

TAXATION DISCIPLINARY BOARD

GUIDANCE FOR INVESTIGATION COMMITTEE MEMBERS

Introduction

1. The Taxation Disciplinary Board (TDB) was set up in 2001 in order to provide an independent body which would consider complaints and undertake disciplinary proceedings involving members of the Chartered Institute of Taxation and the Association of Taxation Technicians.

Key principles

2. Like other professional disciplinary bodies, the TDB aims to operate in the public interest. That means that it seeks to apply three key principles in considering complaints and in disciplining professional members:
 - protecting the public.
 - upholding the proper standards of conduct in the profession
 - maintaining the reputation of the profession
3. Although members of the Investigation Committee do not have a role in imposing sanctions on professional members, they should nevertheless bear in mind the significance of the above principles in exercising their powers under the Taxation Disciplinary Scheme 2008 and the accompanying Regulations.
4. In the case of Bolton -v- the Law Society (1994), Lord Bingham emphasised that maintenance of the reputation of the profession was the primary justification for disciplinary action. The TDB demonstrates its commitment to high standards and to maintaining those standards through the disciplinary process and through publishing details of the orders made. Although punishment is not in itself a purpose of the disciplinary process, it enables the public to see that a particular wrong-doing will not be tolerated.
5. Where a body acts to protect the public, it is expected to consider both the clients of the professional member and the wider public who may also be at risk. In cases where the competence of the member is also an issue, consideration must also be given to whether the public can be properly protected.

Meetings of the Investigation Committee

6. The role of the Investigation Committee (IC) is set out in Regulations 4 and 5 of the Taxation Disciplinary Scheme Regulations 2008. The IC meets as necessary in order to consider complaints referred to it by the TDB's Reviewer. The Reviewer is a staff member of the TDB (currently the Executive Director), whose duties are set out in Regulation 3. The role of the Reviewer is to process complaints and submit them to the IC. The Reviewer may reject a complaint if he considers that it falls into one of three categories specified in Regulation 3, namely:
 - (a) It falls outside the jurisdiction of the TDB;
 - (b) It is out of time; or
 - (c) It is trivial or vexatious.

7. All other cases must be submitted to the IC. In addition, if the complainant appeals to an Investigatory Assessor against the rejection of a complaint by the Reviewer, the Assessor may order the Reviewer to refer the case to the IC.
8. IC meetings are held approximately every two months, depending on the number of cases which require consideration. Its membership is drawn from members appointed to the Investigation Panel. The quorum for a meeting of the IC is three members, but meetings are usually composed of five members. At least one member of the Committee must be a professional member (that is a member of one of the professional bodies who participate in the Scheme), and there must be a majority of lay members. The TDB's Executive Director aims to arrange a schedule of meeting dates well in advance and to ensure that as far as possible all members of the Investigation Panel attend an equal number of meetings.

Consideration of cases

9. The IC meets in private. The agenda for each meeting is prepared by the Executive Director, who is the Secretary of the Committee. He identifies the cases which are ready for submission to the IC, and prepares a dossier on each. Cases are not usually submitted to the IC until the complainant has completed the Board's standard complaint form (copy attached at Annex A) and the member and the complainant have each had at least two opportunities to comment upon the allegations. This correspondence is then presented to the IC, together with a covering summary prepared by the Executive Director analysing the grounds for complaint and the arguments put forward by the parties. The Executive Director arranges in advance for one member of the Committee to introduce the discussion of each case at the meeting, although all members are required to be familiar with all the cases on the agenda.
10. After consideration of the available documents, the IC may consider that, in order to reach a conclusion on the complaint, it needs further information from the member or the complainant (or both). In that case it will adjourn the discussion in order to enable the Secretary to obtain that information and submit it to a later meeting of the Committee (bearing in mind that the composition of the Committee that reconsiders the case will almost certainly be different from that which requested the additional information).
11. Decisions of the IC are to be unanimous or made by majority. If, however, the Committee is equally divided (for example, because only four members are present), the case is to be deferred for fresh consideration by a new IC meeting.

