IRISH APPEALS SYSTEM**

**Details:**

**Name:** \_\_\_\_\_

**Company:** \_\_\_\_\_

**Address:** \_\_\_\_\_

\_\_\_\_\_

**Use of the Appeals System**

1. Have you taken any appeal cases on behalf of clients in the last 5 years?

Yes

No

2. If yes, how many have you taken?

\_\_\_\_\_

3. If no, did you pursue alternative means of resolving the situation?

e.g., Settlement with Revenue, Internal Review, etc.

\_\_\_\_\_

4. Have you ever taken an appeal case after going for Internal Review and, if so, did the outcomes differ?

\_\_\_\_\_

\_\_\_\_\_

5. Is there any particular reason why you would be reluctant to take an appeal case for a client?

\_\_\_\_\_

\_\_\_\_\_



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### Prior to Appeal Hearing

6. How long did it take for the Form AH-1 to be completed and submitted to the Appeal Commissioners?

\_\_\_\_\_

7. How long did it take to receive a date for the hearing?

\_\_\_\_\_

8. How far into the future was the date of the hearing?

\_\_\_\_\_

9. Were you required by the Appeal Commissioners to provide a written submission of the case?

Yes  No

10. Were you asked to exchange submissions with Revenue?

Yes  No

11. If so, did the exchange occur on the same day or did you provide your submission in advance of receiving one from Revenue?

\_\_\_\_\_  
\_\_\_\_\_

### Engaging Counsel

12. Would you automatically engage Counsel if you are taking an appeal case?

Yes  No

13. Would you sometimes engage Counsel, depending on the issue in question?

Yes  No

14. Would you always represent the client yourself?

Yes  No

### The Appeal Hearing

15. Did you receive a decision on the day of the hearing or was the decision adjourned?

Yes  No



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16. How often have you experienced an adjournment and a subsequent hearing on one or more aspects of the case?

\_\_\_\_\_

17. Did you receive written notification of the final decision from the Appeal Commissioners?

Yes

No

### Publication

18. Have details of your appeal case ever been published?

Yes

No

19. In your view, would the decision reached have been of important precedent value that could usefully have been published?

Yes

No

20. To the best of your knowledge, did Revenue rely on any previous appeal cases to which they had access, when dealing with your appeal?

Yes

No

### Other

21. Overall, how would you rate your experience with the Appeals System? (Please tick ✓)

Very Poor  Poor  Average  Good  Very Good

22. Have you any general comments you would like to add about any aspect of the appeals system?

\_\_\_\_\_

\_\_\_\_\_

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