



South Block
Longboat Quay
Grand Canal Harbour
Dublin 2

+353 1 6631700
www.taxinstitute.ie

Ms. Marie-Claire Maney
Chairperson of the Tax Appeals Commission
2nd Floor, Fitzwilliam Court
Leeson Close
Dublin 2
D02 YW24

24 June 2021

Institute Members' Experiences of the Tax Appeals Process – Survey Findings

Dear Chairperson

The Institute commends you on a number of steps that you have taken to address ongoing difficulties within the tax appeals process since you took office last summer at an extremely challenging time due to the pandemic. The new timeframe for publishing Determinations made by the Tax Appeals Commission (“the Commission”), the rollout of a shorter and simplified Notice of Appeal and Statement of Case and a redeveloped website are welcome procedural enhancements and we look forward to further developments to improve the tax appeals process in the months ahead.

We valued the opportunity to meet with you last January to hear about your plans to address the backlog in the tax appeals system and to improve the procedures of the Commission and to share our perspectives of the tax appeals process. The Institute warmly welcomes the ongoing engagement with your office in this regard.

As you know, the Institute recently conducted a survey of members to gather feedback on their experiences of the tax appeals process over the last 18 months.¹ We thought it would be useful to share the key findings of the survey with you to support your endeavours, as Chairperson, to improve the overall efficiency and effectiveness of the Commission.

The feedback reflects an appreciation for the Commission’s ability to adapt to the changed environment due to the pandemic and the flexibility and accommodation shown to those involved in tax appeals to allow them to safely progress their cases.

¹ Irish Tax Institute Survey period from 22 April to 4 May 2021.

Directors: Sandra Clarke, President, Peadar Andrews, Brian Brennan, Colm Browne, Oonagh Carney, Ian Collins, Amanda-Jayne Comyn, Maura Dineen, Karen Frawley, Stephen Gahan, Aileen Keogan, Aoife Lavan, Laura Lynch, Sarah Meredith, Colm O’Callaghan, Tom Reynolds, Kieran Twomey, Shane Wallace, Martin Lambe (Chief Executive).

Immediate Past President: Frank Mitchell.



Member of the Confédération
Fiscale Européenne

The Institute is a company limited by guarantee without a share capital (CLG), registered number 53699.

The Institute is also a registered charity, number 20009533. EU Transparency Register No.: 08421509356-44

86 members completed the survey on their experiences of the tax appeals process and provided their suggestions on ways to improve the process. The members who completed the survey and provided us with additional feedback ranged from members who were only involved in one or two appeal cases in a year, representing small businesses or individual taxpayers, to those involved in highly complex cases and who act as legal advocates during a tax appeal.

The body of this letter focuses on the feedback we received on procedural and administrative aspects of the tax appeals process. Some of the issues and suggestions highlighted by members in response to the survey would require amendment to the legislation governing tax appeals. We will raise such matters with the Department of Finance. However, we have outlined these issues in the Appendix to this letter for your information.

Members' Feedback on Procedural Aspects of the Tax Appeals Process

The feedback on the tax appeals procedures related to the following:

1. Experiences of remote Case Management Conferences (CMCs) and remote appeal hearings
2. The value of CMCs in progressing cases
3. Preparation of a Statement of Case
4. The "Simple Case" procedure for a Statement of Case
5. Encourage engagement between parties to reach a resolution and reduce the costs of appeal for straightforward cases
6. Future procedural improvements favoured by members

Several recent initiatives were also cited by members as very positive developments, including the implementation of a timeframe for publication of Determinations and the new Notice of Appeal form.

1. Experiences of remote CMCs and remote appeal hearings

The Commission's concerted efforts and innovations to facilitate taxpayers' continued access to justice in a safe manner, notwithstanding the restrictions imposed by the pandemic were acknowledged in the feedback from members. The vast majority of those who participated in remote CMCs or remote appeal hearings since their introduction last August, found that the process worked well.

However, some members highlighted the inherent limitations of using a remote approach in the appeals process in certain circumstances. For example, a virtual approach may work well for CMCs which are dealing with procedural issues.

However, it can present challenges for appeal hearings if oral evidence is given remotely, and especially when conducting cross-examination of witnesses. Our members would consider in-person engagement for appeal hearings to be preferable and more efficient compared to engaging virtually via Skype or other online platforms.

