



Response to the  
Consultation on the  
Rules & Procedures of the  
Tax Appeals Commission

## Contents

Executive Summary.....	2
List of Recommendations .....	4
Issues arising .....	7
The length of time to reach a conclusion in the appeals process.....	7
The high cost for the taxpayer of taking an appeal .....	8
The Notice of Appeal .....	9
The Statement of Case.....	10
Lack of transparency about the time it will take for an appeal to be heard and determined .....	11
Limited published determinations provide little information to taxpayers on decided cases.....	11
The introduction of an Alternative Dispute Resolution Mechanism (“ADR”).....	12
A separate forum to deal with small cases .....	12
The Annual Report of the TAC .....	13
Published customer service standards .....	13
Appendix 1- Alternative Dispute Resolution.....	14
Appendix 2- Sample Cases of Members’ Experiences .....	16
Appendix 3 - New York City Tax Appeals Tribunal, Annual Report.....	19

## Executive Summary

The introduction of a reformed appeals regime in March 2016 was a welcome development and the Irish Tax Institute appreciates the opportunity to provide feedback on it. Our members have in-depth experience of the appeals process and their input has informed our approach to this submission.

The Consultation Paper seeks feedback on the Rules and Procedures of the Tax Appeals Commission (TAC). While clearly, the questions raised in the Consultation Paper are aimed at identifying ways in which the TAC can reduce delays in the appeals process and mitigate the costs for taxpayers, we believe that the measures proposed will not address the fundamental deficiencies in the regime, many of which are caused by under-resourcing. Therefore, in this submission we have considered the operation of the tax appeals regime more generally and outlined structural reforms that we believe are necessary to ensure the regime works as intended for the benefit of all.

After many years of discussion and debate, a new tax appeals regime was introduced with effect from 21 March 2016. In announcing the new system, then Minister for Finance Michael Noonan T.D. stated that its objective was:

*“to ensure an enhanced and cost-effective appeal mechanism, which provided transparency and increased certainty for taxpayers”.*

18 months after the commencement of the new TAC, the position according to a Parliamentary Question on 20 September 2017, is that:

- 4,387 appeals are currently before the TAC; representing
- €1.5bn of tax in dispute.

A large proportion of these appeals date back some years and represent cumulative delays and inefficiencies in Ireland’s tax appeals regime. In fact, 2,731 appeals were transferred over to the TAC from Revenue in the last quarter of 2016 after attempts to settle the case load on hand at that time<sup>1</sup> resulted in less than 10% of the cases concluding with a settlement.

In addition to this legacy problem, the 2016 Annual Report of the TAC suggests that an average of 20 new tax appeals are being lodged every week and, although not all of these appeals will progress to a hearing<sup>2</sup>, the number of outstanding cases is certainly on the rise. In contrast, only 40 case determinations have been published by the TAC in the past 18 months.

Dealing with this situation are two full time and one recently appointed temporary Tax Appeal Commissioners, operating from one dedicated room that is available for hearings. There are also two additional members of the senior management team involved in managing the appeals process.<sup>3</sup>

448 appeals were concluded in 2016. At this rate of throughput, it is estimated that it would take nearly 10 years just to clear the current backlog of cases, taking no account of new appeals that will be lodged in the meantime.

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<sup>1</sup> Required under section 31 of the Finance (Tax Appeals) Act 2015

<sup>2</sup> The appeal may be withdrawn or a settlement may be reached with Revenue before a hearing is called

<sup>3</sup> Tax Appeals Commission, Code of Governance, August 2017

This workload is simply not capable of being dealt with by any three individual Commissioners. Further resources are urgently required for the appointment of additional Commissioners and for other reforms, so that the State can unlock whatever part of the €1.5bn tax in dispute is found to be ultimately due.

As well as committing additional resources to the operation of the TAC, effective ways must be found of:

1. Resolving cases more quickly which are already in the TAC system; and
2. Reducing the flow of future cases coming into the system, by creating alternative pathways to dispute resolution.

Issues of natural justice and fairness also arise for all stakeholders who are dealing with the appeals regime. It is well-recognised internationally, that effective dispute resolution regimes enhance tax certainty both for taxpayers and for tax authorities.

*“In the absence of an effective mechanism to resolve disputes, taxpayers’ trust in the fairness of the system will be eroded”.*<sup>4</sup>

Uncertainty undermines taxpayers’ freedom to do business and hampers prospective growth, innovation and entrepreneurship.

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<sup>4</sup> Tax Certainty, IMF/OECD Report for the G20 Finance Ministers, March 2017

## List of Recommendations

### **Resourcing the Tax Appeals Commission regime**

1. The main long-term solution to dealing with time delays is to provide adequate resources so that the tax appeals system can operate as intended. This includes additional permanent and full-time Appeal Commissioners, a Registrar to work with the Commissioners and additional legal support and case management and office staff. This is an investment which would help to unlock the potential tax in dispute for the State which currently stands at the outer level of €1.5bn (the amount due to the State if it were to be successful in all the appeals on hand.)

### **Resolving cases in the system more effectively**

2. Better case management procedures are needed in the tax appeals system, so that cases are dealt with more expeditiously. This has been recognised in the first Annual Report in 2016, published by the TAC earlier this year. For example, just 26 appeals currently account for over €800m<sup>5</sup>, which is almost 50% of the total tax in dispute. A way needs to be found of dealing with complex and large cases at the same time as smaller ones, so that neither group is disadvantaged by the other.
3. Another priority should be a focussed effort on delivering all outstanding determinations for cases that have already been heard.
4. The introduction of a “List System”, where each taxpayer is allocated a reference number, could help to increase the transparency of the waiting period.
5. A separate register of outstanding determinations should also be maintained to track decisions awaited. Such a Register of Reserved Judgments is already in place for decisions of the Courts.
6. It is hoped that if the recommendations provided elsewhere in this document are acted on, then cases can pass more swiftly through the appeals process and more (substantive) determinations will become available on the TAC website.

