

Appeal Commissioners Reform Consultation
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Our Ref
GL / AF

Your Ref

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Dear Sirs

Reform of the Appeal System for Tax Matters

1 Introduction

We welcome the opportunity to make a submission on the proposed reform of the role, functions and structure of the Appeal Commissioners, a system with which we are very familiar. The tax department of Matheson is significantly the largest tax practice group amongst Irish law firms. We have a detailed knowledge of the current appeals system having represented a large number of clients on a vast array of tax issues. We set out below some views on the proposed reforms from the perspective of the taxpayer and the tax practitioner.

We believe that it is important to ensure a dialogue between those working in the tax system and policymakers. With this in mind, we continue our tradition of submitting proposals to make the Irish tax system less administratively burdensome and more streamlined.

We deal with each of the proposals below sequentially as they are set out in the consultation document issued on 16 October 2013. We also include a comment on an issue not raised in the consultation document.

At the outset, it is important to be cognizant that in the creation of any system of justice, the system must not only be fair but be perceived to be fair. With this in mind, we would suggest that it is vital that due to the quasi-judicial nature of the role of the Appeal Commissioners any reform should see responsibility for the oversight of the Office of the

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Appeal Commissioners in the hands of the Department of Justice rather than the Department of Finance. We set out below a number of comments in this regard.

2 **Structure of Appeal Commissioners**

2.1 *“Three Appeal Commissioners are appointed on a full time basis; they are not allowed to undertake work outside their Appeal Commissioner duties.”*

Of the four options outlined on the structure of the Appeal Commissioners, we believe that this is the most satisfactory. The permanent nature of the role should engender a consistent application of the law. We also welcome the requirement to have three Appeal Commissioners rather than the current two, as this should allow for a more streamlined and efficient appeals system.

In the move to a three Commissioner model we believe that one Commissioner, perhaps on a rotating basis, should be responsible for the administration of the Office including the allocation and scheduling of Appeal cases between the Commissioners.

2.2 *“A “Chairperson of the Commissioners” is appointed on a full time basis, who is not allowed to undertake work outside her/his official duties; along with a panel of suitably qualified persons, who will be paid on a per case basis and who are not restricted in undertaking outside work.”*

Whilst we believe that this is the second most attractive option, we believe that a panel of temporary officials comprising private sector tax professionals could pose problems for consistency, impartiality and potentially the elongation of proceedings. In particular we recognise and welcome the objective of seeking to ensure as far as reasonably possible that any new appeal system is constituted and operated on an independent basis. Where panellists are compensated based on an hourly or daily rate this may lead to a perception that a conflict of interest may arise regarding the scheduling and conclusion of appeals.

Again, a risk may arise regarding ‘acting’ Appeal Commissioners who are still engaged in the private sector on a full time basis where a perception may arise that such individuals may make decisions that they feel will benefit them or avoid causing difficulties for them in their private practice. Given the relatively small number of firms representing clients in hearings before the Appeal Commissioners, there is the possibility that competitor firms could be unfairly disadvantaged and subject to prejudice. At the very least, the perception of such prejudice could persist and it is vital that an appeals system is perceived to be fair.

2.3 *“A panel of suitably qualified persons to be appointed as Appeals Commissioners, who are not restricted in undertaking work outside the Appeals Commissioner duties, and who will be paid on a per case basis. Panel members will have no entitlement to sit on any particular case or number of cases.”*

While we welcome the per case basis of compensation and the fact that panel members would not be entitled to select their own cases, we feel that such a system would not be

acceptable for the same reasons of consistency and impartiality as outlined above. The absence of a permanent chairman could have a significant detrimental effect on the consistency of the application of the law in tax disputes.

- 2.4 *“Provision would be made for the appointment of temporary Appeal Commissioners if necessary for a short period or for a particular case or cases.”*

We believe that this is the least preferable option of the four, as such an ad hoc system would be most likely to have an adverse effect on the functioning of the Office of the Appeal Commissioners.

- 2.5 *“Consideration may be given to changing the name of the body (for example, to “Tax Appeals Board”, “Tax Appeals Tribunal”).”*

While we do not have a strong view on the change in the name, we believe that a name such as the “Tax Appeals Tribunal” would be preferable given that the word “Commissioners” is often perceived by taxpayers to be suggestive of a connection with the Revenue Commissioners.

3 Establishment and operation of the Appeal Commissioners

- 3.1 *“The Appeal Commissioners will be established on a statutory basis in a manner which guarantees their independence in relation to the Tax and Customs Acts.”*

We are in agreement with this proposal. In particular see our comments at 2.2 to 2.4 above.

- 3.2 *“The Appeal Commissioners will manage the tax appeal process in a manner which is separate from Revenue.”*

We are in agreement with this proposal.

