



THE BAR OF IRELAND

The Law Library

Submission by The Bar of Ireland in response to Tax Appeals Commission Public Consultation

29th September 2017

INTRODUCTION

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland. The independent referral bar are members of the Law Library and has a current membership of 2,200 practising barristers. Council of The Bar of Ireland welcomes the opportunity to contribute to the Tax Appeals Commission public consultation.

GENERAL COMMENT ON CHANGES TO PROCEDURES

Generally speaking, barristers are only engaged by taxpayers where the issue is one of a technical nature or the quantum of tax liability at issue is significant. There are many tax appeals which come before the TAC which are of small value or are non-technical in nature which are run by taxpayers or their accountants and which do not involve barristers.

Barristers practising in this field very much welcomed the changes introduced by the Finance (Tax Appeals) Act 2015. One of the most significant changes introduced was the mandatory publication of the TAC determinations, which is of great assistance in advising taxpayers. The usefulness of the publication of TAC decisions will only increase as the body of determinations grow. The experience of members in relation to the hearing of appeals themselves has also been overwhelmingly positive with hearings, once commenced, being run efficiently and professionally by the TAC.

However, there is a strong view that the current tax appeals system is in jeopardy. The problems with the current system cannot be cured by legislative changes; the problems are entirely attributable to a lack of resources. There are simply not enough Appeal Commissioners available to deal with the overwhelming volume of cases before the TAC nor does the TAC appear to have the administrative support necessary for carrying out its functions.

The experience of our members suggests that there are now significant delays within the tax appeals system and it has become impossible to advise taxpayers as to when they can expect their appeal to be heard and when they can expect a decision.

The delays experienced are twofold: (i) there is already a significant backlog of cases to be heard and (ii) there is a significant delay in the issuing of determinations.

(i) Backlog of appeals

In 2016, the TAC received 899 new tax appeals and disposed of 209 appeals¹. The TAC's first annual report confirmed that of these 209 appeals only 41² were as a result of written

¹ TAC Annual Report 2016, p13

² TAC Annual Report 2016, p18

determinations and we assume, therefore, that the overwhelming majority of the other cases were appeals which were considered inadmissible at an administrative stage. Therefore, a significant backlog of cases had already formed within the first nine months of the TAC coming into being.

As at 31 March 2017 the total tax which was subject to appeal before the TAC was over €1 billion.³

As at the end of 2016, the TAC had 2,731 legacy appeals⁴ and only one temporary Appeal Commissioner has been appointed to hear these cases. The TAC has stated in its Annual Report for 2016 that it believes that an unspecified number of these legacy appeals will not require hearing and determination following the recent outcome of legal proceedings in the Superior Courts. The TAC further believes that the outcome of separate legal proceedings, which have yet to be concluded, will have a significant bearing upon a considerable number of other appeals. This may be so, but it still seems an unrealistic ambition to have only one Appeal Commissioner dispose of all legacy appeals. It was disappointing that only one temporary Appeal Commissioner was appointed to deal with the legacy appeals when there was clearly a need to appoint several more.

Assuming that 20% of all appeals are inadmissible and also assuming that each appeal Commissioner will hear and issue 40 written determinations each year it will take 24 years for all of the cases currently in the system to be heard. It is true that this estimate does not take account of the unspecified number of cases which the TAC says may not now need to be determined because of other Superior Court litigation. However, it also assumes that there are no new appeals for the next 24 years and does not take account of the fact that the current rate of issuing written determinations is approximately 12 each per Commissioner per year.

(ii) Delay in issuing determinations

Unfortunately, some determinations are now outstanding for in excess of a year. There is a strong view that this delay is entirely a consequence of the TAC being under resourced; there is simply too much of a burden being placed on only three Appeal Commissioners.

