

Submission to the Consultation on the Rules and Procedures of the Tax Appeals Commission

1. Introduction

The reform of the tax appeals system effected by the enactment of the Finance (Tax Appeals) Act 2015 and the establishment of the Tax Appeals Commission (TAC) marked an important turning point for all of the stakeholders in the tax system. Following on from almost two years experience in implementing the reform measures, Revenue very much welcomes the decision of the TAC to engage in a consultation process that allows stakeholders to reflect on the improvements made and to identify further areas of improvement.

Back in January 2014, Revenue stated in its submission to the public consultation on the reform of the appeals system carried out by the Department of Finance that-

“An effective appeals process is a necessary part of a good tax and duty administration system. The appeals process should be fair, easily accessible, expeditious and efficient. As a major stakeholder in the appeals process, Revenue has a particular interest in having a system that:

- *is accepted as independent by all stakeholders,*
- *has procedures that are as simple as possible but are adaptable enough to deal efficiently with appeals of varying importance and complexity,*
- *minimises delays, and*
- *through transparency, ensures that identical issues are not appealed unnecessarily by different taxpayers.”.*

The establishment of the TAC and its adoption of clear rules and procedures represent a very significant step in putting in place an appeals system with these qualities. The TAC’s independence is now clearly established and transparency has been achieved by, for example, ensuring that the lessons learned in each appeal are accessible to stakeholders in the form of published determinations. While the statutory framework is in place to allow the TAC to manage cases in a flexible and expeditious manner, including the power to refuse and dismiss certain appeals and to dispense with hearings in adjudicating certain cases, Revenue considers that the TAC’s statutory powers can be further leveraged to achieve a more flexible, efficient and expeditious appeals process.

The proposals made by Revenue in this submission are primarily concerned with making the appeals process more flexible, efficient and expeditious and reducing the administrative burden on all of the parties involved in an appeal, i.e. the TAC, appellants and Revenue. The main areas of concern in this regard relate to the receipt and admission of new appeals by the TAC and the various submissions that appellants and Revenue must prepare for the TAC. These matters are addressed in sections 2 and 3 of this submission. Miscellaneous matters of concern to Revenue are addressed in section 4. Other matters raised by the TAC in its consultation document are addressed in section 5.

Revenue appreciates that tackling the current caseload of the TAC, including the significant backlog of appeals that pre-date its establishment, in a timely manner requires that the TAC be adequately resourced, both at Appeal Commissioner and support staff level. Some of the changes proposed in this submission will involve additional work for the TAC, or the involvement of staff with some tax expertise: for example, the proposal that requests for a 'statement of case' submission be tailored to the particular circumstances of the case or that appeals involving common or related issues be identified so that previous determinations might be considered in making new determinations. However, other proposed changes should have the effect of reducing the administrative burden on the TAC and freeing up some resources. In making these proposals, Revenue is mindful of the pressures faced by the TAC and has no desire to place additional burdens on the current limited resources. However, Revenue believes that the proposals will ultimately lead to a more streamlined and efficient appeals process that will benefit all of the stakeholders in this process.

A summary of the Revenue proposals are listed in the Appendix.

2. The receipt and admittance of appeals

2.1 Notification of new appeals to Revenue

The TAC is required to notify Revenue of all new appeals as soon as practicable after their receipt. It is imperative that this notification happens without delay so that Revenue can arrange to suspend collection and enforcement action in relation to disputed tax liabilities pending the determination of an appeal and can advise the TAC of any issues with regard to the validity of the appeal.

Revenue is pleased to note the improvement in the timely notification of new appeals but would like to emphasise the importance of this continuing.

2.1.1 The TAC should continue to notify Revenue of all new appeals as soon as practicable after they are received.

One of the questions posed by the TAC in its consultation document relates to the statutory requirement for the TAC to send Revenue a copy of each notice of appeal, together with the Revenue notification to the appellant of the assessment or decision being appealed. The purpose of this requirement is to ensure that Revenue is aware of the subject matter of an appeal and is in a position to confirm to the TAC whether the appeal is valid or not. In circumstances where a large number of similar or same issue appeals are made to the TAC around the same time, Revenue appreciates that the current procedures for the notification of an appeal may prove cumbersome. To facilitate a more expeditious process, Revenue would be prepared to be notified by way of a list of all of the appellants involved, subject to prior agreement with the TAC.