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

7. To ensure that assessments without sufficient Revenue stateable grounds do not enter the appeals process, an external mechanism is required to review these cases. The focus initially could be on smaller amounts of tax in dispute and, for these cases, Alternative Dispute Resolution methods could be explored (see 9. below).
8. An analysis should be published each year by the Comptroller & Auditor General on legal fees incurred by Revenue in taking cases to appeal versus the tax ultimately recovered on those cases. This analysis should be broken down into bands of tax in dispute, for example legal fees incurred versus tax recovered or lost between 0 and €10,000 and so on.

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<sup>5</sup> Parliamentary PQ number 39468/17

9. To help assist with the current levels of congestion in the appeals system, an independent Alternative Dispute Resolution Mechanism “ADR” regime should be introduced. This could help to reduce the waiting times for appeal and the associated costs and stress for taxpayers which are associated with taking an appeal case at present.
10. In addition, the Institute has consistently called for a separate “Small Claims” model tax court to be set up to deal efficiently with smaller taxpayers that are appealing straightforward tax issues. This forum does not displace the need to focus on reaching a settlement with the taxpayer, wherever possible, so that taking a case to the “small claims court” is a last resort.

If the taxpayer does not wish to use this small claims court, they should not be denied their right to a full hearing before the TAC, in full knowledge of the costs and potential delays involved.

#### **Issues of fairness, transparency and certainty**

11. Taxpayers are not responsible for the delays that have accumulated in the tax appeals system. It is unfair that they must pay for these delays at very high interest rates of 8% or even 10% (for fiduciary taxes), should they prove to be unsuccessful with their appeal. Taxpayers are also being prevented from appealing assessments where they do not believe tax is due, because of the fear of these high interest charges. This impacts on their rights as taxpayers to natural justice.

Statutory interest should be “stopped” on cases that are in our congested appeals process until at least such time as the current levels of congestion have been dealt with and taxpayers have a clear understanding of the time line for a decision.

12. Under the Finance (Tax Appeals) Act 2015, the Appeal Commissioners may request that one or both parties provides a Statement of Case that includes information they consider necessary to enable a hearing to be scheduled. In practice, it is the taxpayer who is often asked to provide the Statement of Case. This request on the taxpayer can be made even before they know Revenue’s grounds for raising the assessment in the first place.

In the UK, HMRC is required to submit a Statement of Case first which includes their technical basis for assessing the taxpayer. This enables the taxpayer to make an informed decision as to whether to pursue an appeal, and ensures that all parties have a better understanding of the matters in dispute at an early stage. We would welcome the adoption of a similar approach in Ireland.

13. Under their powers in the Finance (Tax Appeals) Act 2015, the TAC can and should expand the guidance they provide to taxpayers, to make it as clear and as easy as possible for a taxpayer to navigate the appeals system. Areas of particular concern at the minute include:
  - the level of detail required to be included in the Notice of Appeal;
  - the operation of case management conferences; and
  - the circumstances in which the TAC may dismiss an appeal in circumstances of minor breaches of protocol.

14. The Institute welcomes the publication of the first Annual Report of the Tax Appeals Commission, which is a welcome move towards transparency. Additional information on the throughput of cases in the system would be helpful, including:

- The amount of tax in dispute by band and the number of cases in each band in tabular form.
- The length of time that taxpayers have been waiting for a hearing since they lodged their appeal, by year, in tabular form.
- The number of months that taxpayers have been waiting to receive a determination after their appeal has been heard, in tabular form.

The Annual Report of the New York City Tax Appeals Tribunal provides an excellent analysis of case inventories on an annual basis and we attach a copy for information.

15. Once adequate resources have been provided to alleviate the current congestion in the system we would welcome the development of published customer service standards. These could include e.g. expected turnaround time on queries submitted to the TAC, acknowledgment to Statement of Case submitted etc.

## Issues arising

We have carried out a detailed consultation with our members about their experience of the TAC; these are the main issues that they raised.

### The length of time to reach a conclusion in the appeals process

The appeals process begins when Revenue issues an assessment on the taxpayer. If they wish to appeal this assessment, the taxpayer has 30 days to lodge a Notice of Appeal with the TAC.

Once the notice has been filed, the taxpayer will at some stage be asked for a Statement of Case, setting out factual information and relevant material in relation to their case and following that, a date will be set for the hearing. Once the hearing has taken place, the Tax Appeals Commissioner will make a determination on the case and write to the parties notifying them of his/her decision. The determination is then published on the TAC website within 90 days of the parties being notified.

The underlying cause for many of the issues raised below by our members is the sheer length of time that it takes for a taxpayer to move through this process. Time delays are leading to anxiety and cost for taxpayers in this country and much of the difficulty results from years of delay across both this and the previous appeals regime.

As well as delays in obtaining a hearing date, we have also had consistent feedback of long delays in getting a determination, once the Hearing has taken place. In a number of instances, taxpayers have been waiting 16 - 19 months from the date of the hearing without any determination. In another case that was brought to our attention, the years under appeal date back to the late 1990's and the taxpayer is still waiting for a determination.

Delays in the appeals process are being exacerbated by the high number of cases now entering the appeals system. Feedback from our members suggests that Revenue appear more reluctant to settle cases than in the past and, as a result, cases are going to appeal even where relatively small sums are involved – 2,214 appeals are currently before the TAC, where the tax in dispute is less than €10,000. As outlined above, Revenue's "settlement initiative" in relation to cases to be transmitted to the TAC resulted in less than 10% of cases concluding with a settlement. The process of reaching a settlement with Revenue in a tax case is an important principle of a normally functioning self-assessment system and it is recognised in the Taxes Consolidation Act 1997. A reluctance to settle cases will put more pressure on the appeals regime and create even more delays.

#### **Recommendations**

1. The main long-term solution to dealing with time delays is to provide adequate resources so that the tax appeals system can operate as intended. This includes additional permanent and full-time Appeal Commissioners, a Registrar to work with the Commissioners and additional legal support and case management and office staff. This is an investment which would help to unlock the potential tax in dispute for the State which currently stands at the outer level of €1.5bn (the amount due to the State if it were to be successful in all the appeals on hand.)



