

LAW SOCIETY SUBMISSION



RULES & PROCEDURES OF THE TAX APPEALS COMMISSION

TAX APPEALS COMMISSION

SEPTEMBER 2017

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Introduction.

An effective appeals process is a vital part of a good tax and duty administration system. The entire appeals process should be fair, easily accessible, expeditious and efficient.

Whilst an effective appeals process is important for all taxpayers, it is also important in the context of our reputation internationally and in the context of Ireland's commitments internationally.

We welcome the opportunity to participate in this consultation

2. Consultation questions on potential changes to procedure

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

Is there more scope for mediation in the process?

Under the existing regime, the rules are designed to promote settlement and settlement talks.

The Law Society of Ireland ('the Society') notes that the procedures of the Tax Appeals Commission ('TAC'), whilst incorporating procedures that envisage settlements outside of a determination by the TAC, do not currently provide for any formal mediation option. The Society would welcome a more formal mediation procedure to be available to taxpayers. However, this would potentially require changes in legislation in relation to Part 40A TCA 1997 and to provisions in the TCA 1997 in order to afford Revenue the right under the 'care and administration' mandate, to enter into such process with the ability of achieving a settlement that is fair.

In the current experience of members, without such legislative amendments, any mediation is likely to be of limited benefit and unworkable.

Any mediation should of course not impact on the recourse to an appeal on the part of taxpayers and will need to be available on a non-binding basis.

Is there scope for increased emphasis on previous determinations?

As the TAC is not a court and with only two permanent Appeal Commissioners, it is too small a body to develop precedent.

Additionally, the role of the TAC is not a judicial role¹ and the development of precedent in the context of its role would be inappropriate. The TAC must determine cases on a case by case basis given its current mandate and role. Placing increased emphasis on previous determinations would require significant legislation and oversight costs, and point to a more comprehensive reform of the system.

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

The classification of cases that are banded together by Revenue or TAC as "class actions" is

¹ See *The State (Calcul International Ltd and Solatrex International Ltd) v The Appeal Commissioners and The Revenue Commissioners*: III ITR 577

misleading – such an approach could more accurately be described as the reverse of a class action. The Society strongly rejects this proposal – every taxpayer should retain the right to have their own case heard and argued before the TAC and on appeal to the High Court and Supreme Court on the basis of their own facts and circumstances. The reality is no two taxpayers circumstances are ever the same and therefore by definition require their own hearing.

Additionally, the role of the TAC is not a judicial role² and the development of practices which would prevent the ability of individual taxpayers to have their own cases heard (or which would allow for a finding against such a taxpayer without the taxpayer having the right to argue his or her case) in the context of its role would be inappropriate. The TAC must determine cases on a case by case basis given its current mandate and role.

Care is required to be taken in extending the right of the TAC in this regard, particularly in light of the fact that a taxpayer currently has no right of appeal on the facts and may only appeal on a point of law to the High Court.

2.2 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?

At the moment, the timelines are set on a ‘one size fits all’ basis – longer time periods are often required in more complex cases. Over the summer periods when Courts are closed it is virtually impossible to have counsel review submissions. TAC has no discretion to take these practicalities into account.

One major issue on time-limits exists in the context of the filing of a notice of appeal under section 949I TCA 1997. The legislation requires the inclusion of grounds of appeal ‘in sufficient detail’ for the Appeal Commissioners to understand them. This notice of appeal must be filed within 30 days of the date of determination or assessment. In many cases, the Revenue’s initial assessment may not be accompanied by reasons.³ As the taxpayer is appealing the Revenue determination or assessment it is unreasonable to require them to state the grounds of appeal where they have not been provided with the reason for the initial decision. This represents an unfair burden on the taxpayer and raises issues of procedural fairness, natural justice and access to justice.

The main time limits, following the filing of a notice of appeal, apply in relation to the delivery of statements of case⁴ and outlines of arguments⁵.

The Society is greatly concerned at the practice whereby the TAC will seek statements of case and outlines of arguments from taxpayers initially and then permit Revenue have sight of these arguments at the time of preparing their own versions. This represents a potential or actual breach of fair procedures in that both parties should be required to prepare the

² See *The State (Calcul International Ltd and Solatrex International Ltd) v The Appeal Commissioners and The Revenue Commissioners*: III ITR 577

³ The experience of members is that this is particularly prevalent in relation to assessments issued at the end of a calendar year where Revenue may issue assessments to avoid being ‘time-barred’ in relation to the assessment under section 955 TCA 1997 (still operative for tax years up to the end of 2012).

⁴ Under section 949Q TCA 1997.

⁵ Under section 949S TCA 1997.

statements of case and the outlines of arguments at the same time with such documentation exchanged at once.

The staggered approach of the TAC is not required under the grounding legislation and is in conflict with assurances provided to the Society by the Department of Finance in advance of the passing of the legislation. It undermines the basis that both parties are entitled to a fair hearing and is significantly different to the approach in practice prior to the change to TAC.