As the pandemic and the related restrictions abate, perhaps there is scope for the Commission to review a suitable framework for engagement to maximise the value of technological innovations particularly in the context of CMCs, while also recognising their limitations in the context of appeal hearings.

2. The value of CMCs in progressing cases

84% of respondents who had been involved in a CMC (whether held remotely or in-person) found it was helpful in progressing the appeal by enabling the Appeal Commissioner to give a direction to parties to resolve matters that could be resolved, leaving only disputed matters for the appeal hearing. However, concerns were raised about the absence of appropriate sanctions on Revenue if it does not comply with a direction from an Appeal Commissioner, given the critical importance of Revenue's engagement in the process to advancing a tax appeal. The sanctions provided in tax legislation would appear only to address the situation where an appellant fails to comply with a direction, resulting in a potential dismissal of the appeal in such circumstances.

The absence of legislative sanctions to apply in circumstances where Revenue does not comply or does not fully comply with a direction from an Appeal Commissioner is a matter that we will raise with the Department of Finance in our Pre-Finance Bill 2021 Submission to the Minister for Finance (as outlined in the Appendix).

3. Preparation of a Statement of Case

(i) Understanding the basis for the Revenue assessment

In the survey, we sought members' feedback on whether taxpayers clearly understood the basis for Revenue's tax assessment to enable them to make an informed decision as to whether to appeal it. Pursuing an appeal can be a costly and time-consuming process for taxpayers. Factors such as interest, professional costs and personal time must be weighed against the likelihood of success when deciding upon the appropriate action to take. Therefore, clarity on the basis of the assessment at an early stage is essential.

A taxpayer must outline in their Notice of Appeal all of the grounds for appeal which

they intend to rely on in their appeal. Indeed, a taxpayer is prevented from introducing a new ground for appeal at a later stage unless the Appeal Commissioners are satisfied that the ground could not have been reasonably stated in the Notice of Appeal.² Based on the feedback we received, often a taxpayer may not have full information on Revenue's basis for the assessment. For example, an assessment may be based on estimated figures without an explanation from Revenue as to how these figures were derived. We believe the number of appeals by taxpayers would be reduced if they had sufficient information to understand the rationale for the Revenue assessment before filing the Notice of Appeal.

As you may be aware, as part of Revenue's Statement of Strategy 2021-2023, Revenue is currently reviewing its Compliance Intervention Framework and it is envisaged that a new framework will be introduced in early 2022. As part of this review, we believe it is timely to consider a more streamlined approach to providing explanations of assessments on foot of a compliance intervention to aid taxpayers decision-making on how to proceed. For example, such a process could involve Revenue providing detailed findings underpinning the assessment issued to the taxpayer and this is a matter we are raising with Revenue as part of our engagement on the new framework. Such a procedure would assist taxpayers to make an informed decision on how to proceed and whether they wish to appeal the assessment.

(ii) The Statement of Case procedure

At present, following the filing of the Notice of Appeal, the taxpayer is often subsequently required to supply a Statement of Case to the Commission before they have the information on Revenue's grounds for raising the assessment. This can make it difficult for a taxpayer to decide how or even if, they should proceed with the appeal. Often the basis for the assessment may only become apparent after Revenue has provided a Statement of Case or Outline of Arguments.

As outlined in the Commission's Annual Report³, of the 1,392 appeals closed in 2020, 607 appeals (44% of the total number closed) were withdrawn by the appellant. A further, 509 of the closed appeals were closed by way of an agreed settlement. These figures include appellants who lodged an appeal but based on further information made available by Revenue during the appeals process decided that the appeal was no longer worth pursuing to a full hearing.

The Institute believes in the interests of justice, taxpayers should have a clear understanding of the basis for Revenue's tax assessment at an early stage to help

² Section 949I TCA 1997

³ Tax Appeals Commission, Annual Report 2020

inform their decision on whether to proceed with the appeal. As the onus of proof is on the taxpayer at the appeal hearing it is crucial that the taxpayer understands the case they are required to prove. Very often this is not apparent, if at all, until the advanced stages of the appeal process. Indeed, as Revenue is generally not required to give evidence at the appeal hearing, there is limited opportunity to interrogate the basis for Revenue's assessment during the course of the appeal hearing.