2. Better case management procedures are needed in the tax appeals system, so that cases are dealt with more expeditiously. This has been recognised in the first Annual Report in 2016, published by the TAC earlier this year. For example, just 26 appeals currently account for over €800m<sup>6</sup>, which is almost 50% of the total tax in dispute. A way needs to be found of dealing with complex and large cases at the same time as smaller ones, so that neither group is disadvantaged by the other.
3. Another priority should be a focussed effort on delivering all outstanding determinations for cases that have already been heard.
4. To ensure that assessments without sufficient Revenue stateable grounds do not enter the appeals process, an external mechanism is required to review these cases. The focus initially could be on smaller amounts of tax in dispute and, for these cases, Alternative Dispute Resolution methods could be explored as outlined further below.
5. An analysis should be published each year by the Comptroller & Auditor General on legal fees incurred by Revenue in taking cases to appeal versus the tax ultimately recovered on those cases. This analysis should be broken down into bands of tax in dispute, for example legal fees incurred versus tax recovered or lost between 0 and €10,000 and so on. This would provide additional transparency on the use of public funds in this process.

## The high cost for the taxpayer of taking an appeal

The delays outlined above are leading to stress and worry for taxpayers, as reflected in some of the feedback we have received from members:

*".. the stress and worry of this pending case is a burden on the client's health and his family life".*

*"The delays cause massive stress and worry to our clients. One particular client is a retiree whose health is deteriorating. The undue stress that these delays bring has a significant impact on his health and that of his close family. The unfair burden that this places on appellants cannot be understated."*

As well as this emotional stress, there is also a huge financial cost for taxpayers arising from the delays. On taking an appeal, the taxpayer can choose to either pay the disputed tax in full or not. However, if s/he chooses not to pay and subsequently loses the case, then the taxpayer is exposed to very high interest charges and even penalties. The rate of interest that a taxpayer must pay on fiduciary taxes (such as VAT and PAYE) is 10% per annum and the rate applicable to other taxes is 8% per annum. The taxpayer is charged interest from the date the disputed tax was due. In practice therefore, many taxpayers are paying the disputed tax upfront, even though not required to, for fear of the large interest bill that could await them at the end of this congested process, if they are unsuccessful in their case.

Take the example of a taxpayer who has been waiting for four years for their VAT case to be heard and determined – a very common example in the current regime. If the final determination is that €100,000 of tax is due, then interest will have accrued in that period of  $10\% \times 4 \text{ years} \times €100,000 =$

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<sup>6</sup> Parliamentary PQ number 39468/17

€40,000 or 40% of the total tax due, plus possible penalties. This is a completely disproportionate risk that the taxpayer must bear because it is taking so long for the case to be heard and then taking so long again for the determination to be issued.

Again, we have received extensive feedback from our members on this issue.

*“If the tax in dispute is €300,000 the client is potentially financially ruined if they lose”.*

*“Interest costs are increasing every day that the case remains in the appeals system if the case is lost”.*

*“It is totally unfair to be charged interest for the long period waiting for the Appeal Commissioners to make a ruling.”*

*“Another client of ours is massively concerned about the imposition of interest and penalties which is accruing on a payment which he does not believe to be due and which he appealed as soon as possible. The fact that the clock on interest and penalties doesn’t “stop” when an appeal is requested is a huge concern and burden on taxpayers **and is one which does not affect Revenue**”.*

#### **Recommendation**

Taxpayers are not responsible for the delays that have accumulated in the tax appeals system. It is unfair that they must pay for these delays at very high interest rates of 8% or even 10% (for fiduciary taxes), should they prove to be unsuccessful with their appeal. Taxpayers are also being prevented from appealing assessments where they do not believe tax is due, because of the fear of these high interest charges. This impacts on their rights as taxpayers to natural justice.

Statutory interest should be “stopped” on cases that are in our congested appeals process until at least such time as the current levels of congestion have been dealt with and taxpayers have a clear understanding of the time line for a decision.

## The Notice of Appeal

As noted above, the taxpayer must submit a Notice of Appeal within 30 days of Revenue issuing their assessment, to enter the appeals process. The taxpayer must outline their grounds for disputing Revenue’s assessment on the Notice of Appeal.

There is very little practical guidance in the TAC procedures about the level of detail required to be included in this form. Taxpayers are understandably worried about omitting details on the form at this early stage of the process as they can be prevented from raising any additional grounds during their appeal hearing, which have not been outlined on the Notice of Appeal. This concern is compounded by the fact that Revenue has often not given them clear grounds for the basis of the assessment against which they are appealing.

There are also a number of other appeals procedures where further guidance from the TAC would be welcome. These include; the operation of the case management conferences and the circumstances in which an appeal may be dismissed in circumstances of minor breaches of protocol.

### ***Recommendation***

Under their powers in the Finance (Tax Appeals) Act 2015, the TAC can and should expand the guidance they provide to taxpayers, to make it as clear and as easy as possible for a taxpayer to navigate the appeals system. Areas of particular concern at the minute include:

- the level of detail required to be included in the Notice of Appeal;
- the operation of case management conferences; and
- the circumstances in which the TAC may dismiss an appeal in circumstances of minor breaches of protocol.

## The Statement of Case

As outlined above, the taxpayer provides their grounds for appealing Revenue's assessment in the Notice of Appeal. Once this has been lodged, the taxpayer waits for a request from the TAC to provide a Statement of Case to outline factual information about the nature of their case, the relevant documentation and the case law that the taxpayer intends to rely upon. The taxpayer has no indication when this request will be made by the TAC and they will often be asked to submit the Statement of Case long before the hearing takes place. Furthermore, the taxpayer is often asked to provide this information before they know Revenue's grounds for raising the assessment in the first place, as Revenue is not obliged to outline the basis for their assessment until the legal arguments are submitted to the TAC, shortly in advance of the hearing.

