
**REPORT
ON
A FISCAL PROSECUTOR
AND
A REVENUE COURT**

(LRC 72-2004)

IRELAND
The Law Reform Commission
35-39 Shelbourne Road, Ballsbridge, Dublin 4

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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published seventy Reports containing proposals for reform of the law; eleven Working Papers; thirty four Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and twenty five Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in Appendix C to this Consultation Paper.

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NOTE

This Report was submitted to the Attorney General, Mr Rory Brady SC, under Section 4(2)(c) of the *Law Reform Commission Act 1975*. It embodies the results of an examination of and research in relation to the possible benefits of a Fiscal Prosecutor and a Revenue Court which was carried out by the Commission at the request of the former Attorney General, Mr Michael McDowell SC, together with the proposals for reform which the Commission was requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

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INTRODUCTION

1 This Report, which follows a Consultation Paper published in 2003,¹ has been prepared in response to a reference from the Attorney General, pursuant to section 4(2)(c) of the *Law Reform Commission Act 1975*. On 18 February 2002, the then Attorney General, Mr Michael McDowell SC, requested the Commission to consider, in response to the Oireachtas Committee of Public Accounts Inquiry into DIRT,² the establishment of a Fiscal Prosecutor and a Revenue Court.³

2 The background to this Report is the issue of whether the establishment of either a Fiscal Prosecutor or a Revenue Court would assist in dealing with tax evasion, which has become a major problem in Ireland. A 1997 study into the hidden or “black” economy estimated that a relatively conservative figure for tax evasion is that it amounts to 3% of GNP.⁴ Using the 2003 GNP level⁵ this amounts to approximately €3.3 billion. Adopting a preferred approach amongst economists known as the monetary method,⁶ the study calculated a

¹ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003).

² *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001), more commonly known as the “DIRT Inquiry”. DIRT is an acronym for Deposit Interest Retention Tax.

³ The Attorney General, Michael McDowell, stated: “Pursuant to section 4(2)(c) of the Law Reform Commission Act I wish to formally request the Commission to undertake a study to examine the possible benefits of a revenue court and fiscal prosecutor.”

⁴ See Fagan “Measuring the Size of Ireland’s Black Economy” (1997) *Irish Banking Review* Summer 19.

⁵ Irish GNP in 2003 amounted to €109,221 million. See the website of the Central Statistics Office of Ireland, available at www.cso.ie.

⁶ The monetary method attempts to estimate the excess currency holdings and to monitor the evolution of this variable over time. The difficulty with

level of tax evasion of between 8% and 11% of GNP in 1992.⁷ At 2003 GNP levels, this amounted to between approximately €8.7 billion and €12 billion. More reliable figures for tax evasion may be available in the future because from 2004 the Revenue Commissioners will conduct purely random audits of taxpayers⁸ in addition to categories of targeted audits. One of the benefits of using this approach is that the figures for evasion extracted from random audits could be used to indicate a general level of tax evasion.

3 The scandal of tax evasion exposed in recent years, whether by a limited so-called ‘golden circle’ or a wider circle of citizens using bogus offshore accounts,⁹ has resulted in calls for reform of revenue law and of the powers conferred on the Revenue Commissioners. This reflects recent changes in the perception of ‘white-collar’ crime both nationally and internationally. Competition law, for example, has also undergone significant change over the past decade with the introduction of criminal offences for anti-competitive practices.¹⁰

4 The wider debate about the reasons for past widespread tax evasion is outside the scope of this Report.¹¹ It is clear that, arising from the many recent revelations, significant reforms in substantive revenue and financial services law have been enacted, making those particular events less likely to recur. This Report focuses on the appropriate balance that the Revenue Commissioners might strike in the future between their use of civil enforcement powers (audit and civil penalties) and criminal enforcement powers (prosecution and conviction).

this approach is that it assumes that all “excess currency” enters the hidden or “black” economy.

⁷ See Fagan *op cit* fn 4 at 23.