2.1.2 Where a large number of similar or same issue appeals are made to the TAC around the same time, Revenue will accept notification by way of a list of all appellants involved where this has been agreed with the TAC.

2.2 Invalid appeals

In accordance with section 949J TCA 1997, a valid appeal is one where there is a specific statutory right of appeal against the particular matter being appealed and where any conditions that must be satisfied before an appeal can be made have been satisfied. Most commonly, such conditions relate to the submission of a return to Revenue and the payment of the appellant's self-assessed tax liability. Following the notification of a new appeal by the TAC, Revenue is required to consider whether the appeal is valid or not and to advise the TAC accordingly. Section 949N TCA 1997 obliges the Appeal Commissioners to refuse to accept an appeal where they are satisfied that an appeal is not a valid appeal.

Generally, given the limited criteria governing the validity of an appeal, it is immediately clear whether or not an appeal is valid. Revenue is of the view that such questions of validity should be addressed by the TAC at the earliest possible opportunity and, in particular, prior to a request to either party for a 'statement of case' submission. By doing so, the TAC will ensure that all parties (including the TAC itself) do not incur unnecessary costs where the appeal cannot ultimately proceed, that late payment interest charges are kept to a minimum for an appellant and that appellants are in a position to pursue any other appropriate options for redress (for example, Judicial Review) in a timely manner. Revenue accepts that the TAC may require additional information in exceptional cases to make its decision about whether an appeal should be refused or not and will respond promptly to such requests.

Where Revenue notifies the TAC of its view that an appeal is not a valid appeal, it would be helpful if the TAC was to acknowledge this notification, indicating whether it needs to consider the matter further and providing an indicative timeframe for making a decision on the acceptance or refusal of the appeal.

2.2.1 The TAC should reject any appeal that is not valid at the earliest opportunity. Where the matter of validity is not immediately certain, the TAC should indicate the reason why the matter is to be considered further and provide an indicative timeframe for making a decision on the acceptance or refusal of the appeal.

3. Submissions made to the TAC

Following the receipt of a valid appeal, there are essentially two types of submission that the TAC may direct the parties to provide: a 'statement of case' (section 949Q TCA 1997) and an 'outline of arguments' (section 949S TCA 1997).

3.1 'Statement of case'

Revenue's understanding of the purpose of a 'statement of case' submission is to give the TAC some basic information about the matter being appealed and the parties' view about whether it is likely to proceed to a hearing or be settled by agreement between the parties. This submission is concerned with the facts of a case and an indication of any relevant statutory provisions and/or case law and not with any legal arguments that might be involved.

The general TAC approach appears to be to request the submission of a 'statement of case' shortly after an appeal is made. Revenue's view is that such an approach does not sit well with the fact that most appeals are settled by agreement between the parties rather than by hearing and determination by the Appeal Commissioners.

In this context, it would seem more appropriate for the TAC to allow a reasonable amount of time to elapse before requesting the 'statement of case' submission. Although the information required is reasonably basic, the preparation of the submission nevertheless imposes a resource cost on both Revenue and appellants. Revenue has noted that some appellants appear to be treating the preparation of the 'statement of case' submission like an 'outline of arguments' submission, necessitating a more substantial resource input and sometimes having engaged a legal professional such as a barrister for this purpose. There is also a resource cost for the TAC in requesting and processing submissions. Revenue would like to see a balance struck between the avoidance of unnecessary work for the TAC, Revenue and appellants by allowing time for appeals to be settled by agreement and the TAC having sufficient information at an early stage to identify those straightforward appeals that would be amenable to determination based on written material without the necessity to hold a hearing.

Revenue proposes, as a general approach, that a period of at least 6 to 8 weeks be allowed following the making of an appeal before the TAC requests a 'statement of case' submission. However, this general approach should be varied depending on the circumstances of a particular appeal; for example, it might be extended where the parties are engaged in active settlement discussions and might be reduced where there is an opportunity for early determination by the TAC and the parties wish to avail of this opportunity.

3.1.1 As a general rule, the TAC should allow a reasonable amount of time following the making of an appeal before requesting a 'statement of case' submission. A period of 6 to 8 weeks is suggested as being reasonable. However, such a period should be flexible and be adapted to the particular circumstances of an appeal.