In our submission to the Department of Finance on the Heads of Finance (Tax Appeals Commission) Bill 2015, the Institute recommended that the Irish appeals regime adopts the UK Tax Tribunal procedures on the Statement of Case. In the UK regime, HMRC has 60 days to provide the taxpayer or their adviser with a statement of their case once an appeal is lodged. HMRC must outline their technical arguments and the points they intend to make to prove their case. The taxpayer then has 42 days to respond outlining the facts as they see them and their counter arguments. These statements are then provided to the Tax Tribunal judge. This means that all parties to the dispute have a better understanding of the matters in dispute at an early stage in the process.

### ***Recommendation***

Under Section 949Q of the Finance (Tax Appeals) Act 2015, the Appeal Commissioners may request that one or both parties provides a Statement of Case and that the information provided contains information necessary to enable them to schedule a hearing. In practice, it is the taxpayer who is often asked to provide the Statement of Case. This request on the taxpayer can be made even before they know Revenue's grounds for raising the assessment in the first place.

In the UK, HMRC is required to submit a Statement of Case first which includes their technical basis for assessing the taxpayer. This enables the taxpayer to make an informed decision as to whether to pursue an appeal, and ensures that all parties have a better understanding of the matters in dispute at an early stage. We would welcome the adoption of a similar approach in Ireland.

## Lack of transparency about the time it will take for an appeal to be heard and determined

When a taxpayer is trying to decide whether to appeal a Revenue assessment, one important factor will be how long the process is likely to take. The taxpayer knows that uncertainty and cost will arise for as long as the appeal is open.

However, there is currently no visibility on timelines and no communication with the taxpayer when either the Notice of Appeal or Statement of Case are submitted. At the outset of the process, taxpayers have no estimate about how long it will take for their case to be heard and then determined. Similarly, there is no visibility for any taxpayer waiting in the system to know “where they are in the queue”.

### **Recommendations**

1. The introduction of a “List System”, where each taxpayer is allocated a reference number, could help to increase the transparency of the waiting period.
2. A separate register of outstanding determinations should also be maintained to track decisions awaited. Such a Register of Reserved Judgments is already in place for decisions of the Courts.

## Limited published determinations provide little information to taxpayers on cases already decided

Published decisions of the TAC play a vital role in helping taxpayers (and Revenue) understand how tax law is being interpreted by the Tax Appeal Commissioners. Information on decided cases helps taxpayers to decide whether to pursue an appeal, based on the decisions given in previous cases. At present, only 40 decisions have been published on the website of the TAC and so there is limited information available.

### **Recommendation**

It is hoped that if the recommendations provided elsewhere in this document are acted on, then cases can pass more swiftly through the appeals process and more (and more substantive) determinations will become available on the TAC website.

## The introduction of an Alternative Dispute Resolution Mechanism (“ADR”)

To assist with alleviating congestion in the appeals regime, consideration could also be given to introducing an “ADR”. There is widespread international recognition of the benefits brought by alternative approaches to resolving disputes such as independent mediation. With mediation-based ADR, an independent and suitably qualified mediator works with the parties in dispute to assist them to reach agreement. Examples of ADR models operating in other jurisdictions, are attached at Appendix 1. The UK is one example of a country with a well-developed ADR regime, whose role in assisting with tax disputes is recognised by the UK Tax Tribunals. The Tribunal Procedures for the First-Tier and Upper Tier Tribunal require that the Tribunal brings the attention of the parties in dispute to any appropriate procedure for resolving their dispute and that the Tribunal facilitates the use of ADR.

Section 949H and Section 949W of the Finance (Tax Appeals) Act 2015, allows the Tax Appeal Commissioners to invite the parties in dispute to consider a negotiated settlement and to stay, pause or defer proceedings if agreement is possible. This would facilitate the use of an ADR process, if such a regime was available to the taxpayer.

### **Recommendation**

To help assist with the current levels of congestion in the appeals system, an independent Alternative Dispute Resolution Mechanism “ADR” regime should be introduced. This could help to reduce the waiting times for appeal and the associated costs and stress for taxpayers which are associated with taking an appeal case at present.

## A separate forum to deal with small cases

Almost half of all appeals currently before the TAC<sup>7</sup> represent tax in dispute of less than €10,000. These cases amount to only €3.4m in total. A further 886 cases fall between €10,000 and €50,000, representing tax in dispute of €24.4m.

In other countries, such as the US, there are “small claims” courts which deal efficiently with small amounts of tax being appealed, in order to ease the burden on the main tax appeals process.

### **Recommendation**

The Institute has consistently called for a separate “Small Claims” model tax court to be set up to deal efficiently with smaller taxpayers that are appealing straightforward tax issues. This forum does not displace the need to focus on reaching a settlement with the taxpayer, wherever possible, so that taking a case to the “small claims court” is a last resort.

If the taxpayer does not wish to use the Small claims court, they should not be denied their right to a full hearing before the TAC, in full knowledge of the costs and potential delays involved.

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<sup>7</sup> 2,200 cases out of a total of 4,387 appeals as at 20 September 2017 - Parliamentary PQ number 39468/17

## The Annual Report of the TAC

The Institute welcomes the publication of the first Annual Report of the Tax Appeals Commission, which is a welcome move towards transparency. Additional information on the throughput of cases in the system would be helpful, including:

- The amount of tax in dispute by band and the number of cases in each band in tabular form.
- The length of time that taxpayers have been waiting for a hearing since they lodged their appeal, by year, in tabular form.
- The number of months that taxpayers have been waiting to receive a determination after their appeal has been heard, in tabular form.

The Annual Report of the New York City Tax Appeals Tribunal provides an excellent analysis of case inventories on an annual basis and we attach a copy for information.

## Published customer service standards

Once adequate resources have been provided to alleviate the current congestion in the system we would welcome the development of published customer service standards. These could include e.g. expected turnaround time on queries submitted to the TAC, acknowledgment to Statement of Case submitted etc.

