

Rules and Procedures of the Tax Appeals Commission

A submission to the Tax Appeals Commission



29 September 2017

Rules & Procedures of the Tax Appeals Commission
Public Consultation
Tax Appeals Commission
Floor 8, Fitzwilton House,
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Dublin 2,
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VIA EMAIL: procedures@taxappeals.ie

Dear Sirs/Mesdames:

We are pleased to submit comments on behalf of Deloitte in response to your call for public consultation on the rules and procedures of the Tax Appeals Commission. We appreciate this opportunity to share our views and trust that you will find our comments valuable to the discussion.

We look forward to continued collaboration with the Tax Appeals Commission on this and other initiatives and are available to discuss anything in this document, as needed. In the meantime, if you have any queries please do not hesitate to contact us on 01 417-2200.

Yours sincerely,



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Key Messages

As the current Tax Appeals Commission ('TAC') is a new body, having only commenced 2016, our comments laid out within this document should therefore be considered with this in mind, and we may have additional comments regarding procedural aspects of the new process as our experience with its operation grows. We would welcome an opportunity to share these insights at a later date.

However, set out below are some key messages arising from our experiences to date.

- We would welcome mediation in the appeals process, which we believe could be facilitated through the implementation of a mediation procedure by the TAC, and greater communication between counsels of both Revenue and the taxpayer at the earliest opportunity.
- "Class actions" may be useful in certain circumstances, although we also would encourage greater use of test cases to provide guidance to future appellants dealing with the same or similar issues.
- Costs of appeal are currently excessive, and serve as a barrier to many taxpayers pursuing claims through the TAC process.
- Revenue should be required to present their statement of case in advance of the appellant, for review by the appellant.
- In light of the relative lack of appeals due to the expense of the appeals process, it is particularly important that Revenue's internal case review process is robust and transparent.
- We would welcome an expedited appeals process, particularly with regards to the publication of determinations.

We also wish to take this opportunity to share our views on what we believe are important matters which are not considered within the public consultation document. These are set out on page 9 of this document.

Responses to Consultation Questions

1.0 Question 1

Expedition of the process, from point of application, to notification of determination and the number of steps involved

A. Is there more scope for mediation, in the process?

At the moment there is a lack of mediation in the appeals process. Mediation could have the advantage of facilitating quicker and more efficient hearings, or potentially reaching case settlements prior to the commencement of a hearing.

Central to the mediation process could be meetings between both Revenue and appellant counsels. Counsels could, for example, consider which net technical points should be discussed at the hearing by both sides, and which could be settled / disregarded, suggest when and how long the hearing should take place, agree whether a test case would be suitable, etc. We have experienced that such mediation can be successful in expediting the appeals process and potentially lowering costs.

More fundamentally we would also welcome the introduction of a formal mediation procedure, whereby Revenue and the taxpayer would at various points be required to meet to discuss the case and potential solutions prior to proceeding to the next stage in the appeals process. Such discussions could be facilitated by the TAC or an external party.

Legislatively, the prospect of settlement between Revenue and the appellant in respect of cases under appeal is already envisioned - see TCA 1997 s949V (2) "*Where, before a hearing is held, the parties come to an agreement with each other, whether in writing or otherwise, an appeal shall be treated as having been withdrawn*". TCA 1997 s949H (2) also arguably grants power to the TAC assist with the mediation process in some capacity.

Whilst mediation would be welcomed, it is important to recognise that mediation may not be suitable for all cases under appeal. For instance, mediation may be particularly appropriate where for example, both parties acknowledge that a tax charge arises but disagree on the quantum of that charge. Alternatively, in cases where there is significant disagreement between parties on the validity of an assessment neither party may be amenable to settlement by mediation. Practically, difficulties may also arise in finding a mediator with sufficient experience and expertise who is also agreeable to both parties.

Notwithstanding these challenges, to facilitate increased use of mediation in future, it would be helpful for the TAC to outline a format or process for mediation going forward.

B. Is there scope for increased emphasis on previous determinations?

TCA 1997 s949AN (1) states that the TAC may “*have regard to a previous determination made by them in respect of an appeal that raised common or related issues*” and “*if they consider it appropriate, in the light of such a determination, determine the new appeal without holding a hearing*”. We believe this provides for sufficient emphasis on previous determinations, while granting a degree of flexibility to the TAC in arriving at future determinations. This is particularly important at this early stage of the TAC’s life when the published body of determinations is limited. An overly prescriptive approach would not be welcome.

For practitioners and taxpayers, prior TAC determinations form a valuable corpus of tax law, and provide helpful guidance on the approach of the TAC on certain matters. However, it is critical to note that where case fact patterns are similar but not precisely the same, prior determinations will be helpful but should not be determinative.

For the reasons outlined above, we would also greatly welcome the publication of appeals cases adjudicated under the old system.

As the body of published determinations rises, we would echo recommendations made elsewhere for the inclusion of a search facility on the TAC website for the convenience of Revenue, practitioners and taxpayers.

C. Is there scope for “class actions”, where the TAC has multiple applications on the same or very similar matters?

In certain instances there may be scope for “class actions”. This should have the obvious benefit of spreading the cost of appeals between taxpayers, Revenue and the TAC. TCA 1997 s949F already allows different additional parties to join an appeal, so the legislation already exists for a vehicle akin to a “class action”. We welcome the use of “class actions” where circumstances permit.