- 3.3 *“The Office of the Appeal Commissioners should have full independence and be responsible for its own staffing, IT systems, administration, listing of appeals and all related matters.”*

We are in agreement with this proposal. Under the current system, the Appeal Commissioners rely on the Office of the Revenue Commissioners for most of their information technology and staff members of the Office of the Appeal Commissioners use the same domain, “@revenue.ie” as other Revenue employees. Further Revenue have sole access to the forms AH1 and AS1 which frame the terms of the dispute and record the result respectively. Currently, it is the Revenue Commissioners who have carriage of the case in terms of notifying the Office of the Appeal Commissioners of the appeal. This is what has been referred to as the “*institutional overlap*” in the Law Reform Commission report on *A Fiscal Prosecutor and the Revenue Court (2004)*. While this may have been

an administrative necessity, it has caused concerns with regard to the perception of impartiality in the Office of the Appeal Commissioners.

For this reason we would further suggest that for future appeals the taxpayer should be required to give notice of appeal simultaneously to both the Revenue Commissioners and the Appeal Commissioner and thereafter the Appeal Commissioner should communicate simultaneously with both parties on all matters.

- 3.4 *“As at present, one of the Commissioners will be appointed by the Minister for Finance to be the Accounting Officer for the Vote.”*

In order to protect the independence of the Office of the Appeal Commissioners we would suggest that it would be better for the appointment to arise from the Minister for Justice.

- 3.5 *“The Office of the Appeal Commissioners would be responsible for developing processes and guidance to minimise delays; for developing Customer Service standards including relating to the timing and location of appeal hearings.”*

We are in agreement with the first part of this proposal in relation to developing processes and guidance to minimise delays; and for Customer Service standards. However, we believe that the location of appeal hearings should continue to be a neutral venue and should be in a setting such as the local Circuit Court of the taxpayer (where the hearing is to take place outside the Appeal Commissioners’ facilities in Dublin) if this could be facilitated. We believe that this would give a more formal “look and feel” to proceedings.

- 3.6 *“The Office will present an annual report to the Minister for Finance.”*

We believe that more guidance should be provided on what should be contained in such an annual report.

- 3.7 *“The Appeal Commissioners will be accountable to the Minister for Finance for their own performance and the performance of the Office while independent in exercising their statutory responsibility to adjudicate on appeals.”*

We have strong reservations about this proposed amendment to the current system. The above statement is paradoxical. We do not see how an Appeal Commissioner can be classed as independent where they are accountable to the Minister for Finance for their “performance”. This scenario raises questions as to natural and constitutional justice considering that it will be perceived as undoubtedly in the Minister’s best interests that the Revenue Commissioners be successful in the majority of cases. We are of the opinion that such a measure would potentially be an infringement of the well-established principle of *nemo iudex in causa sua* (let no man be a judge in his own case) along with the broader and more obvious separation of powers implications. This is especially pronounced in light of 4.3 below in that the Minister would have the ability to refuse to renew an Appeal Commissioner’s term of office based on his / her “performance”. We believe that the independence of the Office of the Appeal Commissioners is of the utmost importance. By

analogy, the proposed Legal Services Regulation Bill has caused concern over the introduction of ministerial oversight of the legal profession. While we acknowledge that the Bill has improved since being initiated, in the Bar Council's submission on the Bill¹, one of the primary reasons put forward for maintaining the independence of the legal profession was the fact that almost 50% of cases before the courts concern disputes involving the State in one of its guises. We believe that direct ministerial oversight as proposed above and at 4.3 is a far more worrisome development given the fact that 100% of cases before the Appeal Commissioners are effectively against the State and the fact that the Appeal Commissioners are making a determination.

- 3.8 *"Appeal Commissioners would recuse themselves in cases of conflict of interest or where they may know the parties to the Appeal hearing."*

We are in agreement with this proposal. We presume that the reference to parties is to the taxpayer in the case before them.

- 3.9 *"Explicit provision could be made for more than one Commissioner to sit in appropriate cases."*

We are in agreement with this proposal.

4 Appointment of Appeal Commissioners

- 4.1 *"The establishment of an open and formal selection and appointment and removal process for future Appeal Commissioners will be legislated for and put in place."*

We are in agreement with this proposal. We believe that the appointment should be an open process that is advertised to everyone. We would caution against any legislative provisions for removal of Appeal Commissioners which would not guarantee the independence of the Office.

- 4.2 *"Appointment as an Appeal Commissioner will require a professional qualification with a minimum period of experience in law, accountancy or taxation and also that the candidate is otherwise well qualified."*

We are in agreement with this proposal. We presume that the reference to being "otherwise well qualified" relates to a candidate's good standing and suitability as an Appeal Commissioner.