## Appendix 1- Alternative Dispute Resolution

### Other Jurisdictions use of “ADR”

ADR occurs when a third party is brought in with the agreement of both parties to a dispute in order to determine the outcome as an arbitrator or facilitate agreement as a mediator. Some examples of approaches to ADR in a number of countries are outlined below:

#### The UK

A mediation-based ADR mechanism has been in place since 2012 and has proved successful. It can be used to resolve tax disputes for any taxes and for SME and large complex issues. A neutral third party is appointed to mediate the dispute. This mediator can be a HMRC officer specially trained in mediation or a trained external mediator who works in conjunction with a HMRC facilitator.

The role of the mediator is to work with both parties to help them focus on resolving the dispute in a collaborative manner. The mediator does not form a view on who is right or wrong. His/her sole focus is on assisting the parties in dispute work through their areas of disagreement and come to an outcome that satisfies both parties. The discussions are entered on a “without prejudice” basis – the normal legal and judicial options remain open to each party.

#### What types of disputes is it used for?

Some examples of cases where ADR is used by HMRC:

- A breakdown in communication between HMRC and the practitioner/taxpayer because the parties have reached a stalemate
- A lack of understanding of each party’s position or the underlying assumptions being used
- Disagreement or misunderstanding over the facts
- The facts may give to several possible outcomes i.e. there is no clear “right” answer
- The technical position is agreed, but the appropriate methodology for quantifying the liability is not agreed
- The case has no precedent value, it is specific to facts
- It might not be possible to resolve the case by mediation, but agreement on the facts and the issues that need a legal ruling would assist in expediting litigation.

The start of litigation is no bar to mediation and the UK Tax Tribunal play an active role in encouraging parties at appeal to explore alternatives to resolve the dispute.

#### Australia

Appeals against the decisions of the Australia Tax Office (ATO) are made to an independent body called the Administrative Appeals Tribunal (AAT). It reviews a wide range of decisions (including tax decisions) and makes extensive use of ADR methods. Five different types of ADR are used by the AAT:

- Conferences
- Conciliation
- Mediation

- Case appraisal and
- Neutral evaluation

A conference is usually the first step in a review of the case. Generally, a conciliation or mediation will be held for tax cases.

### **The US**

The Office of Appeals works to settle tax disputes on a fair and impartial. A trained mediator from the IRS Office of Appeals is assigned to the taxpayers to help agreement to be reached on the issue. The Appeals mediator may also offer settlement proposals. This regime does not replace the normal appeal procedures. Taxpayers retain the right to take an appeal. For large cases there is a fast track mechanism setting a timeframe of 120 days to resolve the issue at hand.



## Appendix 2- Sample Cases of Members' Experiences

### **Case 1: €60,000 tax in dispute**

**Major concerns: potentially €30,000 in interest charges while at appeal, 6.5 year stuck in the system**

In this case the tax in dispute amounts to €60,000 and relates to a number of tax years. Revenue raised the tax assessments in April 2011 and the Notice of Appeal was lodged the following month. The hearing took place five years later in February and March 2016. Even though the case concluded 18 months ago, the taxpayer does not know whether they have won or lost the appeal – no determination has been made by the Appeal Commissioners. It is now **6.5 years** since the appeal was lodged. At this point, if the taxpayer loses the case the interest charge arising over the period the case has been in the appeals system will amount to over €30,000 (50% of the tax in dispute). The taxpayer has not received any explanation as to why the determination has not been made, or when it will be received and they are extremely worried about how they will fund a €90,000 tax and interest bill if they lose this case.

### **Case 2: Over €250,000 tax in dispute**

**Major concerns: Huge difficulty getting information needed to prepare the case, tax has been paid upfront to minimise potential interest charges**

In this case, the taxpayer experienced significant difficulty in preparing the Statement of Case and the required legal submissions for their appeal because they do not understand the basis for Revenue's assessment. On multiple occasions, they asked Revenue to provide a full explanation of why they think an additional €250,000+ tax is due, but Revenue refused to provide the taxpayer with the basis for their position until 28 days before the hearing date. This made it very difficult for the taxpayer to prepare their case to refute the assessment and the onus is on the taxpayer to show that Revenue's assessment is incorrect. Given the amount of tax involved in this case, the taxpayer decided to pay the tax Revenue is demanding to minimise the potential interest charges if they lose the appeal (the interest would otherwise accrue at 10% per annum in this case).

### **Case 3: Less than €25,000 tax in dispute**

**Major concerns: Costs of appeal greater than the tax in dispute and no clarity on when the issue will be resolved**

In this case, the taxpayer has incurred significant time and costs in preparing the Statement of Case and the written legal submissions outlining their case, which were submitted to the TAC in early 2017. At this point, the costs incurred by the taxpayer in appealing the assessment are greater than the tax at stake so the taxpayer has requested that the case is determined without a hearing to mitigate further costs. They have not received a reply to this request. The matter in dispute centres on the technical interpretation of a section of the legislation. Notwithstanding that the taxpayer believes that Revenue's interpretation of the law is incorrect, they have paid the tax (and interest) Revenue is demanding. Otherwise, they could be exposed to further interest costs at a rate of 10% per annum.

**Case 4: Over €250,000 tax in dispute****Major concerns: 6 years in the appeals process, no communication with the taxpayer on hearing date**

This case relates to a tax assessment for 2007, which was appealed in 2011. The taxpayer has already incurred significant time and expense to date in preparing the Notice of Appeal and the Statement of Case. The Statement of Case was requested in March 2017 and the taxpayer was given just four weeks to prepare the detailed information the TAC requested. The TAC subsequently requested written legal submissions on the case from the taxpayer and from Revenue. The taxpayer is aware that Revenue has sought additional time to prepare their Outline of Arguments but the taxpayer has not received any communication from the TAC to tell them whether Revenue has been granted this extension. Furthermore, they have not received any communication to tell them when the appeal hearing will take place. While the taxpayer believes that they have a strong case they are extremely worried about the potential interest costs if they are unsuccessful at appeal, given the amount of tax in dispute and the considerable delays in getting the case resolved.