Allegations of Misconduct

12. The role of the IC is to determine whether the complaint discloses a prima facie case involving misconduct. Under the Taxation Disciplinary Scheme, misconduct may entail:
 - (a) A breach of professional standards and guidelines; or
 - (b) Inadequate professional service; or
 - (c) Conduct unbecoming the member or the profession.

These are discussed in the following paragraphs.

(a) Breach of professional standards and guidelines

13. This is the category of complaint with which members of the IC will be most familiar, as the majority of complaints allege a breach of the professional standards and guidance. The relevant standards and guidance are set out in the Professional Rules and Practice Guidelines

(PRPG) published by the participant bodies. The PRPG are to be observed by all members, and a breach of the rules and/or the guidelines may well amount to misconduct. But much will turn on the nature, quantity and significance of the alleged breaches. An isolated breach of the PRPG will not necessarily amount to misconduct. For example, where a complaint alleges discourtesy or incompetence on a single occasion, even where this is admitted by the member it would not necessarily amount to misconduct; unless the consequences are substantial, a single isolated breach of the PRPG should not normally be referred to a Disciplinary Tribunal. But most complaints involve a number of allegations which may well entail several breaches of the PRPG, and will need to be considered accordingly.

(b) Inadequate Professional Service

14. Inadequate Professional Service (IPS) is not defined in the Scheme or in the 2008 Regulations. However, in the revised Regulations issued in 2010 the term is defined as "such conduct towards a complainant or performance of professional services for that complainant which falls significantly short of that which is to be reasonably expected of a professional tax adviser in all the circumstances."
15. It will be apparent that IPS is not the same as incompetence or lack of care. Complaints about incompetence or lack of care should be considered in the first place as potential breaches of the PRPG. IPS is focussed on the overall provision of service to the client, and entails service which has fallen significantly short of what the competent professional should provide. In assessing whether the adviser has provided IPS, the IC will need to look at the overall nature of the adviser's dealings with his client. Whilst the IC may find that there is a prima facie case of incompetence or lack of care, it does not necessarily follow that the member has provided IPS. On the other hand, there is unlikely to be a finding of IPS in the absence of one or more findings of breaches of the PRPG.

(c) Conduct unbecoming

16. Conduct unbecoming a member is not defined in the Scheme or in the 2008 Regulations. However, in the revised Regulations issued in 2010 the term is defined as "conduct on the part of a Member, including in a personal or private capacity, which tends to bring discredit upon the Member and/ or tends to harm the standing of the profession and/ or the Association or the Institute (as the case may be)".
17. Case law makes it clear that members of a profession can be held to the highest standards of integrity and conduct. The TDB has a duty to protect the public, and conduct which appears reprehensible may well constitute misconduct when carried out by a professional, even where this does not directly relate to his role as a tax adviser. Thus conduct which results in a criminal conviction, even if this has no direct bearing upon the member's professional work, may well be considered to constitute unbecoming conduct; so too may a finding of dishonesty by a court or other disciplinary body, even if it is unrelated to the member's professional work.

Prima facie case

18. The IC does not hear evidence: it considers the case on the basis of the papers submitted to it, and has no powers to hear witnesses. It is not therefore in a position to resolve conflicts of evidence. Its role is to decide whether there is a case to answer. There is no single definition of what constitutes a prima facie case. In the revised Regulations issued in 2010, a prima facie case is defined as "a factual allegation or series of factual allegations which, if proved, would result in the defendant's being guilty of a disciplinary offence". It can be said that a

prima facie case exists where, on the evidence supplied, the complaint could, on the balance of probabilities, be found to be true and where, should it be true, the act or omission complained of could fall into the category of misconduct as defined above. In other words, a prima facie case exists if the evidence of the complaint is sufficiently strong for the member to be required to respond and would, if proven, amount to misconduct.

