

DPE 022/015/2012

12 October 2012

To: Accounting Officers

**Circular 15 /2012:**

**Minute of the Minister for Public Expenditure and Reform in response to the Committee of Public Accounts Report on VAT Costs on the National Aquatic Centre.**

**A Dhuine Usail,**

1. I am directed by the Minister for Public Expenditure and Reform to enclose, for your information and guidance, a copy of the Minute of the Minister for Public Expenditure and Reform in response to the Committee of Public Accounts Report on VAT Costs on the National Aquatic Centre.

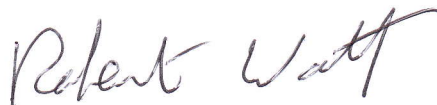
**Issues raised**

2. The Minute addresses a number of issues, including;
  - State involvement in litigation
  - Information being withheld by the State,
  - Consultants and Advisors
  - How changes in tax law are incorporated into guidelines.

**Enquiries**

3. Enquiries in regard to this circular can be addressed to Government Accounting Unit, Department of Public Expenditure and Reform, telephone: +353 1 6767571, LoCall: 1890 661010 or email: govacc@per.gov.ie.

Mise le meas,



Robert Watt  
Secretary General

**Minute of the Minister for Public Expenditure and Reform in response to the Committee of Public Accounts Report on VAT Costs on the National Aquatic Centre.**

**Recommendation 1**

Legal strategies should be underpinned by a cost benefit analysis that encompasses the risks associated with litigation and the benefits and costs that are likely to be associated with both success and failure of the litigation.

The Minister for Public Expenditure and Reform is informed by the Office of the Attorney General that in litigation involving the State, which is under the control of the Attorney General, the purpose of the litigation and potential consequences of the action are fully taken into account whether the State is a plaintiff or defendant and cases are assessed taking into consideration the risks involved in running the case including the likely costs which may be incurred.

This exercise however is not a simple cost balancing exercise as policy issues may arise for the client Department and the Government as a whole and a strategic approach may be required. There are a number of agencies and bodies which conduct their own cases using private firms of solicitors to advise and to conduct litigation, as in this instance, and that litigation is not directed by the Office of the Attorney General or under its control.

The Accounting Officers of such bodies would ensure that a similar risk assessment is carried out.

**Recommendation 2**

The robustness of any legal case instigated by a State Body should rely primarily on the legal framework in place and care should be exercised where reliance is placed on guidelines that are not a statement of the law and may have been produced for other purposes.

The Minister for Public Expenditure and Reform is informed by the Office of the Attorney General and the Office of the Revenue Commissioners that the tax codes are extremely complex and the day to day administration of taxes depends on interpretation and guidance issued by Revenue. VAT is under the Consolidated VAT Act, under the "care and management of the Revenue Commissioners" and guidance issued by Revenue is extremely important for compliance purposes. Other legal frameworks are of a different character but the role of the Revenue is central to the collection and assessment of tax.

### **Recommendation 3**

Departments, in sanctioning any form of legal action, should not rely on oral advice from the Department of Finance and/or the Department of Public Expenditure and Reform.

The Minister for Public Expenditure and Reform is informed by the Office of the Attorney General that ideally sanction should always be in written form but this cannot be so in every instance because of time constraints and urgent situations arise in litigation which may require immediate action and reliance on oral advice.

### **Recommendation 4**

The Department of Finance and the Department of Public Expenditure and Reform should review its procedures in relation to giving oral advice especially in respect of forthcoming litigation and should give written advice whether by formal letter or email.

The issue of a formal sanction by the Minister for Public Expenditure and Reform in respect of voted expenditure is an essential element in the procedure for the management and control of public expenditure. The *Public Financial Procedures* state that “in normal circumstances the spending Department or Office should formally request sanction for expenditure in writing. Where oral sanction is issued by the Minister for Public Expenditure and Reform, it must be followed up with a written confirmation on foot of a formal proposal from the spending Department.”