One way to support the aim of ensuring that the taxpayer understands the basis for Revenue's assessment at an early stage in the appeal process would be to require Revenue to provide a Statement of Case first, before one is supplied by the taxpayer (if it is required at all from the taxpayer). If Revenue was required to provide such information at the initial stages in the appeal process, this would, in our view, also reinforce the need for Revenue to have such information available and indeed, provide it to the taxpayer at the time of issuing the assessment. As we have already stated, we believe the number of appeals by taxpayers would be reduced if they were provided with sufficient information to fully understand the rationale for the assessment before the deadline for filing the Notice of Appeal.

As an observation, in the UK Tax Tribunal regime, the taxpayer must submit a Notice of Appeal but the onus to prepare a Statement of Case falls on HMRC. HMRC has 60 days⁴ 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.

In our submission to the Department of Finance on the Heads of Finance (Tax Appeals Commission) Bill 2015, the Institute had recommended that the Irish tax appeals regime should adopt the UK Tax Tribunal procedures on the Statement of Case, given the taxpayer would already have set out their grounds for appeal in the Notice of Appeal. However, the appeals legislation enacted in the Taxes Consolidation Act 1997 provides for the preparation of a Statement of Case by one or both parties to the appeal without recognising the taxpayer would have already outlined their grounds in the Notice of Appeal and that the Statement of Case should be provided by Revenue.

⁴ For standard or complex cases see Chapter 2, No. 25 (Respondent's statement of case) of the First-tier Tribunal (Tax Chamber) Rules, Consolidated version – as in effect from 21 July 2020.

In the survey, we asked members whether they would be in favour of an approach similar to the UK Tax Tribunal, which would require Revenue to provide a Statement of Case first. We also sought their views on the potential benefits of taking such an approach for the Irish tax appeals system.

78% of members who responded to this question were in favour of requiring Revenue to provide a Statement of Case first. They believed; it would improve the overall fairness of the process for taxpayers as they would understand the basis for Revenue's assessment; it could reduce the cost of the appeal by focusing on the exact matter in dispute and would allow taxpayers to make an informed decision at an earlier stage on whether to proceed with an appeal, based on the likelihood of success.

Members highlighted the challenges for small businesses that are dealing with myriad business issues, in addition to tax, to deduce the basis for Revenue's position with limited information. In contrast, Revenue would have conducted a thorough review of its position in order to support its rationale for disagreeing with a taxpayer's self-assessment.

We note that the Commission has the power under section 949Q(1) TCA 1997 to request a Statement of Case from either or both parties to the appeal. As evidenced in the Annual Report, Statements of Case are actively sought from both parties. We would welcome the Commission's consideration of developing its procedures to provide that the request for a Statement of Case would be made to Revenue first, with a view to assisting taxpayers to gain a better understanding of the matter in dispute and make an informed decision on an appropriate course of action at an early stage in the appeals process.

We will also highlight the differing approach to the Statement of Case used by the UK Tax Tribunal with the Department of Finance, to seek amendment to the Irish legislation.

4. The "Simple Case" procedure for a Statement of Case

We sought feedback on members' experience of the process for appeals which were categorised by the Commission as a "Simple Case"⁵. Only a very small number of members had experiences of the simple case procedure but agreed that a simplified approach, with perhaps a separate stream for straightforward cases is merited. This

⁵ A "Simple Case" referred to a case where the amount under dispute is less than €5,000 or there is a single net point under dispute, and it is not expected that the matter will require a hearing of more than a couple of hours if one is needed at all. [Guidance for Appellants](#), Tax Appeals Commission at page 7.

could reduce the cost of pursuing an appeal. Perhaps the Commission could consider whether there is scope to raise the threshold for simple cases from €5,000 so that this process could have a broader application?

5. Encourage engagement between parties to reach a resolution and reduce the costs of appeal for straightforward cases

Many of the comments in the survey reflect members' concerns about the level of formality and the resulting costs of pursuing a tax appeal, including interest costs, professional costs and often the additional costs associated with challenging senior legal Counsel for the respondent.