The adoption of fair procedures is critical in any tribunal and is of greater importance where the right of a taxpayer to appeal a decision of the TAC is limited to a point of law. This is a step that should be implemented without delay and is already permitted under the relevant legislation.

Extensions appear to be granted by TAC as a matter of course. Based on views of practitioners, extensions tend to be sought by Revenue on a frequent basis. It is incumbent on the TAC to deal fairly with both taxpayers and Revenue, and continuous extensions of deadlines granted to Revenue is not in keeping with this tenet as it unreasonably denies the taxpayer to have the opportunity to have their case heard.

In addition, an enforced time limit on Revenue should be considered. Under the old regime Revenue was obliged to facilitate orderly progress of appeals and that is no longer the case. This is evidently causing delays in the system.

Consultations with members have also disclosed a number of issues that could be addressed through time limits. For example, the experience of members is that the filing of a notice of appeal and statement of case will not provide any clarity on when a taxpayer might obtain a hearing date. In contrast to court lists, where appellants will have some clarity on the date of hearing, the scheduling of hearing dates is not transparent nor, it would appear to our members, does it follow any particular order in being listed.

The listing of appeals is something that requires transparency and certainty if confidence in the appeal regime is to be obtained.

Members have also indicated to the Law Society that there are additional delays in obtaining determinations in cases which have been heard. This is a worrying development particularly in light of the fact that appellants may be exposed to increased statutory interest costs arising from such delays (where the decision has gone against the appellant). Any discussion on time limits should necessarily seek to provide assurance on the delivery of determinations.

Members have indicated to the Law Society that quicker procedures and better case management would assist greatly with obtaining confidence in the appeals regime. It had been hoped that this would be the result of the new appeals legislation but this has not materialised.

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

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

Most taxpayers are indifferent to whether documents are submitted on-line or in hard copy. It would be more practical if TAC could consider the timing of when documents are required. For example, currently, TAC requires all documents that will be relied on to be submitted at the time of the statement of case, even though no date for hearing is set at that

time and it could well be the case that the hearing date may not be for another full year. TAC are permitted to ask for all documents that are relied on at the time the statement of case is submitted but are not required to do this in legislation. It should be noted that in light of the manner of exercise of the statement of case procedures by the TAC – where the appellant will have to file many times before being aware of the Revenue's reasons – requiring full documentation is an onerous requirement. Exercising some discretion in this regard would be welcomed.

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

Original documentation should be returned where no longer required in keeping with good practice under data protection rules.

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

We think it is unreasonable to expect the TAC to be in a position to determine whether appeals are same-issue appeals at the time of receipt of appeals.

There is also a danger in the TAC taking such an approach as it may contravene the right of a taxpayer to have his or her appeal determined separately and breach their statutory right to confidentiality.

2.4 Costs of the process to appellants

Are the costs generally too onerous?

Procedural inefficiencies in the TAC process can give rise to increased costs for taxpayers. The Society hopes that one outcome of this consultation will present options for reform that will give rise to cost savings for taxpayers.

Costs can be but are generally regarded as a necessary aspect of making an appeal. The alternative is to appeal without representation which would ultimately be detrimental to taxpayers and likely would hamper the quality of argument before the TAC.

The separation of statements of case and outline of arguments submissions increases the costs for appellants and might be reviewed as a means of streamlining costs.

Increased transparency on listing of appeals would also greatly assist in limiting costs.

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

Moving to video conferencing is not something that will limit costs for taxpayers in a meaningful way.

The locating of hearings in proximity to appellants, as was previously the practice, will assist to a greater extent in minimising costs.

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?

As outlined above, the use of the term 'class action' here is very misleading. Again, as outlined above, every taxpayer should retain the right to have their appeal heard and argued separately before the TAC. The Law Society are of the view for all the reasons outlined that tax appeals are not an appropriate area for such an approach to be taken.

2.5 Other considerations

Publication of list of tax appeals remaining to be considered.

Due to a serious backlog, there are long delays in dealing with tax appeals. Appellants wish to be informed when it is likely that an appeal will be taken but practitioners are unable to provide this information or even give any information on how many appeals will be dealt with before their appeal.

When each appeal case is initiated, it is given a reference number by the Appeal Commissioners. To facilitate appellants, practitioners and the Revenue, each month, the Appeal Commissioners should publish on its website, a list of the reference numbers of all the appeal cases which remain unheard in the order in which they will be heard.

3. Conclusion

The Society is available to discuss any of the comments made in this submission and reiterates that a functioning and transparent appeal process is essential to the effective operation of our economy. Unfortunately, for the various reasons set out above, we are of the view that the TAC is not meeting all the objective standards required for these criteria to be met.

For further information please contact:

Dr Rachael Hession
Secretary to the Taxation Committee
Law Society of Ireland
Blackhall Place
Dublin 7
DX 79

Tel: 353 1 6724800
r.hession@lawsociety.ie