The TAC has discretion about whether or not to request a 'statement of case' and the information to be provided in this submission. The general TAC approach seems to be to request a 'statement of case' as a matter of course and to look for all of the information items listed in section 949Q TCA 1997, whether or not they might be relevant to the particular appeal. Revenue's view is that a more flexible approach tailored to the particular case would be more appropriate, particularly in relation to very straightforward cases and where the appellant is not represented by a tax agent.

The list of information items contained in section 949Q TCA 1997 includes "a list of, and copies of, any written material that a party intends to rely on or produce in the proceedings" and "brief particulars in relation to any witnesses who might be called upon to provide evidence in the proceedings". Revenue's view is that a request for such information in a 'statement of case' submission is premature, particularly in complex cases, and that it would be more appropriate to request it at a later stage when it appears that the appeal will actually proceed to a formal hearing by the Appeal Commissioners and a date for the hearing has been fixed. Typically, with

more complex cases and with the passage of time and ongoing discussions between the parties and their legal advisors, the legal arguments and the nature of the evidence to be used in support of these arguments changes and becomes clearer.

3.1.2 A request for a 'statement of case' submission should be tailored to an individual appeal and should request a level of information that is appropriate for that appeal at the time of request.

It is important that a party copies the other party with the 'statement of case' submission when sending it to the TAC. It would be helpful if the TAC was to include, by way of a reminder, a direction to this effect in its request for a submission and a direction to the parties to indicate that they have done this when responding to the TAC request.

3.1.3 When requesting submissions, a TAC direction to the parties to copy the other party and indicate to the TAC that they have done so would be a useful reminder to the parties of their requirement to do this.

3.2 'Outline of arguments'

Revenue's understanding of the purpose of an 'outline of arguments' submission is to inform the TAC and the parties, at the time when a hearing is reasonably imminent, of the legal arguments that will be made by the parties at the hearing so that the TAC and the parties can be fully prepared for the hearing.

The general TAC approach appears to be to request the 'outline of arguments' submission as a matter of course shortly after a 'statement of case' submission has been received. In the context of its understanding of the purpose of this particular submission, Revenue's view is that such an approach is not appropriate for the following reasons:

- The determination of many matters may not involve any legal argument but be solely based on establishing the relevant facts. Depending on the matter being appealed, the 'statement of case' submission on its own may have already provided sufficient information to enable a hearing to proceed or for the Appeal Commissioners to make a determination without a hearing;
- In line with the point already made in relation to the early submission of a 'statement of case', an early request for an 'outline of arguments' submission does not sit well with the fact that most appeals are settled by agreement between the parties rather than by hearing and determination by the Appeal Commissioners;
- Depending on the complexity of a case, the preparation of an 'outline of arguments' submission can be difficult, time-consuming and costly, frequently requiring the specialist input of a barrister. It is desirable that such impositions be minimised by postponing the submission until such time as a

- hearing date is reasonably imminent. Indeed, the request for an 'outline of arguments' submission creates an expectation that a hearing is imminent;
- At an early stage of an appeal the parties may not be fully aware of the approach they will take or the legal arguments they will make at a hearing. Having to prepare a submission on this basis may result in those submissions having to be revised at a later stage.
 - Ideally, where a barrister has been engaged, the same person should be involved in the preparation of an 'outline of arguments' submission as would represent a party at a hearing. It can be difficult to secure a barrister's ongoing commitment to a case in the absence of an indication of a likely hearing date. This increases the likelihood of requests to the TAC for hearings to be re-scheduled.

3.2.1 'Outline of arguments' submissions should be requested only where sufficient information is not contained in the 'statement of case' submission and then only when a hearing is reasonably imminent.

It has happened in some cases that Revenue's 'outline of arguments' submission has been sent to the TAC and copied to the appellant before the appellant's submission has been sent to the TAC; for example, where Revenue is unaware that the appellant has not complied with the TAC timeframe for a submission. In keeping with the established principle that the burden of proof in a tax appeal rests with the appellant, and as happens in Courts proceedings, Revenue requests that the TAC ensure that an appellant does not have sight of Revenue's 'outline of arguments' submission before making his or her own submission.

3.2.2 The TAC should request and receive an appellant's 'outline of arguments' submission prior to releasing Revenue's submission.