19. It is not the role of the IC to decide whether the member is guilty of what is alleged. Its function is to filter out complaints which do not disclose a prima facie case. The fact that the case has been submitted by the Reviewer does not in itself indicate that there is any merit in the complaint. As indicated at paragraph 6 above, the Reviewer may reject cases only on specified grounds; it is not his role to judge the validity or substance of a complaint, unless he considers the case to be so minor that it would not merit any of the sanctions contained in the Scheme. It is open to the IC to decide that the complaint is without doubt groundless and there has been no misconduct. The information provided by the complainant may appear confused and inconsistent, such that the evidence appears inherently defective. There will be no prima facie case if there is something so inconsistent about the complaint or something so unbelievable that it does not constitute a proper complaint. Such unmeritorious complaints should be rejected by the IC. But the IC is not obliged to reject a case the moment it has decided that there is not a prima facie case: it may call for additional evidence or invite further comment from the complainant or the member.

Decision-making within the IC

20. The member selected to introduce the case will act as chairman for the ensuing discussion of that case. After presenting the case and his/her own conclusions, that member should ensure that each of the other members contributes to the discussion. The discussion at the IC is confidential, and no detailed record is produced. Members should address the issues with candour. Discussion should address the main grounds for the complaint, with a view to assessing whether there is a prima facie case involving misconduct.
21. Case law has established that decision making in an Investigation Committee should be structured. The person chairing the discussion should draw up a list of the specific issues to which the Committee must give consideration and identify the material which has been submitted in connection with each of those issues. A structured approach will help to avoid the risk of omitting a relevant issue and thus arriving at a wrong decision. It will also help to achieve consistency.
22. Regulation 5.4 identifies the various outcomes that the IC may reach:
 - (a) It may conclude that a prima facie case has not been made out and that the complaint should therefore be rejected and no further action should be taken;
 - (b) It may find that a prima facie case has been made out, but the complaint is so minor as not to merit any of the sanctions available under the Scheme, in which event the IC may order that no action be taken or that the case should rest on file for three years;
 - (c) It may find that a prima facie case is made out, but consider that the evidence is not of sufficient strength to establish the facts before a Disciplinary Tribunal;
 - (d) It may decide that a prima facie case has been made out and that the case should be referred (in whole or in part) to a Disciplinary Tribunal.
23. Thus, the questions to be resolved by the IC may be summed up as follows:
 - (a) Is there a Prima Facie case?
 - (b) Is the matter too minor to warrant referral to a DT?
 - (c) Is there evidence of sufficient strength to establish the facts before a DT?

24. Before deciding that the case is too minor to warrant referral to a Disciplinary Tribunal (as at (b) above), the IC may consider whether there are other matters involving the defendant which have been considered by an IC on a previous occasion when a prima facie case was found but no action was taken. This provision is designed to ensure that action may be taken in respect of a member who may have committed at different times minor breaches of the PRPG, none of which has previously been judged to be of sufficient gravity to warrant referral to a Disciplinary Tribunal, but which collectively could amount to misconduct. In that event, the IC may decide to refer the latest complaint to a Disciplinary Tribunal, together with any previous case which is still resting on file (ie the case has been considered by a previous IC within the past three years).
25. The IC should proceed with care before deciding to reject a complaint. There is a need to reassure the complainant and the public that complaints are fully and properly investigated and that there is no cover up. The IC should also exercise care if its decision might be perceived as inconsistent with that taken by another public body (eg the ICAEW or ACCA). While there is a public interest in professional members not being harassed by unfounded complaints, there is also a public interest in ventilating before a Disciplinary Tribunal allegations which have a real prospect of being established. Cases which raise a genuine issue of misconduct should be determined by a Disciplinary Tribunal, and if there is any real doubt the matter should be resolved in favour of referring the case to a Disciplinary Tribunal. But the IC also has a duty to weed out unmeritorious cases, and case law has established that it is in no-one's interest for cases to be referred when they are bound to fail (for example, because there is no proper evidence).
26. The IC is therefore entitled to consider whether there is a real prospect of what is alleged being established before a Disciplinary Tribunal. The "real prospect" test does not require the IC to assess probability, but rather a genuine (not remote or fanciful) possibility that the alleged facts would be proved and, if so proved, that there is a real prospect that misconduct would be proved. Regulation 5(4)(d) requires the IC to make such an assessment before deciding whether to refer a case to the Disciplinary Tribunal. It is important to note that this assessment is entirely distinct from that of deciding whether there is a prima facie case: the two stages must not be conflated. In reaching its decision, the IC should bear in mind the standard of proof which the Disciplinary Tribunal applies, namely the Civil Standard, which requires that a fact or an allegation must be proved on the balance of probabilities. In a case where the member has submitted some form of mitigation (eg testimonials or statements of an unblemished career), this will be irrelevant to the decision to be taken by the IC: mitigation will normally be relevant only where the question of a sanction is being considered
27. In any case where the IC decides not to refer the case to a Disciplinary Tribunal (ie outcomes (a), (b) and (c) in paragraph 21), there is a right of appeal to an Investigatory Assessor. Separate guidance has been issued about the role of the Investigatory Assessor. If the Assessor upholds the appeal, the case can be referred back for a re-hearing by a Second Investigation Committee composed of members of the Investigation Panel who have had no previous involvement with the case. It is also possible for a case to be referred back to the IC by the Presenter, who is appointed by the TDB to present the case before the Disciplinary Tribunal. He may do so on the grounds that in his view the facts do not disclose a prima facie case or that there is no realistic prospect of securing a finding against the defendant.