- 4.3 *"Appeal Commissioners will be appointed for a fixed term which can be renewed. The term could be 5, 6 or 7 years. In this context, consideration will be given to what safeguards may be necessary to ensure the independence of the each Commissioner."*

1. Initial Submission on the Legal Services Regulation Bill, 2011, Bar Council of Ireland, December 2011.

Further to 3.7 and 4.1 above, a fixed term renewable, we assume, at the instance of the Minister for Finance, could impose an undue burden on the Appeal Commissioner to decide cases in favour of the Revenue Commissioners simply so that their term will be renewed. If the “performance” of the Appeal Commissioner is unsatisfactory to the Minister for Finance, the term may not be renewed. This could have a considerable impact on the independence and perception of the independence of the Office of the Appeal Commissioner. At the very least this creates a potential conflict of interest. For this reason we do not support the introduction of a fixed term appointment.

- 4.4 *“A transparent recruitment and selection process for the nomination of suitable candidates to be appointed as Appeal Commissioners will be conducted under the auspices of the Department of Finance.”*

While we would welcome a transparent recruitment and selection process, we believe that this should be conducted under the auspices of the Department of Justice, due to the perception that the Department of Finance is inherently linked to the Revenue Commissioners. As outlined at 4.1, the Department of Justice has vast experience in the context of the appointment of constitutionally independent judges for the Courts Service and we believe that it would be best placed to oversee the appointment of the Appeal Commissioners to avoid the potential of a conflict of interest arising.

- 4.5 *“The process, which could involve the Public Appointments Service or the Top Level Appointments Committee or both, will present a shortlist of suitable candidates from which the Minister for Finance will make appointments. These bodies, as a matter of course, will engage any expertise needed.”*

We are in agreement with this proposal, subject to the comments at 4.4 above.

- 4.6 *“In accordance with existing practice for civil service appointments, canvassing will disqualify.”*

We are in agreement with this proposal.

5 Determinations of the Appeal Commissioners

- 5.1 *“The Appeal Commissioners will control the record of their own decisions, and make them available to the parties as of right.”*

We are in agreement with this proposal.

- 5.2 *“The Appeal Commissioners will issue a concise reasoned determination in all cases within a short period (ideally three months) of the determination, including a summary of the facts and giving reasons for the decisions.”*

While we would welcome the obligation to publish determinations within three months, we believe that it is crucial that more detailed determinations be generated in order that

taxpayers and tax professionals can gain a greater insight into the reasoning of the Appeal Commissioners in coming to their decision. This would also increase transparency for all taxpayers which is something that should be encouraged. We believe that the practice and development of tax law (as opposed to other areas of law) is hampered by the dearth of comprehensive decisions publicly available.

- 5.3 *“An effective system for the reporting of decisions of the Appeal Commissioners will be established.”*

While the reporting of decisions of the Appeal Commissioners is to be welcomed, it should be made clear who is to be responsible for the reporting of such decisions.

- 5.4 *“Every appropriate decision of the Appeal Commissioners will be published.”*

It is not clear what is meant by the phrase “appropriate decisions”. We believe that all determinations of the Appeal Commissioners should be published in a timely manner to allow for a greater insight into the reasoning of the Appeal Commissioners and the application and interpretation of the tax laws subject, of course, to appropriate anonymisation, redaction of any personally sensitive information and the operation of the *in camera* rule.

- 5.5 *“Access to decisions of the Appeal Commissioners will be simultaneously available to the parties.”*

We are in agreement with this proposal and would suggest that the decisions also be simultaneously available to the public (anonymised as appropriate).

6 **Appeal Commissioners Jurisdiction**

- 6.1 *“The jurisdiction of the Appeal Commissioners may be extended by the Minister for Finance from time to time by way of legislation.”*

We have reservations in relation to this proposal. The jurisdiction of the Appeal Commissioners should only be extended by a decision of the Oireachtas. Given the current suggestion that the Minister for Finance may have the sole authority to appoint Appeal Commissioners (as per 4.5 above), it should not be open to him / her to extend their remit in this way.

The advantage of the proposed preserving of the remit of extension of the jurisdiction of the Appeal Commissioners to a decision of the Oireachtas is, in our view, two-fold. Firstly, such a preservation of the current status quo ensures that the jurisdiction of the Appeal Commissioners is clearly set out in primary legislation for ease of administration and understanding for the public who seek to rely on the services and rule of the Appeal Commissioners. Secondly, the preservation of the status quo, in our view, ensures that a perception of a lack of independence or abuse does not arise whereby a future Minister for Finance could potentially undermine the role of the Office of the Appeal Commissioners by

designating additional duties in areas which do not fully reflect the status of the Appeal Commissioners function and role.