3.3 Timeframe allowed for submissions

Revenue is cognisant of the need for the TAC to be in a position to schedule cases for hearing and to ensure that all of the required information to facilitate an efficient hearing (or, indeed, to dispense with a hearing) has been received, circulated and considered in advance. The number of outstanding appeals at any time would be an important determinant of the timeframes that could be allowed for the submission of information to the TAC. Revenue considers that the current situation would allow for a significant increase in the timeframe allowed for the submission of information to the TAC without compromising the TAC's ability to schedule hearings efficiently. It is imperative that any extended timeframes that might be introduced would not impact adversely on the TAC's scheduling of hearings. Of course, the situation should be kept under review and timeframes may need to be revised in line with any significant reduction in the number of outstanding appeals.

One of the questions asked by the TAC in its consultation document relates to the suitability of deadlines. The TAC has discretion about the time limit to be allowed for both the 'statement of case' and 'outline of arguments' submission, subject to the latter submission being requested at least 14 days before the date of a hearing. The general approach has been for the TAC to allow 28 days for both submissions as a matter of course. Such a short timeframe can prove restrictive in the case of the reasonably basic information required by a 'statement of case' submission, but is particularly acute in the case of an 'outline of arguments' submission which is a relatively complex submission, frequently requiring the engagement of a barrister. It has become common practice for both Revenue and appellants to request additional time for submissions, and the consideration shown by the TAC in granting these is appreciated. However, the process of making such requests can be an additional source of stress for appellants and Revenue staff and processing the requests is a further resource burden on the TAC. Revenue's view is that extending the initial 28 day timeframe can ameliorate the situation.

As a general approach, Revenue suggests that a period of 6 to 8 weeks be allowed following the making of an appeal before a 'statement of case' submission is requested (see section 3.1 above). In relation to the 'outline of arguments' submission, Revenue suggests that the TAC request this submission after a hearing date has been fixed and within the period of 8 to 12 weeks before the hearing.

A small matter but one that would improve clarity about the deadline for submissions to be sent to the TAC would be to specify the latest date for the receipt of submissions on the TAC request instead of, as currently happens, specifying a certain number of days from the date of the request.

3.3.1 As a general approach, a period of 6 to 8 weeks should be allowed before requesting a 'statement of case' submission. The TAC should request an 'outline of arguments' submission after a hearing date has been fixed and within the period of 8 to 12 weeks before the hearing. The actual date by which submissions should be received should be specified in the TAC request.

4. Miscellaneous matters

4.1 TAC case management powers

The TAC has been given the necessary powers to actively manage its cases, including the power to refuse to accept an invalid appeal or to dismiss appeals in certain circumstances, for example, where an appellant fails to comply with a TAC direction to provide a 'statement of case' submission or to appear at an appeal hearing. It is important that these powers are exercised at the earliest possible opportunity so that the available TAC resources can be directed to dealing with valid appeals and

compliant appellants. Expeditious use of these powers will enable the TAC to keep its outstanding caseload to a minimum.

4.1.1 The TAC should exercise the full range of its case management powers, including the dismissal of appeals, where appropriate and at the earliest possible opportunity.

4.2 Hearings

An appellant failing to appear at a scheduled hearing could have his or her appeal dismissed by the TAC. Because this is such a serious consequence, the TAC should ensure that appellants and Revenue officers are aware of a scheduled hearing date and are asked to confirm their availability in advance. Apart from the possibility of an appeal being dismissed, an important consideration is the need to maximise the use of available hearing dates and not create the potential for unnecessary postponements or adjournments.

4.2.1 The TAC should ensure that the parties are aware of a scheduled hearing date and that their attendance is confirmed in advance of the hearing.

When a postponement or adjournment of a scheduled hearing is requested, the TAC should ensure that a new or a resumption date is agreed before granting the request. While Revenue accepts that there will be valid reasons why an appellant may make such a request, the TAC should be mindful of the risk of deliberate delay.

4.2.2 The TAC should agree a new or a resumption date for a hearing before granting a request for a postponement or adjournment of an already scheduled hearing.

