Irish Tax Institute

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Fiscal Policy Division
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12 March 2015

Dear Sir

Re: Heads of Finance (Tax Appeals Commission) Bill 2015

The Irish Tax Institute welcomes the opportunity to provide further comment on the Heads of Finance (Tax Appeals Commission) Bill. This input follows earlier work we have undertaken on the appeals issue:

- The detailed research paper we submitted in 2008.
- Our response to the Public Consultation process in January 2014; and
- The appearance of our Tax Policy Director, Cora O'Brien at the Joint Oireachtas Committee on Finance, Public Expenditure and Reform on 27 January 2015.

Reform of the tax appeals system has been a key priority for the Institute for the past 10 years and we fully support the Minister's objective to enhance the regime so as to provide greater transparency and certainty for taxpayers in a cost-effective manner.

The Institute's key comments on the Heads of Bill

There are a number of very positive aspects to the Heads of Bill, most notably the requirement for publication of reasoned determinations, new transparent procedures for appointment and tenure of the Appeal Commissioners, a better framework for progressing a case to the High Court and the proposals to publish an Annual Report on Tax Appeals. All of these changes will help ensure the more effective operation of the appeals regime.

However, there are important measures included in the Heads of Bill that we believe require some further consideration.

1. The ending of the "in camera" rule, with proposals that all appeal hearings be held in public.
2. The removal of the taxpayer's right to have the facts of their case re-heard at the Circuit Court.
3. The need for clarity to be provided by the Revenue Commissioners (Revenue) at the time when the assessment is issued.
4. The importance of transitional arrangements.

Each of these issues are addressed in our comments in the following pages.

There are also separate observations on a number of other specific clauses in the Heads of Bill.

1. The ending of the "in camera" rule, with proposals that all appeal hearings be held in public – Section 949Y

The Institute believes that the removal of the "in camera" rule will have a negative impact on the rights of Irish taxpayers and their access to the administration of justice.

a) Public appeal cases can jeopardise the principle of taxpayer confidentiality

Taxpayer confidentiality is enshrined in Irish tax legislation[1], administration[2] and legal practice[3] and has been at the heart of our tax regime for over 50 years. Taking a case to appeal is simply an extension of this process, whereby an independent arbiter (namely the Appeal Commissioner) is seeking to determine the facts of the matter before it enters the court process.

The tax appeals system is not a court of law (which, quite properly, must be held in public). It is a fact finding tribunal and until those facts are determined and the case moves into the courts, the taxpayer is entitled to have their affairs dealt with confidentially. In hearing an appeal, the Commissioners are exercising an administrative function. They are adjudicating on the quantum of tax due by the taxpayer; they are not addressing the interpretation of a point of law, which would have wider application and public interest.

b) The principle of confidentiality has served the tax system well to date

Confidentiality underpins our regime of voluntary compliance and has been a fundamental pillar of a successful Irish tax administration system. Tax compliance rates are amongst the highest internationally, at up to 99% for large businesses and 83% for smaller taxpayers. Whilst taxpayers may not always agree with Revenue's view on an issue, there is widespread confidence within the taxpaying community that their confidentiality will be respected when dealing with Revenue to resolve an issue. This understanding has been a significant contributory factor in achieving our high rates of voluntary compliance.

We risk undoing a regime that is working very effectively by changing the rules on taxpayer confidentiality.

c) Transparency can be achieved without holding public hearings

The Institute fully endorses the principle that our tax appeals regime should be open and transparent. However transparency can be achieved by publishing details of determinations by the Appeal Commissioners, with the taxpayer names simply redacted. The taxpayer does not have to be personally identified either in a public hearing or in a written determination in order to achieve transparency. The extract below from the contribution of Appeal Commissioner John O'Callaghan to the Joint Committee on Finance, Public Expenditure and Reform (25 February 2015), demonstrates this point.

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[1] Section 851A Tax Consolidation Act 1997,

[2] Revenue's Customer Service Charter

[3] The rules of procedure for the Appeal Commissioners and Circuit Court

"Vice Chairman – Is there any reason the Office of the Appeals Commissioners could not be given additional resources and make its determinations in writing but with the names redacted so that they cannot be identified?

Mr. John O'Callaghan – None whatsoever.
Vice Chairman – There is no reason it could not be done.

Mr. John O'Callaghan – Precisely.

Vice Chairman – With additional resources the Office of the Appeals Commissioners could give the kind of public information we appear to want to have without getting into the issue of public hearings in the main.