7 Payment of Taxes

- 7.1 *“In all cases taxpayers should be required to pay the tax not in dispute. It may be timely to consider whether, based on the outcome of the appeal, the relevant tax or duty should be paid or repaid as the case may be at the end of each stage of the appeal process.”*

While we agree that in all cases taxpayers should be required to pay the tax not in dispute, we are strongly in favour of maintaining the status quo in relation to the payment of tax in the appeal process. We believe that in tax controversy disputes, the balance of power is tilted away from taxpayers and in favour of the Revenue Commissioners given that they are financed by the State and that they are often acting in a prosecutorial manner. As the amounts in question can often be very substantial and the periods between each stage of the appeal process protracted, we believe that it is just and reasonable that the taxpayer should not have to suffer the hardship of the payment of an amount where the taxpayer has not yet exhausted all avenues of appeal. By way of example, the case stated process to the High Court can often take several years. If a taxpayer were to be unsuccessful at initial appeal but successful on appeal to the High Court, the payment made would have to be refunded and the taxpayer would have been denied access to those funds in the interim which could have a severe impact on the his / her / its financial situation.

In relation to refunds or repayments of tax that has already been paid, where the Appeal Commissioners decide in favour of a taxpayer, we are of the view that the Revenue Commissioners should be obliged to make such repayment to the taxpayer immediately. This seeks to ensure that a level playing field is established between taxpayers regarding the same hardship as noted in the above paragraph. Otherwise, the taxpayer seeking to establish a right to a refund of tax, is effectively required to pay the tax in dispute, i.e., that tax not yet refunded, until all avenues of appeal are exhausted by either party.

By contrast the alteration of the rules regarding payment of tax in dispute would not only lead to hardship and expense for taxpayers, this arrangement could also lead to additional complications for the administration of appeals including increased applications to Superior Courts for stays on orders and / or Judicial Review proceedings. In addition the issue of interest to compensate taxpayers where they are ultimately successful in their appeal would arise for consideration.

8 Appeals from the Appeal Commissioners

- 8.1 *“Two options are proposed for consideration. These may need to be reviewed in the context of the forthcoming establishment of the Court of Appeal. In both options, the Revenue Commissioners should have the same rights of appeal as a taxpayer from decisions of the Appeal Commissioners.”*

1. A three stage process

- *An appeal to the Appeal Commissioners*
- *A right of rehearing of the appeal by a Judge of the Circuit Court*
- *A right of appeal from the Circuit Court to the High Court and Supreme Court on a point of law by way of case stated*

2. A two stage process

- *An appeal to the Appeal Commissioners*
- *A right of appeal from the Appeal Commissioners to the High Court and Supreme Court on a point of law by way of case stated”*

We strongly favour the three stage appeal process. We believe that the taxpayer should have the benefit of a right of rehearing at the Circuit Court on the basis that they may not have had the opportunity or indeed appreciated that expert representation was imperative at the hearing before the Appeal Commissioners. The presentation of the facts of their case may have suffered as a result. The possibility of going before a judge of the Circuit Court and the hearing of the case *de novo* ensures that the taxpayer will not be denied the full benefit of the law in appropriate circumstances. For example, a taxpayer may have mistakenly believed his case was stronger than in reality and thus expert representation may have been avoided to save costs. The right of rehearing at the Circuit Court provides a “second chance” to such taxpayers.

However, we do not believe that the right of rehearing to the Circuit Court should be available to the Revenue Commissioners in all circumstances. For instance, where the onus of proof lies on the taxpayer in a case before the Appeal Commissioners and they have proved their case satisfactorily before the Appeal Commissioners, the Revenue Commissioners should not have the ability to seek a *de novo* hearing on the facts simply because they have failed to adequately make their case at the Appeal Commissioners stage. If, however, the burden of proof rests with the Revenue Commissioners, for example, under a section 811 of the Taxes Consolidation Act 1997 claim, the right of the Revenue Commissioners to a rehearing at the Circuit Court might be appropriate.

9 Further Suggestions for Reform

9.1 Costs

We believe that the issue of costs should be dealt with in any proposed legislation for the reform of the Appeal Commissioners. Under the existing appeals system, both parties pay for their own costs. The reason that is often offered for this, is that the ordinary taxpayer will always be able to argue his or her own case effectively before the Appeal Commissioners without the fear of having to pay the fees of the Revenue Commissioners

including counsel fees for the Revenue Commissioners in the dispute. While this is to be welcomed, we believe that there is scope for an “opt in” situation whereby taxpayers could have the option to elect for an award on costs. This would impose a “soft” pressure on the Revenue Commissioners to ensure that their assessments stand a real chance of succeeding – otherwise, as the costs of the Revenue Commissioners are funded from the public purse, there could be a perception of the Revenue Commissioners having less to lose than the taxpayer.

You might please note that our comments hereon reflect the views of the firm only. We have not consulted with any clients in relation to this submission and it is not issued on behalf of any individual or group of clients.

We trust that these comments are useful. If you wish to discuss any aspect of this submission, please contact our Head of Tax on 01 232 2000.

Yours faithfully

MATHESON