4.3 Appeal determinations

One of the questions posed by the TAC in its consultation document relates to the possibility of putting increased emphasis on previous determinations. In making a new determination, the TAC has a statutory basis (section 949AN TCA 1997) for taking a previous determination into account where it was made in respect of an appeal involving a common or related issue. This is an important efficiency measure and, subject to the TAC following the procedures designed to ensure fairness for an appellant, Revenue would very much support the full use of this power. The existence of a large number of outstanding appeals increases the possibility of there being multiple appeals involving common or related issues. The parties could be asked as part of a request for a 'statement of case' submission if they consider an appeal to be one to which this approach could be taken.

4.3.1 In making a new determination, the TAC should use its power to take previous determinations into account in relation to appeals involving common or related issues.

While Revenue appreciates that some determinations are more complex than others, it has noted significant variations in the length of the period between the hearing of an appeal and the making of a determination. Following the hearing of an appeal, it would be helpful to both appellants and Revenue if the TAC would provide an indicative timeframe as to when a determination could be expected.

4.3.2 Following the hearing of an appeal, the TAC should provide an indicative timeframe as to when a determination could be expected.

In relation to the transmission of determinations to appellants and to Revenue, and in view of the tight timeframe for requesting the Appeal Commissioners to state and sign a case for the opinion of the High Court, it would be helpful if, instead of or in addition to the hard copy of the determination, the TAC was to send an electronic copy to the parties. It would also be helpful if additional persons, such as a central Revenue Appeals team, could be copied on an electronic transmission. This would reduce the risk of missing the deadline for the High Court 'case stated' because of possible postal delays and ensure that all of the relevant people were made aware of the determination at the same time.

4.3.3 The TAC should send an electronic copy of a determination to the parties, copying any additional relevant people on the transmission.

4.4 'Class actions'

One of the questions asked by the TAC in its consultation document relates to the scope for 'class actions' where the TAC has multiple appeals on the same or very similar matters. The TAC has discretion in relation to "consolidating or hearing together 2 or more appeals raising common or related issues" (section 949E(2) TCA 1997) and, as has already been referred to in section 4.3 above, to take previous determinations into account in determining appeals involving common or related issues. Revenue considers that such discretion can be applied to facilitate the more expeditious determination of certain related or similar appeals by way of a 'class action'.

Revenue's understanding of a 'class action' is where a single 'test case' would be selected from a group of similar or related appeals to be heard and determined, with the determination then being binding on all of the appellants in the particular group. Such a determination would typically relate to the substantive or core issue(s) involved in all of the appeals. There is a safeguard for an appellant in that he or she may make a case to the TAC that a 'class action' would not be appropriate for his or

her particular circumstances. However, the TAC has the final decision about whether or not to proceed by way of a 'class action'.

Given the current constraints on the time available for hearings, Revenue sees the TAC discretion to effectively dispense with individual hearings for all the members of a group, without undermining the fairness of the appeal process, as an important efficiency measure. Revenue is aware of several 'groups' of appellants where a 'class action' approach might be appropriate and has brought these to the TAC's attention when transmitting the backlog of appeals that pre-dated the establishment of the TAC.

Revenue considers the potential for using 'test cases' and 'class actions' to be a particularly important TAC power in the context of the modus operandi of certain tax avoidance schemes whereby appellants typically seek to postpone a determination for as long as possible. Individual appellants in a group would request separate hearings even though the same substantive or core matter would be considered at each hearing. **However, it is important to state that the TAC's 'class action' discretion can usefully be applied in a variety of circumstances (including where requested by appellants) and its application per se should in no way be construed as indicating that the particular appeal involves an alleged tax avoidance scheme.**

4.4.1 The TAC should use its powers to deal with multiple appeals involving common or related matters by way of a 'class action' where appropriate.

5. Other matters raised by the TAC

This section addresses those matters raised by the TAC in its consultation document that are not otherwise addressed in this submission.

5.1 Mediation

Revenue is not clear on what's intended by the question on further scope for mediation. Revenue's understanding of mediation, or alternative dispute resolution, in a tax dispute context is that it takes place outside of a formal appeals forum such as the TAC. In the sense that most appeals are settled by agreement between the parties rather than by being determined by the Appeal Commissioners, an informal type of mediation is already a well established practice. It is important that such settlement discussions be allowed to continue. Appeals should be actively managed by the TAC, but an appropriate level of flexibility needs to be afforded to each appeal to facilitate meaningful settlement discussions between the parties. One way of doing this is for the TAC to allow sufficient time for settlement discussions following

the making of an appeal before requesting submissions, as has been proposed in section 3.1 above.