Giving of reasons

28. Under Regulation 5.5, the IC must provide written reasons for all its decisions. The reasons for a finding on any individual case must be discussed and agreed during the meeting. The reasons need not be elaborate or lengthy, but they should be such as to inform the parties in broad terms why the decision was reached. Reasons need to be provided for every decision, whether or not the case is being referred to a Disciplinary Tribunal. The reasons should not make it appear as if the Committee has made any decisions on the facts: that is the role of the Disciplinary Tribunal. The reasons should refer clearly to a particular complaint or complaints, preferably by reference to a breach of the PRPG. The IC must also make clear what aspects of the complaint have been upheld and which rejected, so that if the case is referred to a Disciplinary Tribunal only the relevant material is referred.
29. The member chairing the discussion on a particular case is responsible for securing the Committee's agreement for the reasons, and for ensuring they are written out and given to the Secretary, preferably at the meeting or, failing that, immediately thereafter. The Secretary will then compile a draft report of the meeting, which includes the reasons for each finding, and circulate this to the members for their agreement. Any action required in following up the decisions reached by the IC is undertaken on behalf of the Committee by the Secretary. He will inform the member and the complainant of the findings made by the IC and the reasons for those findings; he will also explain to the complainant the right to appeal to an Investigatory Assessor. Where there is a referral to a Disciplinary Tribunal, the Secretary is responsible for passing the relevant documentation to the Clerk to the Disciplinary Tribunal, together with the reasons for the IC's findings. After allowing time for any appeal from a complainant, the report of each IC meeting is circulated to the Board and to all members of the Investigation Panel.
30. For the convenience of Committee members, two flow charts are attached at Annexes B and C, setting out the processes carried out by the Reviewer and the Committee.

Taxation Disciplinary Board

July 2010

TAXATION DISCIPLINARY BOARD – COMPLAINT FORM

Please read the leaflet “A guide for the public” before filling in this form. If you need help completing this form, please ring the Secretary on 020 8868 9717.