Mr John O'Callaghan – Absolutely, yes"

d) Public hearings have a greater deterrent effect in small countries

In their submission to the consultation on Appeals Reform, Revenue sought the hearing of cases in public as being in line with best international practice: in particular, they cited the UK tribunal regime as a model.

However, there is mixed experience internationally as to whether hearings are held in public. New Zealand is a country with a similar sized population to Ireland and their hearings are held privately. A small society such as Ireland is no bigger than a large UK city and the two countries cannot be compared on this issue - the context for holding hearings in public is totally different.

In smaller societies the prospect of being named in any proceedings with Revenue has a much greater deterrent for taxpayers. The issue here is not the number of taxpayers who actually end up taking an appeal and having their identities published – it is the number who will be deterred from doing so because of the potential impact on their business and personal reputation in a small community.

e) There is a real risk that taxpayers who take an appeal case will be treated as "wrongdoers"

When a taxpayer takes a case to appeal, they are exercising their legal right to disagree with an assessment that Revenue has raised and to have the facts determined by an independent Appeal Commissioner. If the taxpayer disagrees with the technical basis for Revenue's assessment, their only option is to go to appeal on the matter. They have not committed any wrong-doing. However, there is a public perception that having legitimate tax arguments] with Revenue means you have done something wrong. Perhaps this is our legacy of 20 years reporting on the Tax Defaulter's List or the public debate on tax avoidance versus tax evasion that is ongoing at the moment.

Whatever the reason, there is huge scope for public misunderstanding of what a tax appeal is and what it is not. If tax appeals are held in a public forum this will attract media attention and such public analysis of the taxpayer's business affairs will undoubtedly (and unfairly) lead to difficulty for them.

f) The publication of sensitive information could damage a taxpayer's legitimate business

Holding tax cases in public will mean that all aspects of a taxpayer's sensitive, commercial and financial affairs would be in the public domain at appeal hearings accessible to their competitors, suppliers, creditors and customers. This could have serious implications for a person's business and for their professional reputation. A key supplier or creditor could withhold credit if they become aware that a customer has outstanding debts; the disclosure of commercially sensitive information may detrimentally impact the businesses future prospects.

Section 949Y of the Heads of Bill allows the Appeal Commissioners to give direction that a hearing be held "in-camera". However, subsection (3) goes on to specifically exclude confidentiality of tax, financial and business affairs as grounds for a private hearing at the Appeals Commissioners discretion. The proposed exception to the public hearing rule is therefore of very limited application in practice. The extract below from the contribution of Appeal Commissioner John O'Callaghan to the Joint Committee on Finance, Public Expenditure and Reform (25 February 2015), demonstrates this point;

"Mr. John O'Callaghan - Many people in various business, commercial or personal situations would feel that their financial circumstances are particularly sensitive and would want their appeals to heard in camera. This [being Section 949Y – requiring hearings to be held in public] would prevent it from happening. Maybe it is the way to go. Many people would have a view on it."

In addition to the limitation above, it is also noteworthy that Irish and international media would seem not to be subject to any similar restriction from identifying either the taxpayer or the commercially sensitive information considered at the Appeal. Therefore, the holding of hearings in public with unlimited rights of reporting, renders meaningless the restrictions placed upon the Appeal Commissioners when making their own decisions public.

g) The "in camera" rule was not included in the public consultation that took place in 2014

Removing the "in camera" rule would be a very significant change to the appeals regime – in fact, it would be one of the most significant elements of any reform. Notwithstanding this fact, there was no mention of such a change in the Public Consultation document issued last October. The matter was therefore not brought to the public's attention as one of the measures being considered for reform and yet it has now been included in the Heads of Bill. This is a matter of real concern to the Institute in the context of a legitimate consultation process.

Taking all of these concerns into account, the Institute has no doubt that the removal of the "in-camera rule" will deter taxpayers from exercising their right to appeal Revenue assessments that are excessive. In particular, it could act to disenfranchise those taxpayers who use and need the appeals system most, i.e. small to medium sized business taxpayers.

2. Removal of the taxpayer's right to a re-hearing at the Circuit Court – Section 949AM

Section 949AM provides that either party to the appeal (the taxpayer or Revenue) can only appeal a determination of the Appeal Commissioners to the High Court. The existing right that taxpayers have to a rehearing of the facts at the Circuit Court is thus being removed as part of this reform process. The removal of this right (combined with the prospect of hearings being played out in the public arena) compounds the deterrent for taxpayers of taking an appeal. The Institute believes that the option of a re-hearing at the Circuit court should be open to both the taxpayer and Revenue.