5.1.1 Appeals should be actively managed by the TAC, but an appropriate level of flexibility needs to be afforded to each appeal to facilitate meaningful settlement discussions between the parties.

5.2 Electronic documents and systems

Revenue has long been a proponent of doing business electronically whenever possible. Electronic channels are currently used to respond to new appeal notifications and to submit information to the TAC. Revenue intends to continue working with the TAC in developing efficient systems for electronic communication between both offices.

See section 4.3 above in relation to the electronic transmission of determinations.

5.2.1 Revenue and the TAC should continue to work together to develop efficient systems for electronic communication between both offices.

5.3 Costs

In relation to costs, Revenue would support the use of telecommunications/video conferencing to limit the costs of attendance at hearings. This would be particularly important where appellants, their agents and relevant Revenue officers are based outside of Dublin. Even without the use of such technology, any move away from regional hearings would impose additional costs on attendees. The TAC might consider, as happens in the Courts, the setting aside of certain weeks in a year for dedicated hearings outside of Dublin.

5.3.1 Use such facilities as telecommunications/video conferencing to address the costs of attendance at Dublin hearings. Set aside certain weeks in a year for dedicated hearings outside of Dublin.

Appendix - Summary of the Revenue proposals

2.1.1 The TAC should continue to notify Revenue of all new appeals as soon as practicable after they are received.

2.1.2 Where a large number of similar or same issue appeals are made to the TAC around the same time, Revenue will accept notification by way of a list of all appellants involved where this has been agreed with the TAC.

2.2.1 The TAC should reject any appeal that is not valid at the earliest opportunity. Where the matter of validity is not immediately certain, the TAC should indicate the reason why the matter is to be considered further and provide an indicative timeframe for making a decision on the acceptance or refusal of the appeal.

3.1.1 As a general rule, the TAC should allow a reasonable amount of time following the making of an appeal before requesting a 'statement of case' submission. A period of 6 to 8 weeks is suggested as being reasonable. However, such a period should be flexible and be adapted to the particular circumstances of an appeal.

3.1.2 A request for a 'statement of case' submission should be tailored to an individual appeal and should request a level of information that is appropriate for that appeal at the time of request.

3.1.3 When requesting submissions, a TAC direction to the parties to copy the other party and indicate to the TAC that they have done so would be a useful reminder to the parties of their requirement to do this.

3.2.1 'Outline of arguments' submissions should be requested only where sufficient information is not contained in the 'statement of case' submission and then only when a hearing is reasonably imminent.

3.2.2 The TAC should request and receive an appellant's 'outline of arguments' submission prior to releasing Revenue's submission.

3.3.1 As a general approach, a period of 6 to 8 weeks should be allowed before requesting a 'statement of case' submission. The TAC should request an 'outline of arguments' submission after a hearing date has been fixed and within the period of 8 to 12 weeks before the hearing. The actual date by which submissions should be received should be specified in the TAC request.

4.1.1 The TAC should exercise the full range of its case management powers, including the dismissal of appeals, where appropriate and at the earliest possible opportunity.

4.2.1 The TAC should ensure that the parties are aware of a scheduled hearing date and that their attendance is confirmed in advance of the hearing.

4.2.2 The TAC should agree a new or a resumption date for a hearing before granting a request for a postponement or adjournment of an already scheduled hearing.

4.3.1 In making a new determination, the TAC should use its power to take previous determinations into account in relation to appeals involving common or related issues.

4.3.2 Following the hearing of an appeal, the TAC should provide an indicative timeframe as to when a determination could be expected.

4.3.3 The TAC should send an electronic copy of a determination to the parties, copying any additional relevant people on the transmission.

4.4.1 The TAC should use its powers to deal with multiple appeals involving common or related matters by way of a 'class action' where appropriate.

5.1.1 Appeals should be actively managed by the TAC, but an appropriate level of flexibility needs to be afforded to each appeal to facilitate meaningful settlement discussions between the parties.

5.2.1 Revenue and the TAC should continue to work together to develop efficient systems for electronic communication between both offices.

5.3.1 The TAC should use such facilities as telecommunications/video conferencing to address the costs of attendance at Dublin hearings and should set aside certain weeks in a year for dedicated hearings outside of Dublin.