

Raising the bar

Susan Humble and John Whiting outline the workings of the Taxation Disciplinary Board – and how it and comparable arrangements could soon cover all tax practitioners.

Given everything that is happening in the world, even dedicated Budget-watchers could be forgiven for not getting as far as paragraph 2.258 on page 98 of the *Red Book*. For those who didn't, and those who got there only to immediately move to the next section on making tax digital, it has this interesting announcement:

'2.258 Raising standards in the market for tax advice

'The government will publish a call for evidence in the spring on raising standards for tax advice. This will seek evidence about providers of tax advice, current standards upheld by tax advisers, and the effectiveness of the government's efforts to support those standards, in order to give taxpayers more assurance that the advice they are receiving is reliable.'

This has resulted in HMRC's call for evidence on 'Raising standards in the tax advice market' (see tinyurl.com/wqhqkar). *Taxation* readers will no doubt be happy to endorse the principle of raising standards and that taxpayers should be able to rely on advice. That endorsement would no doubt come with a tinge of caution – even worry – as to whether it means bureaucracy such as intrusive checking and form-filling that ultimately achieves little. So where might we be going – and indeed what is there already? Fundamentally, which issues connected with giving tax advice are causing problems?

We'll address aspects of these questions by looking at the Taxation Disciplinary Board (TDB) – what it is there for, what does it do, and the behaviours that put tax advisers on its radar.

The standards starting point

A hallmark of any professional (and trade) body is that it promotes and maintains the highest standards among its

Key points

- HMRC is seeking views on tax advisers and the standards of advice provided by the profession.
- The *Professional Conduct in Relation to Taxation* guidance already applies to members of professional bodies.
- The role of the Taxation Disciplinary Board.
- The referral of cases to the board.
- Investigations, sanctions and appeals.
- Advice for professionals who are under investigation.



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members. For tax advisers who are members of the CIOT, ATT, ICAEW, ICAS, ACCA, AAT and STEP that means adherence to *Professional Conduct in Relation to Taxation* (PCRT – see tinyurl.com/j9ej35u).

As readers hopefully know, the PCRT guidance sets out the fundamental principles and standards of behaviour that all members of the subscribing bodies and students must follow in their tax work. The latest edition, which is effective from 1 March 2019, has a digital structure to improve navigability. The PCRT now consists of the fundamental principles and standards for tax planning and is supported by supplementary help sheets. One of the newer areas, and definitely of current interest, is that on 'tax planning arrangements' – how to deal with the planning versus avoidance boundary.

Most bodies will have further rules and guidelines. The CIOT and ATT publish the *Professional Rules and Practice Guidelines* (PRPG – see tinyurl.com/y9nukwlq). These guidelines set out the fundamental principles and rules together with related guidance that members must comply with and which help members handle challenges encountered in their professional work. Of course, not all tax advisers belong to one of the PCRT bodies, but that does not mean that they should not also adhere to high professional standards. Although they may not be subject to a disciplinary board, they will surely wish to avoid disputes with clients, potential legal action and the unwelcome publicity that this might bring.

When things go wrong

Most practitioners will carry out all their professional work comfortably in line with PCRT and PRPG or their equivalents. But sometimes things go wrong and a problem arises, resulting in a complaint by the client or another member of the public. HMRC can also be involved, as can the professional body itself.

This is where the TDB may come in. It is not the only body that handles complaints, but there are universal lessons in its operations. The TDB is an independent body set up in 2001 by CIOT and ATT to handle complaints against members and students. (For the remainder of this article 'member' can be read as including students.)

As set out on its website (tax-board.org.uk), the purpose of the TDB is to ensure that tax advisers maintain the highest professional standards of conduct and to exercise professional discipline over those who fail to comply. It is empowered to deal with complaints alleging breaches of professional standards and guidance, the provision of inadequate professional service, and conduct unbefitting a professional person. This is all about maintaining public confidence in our profession.

The TDB exists to:

- support and maintain the high professional standards of the CIOT and ATT; and
- handle complaints quickly, impartially and effectively.

The TDB promises to:

- operate economically;
- have easy to understand policy and procedures; and
- publish simple guidance for complainants and members.

The TDB has five directors – three independent and one nominated by each of the two sponsoring bodies. It is run day-to-day by Peter Douglas, the executive director, and draws on a panel of legally qualified chairs, lay members and CIOT and ATT members to deal with investigations and hearings. Nigel Bremner, clerk to the disciplinary tribunal, organises the hearings.

