



South Block
Longboat Quay
Grand Canal Harbour
Dublin 2

+353 1 663 1700
www.taxinstitute.ie

Minister Paschal Donohoe T.D.
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2

24 September 2021

Re: Tax Appeals Commission - Tax Strategy Group 21/05, Corporation Tax Paper

Dear Minister

The Institute very much welcomes the additional resources that have been allocated to the Tax Appeals Commission (TAC) in recent years and the appointment of the Chairperson of the TAC, Ms. Marie-Claire Maney in 2020.

The Institute wrote¹ to the Chairperson of the TAC in June this year to commend her on several steps that she has taken to address ongoing difficulties within the tax appeals process since she took office at an extremely challenging time due to the pandemic.

In our letter to the Chairperson of the TAC, we also shared some key findings from our members' survey of their experiences of the tax appeals process over the last 18 months and their suggestions on ways to improve the process. Furthermore, we included a number of recommendations on the tax appeals system in the Institute's Pre-Finance Bill 2021 Submission², highlighting a number of measures we believe are required to restore equity to our tax dispute resolution procedures.

¹ Letter to Chairperson of the Tax Appeals Commission regarding survey findings from Institute members' experiences of the tax appeals process, Irish Tax Institute, June 2021

² Pre-Finance Bill 2021 Submission, Irish Tax Institute, July 2021

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

Immediate Past President: Sandra Clarke.



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Given the importance of transparency to the TAC, as an independent body, it is our view that any amendment to their powers should be considered only after appropriate consultation has taken place with all relevant stakeholders. Therefore, we welcome the opportunity to provide feedback on the proposed 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 – 21/05 paper (TSG Paper 21/05) published last week.

We have summarised below our observations and recommendations on the proposed measures which are based on feedback we received from members who regularly engage with the tax appeals process. Further analysis of these measures is set out in the attached appendix.

1. Tiered system of Appeal Commissioners

We note from the TSG Paper 21/05 that policymakers intend to implement a “tiered system of Appeal Commissioners” to provide a more efficient and cost-effective appeals service and that a recruitment process aiming to identify and appoint four new ‘Tier 3’ Appeal Commissioners is now underway. In order to maintain the transparency of the TAC, we believe clarity should be provided to all stakeholders involved in tax appeals regarding what is envisaged by the proposed tiered system, including clarification on the criteria for the various tiers. It is important that any increased efficiencies in processing low value or straightforward cases should not result in less resources being available to progress complex or higher value cases.

2. Changes to the case stated procedure

(i) Time limits

It is proposed that the draft case stated (rather than the signed case stated) would be issued three months after the date of the application. The parties would then be given 21 further days to make representations. After this time, the Appeal Commissioner would have a further 21 days to complete and sign the case stated.

We welcome the proposal to increase the time allowed for issuing the case stated. We recommend that the time limit within which the parties may make representations on the draft case stated should be 28 days, rather than 21 days as suggested in the TSG Paper 21/05, as this would allow the parties sufficient time to fully consider the draft case stated.

In addition, we believe that the time limit within which a party must submit their application to the Appeal Commissioner for a case stated should be extended from 21 days to 28 days. Feedback we have received from members indicates that the existing 21-day time frame within which a party must submit their application to the TAC for a case stated is too short and may in fact be a contributing factor to applications being made for a case stated which are subsequently withdrawn.

In our view, providing this small amount of additional time earlier in the process would allow for a more informed decision to be made by the applicant as to whether they wish to proceed with their appeal to the High Court and thus, is likely to reduce the number of requests for a case stated.

(ii) Point of law

We do not believe that the Appeal Commissioner should have the power, as proposed in the TSG Paper 21/05, to refuse an application for a case stated where, in their view, the applicant party has not clearly stated in what respect the determination is erroneous on a point of law.

It is a matter for the High Court, not the Appeal Commissioners, to determine whether a determination is erroneous on a point of law. The Institute would have serious concerns that any proposed amendment should not limit a taxpayer's recourse to the High Court in circumstances where they are dissatisfied with a determination of the Appeal Commissioners.

(iii) Pre-establishment requests

It is proposed to close pre-establishment requests for a case stated where there has been no engagement from the applicant party. In our view, such a proposal would appear sensible provided reasonable notice is given to all parties involved.

3. Failure to comply with a direction

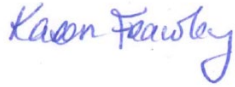
An Appeal Commissioner may impose a sanction on the appellant (who is the taxpayer) if they fail to abide by the directions of the Appeal Commissioner, resulting in their case being dismissed. However, there is no corresponding sanction for the respondent should they fail to abide by a direction from the TAC.