With regard to the provision of oral advice in the future, the Minister for Public Expenditure and Reform is informed by the Department of Finance that it is committed to improving the effectiveness of its communications, and make adjustments to its procedures where necessary.

### **Recommendation 5**

Given the 2011 split of the Department of Finance, the new Department of Public Expenditure and Reform, in advising a State body in respect of a taxation charge, should liaise with the budgetary division of the Department of Finance which has responsibility for policy on taxation and which draws up the annual Finance Bill. This information so supplied by the Department of Public Expenditure and Reform should be in addition to any legal advice received by the State Body from the office of the Attorney General.

The Minister for Public Expenditure and Reform is informed by the Department of Finance that it liaises with other Departments in relation to tax policy as required. However, the day to day interpretation of tax law is an operational matter for the Revenue Commissioners.

### **Recommendation 6**

The office of the Attorney General should, in reviewing the Supreme Court decision in the case of CSID v DWW, examine whether it is necessary to issue guidelines to State bodies in respect of the sharing of information with the other parties in an effort to prevent disputes escalating to litigation.

The Minister for Public Expenditure and Reform accepts this recommendation.

The Minister for Public Expenditure and Reform is informed that the Office of the Attorney General will review the judgement in the case and consult with the Department of Public Expenditure and Reform in light of the Committee's recommendation on what action may be appropriate in relation to State bodies.

### **Recommendation 7**

Revenue should review the way changes to tax law are incorporated into guidelines so as to ensure that avoid a recurrence of the situation in 2002 when a key anti-avoidance measure was incorrectly interpreted by Revenue.

The Minister for Public Expenditure and Reform is informed that the Office of the Revenue Commissioners accepts the thrust of this recommendation and will review the way changes in tax law are incorporated into the guidelines. However, the Office of the Revenue Commissioners recognises the Constitutional position of the Supreme Court as the final arbiter of the interpretation of legislation and can only provide reasonable assurance, and not absolute assurance, as to its interpretation of a particular piece of tax legislation.

### **Recommendation 8**

Revenue should now carry out a formal review of its handling of the CSID VAT issue, having regard to the finding of the Supreme Court in 2010 and in view of the findings in this Report.

The Minister for Public Expenditure and Reform is informed that the Office of the Revenue Commissioners accepts this recommendation and a formal review will commence shortly.

## **Recommendation 9**

The Department of Public Expenditure and Reform should review the performance clauses in contracts of consultants so that under-performance by consultants has an appropriate penalty applied.

The Minister for Public Expenditure and Reform accepts this recommendation.

The existing guidelines for the Engagement of Consultants and other External Support by the Civil Service provide at present that contracting authorities should consider specifying that a realistic amount depending on the subject and value of the contract will be retained by the contracting authority until the project is completed, all deliverables formally accepted, and the final report on the project (or an equivalent agreed project closure mechanism) approved and signed-off at the appropriate level (Paragraph 4.7.1 of the 2006 Guidelines refer).


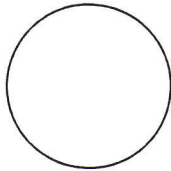
In addition, the Guidelines provide detailed guidance in relation to the preparation of contracts and advise in all cases, that the contract must specify precisely the tasks to be carried out by the contract holder and the specific deliverables to be produced and / or services to be delivered, all of which are subject to acceptance by the contracting authority; and the schedule for their delivery. The contract must provide the contracting authority's procedures for the acceptance of deliverables / services (Paragraph 6.3 of the Guidelines refer).

In relation to payments, the Guidelines provided that the contract should specify the payment schedule setting out the deliverables required for each stage of payment (Paragraph 6.4 of the Guidelines refer).

In light of recommendation no. 9, the Department will review the Guidelines with a view to examining the scope, within the EU Procurement Directives, for the inclusion of a more specific penalty clause in the case of under-performance by consultants and will update the Guidelines accordingly.

Given under the Official Seal of the Minister  
for Public Expenditure and Reform on this the  
*12th* day of October, 2012

L.S.



*Robert Watt*

Robert Watt  
Secretary General  
Department of Public Expenditure and Reform