⁸ *Annual Report of the Comptroller and Auditor General 2003* (Government Publications 2004) at 11, discussed at paragraphs 3.07-3.12 below.

⁹ See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at Chapter 1.

¹⁰ For example, see sections 6, 7 and 8 of the *Competition Act 2002*.

¹¹ See Franzoni “Tax Evasion and Tax Compliance” in Bouckaert (ed) *Encyclopedia of Law and Economics Volume IV: The Economics of Public and Tax Law* at 60-61. See also Andreoni, Erard and Feinstein “Tax Compliance” (1998) 36 *Journal of Economic Literature* 818.

5 Part of the background to this paper is the recent reorganisation of the Revenue Commissioners. The outline plans for this were being formulated by the Revenue Board in the late nineties and were largely endorsed by the *Report of the Steering Group on the Review of the Office of the Revenue Commissioners*, established as a result of the DIRT inquiry.¹² The new structure comprises two national office divisions, four revenue Legislation Service divisions, an Investigations and Prosecutions Division, a Large Cases Division and four new Regional Divisions.¹³ This restructuring process was completed in October 2003.¹⁴ The recommendations in this Report have been made on the basis that the newly restructured Revenue Commissioners would be more effective in ensuring tax compliance and prosecuting offenders where appropriate. The Report also makes recommendations on the further reform of the Revenue Commissioners.

9 The layout of the Report differs from the Consultation Paper in that chapters are grouped in relation to the prosecution and the adjudication process. Chapter 1 deals with the recent comprehensive reform of the Revenue Commissioners. Chapter 2 considers the imposition of civil penalties by the Revenue Commissioners. Chapter 3 deals with the Revenue audit process. Chapters 4, 5 and 6 relate to prosecutions and the desirability or otherwise of establishing a Fiscal Prosecutor. Chapters 7 and 8 relate to the adjudication process, including the role of the Appeal Commissioners and the desirability or otherwise of establishing a separate Revenue Court system.

¹² *Report of the Steering Group on the Review of the Office of the Revenue Commissioners* (Government Publications 2000). This Report is available at www.revenue.ie/wnew/pr_steer.htm.

¹³ See Appendix 1 of the *Annual Report of the Revenue Commissioners 2003* (Government Publications 2004).

¹⁴ *Ibid* at 7.

CHAPTER 1 REFORM OF THE REVENUE COMMISSIONERS

A Introduction

1.01 A number of reports emanating from tribunals of inquiry, the Oireachtas and the Comptroller and Auditor General have uncovered widespread tax evasion in Ireland dating back to the 1980s. A number of these reports pointed out the need for substantive reform of revenue law but also raised questions about the priority given in the past to prosecution of revenue offences by the Revenue Commissioners. This led to calls for substantial reform and reorganisation within the Revenue Commissioners and much of these reforms have now been implemented and are outlined in this Chapter. Of particular relevance to this Report, is the question raised by the 2001 *Final Report of the Oireachtas DIRT Inquiry*¹ as to whether a specialist fiscal prosecutor and revenue court should be established. This led to the Attorney General requesting the Commission to examine these two issues.

1.02 The Consultation Paper² outlined and discussed the large number of tribunals and reports pertinent to the Revenue Commissioners prior to its publication in October 2003. They are:

- The Tribunal of Inquiry into the Beef Processing Industry (the Beef Tribunal);
- The Tribunal of Inquiry ('Dunnes Payments')/McCracken Tribunal;
- The Moriarty Tribunal;
- The Ansbacher Report;

¹ *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

² See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at Chapter 1.

- The DIRT Inquiry;
- The Steering Group on the Review of the Office of the Revenue Commissioners; and
- The Comptroller and Auditor General's Examination of Revenue Write Offs.