A tax appeal is a difficult and costly step for a taxpayer to take. In most cases they have to incur time, resources and professional fees to engage in the appeals process, without any certainty of success. It is certainly not a route that is embarked upon by taxpayers in a frivolous manner.

One of the stated objectives of the appeals regime upon its establishment was to provide ease of accessibility for taxpayers. A taxpayer may represent themselves before the Appeal Commissioners without legal counsel or professional assistance and approximately 10% of taxpayers avail of this option. Removing the right of re-hearing at the Circuit Court increases the pressure on all taxpayers to incur additional costs in engaging professional expertise, even in straightforward cases.

The only avenue open to a taxpayer dissatisfied with a decision of the Appeals Commissioners will now be an appeal to the High Court on a point of law. High Court costs are beyond the means of all but the wealthiest of taxpayers. It is estimated that the minimum costs that a taxpayer must budget for in taking a case to the High Court is €100,000 and this makes such an option inaccessible to most Irish businesses and individuals. Revenue's right to appeal a decision to the Circuit Court, while limited, will also be impacted by the changes proposed. This will potentially increase the costs to the Exchequer of engaging in the appeals process.

A taxpayer will now have to weigh up a range of business risks, reputational risks and compliance costs in deciding whether to even enter the first stage of the appeals process. In many cases taxpayers will determine that the risks/costs outweigh the benefits and will waive their right to appeal even when they are certain that Revenue's assessment in incorrect.

In the interests of improving the efficiency of the appeals regime we believe there is merit in appointing several Circuit Court judges with a specific expertise in tax. Their remit would be solely tax cases. Proceedings could be centralised through the Dublin Circuit Court. This proposal would of course require discussion with the Courts service. This would facilitate an appropriate through-put of cases in a prompt manner.

3. The need for clarity to be provided by Revenue at the time when the assessment is issued

Section 949Q of the Heads of Bill deals with the provision of information in relation to the matter under appeal. However, the Institute believes that the obligation to provide information on the matter under appeal rests with Revenue in the first instance, at the outset of the appeals process i.e. when the assessment is issued by them.

Under the current assessment and appeals regime, it is very difficult for the taxpayer to make an informed decision about whether to appeal an assessment because they generally have limited information on Revenue's grounds for making the assessment. This is a matter of fundamental importance that needs to be addressed as part of this reform of the Tax Appeals regime.

Section 959AJ of the Taxes Consolidation Act 1997 requires a taxpayer to outline:

a) each amount or matter in the assessment with which the taxpayer is aggrieved and
b) detailed grounds for the appeal on each matter or amount.

when they are lodging a Notice to Appeal. There is no corresponding obligation on Revenue to provide information as to why the assessment was raised in the first place and how the tax sought in the assessment was calculated. We are aware of quite a number of actual cases where taxpayers have not been informed of Revenue's legal grounds and reasoning for the issue of an assessment until the time when Revenue serve their legal submissions in the weeks leading up to the hearing of the appeal itself. This places taxpayers in the impossible position of first deciding whether they should incur the time and expense in appealing a decision which has been made on an undisclosed basis and second preparing for an appeal when they do not know precisely why and what they are appealing.

It is critical that sufficient information is provided to the taxpayer at the beginning of the process to enable him/her to comment on the basis of the assessment and prepare a response. This is particularly important as the onus of proof falls on the taxpayer to prove that the Revenue assessment is excessive.

Since the Supreme Court decision in Mallak v Minister for Justice[4], there can be no doubt but that, there is an administrative law obligation upon Revenue to provide reasons for their decisions and that Revenue is subject to such an obligation. In Mallak, the Supreme Court held that:

"… The developing jurisprudence of our own courts provides compelling evidence that, at this point, it must be unusual for a decision maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reasons, it is simply not possible for the applicant to make a judgment as to whether he has a ground for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. At the very least, the decision maker must be able to justify the refusal."

Section 18 of the Freedom of Information Act 1997, Article 296 of the Treaty on the Functioning of the European Union (FFEU) and Article 41 of the EU Charter of Fundamental Rights also provide that every person shall benefit from the right to good administration, which includes the obligation of the administration to give reasons for its decisions.

[4] [2012] 3 IR 297

In the equivalent UK tax tribunals, HMRC have 60[5] days to provide a statement of their case to the taxpayer or their adviser, once an appeal is lodged. This time limit applies in both standard and complex cases. HMRC must outline their technical arguments and the points they intend to make to prove their case. The taxpayer then has 42 days to respond to this statement outlining their counter arguments and the relevant facts to refute Revenue's position. These statements are provided to the Tax Tribunal judge and allow the parties to clearly define the matters in dispute at an early stage in the litigation process. An extract from the relevant tribunal procedures is included in the appendix below.