As outlined in the Commission's Annual Report, over a third of the appeals closed in 2020⁶ were settled in advance of an appeal hearing which illustrates that agreement is possible through engagement between both parties, without an appeal hearing, often facilitated by the CMCs. Members noted that genuine engagement between both parties in dispute reduces the requirement to pursue a full formal appeals process for simplified matters. Many of the matters lodged with the Commission may not be of a complex or technical nature nor require the Commission's consideration of the interpretation of legislation.

The Institute strongly believes there is a need for some alternative mechanism to enable agreement to be reached on smaller or straightforward disputes between taxpayers and Revenue. This would include circumstances, for example, where the dispute centres on the facts in question but the parties have reached an impasse.

We have long sought in our representations to the Department of Finance the facilitation of a process to enable a quick and low-cost resolution of simple cases through the introduction of an Alternative Dispute Resolution (ADR). Such a mechanism would allow for an independent and suitably qualified mediator to work with the parties in dispute to reach an agreement. In our view, this could reduce the number of appeals that are lodged in respect of cases where a formal appeal process should not be necessary to reach a resolution.

The UK is an 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 require the Tribunal to bring to the attention of the parties the availability of any appropriate alternative procedure for resolving their dispute, and if the parties

⁶ 509 of the 1,392 appeals closed in 2020 were closed via an agreed settlement, page 24 Tax Appeals Commission, Annual Report 2020.

wish, and provided that it is compatible with the overriding objective, to facilitate the use of the procedure.⁷

We note that sections 949H and 949W TCA 1997, allows the Appeal Commissioners to invite the parties in dispute to consider a negotiated settlement and to stay proceedings if agreement is possible. This would facilitate the use of an ADR process, if such a regime were available to taxpayers in Ireland.

75% of those who responded to our survey supported some form of alternative mechanism to resolve disputes that would allow for a mediated approach to reaching agreement. We note the usefulness of the CMCs as outlined above, in the Appeal Commissioners efforts to bring parties together to reach agreement on matters that can be resolved and reach agreement on factual areas in dispute. We would encourage and support the Commission's efforts to encourage constructive engagement between the parties to an appeal through the CMCs.

6. Future procedural improvements favoured by members

We appreciate that you have significant plans and developments underway to improve the efficiency and effectiveness of the tax appeals process. In our survey, we sought feedback on procedural developments to the tax appeals process that our members consider of particular importance. We sought feedback on five areas for improvement that members had raised with us in recent times. These were:

- i. Statement of Case to be provided by Revenue rather than by the taxpayer.
- ii. Eliminate duplication between details included in Statement of Case and Outline of Arguments.
- iii. More frequent Case Management Conferences to assist quicker progression of cases to a hearing.
- iv. A case-listing system by case reference number so taxpayers can understand where they are in the queue of cases at appeal.
- v. Ensure Determinations are issued in accordance with the new timeframes set out by the Commission.

The highest priorities identified from the selection above were a case-listing system to allow taxpayers identify where their appeal is in the queue, like what is in place in the High Court and ensuring Determinations are issued in accordance with the Commission's new timeframes.

⁷ Part 1 of the First-tier Tribunal (Tax Chamber) Rules, Consolidated version – as in effect from 21 July 2020.

Members also considered requiring Revenue to provide a Statement of Case first as a high priority (as referenced above). Since the completion of the survey, we note that the Commission has taken steps to address the duplication between the Notice of Appeal and the Statement of Case as part of the redeveloped Statement of Case, which is very welcome.

We recognise that you and your fellow Commissioners have set challenging priorities to develop the operation of the Commission in your Statement of Strategy for the next three years. The Institute is more than happy to engage with you and your team as these developments unfold and support your endeavours to obtain appropriate resourcing for the Commission's ongoing work.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sandra Clarke', with a stylized flourish at the end.

Sandra Clarke
Institute President

Appendix

Legislative recommendations to the Department of Finance in relation to tax appeals

Inequitable treatment between appellants and respondents to tax appeals

Several aspects of the existing legislation underpinning the tax appeals system impose an inequitable treatment between the appellant and respondent. Finance Act 2020 amendments exacerbated this unequal treatment between the parties to an appeal through a number of measures. As a fair approach for those seeking to access justice is important, we would suggest that several legislative provisions be reconsidered.

