

TAXATION DISCIPLINARY BOARD

GUIDANCE FOR PANEL MEMBERS

INTERIM ORDERS

Background

1. Earlier this year the participants in the Taxation Disciplinary Scheme agreed that the TDB should be given additional powers which would enable it to impose an interim order in appropriate cases. Such an order would be considered at an interim stage between the consideration of a case by the Investigation Committee and the substantive hearing at a Disciplinary Tribunal. It would aim to deal with a member who poses a particular threat to the public such that it is considered to be in the public interest or necessary for the protection of the public that his membership should be suspended, pending the full hearing of disciplinary charges by a Disciplinary Tribunal.
2. The introduction of an arrangement for interim orders has required additions to the Scheme, in order to confer on the TDB the power to impose such orders. The Scheme has therefore been amended by inserting references to an Interim Orders Panel at appropriate points. The revised Scheme has been approved by the Councils of the two member bodies. The details of the arrangements are contained in additional Regulations which have been incorporated into the current Regulations and issued by the TDB Board of Directors. The new arrangements take effect from 1 January 2013 and apply to all cases which are considered by the Investigation Committee after that date.

Criteria for interim orders

3. The new power to impose an interim order will need to be considered in any case where this appears to be in the public interest or necessary for the protection of the public, including the likelihood that the alleged misconduct which has been referred to a Disciplinary Tribunal will continue. The new Regulation 5.4A specifies that such an order may be imposed where the complaint is related to a member:
 - (i) who has been charged with a criminal offence;
 - (ii) who has been convicted of a criminal offence;
 - (iii) who has been expelled from membership of another disciplinary body; or
 - (iv) whose professional competence or efficiency is seriously impaired as a result of ill health or mental incapacity.

Role of Investigation Committee

4. Where the Investigation Committee finds that a prima facie case has been made out against the member, and has decided that the case should be referred to a Disciplinary Tribunal in accordance with the provisions of Regulation 5.4(e), it must then consider whether an interim order may be appropriate. If the Committee finds that one or more of the criteria set out in Regulation 5.4A have been met, it may refer the case to an Interim

Orders Panel. Before doing so, it must be satisfied that one or both of the conditions which apply to the making of an interim order have been met. These are set out at Regulation 7C.1, namely that:

- (a) The continuing membership by the defendant of any Participant presents a real risk of harm to the public; and/ or
- (b) The continuing membership by the Defendant of any Participant presents a real risk of damaging the reputation of the Participant of which the Defendant is a member.

The Interim Orders Panel

- 5. In order to deal with interim orders, a new body is being set up within the TDB, to be known as the Interim Orders Panel (IOP). The role of the IOP is to determine whether, during the period prior to a Disciplinary Tribunal hearing, the defendant's membership of the relevant participant body should be suspended or subject to particular conditions. It may do so when it considers this to be necessary for the protection of members of the public or it is otherwise desirable in the public interest in order to maintain public confidence in the participant and the profession. An IOP does not make findings of fact or determine the allegations against the member: its function is to decide on whether the member represents a risk to the public in terms of the criteria set out above.
- 6. The Panel will consist of three members selected on a case-by-case basis from the Disciplinary Panel of the TDB. The Panel must include a legally-qualified chairman, a professional member and a majority of lay members. None of those selected must have had any previous involvement with the case or sit on the Disciplinary Tribunal which subsequently hears the case against the defendant.
- 7. The arrangements for convening an IOP will be made by the Board's Executive Director. Within seven days of the Investigation Committee's decision, the defendant must be informed that the case is being referred to the IOP and given a summary of the evidence that led to this decision and the reasons for that decision. The Panel will aim to meet as soon as possible after the Investigation Committee decision. The defendant will be invited to make written representations. These must reach the TDB no later than a week before the date scheduled for the meeting of the Panel. The Panel will sit in private, and the defendant may make oral representations to the Panel by telephone. He does not have the right to attend the Panel meeting, but the Panel may in certain circumstances agree to a request by him to attend in person or through a representative. Those circumstances are set out in Regulation 7B.3. In cases where the defendant has not made any representations and is not present the IOP will need to satisfy itself that the relevant documents have been properly served on him.

The interim order

- 8. Where the IOP considers that one or both of the conditions set out in Regulation 7C.1 are met (these are stated at paragraph 4 above), it may make an interim order. However, before deciding to make an interim order, the IOP must be satisfied as to the requirements stated in Regulation 7C.3. These are that:

- (a) There is a real prospect that the Complaint against the Defendant will be made out; and
 - (b) There is a real risk that not to make an interim order will expose the public to harm and/ or expose the reputation of the Participant of which the Defendant is a member to harm; and
 - (c) The need to protect the public or the reputation of the Participant of which the Defendant is a member clearly outweighs the effect on the Defendant of the interim order.
9. In determining whether or not a member's professional competence or efficiency is seriously impaired as a result of ill-health or mental incapacity, the Interim Orders Panel may rely on a report by a registered medical practitioner; but the absence of such a report does not prevent the Panel from determining on the basis of the member's conduct that it is appropriate to make an interim order. If an order is made on the grounds of health impairment, it is open to the member subsequently to apply for the IOP to reconsider the order on the grounds that it is no longer necessary, for example because his particular health problem has been cured (see Regulation 7C.9).
10. The IOP's power to make an interim order is discretionary. In exercising its discretion, the IOP must weigh the relevant factors and assess the proportionality of its response in dealing with the risk to the public interest (including public confidence) and the adverse consequences of any action on the member's own interests. In assessing whether or not to take action, the IOP should consider the seriousness of any criminal charges and the acceptability of its decision on interim action should the member later be convicted or acquitted (including the effect on public confidence).
11. Upon reaching its conclusions, the Panel must set these out in a written decision which includes a statement of the reasons for its conclusions, including a conclusion not to impose an order. The decision, which should be dated and signed by the chairman of the Panel, should be completed as soon as possible, and sent forthwith to the defendant by the Executive Director. If the Panel makes an interim order, this will become effective on the date on which it is deemed to be served on the defendant. (Regulation 26.3 sets out the provisions governing the service of documents by the TDB.) The reasons for imposing an interim order will not be made available to the Disciplinary Tribunal which hears the charges against the defendant until after it has found the case proved. The defendant is, however, free to refer to the written reasons when giving evidence to the Tribunal.
12. The interim order will normally take the form of an order to suspend the member from membership of the relevant participant body until the Disciplinary Tribunal has heard the charges laid against him. Alternatively, the interim order may impose conditions on the member for the same period, but without suspension. If the IOP considers the possibility of imposing conditions, it must ensure that any conditions imposed are workable, enforceable and will protect the public, the wider public interest or the defendant's own interests. There is no right of appeal against a decision to make an interim order,