1.03 The 1994 *Report of the Beef Tribunal*³ examined the Goodman International Group and discovered tax evasion within the company and highlighted other breaches of revenue law by other beef processing companies. The Report of the McCracken Tribunal⁴ dealt with payments to the former Taoiseach, Charles Haughey, and to Michael Lowry, a former minister, by the businessman, Ben Dunne. Evidence of the use of off-shore accounts (Ansbacher accounts) by Irish residents was discovered during the course of the McCracken Tribunal. Since the McCracken Tribunal terms of reference did not incorporate the investigation of these payments, the Moriarty Tribunal was established.⁵ This led to the Minister for Enterprise, Trade and Employment appointing an inspector to investigate the activities of Ansbacher (Cayman) Limited. Contemporaneously, the Revenue Commissioners assigned a Special Project team to investigate Ansbacher accounts. The *Annual Report of the Revenue Commissioners 2003* states that 289 Ansbacher cases were being dealt with and that the number of concluded settlements amounted to 56.⁶

1.04 In hindsight, it has become apparent that the use of bogus off-shore accounts⁷ was widespread in Irish society during the 1980s

³ *Report of the Tribunal of Inquiry into the Beef Processing Industry* (Government Publications 1994).

⁴ *Report of the Tribunal of Inquiry (Dunnes Payments)* (Government Publications 1997).

⁵ This tribunal was also established to investigate payments to the former Minister for Transport, Energy and Communications, Mr Michael Lowry.

⁶ *Annual Report of the Revenue Commissioners 2003* (Government Publications 2004) at 25.

⁷ This colloquialism has been defined by the Revenue Commissioners as those which were "treated by a financial institution as being exempt from deposit interest retention tax (DIRT) on the grounds that no person ordinarily resident (or since 1994, resident) in the State was beneficially entitled to interest on the account while, in fact, a person so beneficially

and early 1990s. By the end of 2003, over €258 million had been recovered in tax, interest and penalties, with 20,390 cases having been concluded. Over 7,500 individuals did not avail of the voluntary disclosure deadline of 15 November 2001 and are now being targeted for investigation and prosecution.⁸ The State's response to the discovery of these non-resident accounts was two-fold; the *Finance Act 1999* granted the Revenue Commissioners extra powers and the Oireachtas' Public Accounts Committee conducted an Inquiry on Certain Revenue Matters ("DIRT Inquiry").

1.05 The DIRT Inquiry published three reports. One of the key recommendations of the first report was that the Revenue Commissioners' independence, accountability, organisation and structure be reviewed. This review was conducted by the Steering Group on the Office of the Revenue Commissioners, which the Commission understands largely endorsed the Revenue Commissioners' own plans for a radical restructuring of the organisation and this was implemented in large measure by the end of 2003. The second DIRT Report concerned itself with a look-back audit with a time frame of April 1986-1998. The third and final report recommended an overhaul of the Board of the Revenue Commissioners with the creation of a new board comprising three executive and three non-executive directors.⁹ One of this Report's recommendations called for the Department of Finance and the Attorney General to undertake a more detailed study of the benefits of establishing a Fiscal Prosecutor and a Revenue Court. This led to the Attorney General referring the matter to the Law Reform Commission and as a result of this request, the Commission published a Consultation Paper on the matter in 2003 which is the basis for the present Report.

1.06 Since the publication of that Consultation Paper, a number of reports have been published, namely: the *Annual Report of the*

entitled was ordinarily resident (or since 1994, resident) in the State." *Statement of Practice SP-Gen 1/01* (Revenue Commissioners 2001).

⁸ *Annual Report of the Revenue Commissioners 2003 op cit* fn 6 at 27.

⁹ Consideration of the implementation of this recommendation has been postponed until the completion of the Moriarty tribunal.