In the Irish regime, there is currently little clarity on the basis for many assessments that are issued. Not only does this mean that taxpayers are in the dark when considering whether to appeal an assessment, but it also creates inefficiencies in the system in respect of delays and in respect of the lodging of appeals that may be inappropriate and could be settled by agreement.

In our view, the Taxes Consolidation Act should be amended so that Revenue is required to issue a full Statement of Reasons to accompany any assessment issued. This Statement of Reasons should clearly outline the basis for the assessment, for example.

- the facts as Revenue understand them
- the relevant statutory provisions and case law upon which Revenue rely,
- Revenue's application of the statutory provisions and case law to the facts
- the basis for their computed assessment.

This early clarity would assist the taxpayer in making an informed decision about whether to appeal the assessment. It would also improve the appeals process by reducing delays in a case reaching appeal and reducing the requirement for additional information to be provided by either party under S949Q. All parties would have a better and earlier understanding of the matters under dispute.

While the Bill seeks to introduce better and welcome structure and formality, it will diminish taxpayers' rights further unless these are coupled with a statutory obligation on the part of Revenue to provide written reasons for any assessment issued.

[5] Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

4. Transitional issues to consider in moving to a new regime

Given the scale of the intended reforms to the appeals system, it is critical that a number of important transitional issues are carefully managed and that the transitional process is discussed and agreed with the existing Appeal Commissioners in advance.

Some examples of transitional issues would include the following:

- If (for whatever reason), either or both of the existing two Appeal Commissioners are not appointed under this new legislation, then a number of Cases Stated to the High Court will remain unsigned, giving rise to complex legal issues arising out of the fact that it is only the person who heard the appeal who has jurisdiction to sign the case stated. To provide for this eventuality, a fixed timeframe for the signing of open cases by the incumbent commissioners should be included in the Bill. We suggest a period of one year.

- If the intention is to make reports of determinations given in the past by the Appeal Commissioners publicly available, this will require planning and resources. Such a programme of publication could be phased in over a period of time and would help to address the lack of transparency that has arisen to date.

- Care will need to be taken generally over transitional arrangements for cases already at some stage in the appeals process.

5. Other issues in the Heads of Bill

Appeals raising common or related issues - Section 949F

Section 949F allows the Appeal Commissioners to consolidate the hearing of two or more appeals on common or related issues. Section 949AK enables an appeal to be determined without a hearing where the Appeal Commissioners consider that a determination has already been made in an appeal concerning common issues.

While it is correct that some cases may concern similar issues, it is very seldom that they would have identical fact patterns. A taxpayer is typically unaware of the fact patterns or the arguments to be advanced in relation to any other taxpayer's case.

In the interests of fair procedure, each taxpayer should prima facie have the right to have their case heard and determined on its own merits. However, it there should be provision to make it possible to consolidate the hearings in the event that both taxpayers agree to this.

The Jurisdiction of the Appeal Commissioners

The jurisdiction of the Appeal Commissioners is currently limited to an adjudication on the quantum of tax due. As explained in our response to the Public Consultation, we believe there is merit in extending this remit as recommended by the Revenue Powers Group. [6]

Under these recommendations, the jurisdiction of the Appeal Commissioners would be extended to allow for appeals on:

- The categorisation of penalties,
- The level of interest sought by Revenue,
- The facts defining a voluntary (qualifying) disclosure,
- The issue of whether Revenue has the right in law to seek particular information sought,
- Breach of proposed statutory time limits on audit or request to stay an audit, and
- Unreasonable disruption to business from removal of records and equipment.

Refusal to accept an appeal

Section 949N outlines the Appeal Commissioners' right to refuse an appeal. Section 949N(1) includes grounds for refusal where the Appeal Commissioners are satisfied that the appeal is "without substance or foundation".

In the absence of hearing the facts of a case in full, it would be inappropriate to pre-determine the substance of the case and refuse a taxpayer access to the appeals process on these grounds. This is particularly important as the Appeal Commissioner's decision to refuse an appeal is "final and conclusive" under S949N(3).

The grounds for refusal of an appeal should be limited only to cases where an appeal does not meet the requirement for a valid appeal under S949J, i.e. it does not relate to an appealable matter or the conditions required by the Act are not satisfied.