- **The absence of sanctions on the respondent for non-compliance with a direction by the Commission**

Finance Act 2020 amended section 949AV TCA 1997 to extend the grounds on which the Appeal Commissioner can dismiss an appeal, to include instances where there has been a failure to comply with a direction to file a Statement of Case in accordance with section 949Q(1) TCA 1997 and where there has been a failure to comply with a direction to file an Outline of Arguments in accordance with section 949S(1) TCA 1997.

These provisions impose a sanction on the appellant (who is the taxpayer) if they fail to abide by the directions of the Appeal Commissioner, resulting in their case being dismissed. In contrast, there is no corresponding sanction on the respondent should they not abide by a direction from an Appeal Commissioner. In fact, conceivably a failure by the respondent to perform a certain action could result in the appellant's case being dismissed, even though we understand it is not envisaged that the legislation would be applied in such a manner in practice.

In the interest of promoting fair and equal treatment of both the appellant and the respondent, neither party should be allowed to frustrate the progress of a tax appeal. We consider it appropriate to have some form of legislative sanction for instances where the respondent does not fully comply with a direction. One means of achieving this would be to stop the "interest clock" from a date to be appointed by the Commissioner where the respondent has not complied with a direction. This would ensure that the appellant is not penalised through additional interest charges for the action or inaction of the respondent.

There is legislative precedent for stopping interest accruing on a tax liability, for example, with the "Expression of Doubt" facility when filing a tax return. Under section 959P TCA 1997, a genuine Expression of Doubt affords protection from interest charges for the taxpayer until the doubt is resolved.

- **Non-payment of interest where the appellant makes a payment on account of the tax liability and is successful at appeal**

Section 960GA TCA 1997 disallows the payment of interest on overpaid tax in circumstances where a taxpayer appeals an assessment and discharges the disputed tax liability but subsequently wins the appeal. This treatment discriminates against an appellant who is not entitled to interest when successful at appeal, notwithstanding the time value of the funds provided to the State which are ultimately not due. In contrast, the appellant is charged interest at annualised rates of 8% or 10% per annum from the date the tax liability falls due.

Institute members who are very experienced in dealing with tax appeals have estimated that the average waiting time from filing a Notice of Appeal to the appeal hearing can be up to three years. This equates to a 24%/ 30% increase in the taxpayer's liability due to interest alone which is accruing over that period.

The rationale for adopting such an approach is unclear. As it is, interest at an annualised rate of 4% is payable on a repayment of tax only in circumstances where the overpayment is as a result of a "*mistaken assumption made by the Revenue Commissioners in the application of any provision of the Acts*".⁸ Prior to the introduction of section 960GA it was quite common for no interest to be paid on repayments of tax arising on foot of statutory appeals, on the basis that the dispute centred on the facts of a case rather than the law.

We believe in the interest of fairness in the tax system and balance between parties to an appeal that section 960GA TCA 1997 prohibiting the payment of interest to the appellant in such circumstances should be revised and the right to interest reinstated.

As outlined in previous representations to the Minister for Finance, we would urge that the rates of interest on underpaid tax are reviewed to ensure the rate imposed is more commensurate with the cost of borrowing, such as is the case in UK, where the rate is 2.6%⁹, tracked at 2.5% above the current Bank of England base rate.

Alternative Dispute Resolution (ADR)

To assist with alleviating congestion in the tax appeals system, consideration could be given to introducing an Alternative Dispute Resolution mechanism, an "ADR". There is widespread international recognition of the benefits brought by alternative approaches to resolving disputes such as independent mediation.

⁸ Section 865 TCA1997.

⁹ From 7 April 2020.

With mediation-based ADR, an independent and suitably qualified mediator works with the parties in dispute to assist them to reach agreement. 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 require the Tribunal to bring to the attention of the parties the availability of any appropriate alternative procedure for resolving their dispute, and if the parties wish, and provided that it is compatible with the overriding objective, to facilitate the use of the procedure¹⁰ (i.e., ADR).

Sections 949H and 949W TCA 1997 permits the Appeal Commissioners to invite parties in dispute to consider a negotiated settlement and to stay proceedings if agreement is possible. This could facilitate the use of an ADR process in an Irish context, which in turn could help to reduce the waiting times for appeal and the associated costs and stress for taxpayers that can be experienced when taking an appeal case at present.

¹⁰ Part 1 of the First-tier Tribunal (Tax Chamber) Rules, Consolidated version – as in effect from 21 July 2020.