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Minister Paschal Donohoe TD
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Upper Merrion Street
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Re: Tax Appeals Commission - Tax Strategy Group 19/01, Corporation Tax Paper

Dear Minister

The Institute very much welcomes the additional resources that have been allocated to the Tax Appeals Commission (TAC) over the last year and the publication of the Finance (Tax Appeals and Prospectus Regulation) Bill 2019, which will allow for the appointment of a Chairperson of the TAC.

Given the importance of transparency to the TAC, as an independent body, we believe that any amendment to their powers should be considered in the round and only after appropriate consultation has taken place with all relevant stakeholders. Therefore, we welcome the opportunity to provide feedback on changes under consideration by the Tax Strategy Group (TSG) ahead of this year's Finance Bill, as outlined in the Department of Finance Corporation Tax, Tax Strategy Group – 19/01 paper, published in July. We have reached out to practitioners who regularly engage with the tax appeals process for assistance in formulating this response.

1. Publication of some determinations without redaction

The Corporation Tax TSG paper proposes the publication of determinations without redaction in certain circumstances, for example, where an appeal has been lodged with the High Court. The rationale provided in the paper for this change is that it would improve the precedent value of the determination for other taxpayers and it would reduce the administrative burden imposed on the TAC. The paper suggests that as the full unredacted determination must be lodged with the High Court, as part of the case stated process, it enters the public domain.

The TSG 19/01 paper notes that the publication of determinations without redaction could be perceived as a barrier to parties considering an appeal of a determination to the High Court. It suggests that lifting the redaction requirement could be limited to circumstances where the party, who requested the case stated, has confirmed that it has been lodged with the High Court.

Currently, when the TAC notifies the parties of their determination, the parties have 21 days to file a notice with the TAC, requesting for a case stated, if they are dissatisfied with the

determination. Subsequently, there is a 3-month period within which the case stated must be prepared by the Appeal Commissioners, sent to the parties for their observations and then completed and signed by the Appeal Commissioners. The requesting party then has 14 days to file the case stated, which will include a copy of the unredacted determination, with the High Court. However, the ultimate hearing of the matter before the High Court is unlikely to take place for at least another one to two years.

The issue of when a determination enters the public domain is a critical factor for many taxpayers. The publication of the unredacted determination at an early stage in the case stated process could put excessive pressure on a taxpayer, given that there can be significant delays between the lodging of a case stated in the High Court and the ultimate hearing.

The simple filing of the case stated in the High Court, does not result in the documents which form part of that case stated entering the public domain at that point. It is only when the hearing of the case stated actually takes place in the High Court that the unredacted determination will be opened to the court. Case law has confirmed that the public are entitled to have access to documents, which are opened without restriction before the court. However, it also states that entirely different considerations arise in respect of material which is not opened in court or which is protected by *in camera* rules.¹

While it is acknowledged that ultimately the unredacted determination will enter the public domain on the hearing of the case stated in the High Court, this will be preceded by a rigorous process, where counsel's advice on the merits of the case is likely to have been sought and received by both parties and full consideration of the issues will have been undertaken by the appropriate officials within the Revenue Commissioners ("Revenue") and the taxpayer. Often as a result of this process, many appeals in respect of which a case stated has been lodged with the High Court, are settled, either at the behest of Revenue or the taxpayer, before the High Court hearing takes place.

The removal of the redaction requirement for determinations, where a case stated has been lodged with the High Court, could act as a barrier for taxpayers lodging an appeal with the TAC in the first instance. For example, in cases where a taxpayer's appeal is upheld by the TAC and Revenue proceed to lodge a case stated with the High Court, the operation of the proposed amendment would result in Revenue triggering the immediate publication of the unredacted determination, without recourse to the taxpayer. This would, therefore, place Revenue in a position where they could trigger the immediate publication of the unredacted TAC decision simply by initiating the appeals process. It means, therefore, that taxpayers are no longer assured that their tax appeal will be heard and determined in private. Placing this power in the hands of the Revenue will, in our view, undermine the *in camera* rule for TAC proceedings to such an extent that it would be rendered meaningless.

In our view, the requirement to redact determinations provides a fundamental safeguard to taxpayers, wishing to appeal an assessment and any change to the rule would create a significant barrier to using the appeals system. The Institute does not agree that the precedent value of decisions is impacted by redaction, as evidenced by the fact that such redacted precedents have been relied upon for the last three years, since the Tax Appeals

¹ Allied Irish Bank plc v Treacy (No. 2) [2013] IEHC 242

Commission was formed. The precedent value of determinations is capable of being assessed, without full access to the facts which identify the appellants.

2. Case Management Conferences – consequences of non-appearance

The TSG 19/01 paper considers an amendment which would specify that where an appellant fails to attend a scheduled Case Management Conference (CMC) the appeal shall be considered to be withdrawn.

The Institute notes that the intention of the proposed amendment is to improve the efficiency of the CMC process and thereby, improve the processing time for appeals before the TAC. Given the very serious consequences for a taxpayer if an appeal is deemed withdrawn, it is essential that adequate and sufficient safeguards would exist to ensure that the deemed withdrawal would not apply where the non-attendance at a CMC is due to reasonable cause.

The proposed amendment specifies the consequences for a taxpayer's failure to attend a CMC but it does not specify the consequences of Revenue failing to attend. In the interests of equity and with a view to ensuring the amendment achieves the desired result of improved efficiency and processing time for appeals, there should be similar appropriate consequences for non-attendance at a CMC by either party to the appeal. Therefore, in the event that Revenue fail to attend a CMC, the assessment should also be deemed to be withdrawn.

3. OECD Mutual Agreement Procedure (MAP) for transfer pricing disputes

The TSG 19/01 paper proposes consideration of an amendment to section 949W Taxes Consolidation Act 1997 to enable the TAC to suspend an appeal, pending the outcome of a MAP. Currently, the TAC is required to specify the date by which an appeal is to be resumed. The TSG 19/01 paper states that such a requirement conflicts with the MAP process, where negotiations may take several years to conclude.

In our view, the proposed amendment should also provide the parties to the appeal with a right to request the TAC to resume the appeal, subject to representations from the other party to the appeal, where they believe that the competent authorities, who are party to the MAP process have reached an impasse or the discussions are not making sufficient progress.

We would welcome the opportunity to discuss the matters raised in this submission with you or your officials.

Yours truly



Marie Bradley
President