Impact of these delays on taxpayers

These delays in the tax appeal system unfairly impact taxpayers. Unlike a litigant in the civil system who will incur interest at the rate of 2% per annum, a taxpayer incurs a punitive interest rate of

³ Written PQ Answer from Minister Paschal Donohoe 29 June 2017

⁴ TAC Annual Report 2016, p20

between 8% and 10% per annum of the tax underpaid. This means that current delays are adding to the costs to be incurred by taxpayers. By contrast, successful appellants are only entitled to interest of approximately 4% per annum which is not payable if the outcome of the appeal turns on factual matters.

Naturally, taxpayers are not only individuals but include large corporates, PLCs and foreign companies investing in Ireland. Barristers are having to advise multi-national corporations that the Irish tax appeals system is in complete disarray and there is no predicting when an appeal might be selected for hearing.

The delays and uncertainty act as a significant disincentive to taxpayers bringing appeals and must also, ultimately, be a disincentive to foreign direct investment. It is imperative that changes to the system take account of the need to improve the perception of dispute resolution in the tax area in light of the potential opportunities that may be created post-Brexit.

We are also greatly concerned as to how these delays, when coupled with the punitive late payment interest rates, affects a taxpayer's rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution and EU general principles.

How these delays might be eased

The TAC is chronically under-resourced for the body of work with which it has been charged. More Appeal Commissioners are required to assist with the backlog of current cases, more temporary Appeal Commissioners are required to deal with the legacy cases and more resources are required to assist the TAC in discharging its administrative functions.

A transparent listing system would greatly assist in allowing taxpayers to know how hearing dates are allocated and when they might expect their case to be heard by the TAC. This will undoubtedly add to the administrative work of the TAC and again must be properly resourced.

Once an appeal is heard, it should be given a subsequent first listing on a date three months thereafter so as to update the parties as to the progress of the determination and when the parties might expect to have a determination from the TAC. This would be akin to the listing which already occurs in the Superior Courts to ensure a litigant's rights under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms is not breached and that they receive a determination within a timely manner.

Finally, in order to ease the financial hardship that these delays have on taxpayers, once a Notice of Appeal has been accepted by TAC, interest pursuant to s1080 of the Taxes Consolidation Act 1997 (the **TCA**) of 8% per annum should be suspended pending the determination of the appeal, unless the TAC

were to determine that the appeal was wholly lacking in merit and substance and had been made only for the purposes of delaying payment.

SPECIFIC QUESTIONS RAISED BY THE TAC:

<p>1. EXPEDITION OF PROCESS, FROM POINT OF APPLICATION, TO NOTIFICATION OF DETERMINATION AND THE NUMBER OF STEPS INVOLVED</p>
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Is there more scope for mediation in the process?

The nature of cases in which barristers tend to be involved in do not lend themselves to mediation. Furthermore, we see no role for mediation where a point of law is involved.

Mediation may not be ideally suited to smaller cases and in particular, VRT appeals, and in our view, the limited resources of the TAC should not be utilised in dealing with such straightforward matters. There may be merit in considering removing VRT valuation issues from the TAC's jurisdiction.

As often happens in litigation, the most meaningful of discussions can occur on the morning of the hearing itself. It is our view that such discussions can be quite beneficial in narrowing the issues between the parties and on occasion, in disposing of the appeal entirely. The TAC does not currently have any break-out rooms so as to enable these discussions to occur and practitioners have resorted to conducting negotiations in the hallways of the TAC. We believe break-out rooms would greatly assist practitioners in their efforts to narrow the issues in the appeal and, when possible, disposing of the appeal entirely.

Is there scope for increased emphasis on previous determinations?

We don't believe so. The determinations of the TAC are already publicly available and properly advised taxpayers will be aware that whilst these decisions are not binding they are of significant influence and will not be departed from lightly.

Is there scope for "class actions" where the TAC has multiple applications on the same or very similar matters?