It is suggested in the TSG Paper 21/05 that it may be appropriate to address any failure of compliance with a direction of the TAC by the respondent *“by establishing a clear escalation procedure to address any individual failure to comply, and / or to provide for publication of data in respect of any such instances in the TAC annual report.”*

We welcome the move to introduce a procedure to deal with failures by the respondent to comply with a direction of the TAC. However, it is unclear whether it is envisaged that the proposed procedure will be set out in legislation or whether it would be dealt with administratively by the TAC. In our view, it is important that there is a legislative sanction applicable to the respondent to address any failure of compliance with a direction of the TAC, as otherwise there is an imbalance in the tax appeals process to the detriment of the taxpayer.

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

Yours sincerely

A handwritten signature in blue ink that reads "Karen Frawley". The signature is written in a cursive style with a large, looping 'y' at the end.

Karen Frawley
Institute President



APPENDIX

1. Tiered system of Appeal Commissioners

The TSG Paper 21/05 proposes that the TAC should have a tiered system of Appeal Commissioners to reflect the actuality of the case load it receives, and to provide a more efficient and cost-effective appeals service for taxpayers. It states that the introduction of a new four-tiered structure of Appeal Commissioners has now been approved by Government, expanding on the existing system of Appeal Commissioners and Temporary Appeal Commissioners which has been in place to date. A recruitment process aiming to identify and appoint four new 'Tier 3' Appeal Commissioners is now underway.

Clarification on how the new tiered system will operate would be welcomed by stakeholders, as it is not clear from the limited information provided to date as to how the proposed new tiered system and the recruitment of 'Tier 3' Appeal Commissioners will provide a more efficient and cost-effective appeals service for taxpayers. For example, what is the criteria for each of the four tiers and how will the overall structure operate?

Whilst the TSG Paper 21/05 states that there are six Appeal Commissioners, it is our understanding that of the six, three temporary Appeal Commissioners have either recently left or will be vacating their positions on the TAC. Is it intended that the three departing temporary Appeal Commissioners will be replaced or will the vacant temporary Appeal Commissioners positions be replaced with the new 'Tier 3' Appeal Commissioners?

Significant operational issues following the establishment of the TAC were identified by Ms. Niamh O'Donoghue in her *Review of the Workload and Operations of the Tax Appeals Commission*. The recommendations made in that report resulted in additional Appeal Commissioners being appointed and further resources being allocated to the TAC to help alleviate the backlog which had built up in the tax appeals system.

It is critical, in our view, that any further changes in the Appeal Commissioner structure builds on the progress which has been made to date in alleviating the backlog of tax appeals and so, careful consideration must also be given to the potential impact of such changes on the broad range of appeals received by the TAC, in terms of both complexity and quantum. The Institute is concerned that any increased efficiencies in processing low value or straightforward cases should not be

at the cost of the level of resources available to progress complex or higher value cases.

2. Changes to the case stated procedure

Where a party to an appeal is dissatisfied with a determination made by the Appeal Commissioner they may appeal the determination to the High Court on a point of law, by making an application to the Appeal Commissioner within 21 days after the issue of the determination to require them to state and sign a case (a “case stated”) for the opinion of the High Court. The TSG Paper 21/05 considers three proposed amendments to the case stated procedure. We have set out our observations in relation to each of the proposed amendments below in further detail.

2.1 Time limits

The legislation requires that the signed case stated must be issued within three months of the date of the application. The TSG Paper 21/05 proposes that the time limits for issuing the draft case stated would be increased and the draft case stated (rather than the signed case stated) would be issued three months after the original application. The parties would then be given 21 further days to make representations. After this time, the Appeal Commissioner would have a further 21 days to complete and sign the case stated.

The Institute welcomes the proposal to extend the time to prepare the case stated given the existing timeframe set out in legislation is very challenging. We believe the proposed time limit of three months to issue the draft case stated is reasonable. However, we recommend that the time limit within which the parties may make representations on the draft case stated should be 28 days, rather than 21 days as suggested in the TSG Paper 21/05, as this would ensure the parties to the appeal sufficient time to fully consider the draft case stated.

In addition, feedback we have received from members indicates that the 21-day time frame within which a party must submit their application to the TAC for a case stated is too short and may in fact be a contributing factor to applications being made for a case stated which are subsequently withdrawn. Given the very short time frame allowed, we understand that it would not be unusual for a party to request a case stated in order to protect their position so that they have time to assess the TAC’s determination in their case and consider whether an appeal is warranted.

