

Our Ref BFD

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**Sent via email: [procedures@taxappeals.ie](mailto:procedures@taxappeals.ie)**

Public Consultation  
Tax Appeals Commission  
Floor 8, Fitzwilton  
Wilton Terrace  
Dublin 2  
D02 FX04

## **Tax Appeals Commission Public Consultation**

Dear Sirs

We refer to the public consultation paper "Rules and Procedures of the Tax Appeals Commission" ("TAC") dated 4 September 2017. We wish to make the following comments on aspects of the consultation paper.

### **2.1 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?*

We note from the TAC's Annual Report 2016 that in 2016 (i) 42% of new appeals were settled, (ii) 11% were withdrawn, and (iii) 9% were either not accepted or the taxpayer failed to attend the hearing. If 2016 is indicative this means that 62% of new appeals each year will not be heard by the TAC. Whilst we can see the benefits of mediation it would not expedite the process (it would lengthen it) if the decision of the mediator was not accepted. It should also be pointed out that it may be worth exhausting the Revenue's internal and external review processes before embarking on tax litigation. The external reviewer is akin to a mediator in such disputes that are brought to his/her attention. It is not clear how widely the Revenue's external review process is availed of but it could have the ability to reduce the number of tax appeals taken thereby reducing the TAC's workload.

Sometimes it is obvious that a tax appeal will not be settled. Other times it is less obvious. It would be helpful if there was more transparency around the parameters in which Revenue would be minded to settle a tax appeal before a TAC hearing. In Revenue audit situations settlement offers by taxpayers require the approval of Revenue Senior Management and / or the Revenue Commissioners. Thus, it is almost always the case that the Revenue officer that deals with the tax appeal will have to refer the matter to a Revenue Senior Manager who may have to refer it to a higher level. Thus it would appear that Revenue's procedures for settling tax cases is cumbersome and time consuming.

*b. Is there scope for increased emphasis on previous determinations?*

We believe there is notwithstanding that the TAC is not a court of law and therefore does not produce determinations of precedential value. Taxpayers and practitioners take note of each determination of the TAC that is published and rightly or wrongly the determinations will inform the decision on whether to litigate. Taxpayers will also carry out a "cost benefit" analysis before embarking on tax litigation. Very few determinations under the old appeals system were published with the result that the only party that knew of the outcome of these cases was Revenue. Under the new appeals system the TAC is now obliged to publish its determinations within a certain time period. As determinations are published it will give taxpayers and practitioners an idea of the issues dealt with and determined by the TAC which then can be taken into account when considering embarking on tax litigation.

It should be noted that an Appal Commissioner has power under Section 949AN TCA 1997 to have regard to a previous determination made by them in respect of an appeal that raised "common or related issues" and determine an appeal without holding a hearing.

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

We believe there is notwithstanding that all taxpayers have a right to have their cases heard and that all such cases may not be the same. That said many tax cases may very well deal with the same issues and set of circumstances – take for instance tax investor schemes where taxpayers claim tax deductions against income in respect of qualifying expenditure. We do not see why such cases could not be dealt with together or by way of a test case. Indeed under the old system Revenue would often make a practitioner aware that a similar case to their clients was being litigated (either in the Appeal Commission or in the High Court) and certainly the view was that the outcome of that case would inform the decision as to whether to proceed with tax litigation.

## **2.4 Costs of the process to applicants**

*a. Are the costs generally too onerous?*

Generally all litigation is expensive (a so called "necessary evil" in some cases) and once a taxpayer enters the process they should appreciate that a decision by the TAC in favour of a taxpayer may not be the end of the matter because Revenue could appeal the determination to the High Court. Thus a taxpayer wishing to continue in the litigation process runs the double risk of the High Court ruling and/or awarding High Court costs against the taxpayer. In such a scenario if a taxpayer wishes to continue the tax litigation he/she would then have to fund the cost of an appeal to the Court of Appeal.

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

We believe so. Certainly if witnesses can give evidence remotely (or as mentioned below by way of written statements) this should reduce costs and minimise inconvenience.

To reduce costs and the length of hearings, written witness statements should become the normal practice and accepted by TAC. Revenue at times insist that witnesses give evidence in person at the hearing. This has cost implications for the taxpayer, may be inconvenient for the witness and lengthens the hearing. Revenue's objection is that the statement/evidence is not given under oath and that Revenue will not have the opportunity to cross examine the witness. If the TAC is truly to be an informal setting then written statements should be accepted unless they are clearly inaccurate.

In cases where expert witnesses are being relied upon, the other side should be made aware that an expert will be called and also what that expert will say (expert reports should be shared) thereby giving the other side an opportunity to consider the expert's opinion and produce its own expert witness, if necessary.

We note that under Section 949AC TCA 1997 the Appeal Commissioner may allow evidence to be given orally or in writing. The Appeal Commissioner may also admit evidence whether or not the evidence would be admissible in an Irish court. Under Section 949AD TCA 1997 the Appeal Commissioner "may require" any person who gives evidence to swear an oath in relation to the evidence; thus it is possible to give evidence without swearing an oath.

## 2.5 Other Considerations

a. *Publication of list of tax appeals remaining to be considered.*

We think this would be helpful. Clearly the name of the Appellant should be redacted in cases where the taxpayer has requested that the case is dealt with in private. We would suggest that the TAC reference number should only be published together with details of how long the parties have indicated the hearing is likely to take. In addition perhaps details of average times between filing of an appeal and the hearing of the appeal by the Appeal Commissioners could be published each year in the TAC annual report. Such details should help practitioners give a reasonably accurate estimate of the timeframe for a case before the TAC to be heard.

Yours sincerely

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*Sent by email and accordingly bears no signatures*

Martin Phelan

Brian Duffy

Direct Dial: +353 -1- 639 5138  
E-Mail: [martin.phelan@williamfry.com](mailto:martin.phelan@williamfry.com)

Direct Dial: +353 -1- 639 5156  
E-Mail: [brian.duffy@williamfry.com](mailto:brian.duffy@williamfry.com)

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