However, there are two primary of limitations with such “class actions” in a tax context when compared other “class actions”.

i. Fact patterns

Often “class actions”, deal with a single issue, e.g. consumer product class actions in the United States and fact patterns of the parties to the action may not be relevant. However, determinations may be made by Revenue for multiple taxpayers who have similar, but nonetheless distinct, circumstances. In this context, it may be difficult to build a uniform defence suitable for a large number of taxpayers.

ii. Privacy

Unlike other “class action” lawsuits, taxpayers may be concerned of the risk of having sensitive information, such as commercial practice, divulged to their co-appellants, and therefore may be reluctant to use the “class action” vehicle. This concern could be countered by outlining that an agent holds a duty of confidentiality to each individual client

Given the privacy inherent to tax matters, there is also the problem of information asymmetry. One taxpayer may not be aware that another has been subject to a similar assessment, and unless there is already a common agent aware of similar assessments

raised across a number of clients, or the matter has attracted media attention, it may be difficult to identify suitable and willing clients for such “class actions”.

Another approach may be the use of test cases. Although the resulting determination may not be binding for future appellants, its direction will be useful. The use of a test case would be particularly beneficial in a context where there are multiple appellants with similar, but not identical, fact patterns as the determination could be considered in light of these differences.

2.0 Question 2

Suitability of the various deadlines set down in the statute, or by the TAC, in relation to various steps in the determination process

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

We would like to see the process move more quickly in most instances. We would encourage the issuance of determinations within two weeks following the hearing. In our experience there has been significant delay in such matters. Publication of the decision online could be done within the week following the decision being made known to the parties concerned, to allow time for redacting of confidential information if necessary.

As a general note, we have found the TAC to be accommodating with regards to deadlines. We have found that if more time is needed to prepare a statement of case, for example, the TAC staff have been cooperative and obliging, which we and our clients appreciate.

3.0 Question 3

Burden and responsibility of document-production and transmission to all parties, including consideration of e-systems in this regard

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

We would be in favour of using entirely on line document transmission systems, provided they are sufficiently resourced, secure and do not have capacity constraint issues.

We have found in the past for example that the Revenue File Transfer Service ('RFTS') 'drop box' type system can handle large volumes of documentation efficiently. The TAC system is not as modern, and should have an online facility for tracking documentation submitted.

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

Our view is that the transmission of all documentation should be done via online means, and have no particular comments with regards to the retention or return of documents.

C. Where Revenue has large numbers of related/same-issue appeals, received at 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?

This is predominantly an issue for Revenue.

4.0 Question 4

Costs of the process to appellants

A. Are the costs generally too onerous?

Yes. The cost burden for taxpayers under the new system is too onerous.

In first instance, the taxpayer may have already incurred significant costs liaising with Revenue throughout the various channels before an issue makes its way through to TAC process.

To then move forward within the appeals process a taxpayer is required to prepare comprehensive and often lengthy arguments, which more likely than not requires the input of counsel and tax advisors. There are therefore significant front loaded costs from the early stages of the appeals process. Many taxpayers are not in a position to fund such significant costs, and may have no alternative but to abandon an appeal. Even where taxpayers have the means to engage counsel and tax advisors, often it is not financially viable to appeal a liability of less than €150,000. The lack of recourse to the Circuit Court has led to the 'all or nothing' element of the new system, which also increases the costs given the requirement for detailed legal defences to be prepared where a taxpayer must place the first foot forward and prepare lengthy and costly cases, particularly where there is minimal knowledge of Revenue's defence.

What could be helpful in reducing the significant upfront counsel/advisor costs is if Revenue were required to present their statement of case first, for review by the appellant. We believe this would be equitable given that Revenue's basis for reaching a determination should already be clear as a result of their internal procedural reviews.

Given the amount of taxpayers unable to pursue appeals as a result of the high cost, it is critical that Revenue's internal review processes and procedures are robust, comprehensive and transparent as in reality many taxpayers will be left with no viable avenue of appeal other than Revenue's internal process.

Mediation may also serve to reduce costs, if properly implemented. We refer to our earlier comments in this regard.

Other costs in the process are onerous on the taxpayer, for example the requirement that a taxpayer fund 50% of stenographer fees. In general, the process should be set up to primarily facilitate the appellant, in light of the resources available to the State vis-à-vis taxpayers.

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

This may be helpful at earlier stages in the process, such as the case management hearings, but we see little scope for any significant cost reductions as a result of greater use of such technology.

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

Please refer to our comments above.

Other items of note

- We recommend that tax cases appealed beyond the TAC should be held entirely in camera, given there is no particular need to identify the taxpayer. Going into the public eye is a significant issue for business. For example they may be revealing confidential business information, may be concerned about damage to their good name arising from a dispute over what they view as an invalid ruling, etc. We are aware of taxpayers who would appeal their cases but for concerns regarding publicity.
- The current office of the TAC does not provide separate rooms where appellant and respondent can meet privately prior to commencement of the hearing. We would welcome such a space when the TAC relocate office, which would bring the facilities of the TAC in this respect in line with the Circuit and Higher Courts.



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