**Case 5: Over €100,000 tax in dispute****Major concerns: No communication on hearing date, concerns regarding exposure to interest costs**

In this case the Notice of Appeal was filed by the taxpayer more than 18 months ago. More than a year after the appeal was lodged, the taxpayer was requested by the TAC to provide a Statement of Case which was submitted within the required time limit allowed in the request. The taxpayer subsequently wrote to the TAC to ask when the appeal might be heard but there was no response to this request. At this point, the taxpayer is very worried about the impact of the delays in the process on the interest costs, if they are ultimately unsuccessful at appeal. This case relates to differing views on the technical interpretation of a piece of tax legislation, so there is little prospect of resolving the matter without a determination by the TAC. Notwithstanding that the taxpayer has done everything that has been required of them to progress this appeal, they still have no idea when the case will be heard and when the issue will be resolved.

**Case 6: Greater than €250,000 tax in dispute****Major concerns: Refund case – 2.5 years in the appeal process causing considerable stress**

This appeal concerns a tax refund. The notification of the appeal was submitted to the previous Appeal Commissioners in 2014. The appeal hearing took place over a number of days in 2016 and 2017, and concluded in early 2017. It has now been nearly 9 months since the appeal hearing concluded and the taxpayer has still not received a determination. The taxpayer incurred significant legal costs in the preparation of written legal submissions and books of evidence for the hearing and these costs had to be paid upfront. It took two years to get to a hearing date and 9 months later they are still unclear on whether they have won or lost the appeal. The appeals process has caused the taxpayer and his family considerable money, stress and worry.

**Case 7: Greater than €250,000 tax in dispute****Major concern: the potential interest and legal costs of the appeal**

In this case the taxpayer submitted a Statement of Case earlier this year with the details of the particulars of their appeal. They have not yet engaged legal counsel or commenced the preparation of a written legal submission, as there has been no communication from the TAC about a hearing date. The taxpayer does not want to incur legal costs until they can be certain that the appeal hearing is going ahead. They are very worried about the potential interest costs that are accruing on

a daily basis and they don't understand why they cannot establish when the case will be heard. They do not understand why the "interest clock" can continue, when it is not their fault the case has not yet been heard. The taxpayer tried to engage with Revenue to resolve the issue but Revenue would not engage with them or outline the reasoning behind their assessment.

**Case 8: Tax refund of over €100,000**

**Major concerns: Delays in getting a hearing, then settled on the day**

In this case it took 12 months to get to a hearing date and 120 hours were expended in preparing the necessary information and legal submissions for the hearing. Ultimately the case was settled with Revenue on the day of the hearing. Revenue had refused to engage in settlement talks before this point.

**New York City  
Tax Appeals Tribunal  
Annual Report  
July 1, 2015 - June 30, 2016**

## TABLE OF CONTENTS

Introduction .....	Page 1
Purpose .....	Page 1
Organization .....	Page 1
- Administrative Law Judge Division	
- Appeals Division	
History .....	Page 3
Procedure .....	Page 3
- Filing Petitions with the Administrative Law Judge Division	
- Filing Exceptions with the Appeals Division	
- Small Claims Proceedings	
Additional Items .....	Page 5
Review of Inventory .....	Page 7

NEW YORK CITY TAX APPEALS TRIBUNAL  
ANNUAL REPORT 7/1/2015 – 6/30/2016

1. Introduction. This report is prepared pursuant to §168.f of the New York City Charter (Charter). The New York City Tax Appeals Tribunal (Tribunal) has jurisdiction over petitions filed by taxpayers protesting statutory notices issued by the Department of Finance (Department) for all non-property income and excise taxes, and annual vault charges administered by the City of New York (City).<sup>1</sup> This report covers the period from July 1, 2015 through June 30, 2016.

2. Purpose. The Tribunal is responsible for providing taxpayers and the Department with a fair, impartial, independent, efficient and knowledgeable forum in which to resolve protests of notices issued by the Department.

3. Organization. In 2007, the City Council amended the Charter putting both the Tax Appeals Tribunal and the Tax Commission (the agency charged with administrative review of Real Property Tax assessments) within the Office of Administrative Tax Appeals (L.L. 59 of 2007).

The Tribunal consists of two divisions: the Administrative Law Judge Division and the Appeals Division.

Administrative Law Judge Division. The President of the Tribunal appoints the Administrative Law Judges. The President of the Tribunal may designate one of the Administrative Law Judges to be the Chief Administrative Law Judge. Administrative Law Judges are authorized to conduct any hearing or motion proceeding within the jurisdiction of the Tribunal. Each Administrative Law Judge must be an attorney admitted to practice in New York State for at least five years and must become a resident of the City within 90 days of appointment.

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<sup>1</sup> The New York City Sales and Use Tax and Personal Income Tax are administered by the New York State Department of Taxation and Finance and therefore, are not within the jurisdiction of the Tribunal.

As of June 30, 2016,<sup>2</sup> the Administrative Law Judges were:

Chief Administrative Law Judge	Anne W. Murphy
Administrative Law Judge	David Bunning
Administrative Law Judge	Sandra Rodriguez-Diaz

The Chief Administrative Law Judge is responsible for the day-to-day administration of the hearing function, both for formal hearings before Administrative Law Judges and small claims hearings before Presiding Officers. The support staff in the Administrative Law Judge Division handles petition intake and review, calendaring, and some word processing.

Appeals Division. The Appeals Division consists of three Commissioners appointed by the Mayor for staggered six-year terms. Each Commissioner must have been admitted to practice as an attorney in New York State for a minimum of ten years and have substantial knowledge and competence in the area of taxation. Each Commissioner must become a resident of the City within 90 days of appointment. One of the three Commissioners is designated by the Mayor to serve as President of the Tribunal during his or her term as a Commissioner. In addition to his or her duties as a Commissioner, the President is responsible for the overall administration and operation of the Tribunal. However, neither the President nor any Commissioner has any role with respect to specific cases pending before the Administrative Law Judge Division.

