

TAXATION DISCIPLINARY BOARD

EXERCISE OF DISCRETION BY TRIBUNALS

NOTE FOR THE DISCIPLINARY TRIBUNAL

The Taxation Disciplinary Scheme Regulations 2014 give the Disciplinary and Appeal Tribunals the ability to exercise their discretion in a number of areas. This is an important feature of the disciplinary arrangements, as it allows tribunals to determine their decisions in a way which can take account of all the circumstances of a particular case. The Board regards it as essential that tribunals should be able to examine cases on an individual basis and reach their determination in a way which takes full account of the circumstances of each case.

The exercise of discretion needs also to take into account those topics on which guidance has been issued by the Board. Such guidance is intended to reflect the broad policy of the Board on issues of public interest and the kind of consideration that may need to be taken into account in reaching a decision. But the actual decision is a matter for the tribunal. It alone has heard all the evidence and is in a position to make appropriate decisions which reflect the circumstances of each individual case. What is important is that the tribunal should articulate the reasons for reaching its individual decisions, particularly in cases where it decides to depart from the broad policy set out in the guidance.

For example, the Board has issued guidance on the publication of tribunal decisions. The general presumption is that the tribunal's findings will be published on the Board's website and in the journal Tax Advisor. Where a finding is made against a member, the name of the member will usually be included in the publication of the tribunal's order. These arrangements are designed to provide transparency and demonstrate accountability in the public interest. But regulation 28.3 allows tribunals the discretion to direct that the name of the member shall not be published. The criteria which may lead a tribunal to decide that the name of the member shall not be published are not specified in the Regulations. It is therefore important that where a tribunal directs that the member's name shall not be published, it should give reasons for such a direction.

Similar considerations would apply to a decision to make a costs order involving a sum different from that computed by the Secretary to the tribunal. The guidance on costs already issued by the Board explains the basis on which that calculation will be made, in the interests of ensuring that 'the polluter pays' and that the burden of disciplining a member who is found to engage in misconduct does not fall on the wider membership of the participating bodies. The guidance also indicates several aspects of the process for making an order for costs where the tribunal may exercise its discretion to award less than the full amount calculated by

the Secretary. In that event, the tribunal should explain the reasons why it considers it appropriate to make an order for a lesser sum. Similar considerations apply in determining the level of a fine or a compensation order.

The reasons underlying a tribunal's decision to exercise discretion should be state clearly at the time the decision is announced during the tribunal hearing and included in the report which the Chairman prepares following the tribunal hearing. The provision of reasons is an essential means of ensuring a measure of consistency of decision making. It is therefore particularly relevant in the event of any subsequent appeal against a finding or order made by a tribunal.

Taxation Disciplinary Board

April 2016