Section 949E(2)(b) of the TCA permits the Appeal Commissioners to direct that two or more appeals raising common or related issues be heard together or consolidated. The scope and effect of this provision has not yet been tested and we do not believe any legislative changes are as yet required.

2. SUITABILITY OF THE VARIOUS DEADLINES SET DOWN IN THE STATUTE, OR BY THE TAC, IN RELATION TO VARIOUS STEPS IN THE DETERMINATION PROCESS

Are shorter or longer timelines, at specific stages, more appropriate?

The experience of members is that the allocation of timelines has been very fair and that adjournments are granted where genuine requests are made. However, some recent requests for extensions of time or variations of directions have not been responded to prior to the expiry of the deadline for the initial directions, which has caused great uncertainty. This again appears to be related entirely to the TAC's lack of resources.

The statement of case can be a useful document so that all parties and the TAC have a broad outline of the case to be made and the evidence which will be tendered. There is good sense in requiring these to be exchanged at an early stage.

There appears, however, to be a practice of requesting written legal submissions after the exchange of statements of case. In our view, there is no merit or benefit in doing so. Written legal submissions should be exchanged a few short weeks before the scheduled hearing date when all of the available evidence has been gathered and an up to date picture of all case law is available. The provision of written legal submissions at an early stage is inevitably going to lead applications to submit amended or supplemental written submissions nearer the hearing date.

If it is intended that the exchange of submissions at a very early stage will precipitate constructive engagement between the parties with a view to settling disputes, this has not been the experience of barristers to date. In any event, such an objective could more easily be met by seeking a non-exhaustive outline of arguments in the Statement of Case.

3. BURDEN AND RESPONSIBILITY OF DOCUMENT PRODUCTION AND TRANSMISSION TO ALL PARTIES, INCLUDING CONSIDERATION OF E-SYSTEMS IN THIS REGARD?

While a taxpayer and the Revenue Commissioners should exchange the documentation listed in the Statement of Case at the time the Statement of Cases are exchanged, the TAC itself should not receive this documentation until the case has been listed for hearing as, in most cases, this list will be supplemented by other documents which become available nearer to the hearing date. We would suggest that once a case is listed for hearing, the TAC should direct that an agreed booklet of documents be produced by the parties and this agreed booklet of documents should be provided to the TAC two weeks before the hearing of the appeal.

Is there scope for increased use of on-line submission and transmission of documents?

This is not an issue for barristers.

Should appellants' documents be returned or retained and if so, when/why/how?

The TAC, in our view, should receive hearing bundles shortly before a hearing and can dispose of them after the ultimate determination of the appeal. As the High Court can remit a hearing back to the TAC (although it very rarely does so) the papers cannot be disposed of prior to this.

Where Revenue has large numbers of related/same-issue appeals, received in or around the same time, is there scope for the TAC only to send lists of appellants to Revenue, rather than each application and body of documents?

We are of the view that this could only be done with the permission of each individual taxpayer.

4. COSTS OF THE PROCESS TO APPELLANTS
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Are the costs generally too onerous?

The cost of litigating complex tax disputes before the TAC is comparable to the costs of High Court litigation save for the fact that taxpayers are being exposed to a punitive rate of interest in the event that their appeal is unsuccessful.

Is there scope for increased use of telecommunications/video conferencing to, limit the costs of attendance at hearings?

We are of the view that telecommunications/video conferencing may be of benefit for case management hearings. We would further suggest, in respect of case management hearings, that a particular day be set aside for case management hearings and a number of case management hearings, listed for perhaps 30 minutes each, be listed in a day.

Videoconferencing is sometimes necessary where a witness is unable to attend and this facility is already available.

Is there scope for class actions, where representation is by the same adviser(s) for all appellants, with a view to minimising and sharing costs?

In our view, this is a matter for the taxpayer. Equally, as outlined above, section 949E(2)(b) of the TCA permits the Appeal Commissioners to direct that two or more appeals raising common or related issues be heard together or consolidated.



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