



What To Know If Appealing A Tax Assessment

Introduction

There has been a marked increase in enquiries initiated by the Irish Revenue Commissioners (“**Irish Revenue**”) in recent years, with a resulting increase in the number of amended tax assessments being raised against taxpayers by Irish Revenue.

There are a number of reasons underpinning this increase in Irish Revenue activity, including:

- Irish Revenue has bolstered its resources, both in terms of headcount and technology / data analytics expertise and systems. This is most pronounced in the context of transfer pricing (“**TP**”) where Irish Revenue’s TP branch has significantly increased its resources in recent years;
- recent State aid investigations conducted by the European Commission have changed the audit environment and there is, in general, an increased focus on the tax affairs of multinationals; and
- legislative changes in response to developments at an OECD and EU level have led to increased complexity and uncertainty for many taxpayers thereby increasing the scope for Irish Revenue to initiate enquiries with respect to taxpayers’ affairs.

Against this prevailing backdrop, it is becoming increasingly important for in-house tax and legal teams to understand how to address Irish Revenue enquiries and to understand the process to be followed in challenging tax assessments.

In this briefing, we provide an overview of the primary considerations that taxpayers should bear in mind when appealing a tax assessment, together with a roadmap on the process that taxpayers can expect to encounter when pursuing an appeal to the Tax Appeals Commission (“**TAC**”).

Practical Considerations to Address When the Notice of Assessment Issues

The first substantive decision to be taken upon receipt of a disputed tax assessment relates to the appropriate strategy and forum for seeking redress. While an appeal before the TAC is the most usual avenue to seek redress, judicial review proceedings before the High Court seeking to have the tax assessment set aside may be more appropriate. In some cases proceedings at both TAC and the High Court may be initiated in parallel.

In making this decision and for the purposes of preparing a robust defence file, it is recommended that a taxpayer engage with their advisors at an early stage. The taxpayer should be cognisant of the benefit of legal professional privilege as advice provided by a lawyer in preparation or contemplation of litigation may benefit from privilege.

Where an appeal is being pursued before the TAC, the immediate action item is to prepare and lodge a Notice of Appeal with the TAC.

Section 959AF of the Taxes Consolidation Act 1997 (“**TCA**”) requires the Notice of Appeal to be submitted to the TAC within 30 days after the date of the notice of assessment. This timeline is strictly enforced with taxpayers being afforded little leeway in terms of extensions or delays. As a result, it is important that the taxpayer engage immediately regarding the tax assessment once issued by Irish Revenue.

While the Notice of Appeal is not a particularly detailed document, it is very important that a taxpayer pays particular attention to how their “grounds of appeal” are framed within the Notice of Appeal. The grounds need to be drafted with sufficient precision and detail to enable the TAC to clearly understand the grounds.

It is also important to note that while the default position is that TAC hearings are held in public, a taxpayer may request that some or all of the hearing of the case be held in private. Once requested, the TAC must accede to the request. Whilst previously the Notice of Appeal form gave the taxpayer the opportunity to request that the hearing of the appeal be conducted in private the TAC have recently simplified the Notice of Appeal form and it no longer contains this facility. Instead, the opportunity to request the hearing to be held in private will be dealt with as part of the Statement of Case process (set out below). That noted, it is still good practice for a taxpayer to make it clear when submitting the Notice of Appeal if it wants the hearing of the appeal to be conducted in private. The ability to conduct some or all of the hearing of a TAC case in private is a key advantage of the TAC process over the general court route, particularly given the commercial sensitivities that surround many tax disputes.

Whereas a TAC appeal is limited to considering the quantum of an assessment (including if the quantum should be zero), other legal issues in respect of an amended assessment may arise that are more appropriately dealt with through judicial review proceedings before the High Court. Although each case must be considered on its own facts, such issues could include whether the Irish Revenue official had the authority to raise the amended assessment or whether the amended assessment was raised in breach of administrative law principles. Where such issues arise to be determined then a taxpayer has three months from the date of the action giving rise to the claim (which will typically be the date Irish Revenue first notify the taxpayer of their decision to amend the assessment) to lodge judicial review proceedings in the High Court. Given the different deadlines for filing the Notice of Appeal with the TAC and judicial review proceedings in the High Court, in practice taxpayers may wish to lodge the Notice of Appeal with the TAC and seek to stay those proceedings pending the outcome of the judicial review. An important distinction between the TAC proceedings and judicial review proceedings is that the latter will be held in public.

The Statement of Case

Once the Notice of Appeal has been filed with the TAC and Irish Revenue have not objected to the appeal, the next step will normally be for the TAC to issue a direction requesting that the taxpayer provide a Statement of Case.

Unlike the Notice of Appeal, the timeline for submission of a Statement of Case can be more fluid and can vary depending on the case. Generally, it would be usual to have approximately 60 days from the date of receiving the TAC direction to prepare and file the Statement of Case.