During the period covered by this report, the Commissioners of the Tribunal were:

President and Commissioner	Ellen E. Hoffman
Commissioner	Robert J. Firestone
Commissioner	Frances J. Henn

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<sup>2</sup> Effective August 15, 2016, Alexander Chu-Fong joined the Tribunal as an ALJ.

Commissioner Hoffman's term expired on June 30, 2016.<sup>3</sup> Commissioner Firestone's term expires on June 30, 2018. Commissioner Henn was appointed on May 2, 2016 to complete a term that expires on June 30, 2020.

In addition to the Commissioners, the Appeals Division includes a General Counsel and a secretary. The General Counsel, Mary E. Gallagher, works directly with the Commissioners and is responsible for assisting the Commissioners in the preparation of decisions, orders, notices and other legal documents. The General Counsel also coordinates all administrative aspects of the judicial and non-judicial functions of the Tribunal. The secretary for the Appeals Division handles exception intake and review, correspondence, calendaring and some word processing.

4. History. Prior to the establishment of the Tribunal, disputes between taxpayers and the Department were heard by the former Bureau of Hearings within the Department. The hearing officers only could issue recommended determinations for the signature of the Commissioner of Finance. Thus, although the Department was a party in all proceedings before the Bureau of Hearings, the Commissioner of Finance issued the final determination. Consequently, critics of the system noted that, at a minimum, there was a perception of unfairness. In addition, because the Department promulgated the regulations governing City taxes that were within the jurisdiction of the Bureau of Hearings, there were concerns that the Bureau of Hearings could not fairly and objectively review the validity or application of those regulations.

The Tribunal was created as an independent agency by §168 through §172 of the Charter in 1988. In 1992, the New York State Legislature expanded the Tribunal's jurisdiction to include all taxes administered by the City, other than the Real Property Tax. The 1992 legislation formed the Administrative Law Judge Division to replace the Department's Bureau of Hearings and created the current two-step process of hearings and appellate review.

5. Procedure. The Administrative Law Judges conduct formal hearings including related motions and small claims hearings as Presiding Officers. An Administrative Law Judge hears a case and issues a determination under his or her own name. An Administrative Law Judge

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<sup>3</sup> Commissioner Hoffman also serves as President of the Tax Commission for a term that expires on January 6, 2020.



determination is reviewed by the Tribunal Commissioners sitting as a panel if either the taxpayer or the Department files an exception to the Administrative Law Judge determination.

The Tribunal's rules include provisions governing the filing of petitions and exceptions and practice and procedure before the Administrative Law Judge Division and the Appeals Division. From time to time, the Tribunal convenes an Advisory Committee to assist in evaluating the adequacy and appropriateness of its regulations on practice and procedure. The committee includes practicing tax attorneys, tax accountants and representatives of the Department and the City Law Department. The Tribunal has undertaken a project to revise and update its current rules. The Advisory Committee will be enlisted to review and comment on proposed revisions.

Filing Petitions with the Administrative Law Judge Division. A case begins when a taxpayer files and serves a petition challenging a statutory notice issued by the Department. The petition is acknowledged by the Chief Administrative Law Judge. The Department, represented by the Tax and Bankruptcy Division of the Law Department, files an answer to the petition. Thereafter, the Administrative Law Judge assigned to the case holds a pre-hearing conference, at which time settlement is explored. If it appears that the case will proceed to hearing, an attempt is made to narrow the issues and encourage the parties to enter into a stipulation of facts.

Generally, the same Administrative Law Judge who presided over the pre-hearing conference conducts the hearing, receives evidence and issues a written determination within six months after the later of the completion of the hearing or the submission of briefs by the parties. This period may be extended by the Administrative Law Judge for an additional three months for good cause. The determination of the Administrative Law Judge includes a statement of the issues in the case, the relevant facts as found by the Administrative Law Judge based on the record, and conclusions of law. The determination is binding on both parties unless one or both of the parties requests a review of the determination by filing an exception with the Appeals Division of the Tribunal within 30 days after the issuance of the Administrative Law Judge's determination.

Filing Exceptions with the Appeals Division. If an exception is filed with the Appeals Division, the Commissioners will review the record of the hearing and any briefs submitted. They may grant oral argument on the request of either party, require oral argument if it is not requested by

either party, or decide the case without oral argument. The Commissioners will issue a written decision affirming, reversing or modifying the determination of the Administrative Law Judge, and/or remanding the case for additional proceedings. Each decision of the Commissioners includes a statement of the issues in the case, the relevant facts as found by the Commissioners based on the record and the Commissioners' conclusions of law. Commissioners' decisions must be rendered within six months after the latest of the date the exception is taken, the date briefs are filed by the parties or the date of the oral argument before the Commissioners.

Decisions issued by the Commissioners are final and binding on the Department. However, taxpayers may appeal a decision of the Commissioners by instituting an Article 78 proceeding with the Appellate Division, First Department, of the New York State Supreme Court within four months after the date of the Commissioners' decision.

Small Claims Proceedings. As an alternative to a formal hearing, if the amount in dispute is \$10,000 or less (not including penalties and interest) taxpayers have the right to opt for a small claims proceeding within the Administrative Law Judge Division. A small claims hearing is conducted informally by an Administrative Law Judge serving as a Presiding Officer. The Presiding Officer's determination is final and binding on both parties and cannot be appealed to the Appeals Division or to the courts. At any time before the conclusion of a small claims hearing, a taxpayer may discontinue the proceedings and request that the case be transferred to an Administrative Law Judge for a hearing and an appealable determination.

6. Additional Items. The Tribunal's website is located at [www.nyc.gov/taxtribunal](http://www.nyc.gov/taxtribunal). The Tribunal's website contains the Tribunal's Rules of Practice and Procedure, the Tribunal's forms, a list of pending exceptions, recent decisions, determinations and orders, and a link to the New York Law School website where most published Appeals Division decisions and orders and Administrative Law Judge determinations are available in both a searchable and printable format.