Please complete in block capitals (using black ink if possible)

1 Your details

Name _____

Address _____

_____ Daytime telephone number _____

Email address _____

2 Member's/Student's details

Name _____

Firm _____

Address _____

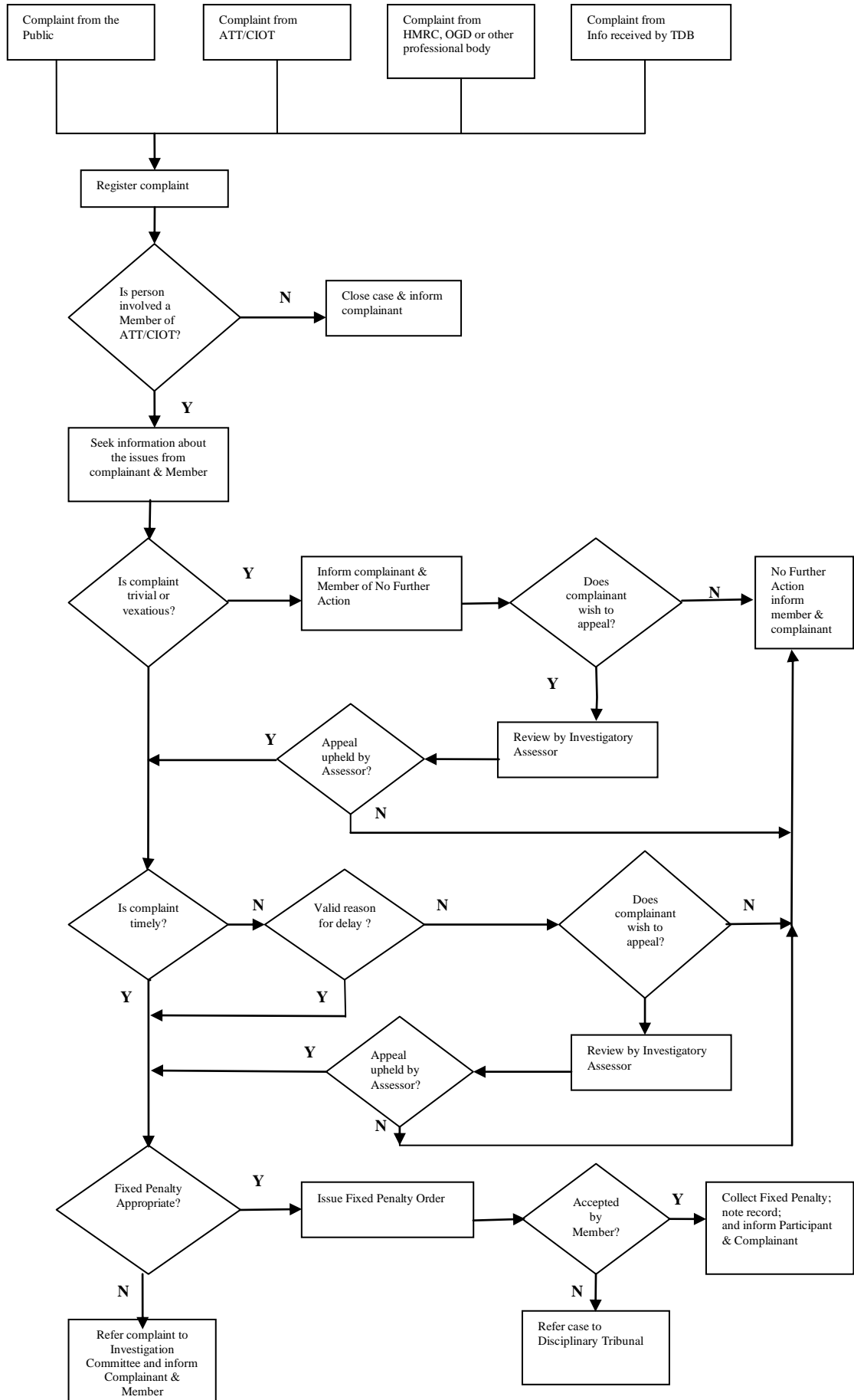
3 Have you taken your complaint up with the member/student? Yes No

Or with their firm? Yes No

If so, what happened? If not, why not?

4 Please set out, as clearly as possible, your complaint. You must tell us who you are complaining about, when the events you are complaining about occurred and what you believe was done wrong.

ANNEX B: INITIAL PROCESSING PRIOR TO INVESTIGATION COMMITTEE



ANNEX C: INVESTIGATION COMMITTEE