although a member where health impairment is an issue has a right to request that the order be reconsidered (see paragraph 9 above).

13. In those rare cases where it proves impossible to hold the Disciplinary Tribunal within a year of the original interim order (for example, if the member is ill or in prison), the IOP must reconvene and review whether the interim order should be renewed, varied or lifted. Before doing so, the defendant must be given the opportunity to make representations, in the manner summarised at paragraph 7 above. In reviewing an interim order, the IOP must fully consider all the circumstances relating to the case, including any new information. In reaching its decision, the IOP should apply the same test and take account of the same factors as set out in paragraphs 8-10 above.
14. The consequences of an order to suspend a member are set out in the governing instruments of the two participants. These provide that a suspended member is not entitled to use any of the designatory letters and titles of the CIOT or ATT or to receive any publications or other materials normally provided to their members.
15. Regulation 7C.4(b) provides for the publication of any order made by the Interim Orders Panel. The arrangements will be similar to those relating to the publication of Tribunal decisions set out in Regulation 23. The TDB does not intend to announce forthcoming meetings of the IOP, but if an interim order is made against a member or firm, this will be announced on the TDB's website and in the journal Tax Adviser, but the written reasons for the order will not be published.

Application to firms

16. Where a member has been suspended, it is important that the consequences of his suspension flow through to any firm where he may be a partner or director. This is particularly important where the member is a sole practitioner; otherwise he could evade the effects of suspension by allowing his firm to continue operating as before. If the suspended member works in a firm which is one of those designated as a firm of Chartered Tax Advisers, during his suspension he will not count as a CTA for the purposes of complying with Members Regulation 44 of the CIOT, which sets out the rules governing the entitlement of firms to adopt the designation of CTA. If he is the nominated member or the only CTA in the firm, that may result in the firm losing its CTA status.
17. Where an interim order made against a defendant could also affect a firm's membership of the CIOT (eg a firm with CTA status), the IOP must notify the firm (described in the Regulations as "the Member") that it is minded to make an interim order and give the firm the opportunity to explain within ten days why such an order should not be made. If the firm provides representations, the IOP must reconvene and allow the firm to make oral representations on the same basis as an individual defendant (see paragraph 7 above).

Disciplinary Tribunal decisions

- 18 It is the Disciplinary Tribunal which makes the substantive decision about a defendant. The Tribunal will not be informed of the reasons for an interim order until it has made its findings in relation to the defendant. If it finds none of the charges proved, the interim order will terminate automatically. If it finds one or more charges proved, it will then be

informed of the existence of the interim order and the reasons for it. In determining the sanction, the Tribunal must take account of the interim order so as to ensure that it remains in place at least until its sanction takes effect. Under Regulation 15.9 an order of the Disciplinary Tribunal becomes effective on the day it is deemed to be served on the defendant (usually two days after it is posted to him). If, therefore, the Tribunal orders a sanction of suspension or expulsion, it must ensure that suspension under an interim order remains in force until its own sanction becomes effective. The Disciplinary Tribunal does, however, have a discretion to stay an order where a notice of Appeal is submitted; so too does a Disciplinary Assessor and an Appeal Tribunal (see new Regulation 16.2A).

Supplementary matters

19. The opportunity has been taken to make two further changes in those Regulations which have been amended. First, the requirement for the Investigation Committee to provide written reasons for its decisions has been modified by the new Regulation 5.6. This makes it clear that the written reasons provided by the Investigation Committee should no longer be made available to the Disciplinary Tribunal before it has found a charge proved, lest they unduly influence the Tribunal and prejudice the position of the defendant. The written reasons will, however, be made available to the Interim Orders Panel, as that body is not making a finding as to the facts alleged against the defendant but whether he poses a risk to the public. The IOP may well be assisted by learning of the reasons why the case has been referred to them. The Investigation Committee's written reasons will also continue to be sent to the complainant and to the defendant, who will be free to refer to them when appearing before an Interim Orders Panel or a Disciplinary Tribunal.
20. The second change relates to the role of the Presenter. In the light of experience it has been found that the previous Regulation 7.1, which required the Investigation Committee to refer a complaint to the Presenter within 21 days, was impractical in view of the various preliminary procedures which have to take place before a case can be passed to the Presenter. The Regulation has therefore been amended by removing the reference to the Presenter and replacing it by a requirement to forward the case to the Clerk to the Disciplinary Tribunal within 21 days. The previous Regulations 7.2 to 7.6 have been simplified, so that the powers of the Presenter to refer a case back to the Investigation Committee are now set out in Regulation 7.3.

Taxation Disciplinary Board

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