Independent direction

General Features | Professional standards



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Larry Darby reflects on the developments within the Taxation Disciplinary Board over the past four year

Key Points

What is the issue?

There has been considerable change in both public and regulatory perception of good practice for self regulating professions.

What does it mean for me?

The TDB is a truly independent organisation that helps protect the interests of members and the public through fair and transparent processes.

What can I take away?

The number of complaints is exceptionally low, but, if you are affected, help is available.

Much has changed in the world of professional practice since ATT appointed me as a director of the TDB in the summer of 2012. Here’s a summary of what I think, as practitioners, you might find interesting about how TDB has developed and dealt with this change.

An independent operation

Thankfully, very few of us will ever face the prospect of investigation or disciplinary proceedings brought by the TDB. On average, TDB receives fewer than a hundred complaints annually and less than half of these reach the formal disciplinary stage. As a percentage of total membership, this is one of the lowest complaint rates of any UK professional organisation. Something of which we can all be justly proud.

We have the benefit of fair, independent processes for dealing with professional practice complaints. The TDB is a company limited by guarantee set up in 2001 by our sponsoring bodies the CIOT and the ATT to administer the Taxation Disciplinary Scheme (TDS).

TDB’s board of directors is responsible for policy, operational efficiency and governance. The board engages 24 lay investigation committee and disciplinary tribunal members, many legally qualified, who together with tax practitioners (who are minority members of panels) take all decisions regarding the commencement of disciplinary action and any findings of fault.

Currently TDB’s board is formed of one member each appointed by the sponsors and an independent chair.
The board is responsible for the design of processes - the TDS - but is not involved in

the management of cases before the Investigation or Disciplinary Tribunals.

The board cannot and does not interfere with the judgment of its lay majority investigating or disciplinary panels – a vital safeguard for members and public alike.

The TDS, 'owned' by the TDB, is a living structure that changes as experience, good practice or legal precedent requires. The sponsors, of course, are responsible for their own professional rules and practice guidelines (PRPG) which are central to our structure of rules and complaint handling. The TDS is the mechanism by which the TDB investigates and prosecutes breaches of the sponsors' PRPG.

Because of the independence and efficiency of the TDS (most complaints are concluded within 12 months) the TDB has attracted interest from other professional bodies both in the UK and overseas and we continue dialogue with some on whether we can help either by providing a service, or by bringing them into the scheme. Until its merger with CIOT in 2012, the Institute of Indirect Taxation, was a sponsoring member of TDB, for example.

In a recent development, TDB now has an agreement with the Irish Institute of Taxation where we provide an initial complaint assessment service to them.

The changing face of tax advice

In March 2015, George Osborne and Danny Alexander, issued a challenge to the professions with the publication of the government's paper 'Tackling tax evasion and avoidance'. This tasked the tax profession to look carefully at its stance on involvement with tax avoidance and planning and to 'play by the rules'.

Here are extracts of the two main definitions from that paper:

- '**Tax avoidance** involves bending the rules of the tax system to gain a tax advantage that Parliament never intended. It involves operating within the letter – but not the spirit – of the law.'
- '**Tax planning** involves using tax reliefs for the purpose for which they were intended …However, tax reliefs can be used excessively or aggressively … in ways that clearly go beyond the intention of Parliament.'

In addition, the foreword to the paper encouraged: '… the regulatory bodies who police professional standards to maximise their role in setting and enforcing clear

professional standards around the facilitation and promotion of avoidance.’

How this challenge affects regulation is a matter for our sponsoring bodies, of course, but if the Professional Bodies were to introduce changes to the PCRT, TDB would be faced with the task of dealing with any resulting complaints or accusations of breaching an updated PCRT.

Let’s pose a question – under the existing rules, is it really a disciplinary matter should tax planning not achieve the intended result?

There are, I believe, a number of universal lessons, helpful to members that emerge from the cases heard by the TDB panels.

Rarely are complaints brought on the basis that tax advice was wrong. By far the majority of cases have their origins in a lack of communication and a breakdown of relationship and trust.

Taking a simple common case example, a client may get charged ‘more’ than they expected, often because no formal contemporary record (most easily dealt with via an engagement letter) existed or did not clearly record the work (or any changes to the work) to be performed. The adviser believes they did what was needed and agreed and wants to be paid in full; the client does not agree and wants to stick to the originally quoted figure, they reach an impasse and the client complains to the TDB that his adviser is acting unprofessionally. All too often the member fails to deal with the compliant and criticism either at all or in a timely or professional way.

Adapt this to the possible scenario of tax planning that fails, perhaps because of HMRC challenge.

If engagement terms are clear, the risks and rewards fully set out, and the responsibilities of all parties involved fully and clearly defined, it is difficult to see that the client can raise a complaint against the adviser purely because the tax planning didn’t work.

Who can complain?

This leads us to the question of who can raise a complaint.

The TDS allows that any ‘person or body’ can raise a complaint. Person in this sense very much has its generally accepted meaning.

It is interesting, though, that it is possible for a member to complain about themselves. Circumstances appropriate for this to happen are not as uncommon as you might think. Take a case of non-compliance with CPD or AML requirements, a member self-declaring – what we might call an ‘auto-complaint’ – might expect assessors to deal more compassionately than if the complaint came from the member’s professional body. In practice, TDB has not yet had to deal with a case of auto-complaint.

Let us then consider the matter of which body might make a complaint.

In light of the March 2015 government paper and any possible changes to PCRT and the PRPG, if HMRC thought that an adviser is not ‘playing by the rules’ by advocating what they see as aggressive tax avoidance, might they raise a complaint? They might, but, is it a breach of the PRPG?

Members will be familiar with the CIOT and ATT’s guidance on Professional Conduct in Relation to Taxation (PCRT). The latest version of this is effective from 1 May 2015. While PCRT makes mention of the March 2015 government paper, however, the introduction makes clear that it does not contain any specific changes following that paper.

That said, the PCRT does say that, although in the form of guidance, it ‘has been recognised in the courts as ‘setting the standard’ for use by all tax advisers in the UK’, so advisers must treat the PCRT as part of the PRPG.

Any complaint by HMRC would have to reflect a breach of either or both of PRPG and PCRT in their forms applicable to the time of the alleged offence, to be even considered by TDB. A simple (if that is not too glib a word to use) failure of the tax avoidance scheme in the courts is unlikely to be enough on its own. Our professional rules are about the way the professional member behaves, not about the tax outcome for the client, and I would expect that to remain the case as PCRT is adapted to respond to the Government’s challenge.

Who can be complained about?

Members and registered students agree to be subject to the PRPG and PCRT as a condition of their membership of the CIOT and ATT. A member cannot resign during the progress of an investigation in order to avoid disciplinary action.

Friend or foe?

As I mentioned, the number of complaints brought against members is remarkably low.

Is this because the TDB is feared as an aggressive prosecutor so members do everything they can to avoid being hauled up in front of the beak? Or is it just because as tax advisers, we are basically a conscientious lot who just want to stick to the rules?

I like to think that it is because there is a lot of guidance out there which helps individuals steer a straight path. The TDB website (www.tax-board.org.uk) contains clearly worded guidance for both complainants and members including what to expect if you are in the unfortunate position of being found lacking. Most importantly, the two sponsoring bodies provide a help desk service for members before they get into difficulty.

As I said at the beginning of this article, much has changed and will continue to change. It has been an interesting four years, and I am looking forward to the challenge of the next two.