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Ireland's Finance (Tax Appeal) Bill 2015

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The Finance (Tax Appeal) Bill 2015 is intended to overhaul the tax appeals process in Ireland, and is likely to be signed into law by the end of 2015. The background and main areas of note are considered here.

I. Introduction

The Finance (Tax Appeal) Bill 2015 (the “Bill”) was published last July following a commitment made by Michael Noonan, the Minister for Finance, in last year’s budget to review the tax appeals process in Ireland and a pre-legislative scrutiny process. The Bill overhauls the tax appeals process in Ireland. Not only will practitioners and taxpayers have to familiarize themselves with the new tax appeals process, they will also have to understand how the proposals that deal with the transition from the old appeals process to the new appeals process impact any existing tax litigation. The Bill was introduced by Minister Noonan in Dail Eireann (the Irish Parliament) on October 1, 2015 and the Committee Stage amendments were published on October 6, 2015. The Bill has moved onto Report Stage and it is likely that it will be signed into law towards the end of this year.

II. Background

In January 2015, the author participated in the pre-legislative scrutiny of the draft heads of the Finance (Tax Appeals Commission) Bill (the “Draft Heads”). This was the first time a tax practitioner was invited to the process and the author (as well as representatives from the Irish Tax Institute and the Consultative Committee of Accountancy Bodies—Ireland) gave evidence before the Oireachtas Joint Committee on Finance, Public Expenditure and Reform (the “Joint Committee”) on the Draft Heads.

The Bill was published on July 16, 2015 and aims to reform the functions and structure of the Office of

Appeal Commissioners which is responsible for the hearing of “first tier” appeals by taxpayers against decisions of Revenue. The Bill overhauls the tax appeals process in Ireland and provides for the establishment of a new body called the “Tax Appeals Commission” (referred to in the Bill as the “Commission”). This new body will, in due course, replace the Office of the Appeal Commissioners; however, each member of the Commission will still be known as an Appeal Commissioner or Commissioner. Some of the measures being introduced are new but others merely put on a statutory footing what was already the practice and procedure in the area.

A summary of all the new measures is beyond the scope of this article but the main areas of note are discussed below.

III. Functions of Commission

The functions of the Commission are broader than those that were held under the old system and reflect some of the main changes being introduced. Some examples of the broader functions include:

- deciding whether or not to accept an appeal from the outset—such a decision will be “final and conclusive,” i.e. not appealable (as opposed to the Revenue Inspector first making a decision and the taxpayer appealing the refusal to transmit the case for an appeal).
- deciding the appropriate procedure to be adopted concerning the adjudication of the appeal, i.e. whether to make a determination from the papers submitted by both parties or to have an oral hearing.

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- providing and publishing written determinations and preparing the case stated for the opinion of the High Court.

The Bill states that the Commissioners must perform their functions in a manner which has regard to concluding the appeals process as expeditiously as possible. Contained in the Bill are, however, measures designed to provide for the speedy resolution of disputes. For example, Section 9 of the Bill allows for the appointment of temporary Commissioners to be appointed from the Circuit Court to perform the functions of a Commissioner where it is deemed necessary.

Where an appeal is accepted by a Commissioner he/she may direct the parties to provide the following information:

- the statutory provisions being relied upon in relation to the matter under appeal;
- an outline of the relevant facts;
- the relevant case law; and/or
- a list of, and copies of, any written material that a party intends to rely on or produce in the proceedings.

This is the same information that must be provided under the existing rules. The further information which is now also required includes:

- whether a party wishes a hearing, or a specified part of a hearing to be held *in camera*/private; and
- whether a party considers that a matter under appeal is one that could be settled by way of an agreement with the other party.

A Commissioner will now be permitted to adjudicate an appeal without an oral hearing. Where the Commissioner considers it appropriate he/she may adjudicate the matter solely by means of any of the following:

- the consideration of the notice of appeal or any other written material provided;
- the holding of discussions with the parties; and
- any other means they consider appropriate.

In the event that the Commissioner adjudicates without a hearing, he/she is obliged to notify the parties. Within 21 days of receiving this notice either party may notify that they wish to have an oral hearing which obliges the Commissioner to adjudicate it by way of an oral hearing. This is an important safeguard and means that the taxpayer will not be denied the right to a full oral hearing of their appeal. The ability, however, to have matters determined without a hearing should have a positive impact on any waiting lists and improve the efficiency of the appeals process.

IV. Tax Appeal Hearings May be Held in Public or Private

Under the current tax appeals process, hearings before the Appeal Commissioners are held in private in order to protect the privacy of the taxpayer. The Draft Heads provided for tax appeals to be heard in public subject to extremely limited exceptions on grounds of public interest and security. In the author's submission before the Joint Committee, the author stated that the introduction of the public hearing of tax appeal cases would constitute a serious impediment to taxpayers appealing a tax matter on the basis that in a very small jurisdiction such as Ireland, indi-

viduals and corporates wish to maintain privacy over their tax affairs and finances.

Although the default position in the Bill is that all hearings before the Commission will be held in public, importantly the Bill permits the taxpayer to request a hearing (or aspects of it) to be held in private. It is not necessary for the taxpayer to justify the need for a private hearing. This is positive for taxpayers wishing to keep personal and commercially sensitive information private. Tax appeals involving overriding issues of public order, national security, sensitive information, protection of a person's right to respect for his or her private or family life and the interests of justice will automatically be held in private.