Cases can come to the board as a result of a referral by:

- a member of the public;
- HMRC; or
- CIOT or ATT.

Referral by a member of the public

This is the main source of referrals – a client, or perhaps more likely a former client. Typical complaints include a failure to respond to communications from the client, failure to advise of the risks of the suggested tax planning, and missed deadlines. Sadly, dishonesty can also arise. Sometimes the referral might be from a new adviser struggling to obtain information from the previous adviser, or who believes the previous adviser handled the client's affairs wrongly.

Fee disputes are not for the TDB. Instead, the complainant and member should resolve the matter through negotiation, mediation or ultimately the courts.

Referral by HMRC

In the past, HMRC felt unable to pursue most complaints because of confidentiality issues under the Commissioners for Revenue and Customs Act 2005. More recently, however, HMRC established a memoranda of understanding with many professional bodies, enabling them to disclose cases of serious misconduct. HMRC's stated aim is to increase the number of referrals to those bodies as they develop reporting mechanisms within HMRC.

Referral by CIOT or ATT

Members must notify the CIOT or ATT:

- within two months of being arrested on suspicion of, charged or convicted of a criminal offence;
- if they are notified of disciplinary or regulatory action upheld against them by another professional body they belong to;

- if they are dismissed for misconduct or gross misconduct by their employers or are disqualified as a director or trustee;
- receive a dishonest tax agent conduct notice; or
- receive a monitoring notice from HMRC under the promoters of tax avoidance scheme legislation.

There are several obligations that members must observe. These include undertaking continuing professional development (CPD), holding professional indemnity insurance (PII), registering for anti-money laundering (AML) supervision, and completing their annual return. Failures here can give rise to a referral by CIOT or ATT.

Failure to observe AML requirements is an increasing source of referrals and the importance of the professional bodies being seen to endorse their professional standards is endorsed by the Office for Professional Body Anti-Money Laundering Supervision (OPBAS – www.fca.org.uk/opbas).

What happens when a complaint is received?

A complaint is received by the TDB's executive director. Complainants are always advised that bringing a complaint to the TDB is no substitute for initially seeking redress through the member's, or the member's firm's, complaints procedure, or possibly through the courts. The TDB can decide on whether a member has complied with professional conduct regulations relating to fees, but as noted it does not intervene in fee disputes.

Review stage

All complainants are sent a standard complaint form to complete. Once returned, it will be examined by a TDB officer (the reviewer), who considers whether the complaint:

- falls within the board's jurisdiction; and
- has been submitted within 24 months of the events that form the subject matter of the complaint.

If the reviewer considers the complaint to be trivial or vexatious, the complainant will be advised that the TDB does not consider the complaint to be one that should be pursued. If the complainant objects to that decision, they are entitled to request reconsideration by an investigatory assessor, an independent person appointed by the TDB.

However, if the complaint is substantive and meets the two criteria, the reviewer will forward the complaint together with all related correspondence to the member with an invitation to respond with their observations. The member's response is, in turn, forwarded to the complainant. The member is then given a further opportunity to comment. It is important to note that the member is kept fully in the picture and involved in the process. The TDB appreciates that any complaint against a member will be stressful and needs to be handled with care.

The investigation committee

The reviewer then refers the complaint for examination by the investigation committee. Typically, a case takes three or four months to reach the referral stage.

An investigation committee is made up of three or five people, drawn from the panel established by the TDB referred

to above. All are required to preserve the TDB's independence and to ensure this happens lay members are in the majority and include a legally qualified member.

The role of the committee, which meets in private, is to consider the documentary evidence submitted by the reviewer and determine whether there is an arguable case to answer against a member. The committee can instruct the reviewer to undertake further enquiries to be satisfied it has the full facts relevant to the allegation. Once the committee is satisfied, it either dismisses the complaint or finds there is a prima facie case to answer.

In some prima facie cases the committee may decide to take no action, if the matter is not serious enough to merit a sanction. Otherwise, the case will be referred to the disciplinary tribunal.

Both parties will be advised of the investigation committee's decision and the reasons for it. They will also have the right of appeal to an investigatory assessor (if either party objects) who may either uphold the committee's decision or ask for it to be considered by a new panel. The assessor's decision is final.

Interim orders

An interim order is an additional layer of protection if it is considered to be in the public interest, or necessary for the protection of the public, that a member's membership should be suspended pending the full hearing of disciplinary charges by a disciplinary tribunal.