In our view, extending the time limit within which a party must submit their application to the Appeal Commissioner for a case stated from 21 days to 28 days would allow the party to make a more informed decision as to whether they wish to proceed with their appeal to the High Court.

2.2 Point of law

Where a party requests that the TAC prepare a case stated, they must “*state in what particular respect the determination is erroneous in a point of law*”³. The TSG Paper 21/05 proposes an amendment to specifically provide a power to the Appeal Commissioner to refuse an application for a case stated where the applicant party has not stated clearly in what respect the determination is erroneous on a point of law.

The Institute would welcome clarification in relation to the policy intention of the proposed amendment as we believe that this proposal gives rise to very serious consequences for a taxpayer and fails to take into account the role of the High Court in the case stated process. Whilst the Appeal Commissioner has responsibility for drafting the case stated, the point of law to be included by the Appeal Commissioner in the case stated is required under the legislation to be “*the point of law as set out*” by the applicant party in its application for the case stated⁴.

Currently, the TAC does not have discretion to adjudicate on the point of law which the applicant is seeking to establish and in our view there is no apparent policy reason as to why this position should be altered. It is for the High Court and not the Appeal Commissioners to decide whether a point of law has been established and whether the determination was in fact erroneous on that point of law.

It is also unclear how the proposed provision would operate in practice. For example, if the TAC were to refuse a case stated on the basis that the point of law was unclear, would there then be a right for the applicant party to appeal that decision to the High Court? If the High Court finds that an applicant party is entitled to appeal on the point of law, is the intention that the applicant party would then be required to go back to the TAC to get the case stated and then proceed again to the High Court to hear the case stated? The Institute would have serious concerns that any amendment should not limit a taxpayer’s recourse to the High Court in circumstances where they are dissatisfied with a determination of the Appeal Commissioners.

2.3 Pre-establishment requests

The TSG Paper 21/05 notes that on establishment, the TAC inherited a tranche of outstanding case stated applications from the former Office of the Appeal Commissioners with no time limit for the signed case stated to issue. It is noted that there are still a number of legacy case stated applications which the TAC has not been able to progress due to the lack of engagement from the parties involved.

Currently, there is no legislative provision to address this issue, therefore the introduction of a power to close these requests for a case stated is being proposed,

³ Section 949AP(3)(b) Taxes Consolidation Act 1997

⁴ Section 949AQ(1)(v) Taxes Consolidation Act 1997

where the TAC has made repeated attempts to progress the matter but there has been no engagement from the applicant party.

In our view, the proposal to close pre-establishment requests for a case stated where there has been no engagement from the applicant party would appear sensible provided reasonable notice is given to all parties involved.

3. Failure to comply with a direction

The TSG Paper 21/05 proposes that any failure of compliance with a direction of the TAC by the respondent to an appeal could be addressed by establishing a clear escalation procedure to address any individual failure to comply, and/or to provide for publication of data in respect of any such instances in the TAC annual report.

We welcome the introduction of a procedure to deal with failures by the respondent to comply with a direction of the TAC. However, it is unclear whether it is envisaged that the proposed new procedure will be provided for in legislation or whether it would be dealt with administratively by the TAC.

As outlined in the Institute's Pre-Finance Bill 2021 Submission, we consider it appropriate to have some form of legislative sanction for instances where the respondent does not fully comply with a direction of the TAC. Where there has been a failure by the appellant (who is the taxpayer) to comply with a direction of the Appeal Commissioner to file a Statement of Case or an Outline of Arguments, the Appeal Commissioner can dismiss the tax appeal.

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. In our view, it is important that there is a legislative sanction applicable to the respondent to address any failure of compliance with a direction of the TAC, as otherwise there is an imbalance in the tax appeals process to the detriment of the taxpayer.

It is worth noting that in the UK First-tier Tax Tribunal regime, if either party has failed to comply with a direction, the Tribunal may take such action as it considers just, including requiring the failure to be remedied or restricting a party's participation in proceedings. It may also request the Upper Tribunal to exercise its powers (which are the same powers as that of the High Court) in relation to, any failure by a person to comply with a requirement imposed by the Tribunal to attend at any place for the purpose of giving evidence or to produce or facilitate the inspection of a document.⁵

⁵ First-tier Tribunal (Tax Chamber) Rules, Consolidated version – as in effect from 21 July 2020, Rule 7.