V. Publication of Decisions

The Commissioner must determine the appeal as soon as practicable after the completion of their adjudicating on the appeal. Appeal Commissioners are not currently obliged to publish their decisions. The Bill requires publication of the determinations of the Commission on the internet within 90 days of notification of the determination. It also permits the Commissioner to provide copies of previous determinations (redacted) that dealt with "common or related issues" and (where the parties do not object) determine the appeal without a hearing. Determination of hearings that were held in private will be published in such a way that the identity of the taxpayer will not be disclosed. The publication of decisions is positive for taxpayers and should speed up the appeals process and also help taxpayers make an informed decision before embarking on tax litigation.

VI. Appeal to Circuit Court Abolished

Under the existing tax appeal process, a taxpayer who is aggrieved by the determination of an Appeal Commissioner can appeal to the Circuit Court for a full rehearing of the case, or to the High Court by way of case stated on a point of law. The Draft Heads proposed the removal of the right of appeal to the Circuit Court and the author made representations to the Joint Committee that it should be retained. Unfortunately the Bill only permits an appeal from the determination of the Commissioner by way of case stated on a point of law to the High Court (and then after that to the Court of Appeal). This is disappointing in that it removes a fundamental safeguard to the taxpayer. Giving the Commission the sole power to decide factual issues without offering a taxpayer the right to a rehearing of the case does raise constitutional issues. The Irish Constitution stipulates that justice must be administered by the courts and only permits limited powers of a judicial nature to be given to non-judicial bodies/tribunals. The Commission is such a body. See the section below on transitional measures where a rehearing in the Circuit Court may be available for certain tax litigation commenced but not concluded at the commencement of the new rules. An appeal by way of case stated is a very specific form of legal appeal, based solely on a point of law. The grounds of appeal are to be restricted to situations where the party considers that the Commissioner

erred in making his/her determination concerning a point of law and not in relation to the facts.

The responsibility for drafting the case stated is with the Commissioner (who cannot delegate this function but may have “regard to” the representations of the parties on the content of the draft case stated). Therefore, the taxpayer has no general right of appeal against the decision of the Commission, which is unusual in the context of judicial or quasi-judicial proceedings. The costs associated with mounting High Court proceedings (which can be significant) will have to be taken into account by a taxpayer in deciding whether to appeal a determination of a Commissioner.

VII. Transition from Old System to New System

Practitioners and taxpayers will have to understand how the proposals that deal with the transition from the old appeals process to the new appeals process impact any existing tax litigation. The transitional provisions are the most complex contained in the Bill. Depending on the stage of the process the tax litigation may be deemed to be taken under the new system and/or move on to the next analogous stage in the process.

Special transitional arrangements are required to grandfather out any appeals against a Revenue Inspector’s refusal to transmit an appeal which may have been in being at the time of the commencement of the new measures.

Under the old system, a taxpayer dissatisfied with, for example, a notice of assessment to tax appealed the assessment by notice in writing to the Inspector of Taxes dealing with the matter. Under the new system the taxpayer must now appeal by notice in writing to the Commissioner.

Section 27 of the Bill is an extremely important section, as it stipulates the conditions relating to the manner in which appeals that have been made under the old system are to transition to and be dealt with under the new system. It refers to “steps” of the tax appeals process. Steps include the making of an appeal, the acceptance/refusal of an appeal, the holding of a hearing and the determination of appeal. The general rule for transitional appeals is that if an existing appeal is in train, any remaining steps will be dealt with under the new system. Section 27(4) of the Bill sets out the main exceptions to the general rule, most notably that the taxpayer can continue to avail of the Circuit Court rehearing available under the old system. It provides that where an appeal hearing has commenced but is not yet completed before the commencement of the new system and the Commissioner has not as yet made a determination before the commencement, the taxpayer is still entitled to an appeal *de nova* to the Circuit Court within 10 days of the termination of the Commissioner.

If the hearing of the appeal has not commenced at the commencement of the new system, no appeal to the Circuit Court is available.

Under the new system, where either party does not object, there is no obligation on the Commissioner to hold an oral hearing of the appeal and he/she may make a determination of the appeal based on the papers submitted by the parties.

VIII. Comments

The measures obliging Commissioners to publish their determinations will certainly achieve the stated aim of providing a tax appeal process that delivers enhanced transparency and increased certainty for taxpayers.

Practitioners and taxpayers engaged in tax litigation at the commencement of the new system will have to understand how the proposals that deal with the transition from the old appeals process to the new appeals process impact such existing tax litigation.

It is positive that “first tier” tax appeals can be held in private at the request of the taxpayer but losing the right to a full rehearing of the case in the Circuit Court is a blow to taxpayers. It remains to be seen if the government will bow to political pressure and amend the Bill to reintroduce the Circuit Court appeal route. The new system will be inherently flawed if only the wealthy can challenge determinations of the Commission. Indeed it will be interesting if the President refers the Bill to the Council of State to consider the constitutional aspects of vesting the Commission with such judicial powers.

One of the main reasons propagated for the overhaul of the tax appeals process was to streamline the process and make it more cost and time-efficient; there was a perception, in certain quarters, that tax cases were taking too long to progress through the system (for instance, the Department of Finance submitted to the Joint Committee that as at January 2015, 770 million euros in tax revenue was in question where assessments had been raised but collection could not proceed pending resolution of the disputed issues). The author does not believe that the new appeals system will succeed in speeding up the process as, in the main, the same delays will be experienced following the transition of tax cases from the Appeal Commissioners into the court system proper (i.e. on appeal to the High Court). Delays in the tax appeals process will continue to be experienced until a dedicated Tax Court is established at the level of the High Court.

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