The disciplinary tribunal

A member will be advised if a complaint has been referred to a disciplinary tribunal. They will receive a proposed date, time and location for the hearing. This should be acknowledged as soon as practical with, if relevant, any valid reasons that would prevent attendance. Before the hearing, a member is informed of the charges, invited to set out their response and to indicate what, if any, evidence they intend to rely upon. They are required to name any witnesses they might intend to call.

The tribunal is composed of three members, two of whom are lay members and one a member of either of the sponsoring bodies. The chairman of the disciplinary tribunal is legally qualified.

The tribunal's role is to consider the evidence presented to it by a lawyer (the presenter) acting on behalf of the TDB, determine whether the alleged conduct is proven and make a finding accordingly. A disciplinary tribunal, unlike an investigation committee, sits in public with both parties able to attend even if they do not wish to give evidence.

The disciplinary tribunal processes and procedures, the rights to be heard and to call witnesses, if required, are explained in material issued by the clerk to tribunal. A member may opt to present their case in person or appoint external advice and counsel.

Penalties

If it has been established that the complaint is proven and that a breach of discipline has occurred, the tribunal may impose such penalty as it considers appropriate in accordance with powers given to it, after taking into account the gravity of the breach and the facts and arguments presented.

The tribunal has a wide range of sanctions, including:

- no further action;
- order to rest on file;
- order to apologise;
- censure;
- fine;
- suspension;
- expulsion; and
- imposition of conditions on the member.

Note that the TDB's sanctions policy is currently the subject of a consultation process – the first stage concluded on 31 March and the aim is that this will lead to a second stage consultation on any proposals for change.

As well as the above list, the disciplinary board also has the power to award compensation if the tribunal has made a finding of inadequate professional service. If a complaint is held to be proven, the disciplinary tribunal will normally make an award of costs. The tribunal's decision, with reasons, will be sent in writing to both the member and the complainant. They will also normally be published (on the TDB's website and usually in *Tax Adviser*). However, the member has a right of appeal.

The appeal tribunal

Following a decision by the disciplinary tribunal, the member or the TDB may appeal. Members can only appeal on the grounds that:

- there has been a misapplication of the relevant rules or the relevant law;
- the findings or sanction(s) were unreasonable; or
- new evidence has become available which, had it been available earlier, would materially have affected the findings.

Any appeal request will first be considered by a disciplinary assessor to ensure that the appeal comes within the specified grounds. If permission to appeal is granted, the case will be heard by an appeal tribunal. Like a disciplinary tribunal, this body normally sits in panels of three, two lay members and a member of either sponsoring body and the chairman is legally qualified. The appeal tribunal may uphold, modify or overturn any finding of a disciplinary tribunal. Its decision is final within the process. The TDB aims to ensure that all complainants are treated fairly. If a member is unhappy with the way a case has been handled, they may complain to the TDB who will undertake a review of the case.

A few pointers

Looking at some recent findings by the disciplinary tribunal, these include:

- failure to notify the member's body of a consent order and then repeated failure to respond to correspondence, including from the TDB, in a timely manner;

Planning point

Have you and perhaps your employees involved in providing tax advice read the latest version of the *Professional Conduct in Relation to Tax* guidance? Could an in-house discussion of its contents be useful in avoiding potential problems?

- sending confidential information about the member's employer and the employer's clients to their personal email address, breaching the GDPR and acting dishonestly in relation to this data; and
- falsifying expenses claims which has resulted in a conviction for fraud.

In the unlikely event that a complaint is laid against them, a member should:

- acknowledge it without delay;
- if it is impossible to give an immediate substantive response, inform the reviewer accordingly and state when it will be forthcoming;
- bear in mind that a failure to respond to an official communication may itself be considered a breach of professional discipline;
- if they are employed, they must consider advising their employer; and
- consider the need for legal advice and the requirement to advise their professional indemnity insurers.

Conclusion

Disciplinary rules and procedures exist to protect the public. In so doing, they also protect members: assuring and enhancing the standing and reputation of the tax profession. The numbers of complaints referred to the TDB are low: 37 in the past year, with 35 AML breaches.

The problems referred to in this article may seem unlikely to arise in a well-run practice or by a member who is operating properly but, along with others, they have happened. The best advice on how to avoid becoming a 'customer' of the TDB is giving clients a good professional service – hardly rocket science and surely the aim of all practitioners. ●

Author details

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The TDB can be contacted on 01825 890 668.

FIND OUT MORE On Taxation.co.uk

- PCRT guidance: tinyurl.com/sbs7ouu
- The profession's responsibilities: tinyurl.com/rytt4pb
- HMRC's strategy on tax avoidance: tinyurl.com/swbhdz7