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[6] Revenue Powers Group Report to the Minister for Finance, November 2003

Determinations

We have a number of observations on the procedures for issuing determinations:

Taxpayer confidentiality

We welcome the confirmation in 949AL that determinations will be published online. Free and timely access is critical to ensuring greater transparency in the process. We would like to see 949AL(4) amended to reflect our concerns outlined in detail above about taxpayer confidentiality. The identity of parties to the case should be redacted in **all determinations**, and not just the very limited number that are permitted to be held in camera under Section 949Y, as it is currently drafted.

Timely publication

We welcome the clarity provided in Section 949AF and Section 949AH that the Appeal Commissioners must issue written determinations in all cases. This is central to improving the transparency of the appeals regime. The legislation refers to the issuance of determinations as soon as it "is practicable". In the interests of certainty for a taxpayer it would be helpful if a written determination could be issued within 6 months of the hearing of an appeal.

Timeframe to lodge an appeal

Section 949AM (3)(b) outlines the right to appeal a determination where a notice is lodged within 21 days of the notification of the determination. We suggest that this 21 day period should commence on the date of receipt of the notification, otherwise the deadline could expire (or be close to expiration) before the written determination is actually received.

Appealing a decision to the Court of Appeal

It appears that the reference in S949AP to appealing a decision to the Supreme Court should refer to an appeal to the Court of Appeal.

Separate forum for small cases

S949H notes that the Appeal Commissioners shall endeavour to conduct proceedings in an informal, flexible manner proportionate to the complexity of the matter under appeal.

As outlined in our previous submission on the reform process, it is the Institute's view that there is merit in establishing a separate forum for small cases, where the tax in dispute does not exceed €50,000. The introduction of such a regime would make the system more accessible to small business and similar small claims forums are available to taxpayers in a number of other countries internationally.

Resourcing a reformed appeals regime

The Heads of Bill expands considerably the range of duties and responsibilities of the Office of the Appeal Commissioners. Proper resourcing of the reformed regime will be critical to its success.

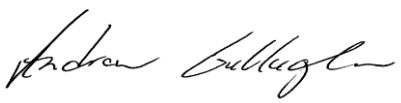
We welcome the fact that an Appeal Commissioner will now serve no more than 2 terms of office and suggest that each term be for a period of 7 years, rather than 5 years. This is comparable with the term of office for Secretaries Generals of Government Departments and other equivalent positions.

Tax law, in particular VAT law, has grown increasingly complex in recent years especially in light of the EU dimension. As such, we believe any new appointees should have strong background in tax or law. We would suggest that the minimum requirements for an appointee should be a professional qualification and 10 years' practical experience in law or tax.

The Heads of Bill includes proposals that will require related changes in the Taxes Consolidation Acts. The opportunity to review the Heads of Bill has been very useful and it would be of equal importance that there is adequate consultation on the proposed Finance Bill changes.

Should you wish to discuss any aspects of this submission please contact Cora O' Brien (01 6631719).

Yours sincerely,



Andrew Gallagher
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Appendix

The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273)

Extracts from Chapter 2 - Procedure after allocation of cases to categories

Respondent's statement of case

25.—(1) [A respondent must send or deliver a statement of case to the Tribunal, the appellant and any other respondent so that it is received—

(a) in a Default Paper case, within 42 days after the Tribunal sent the notice of appeal or a copy of the application notice or notice of reference;

(b) in an MP expenses case, within 28 days after the Tribunal sent the notice of appeal; or

(c) in a Standard or Complex case other than an MP expenses case, within 60 days after the Tribunal sent the notice of appeal or a copy of the application notice or notice of reference.]

(2) A statement of case must—

(a) in an appeal, state the legislative provision under which the decision under appeal was made; and

(b) set out the respondent's position in relation to the case.

(3) A statement of case may also contain a request that the case be dealt with at a hearing or without a hearing.

(4) If a respondent provides a statement of case to the Tribunal later than the time required by paragraph (1) or by any extension allowed under rule 5(3)(a) (power to extend time), the statement of case must include a request for an extension of time and the reason why the statement of case was not provided in time.

Further steps in a Standard or Complex case

27.—(1) This rule applies to Standard and Complex cases.

(2) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (or, where there is more than one respondent, the date of the final statement of case) each party must send or deliver to the Tribunal and to each other party a list of documents—

(a) of which the party providing the list has possession, the right to possession, or the right to take copies; and

(b) which the party providing the list intends to rely upon or produce in the proceedings. 15 (3) A party which has provided a list of documents under paragraph

(2) must allow each other party to inspect or take copies of the documents on the list (except any documents which are privileged).