In terms of content, the Statement of Case builds on the information provided in the Notice of Appeal and, in particular, generally includes more detail on the primary legal provisions underpinning the taxpayer’s challenge to the assessment. Therefore, it is good practice to specify the case-law and statutory provisions (including any EU provisions) that the taxpayer intends to rely on at the hearing of the case.

One of the most important practical aspects of the Statement of Case that taxpayers should be cognisant of is that when outlining the relevant facts of the case it allows the taxpayer to provide details of the witnesses it intends to call at hearing. The details of witnesses who may be called upon by the taxpayer to give evidence is something that may be specifically requested in the direction from the TAC requesting the Statement of Case but it is good practice to include this detail at this time in any event. This is because identifying witnesses at this stage helps ensure that the facts outlined in the Statement of Case are accurate and can be supported at hearing.

While there is no strict requirement to list the names of specific witnesses at this stage, a generic description of their role, for example, should be included. As such, taxpayers should, at an early stage of the process, identify what witnesses (if any) they want to call at hearing.

The identification of witnesses is linked to one of the most important roles of the TAC that can be overlooked by taxpayers. The TAC establishes the facts of a case and, once established, they will not generally be interfered with by a court in any subsequent appeal. As such, in preparing a case to go before the TAC it is very important that taxpayers and their advisors put the appropriate resources and time into properly preparing the case and getting the right facts on the record. Failure to do so could negatively impact on the TAC determination as well as any subsequent appeal.

Upon submitting its Statement of Case to the TAC, a taxpayer is statutorily obliged to share a copy of the filed Statement of Case and associated TAC direction with Irish Revenue.

Thereafter, Irish Revenue will provide their own Statement of Case which will generally be the first elaboration by Irish Revenue of their position since the issuance of the assessment.

Outline of Arguments

Following the submission of the Statement of Case, the TAC will write to both parties to request that an Outline of Arguments be delivered within a specified timeframe. The timeline can vary depending on the case.

The Outline of Arguments is the main written legal submission that the taxpayer will make to the TAC during the course of the dispute.

While TAC submissions (including the Outline of Arguments) may lack the formality of court documents, they are, in terms of detail, similar to briefs that are submitted in a general court context and, critically, underpin the points to be argued at the oral hearing.

Indeed, as the cases coming before the TAC have become more complex, the Outline of Arguments have similarly become increasingly detailed and can take a significant amount of time to prepare (something that should be factored in as part of messaging to internal stakeholders).

In many instances, the taxpayer will submit its Outline of Arguments first, and then Irish Revenue will be given a period of time to respond. The idea behind this approach is that Irish Revenue’s Outline of Arguments should be responsive to the document submitted by the taxpayer in line with the general burden of proof being on the taxpayer in TAC proceedings.

It should further be noted that, at this stage of the process, the TAC may also convene a case management conference to review how the appeal proceedings are progressing and give such directions as the TAC consider necessary or desirable for the purpose of securing the completion of the proceedings in an expeditious and fair manner.

Hearing

The TAC hearing itself can resemble a court process. Each side will present oral arguments and the relevant Appeal Commissioner will generally intervene with questions for both parties.

Where there are a number of witnesses involved, the hearing can traverse a number of days as both sides will have the opportunity to cross-examine the other’s witnesses. In the context of the Covid-19 pandemic, TAC cases are continuing to proceed, with remote hearings also taking place.

Conclusion of the TAC Process

There is no set timeline within which the TAC has to give its determination. It generally depends on the circumstances and, in particular, the complexity of the specific case.

In practice, some determinations have issued in as little as five weeks following the completion of the hearing. However, the delivery of other determinations has taken significantly longer.

An important point with respect to the TAC determination that taxpayers should be aware of is that once the determination is delivered by the TAC, it will be publicly available on the TAC website. This applies even where the hearing itself was held in private.

However, before the determination is made publicly available, the TAC will provide the determination to the parties and request that the parties provide any redactions which they believe should be made (eg, to protect commercially sensitive information that may be contained in the determination).

In practice, the TAC has been co-operative in trying to make sure that potentially identifying details within a decision are redacted before publication.

Appealing a TAC Determination

A party who is dissatisfied with a determination of the TAC may appeal the determination by requesting the relevant Appeal Commissioner to state and sign a case (ie, a case stated) on the opinion of the High Court. This request by the dissatisfied party is required to be submitted to the Appeal Commissioner within 21 days of being notified of the determination.

It is important to note that this right of appeal is restricted to situations where the dissatisfied party considers that the determination is erroneous on a point of law.

Subsequent appeals are also possible to the Court of Appeal and Supreme Court but again these are restricted to being on points of law only.

Conclusion

While the TAC process is not as formal as a general court process, there is, nonetheless, a significant volume of work involved in ensuring that preparation for a TAC appeal is properly managed from a procedural, technical and strategic perspective.

Therefore, from an early stage in the process, engaging with advisors to create a defence file and identifying key witnesses are important practical steps a taxpayer should take to help ensure the TAC process moves as quickly, smoothly and successfully as possible.