When their Tribunal work allows, the Administrative Law Judges, Commissioners and the General Counsel (collectively Tribunal Attorneys) also are designated by the Tax Commission President to serve as hearing officers for Tax Commission matters, including not-for-profit

exemption applications. In 2016 almost 6000 Real Property Tax applications were reviewed by Tribunal Attorneys plus 122 not-for-profit exemption applications.<sup>4</sup>

Since 2012, the Department has asked the Office of Administrative Tax Appeals to conduct hearings on protests of penalties asserted for failure to file Real Property Income and Expense Statements with the Department. In 2016 the Office of Administrative Tax Appeals received 105 protests of such penalties.

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<sup>4</sup> Tax Commission productivity is tracked on a calendar year basis.

REVIEW OF JULY 1, 2015 - JUNE 30, 2016 INVENTORY

<u>ADMINISTRATIVE LAW JUDGE DIVISION</u>			
	<b>ALJ</b>	<b>Small Claims</b>	<b>Totals</b>
<b>Opening Inventory</b>	<b>57</b>	<b>9</b>	<b>66</b>
New Petitions Received	37	2	39
Petitions Reopened/Remanded	0	0	0
Transfers from Small Claims	0	0	0
<b>Total Receipts</b>	<b>37</b>	<b>2</b>	<b>39</b>
Default Determinations	0	0	0
Dismissal Determinations	4	1	5
Resolved by Order	8	0	8
Substantive Determinations	2	0	2
Transfers to Small Claims	0	0	0
<b>Total Closures</b>	<b>14</b>	<b>1</b>	<b>15</b>
<b>Closing Inventory</b>	<b>80</b>	<b>10</b>	<b>90</b>

<u>APPEALS DIVISION</u>	
<b>Opening Inventory</b>	<b>8</b>
Exceptions Filed by Taxpayer	1
Exceptions Filed by DOF	
Exceptions Closed by Decision	5
Exceptions Closed by Withdrawal	
Exceptions Closed by Stipulation of Discontinuance	
<b>Closing Inventory</b>	<b>4</b>

**INVENTORY BY TAX TYPE**

<u>ADMINISTRATIVE LAW JUDGE DIVISION</u>				
<b>Tax</b>	<b>Open Inventory as of 06/30/15</b>	<b>Petitions Received 7/1/15- 6/30/16</b>	<b>Petitions Closed 7/1/15 – 6/30/16</b>	<b>Open Inventory as of 6/30/16</b>
BANK/FINANCIAL CORP.	2	1	1	2
CIGARETTE				
COMMERCIAL MOTOR VEHICLE	1			1
COMMERCIAL RENT	3	1		4
FOREIGN AND ALIEN INSURANCE				
GENERAL CORPORATION	19	20	5	34
HOTEL ROOM OCCUPANCY				
REAL PROPERTY TRANSFER	27	10	5	32
RETAIL LIQUOR LICENSE				
UNINCORPORATED BUSINESS	10	4	1	13
UTILITY	3	3	2	4
UNSPECIFIED				
NO JURISDICTION	1		1	
TOTAL	66	39	15	90

**INVENTORY BY TAX TYPE (cont'd)**

<u>APPEALS DIVISION</u>				
Tax	Open Inventory as of 06/30/15	Exceptions Received 7/1/15- 6/30/16	Exceptions Closed 7/1/15 – 6/30/16	Current Inventory as of 6/30/16
BANK/FINANCIAL CORP.	1		1	
CIGARETTE				
COMMERCIAL MOTOR VEHICLE				
COMMERCIAL RENT				
FOREIGN AND ALIEN INSURANCE				
GENERAL CORPORATION	2	1	2	1
HOTEL ROOM OCCUPANCY				
REAL PROPERTY TRANSFER	3		1	2
RETAIL LIQUOR LICENSE				
UNINCORPORATED BUSINESS	1			1
UTILITY	1		1	
UNSPECIFIED				
NO JURISDICTION				
TOTAL	8	1	5	4

**OUTCOME OF DETERMINATIONS**

ADMINISTRATIVE LAW JUDGE DIVISION (Substantive Determinations Only)		
<b>OUTCOME ON DOF NOTICE</b>	<b>7/01/15 – 6/30/16</b>	<b>10/01/92 – 6/30/16</b>
DOF NOTICE SUSTAINED	1	113
DOF NOTICE MODIFIED		50
DOF NOTICE CANCELLED	1	60

APPEALS DIVISION		
<b>OUTCOME ON DOF NOTICE</b>	<b>7/01/15 – 6/30/16</b>	<b>10/01/92 – 6/30/16</b>
DOF NOTICE SUSTAINED	3	53
DOF NOTICE MODIFIED		15
DOF NOTICE CANCELLED	1	34
REMANDED OR DECIDED ON NON-SUBSTANTIVE GROUNDS	1	7

APPEALS DIVISION		
<b>OUTCOME ON ALJ DETERMINATION</b>	<b>7/01/15 – 6/30/16</b>	<b>10/01/92 – 6/30/16</b>
ALJ DETERMINATION/ORDER MODIFIED		17
ALJ DETERMINATION REVERSED	2	20
ALJ DETERMINATION SUSTAINED	2	67
MATTER REMANDED OR DECIDED ON NON-SUBSTANTIVE GROUNDS	1	5

**OUTCOME OF DETERMINATIONS (cont'd)**

APPEALS DIVISION		
OUTCOME ON EXCEPTIONS	7/01/15 – 6/30/16	10/01/92 – 6/30/16
TAXPAYER EXCEPTION GRANTED	0	11
TAXPAYER EXCEPTION GRANTED IN PART	0	5
TAXPAYER EXCEPTION DENIED	0	50
TAXPAYER EXCEPTION DISMISSED ON NON-SUBSTANTIVE GROUNDS	1	3
TAXPAYER EXCEPTION REMANDED TO ALJ DIVISION	1	2
DOF EXCEPTION GRANTED	2	9
DOF EXCEPTION GRANTED IN PART	0	6
DOF EXCEPTION DENIED	1	23