Comptroller and Auditor General 2002,¹⁰ the *Report of the Revenue Powers Group to the Minister for Finance*,¹¹ the *Annual Report of the Revenue Commissioners 2003*,¹² the publication of the *Report on National Irish Bank*¹³ and the *Annual Report of the Comptroller and Auditor General 2003*.¹⁴ Also of relevance is the enactment of the *Companies (Auditing and Accounting) Act 2003* and the *Central Bank Act 2004*, arising from the recommendations of the *Report of the Review Group on Auditing*¹⁵ and the *Central Bank and Financial Services Authority of Ireland Acts 2003 and 2004*, arising from the *Report of the Working Group on a Single Financial Regulatory Authority*.¹⁶

1.07 The *Report of the Comptroller and Auditor General 2002* contained useful information concerning DIRT investigations, special investigations by the Revenue Commissioners regarding National Irish Bank, Ansbacher (Cayman) Limited and Pick-Me-Up schemes.¹⁷

¹⁰ *Annual Report of the Office of Comptroller and Auditor General 2002* (Government Publications 2003).

¹¹ *Revenue Powers Group: Report to the Minister for Finance* (Government Publications 2003).

¹² *Annual Report of the Revenue Commissioners 2003* (Government Publications 2004).

¹³ *Report on Investigations Into the Affairs of National Irish Bank Limited and National Irish Bank Financial Services Limited* (Government Publications 2004).

¹⁴ *Annual Report of the Office of the Comptroller and Auditor General 2003* (Government Publications 2004). The 2003 Report also refers to the *Third Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments* (Government Publications 2004) (Chair: Judge Alan Mahon).

¹⁵ *The Report of the Review Group on Auditing* (Government Publications 2000).

¹⁶ *Report of the Working Group on the Establishment of a Single Financial Regulatory Authority* (Government Publications 2000).

¹⁷ Pick-Me-Up schemes involve the expenses for goods or services incurred by a political party being invoiced by the supplier to another trader who then pays the supplier as a means of supporting the party. These payments should not have been deducted and VAT should not have been reclaimed. See *Annual Report of the Office of Comptroller and Auditor General 2002* (Government Publications 2003) at 11.

More importantly, from the perspective of this Report, the Comptroller and Auditor General made a number of criticisms in relation to the non-filing of tax returns and the lack of an adequate response to this, which forms the basis for the recommendations in Chapter 4.

1.08 The *Revenue Powers Group Report*¹⁸ contained recommendations on the effectiveness of revenue powers, on the appropriate balance of Revenue powers,¹⁹ on the streamlining of powers,²⁰ on the need for further powers,²¹ on the Appeal Commissioners and on administrative reviews (*ie* an internal review function and the role of external reviewers).²²

1.09 The NIB Report published in 2004 contained a detailed analysis of the level of evasion operated by NIB and National Irish Bank Financial Services Limited. The Report outlined how the Clerical Medical Insurance (“CMI”) policies operated as a vehicle for customers of NIB to hide bogus non-resident accounts.²³ The

¹⁸ *Revenue Powers Group: Report to the Minister for Finance op cit* fn 11.

¹⁹ In this regard, the Report made recommendations on the levels of third party and Revenue authorisations required to activate Revenue powers. These include the power to search with and without warrants, powers in relation to criminal investigation with a view to prosecution, on the Appeal Commissioners, on Revenue penalties, interest, voluntary disclosure, publication of tax defaulters, disclosure of information to the Director of Corporate Enforcement and other agencies, the removal and retention of taxpayer’s records and compliance with orders.

²⁰ In particular, the legislative gradation of powers from the less intrusive to the more intrusive with existing prosecution powers being separated from other powers.

²¹ For example, recommendations relating to the general right to obtain information, on automatic reporting to the Revenue Commissioners, on offshore assets and overseas payments, payments for services provided from countries with which Ireland does not have a tax treaty and also on additional prosecution powers such as the ability for Revenue investigators to be permitted to question persons detained in Garda custody in connection with an arrestable offence (on this particular recommendation, see paragraphs 5.18-5.27, below).

²² See paragraphs 2.15-2.20, below.

²³ See *Report on Investigations Into the Affairs of National Irish Bank Limited and National Irish Bank Financial Services Limited* (Government Publications 2004) at Parts 1, 2 and 3.

Commission have been informed by the Revenue Commissioners that they have completed investigations into the majority of those involved and some have been prosecuted. The 2003 *Annual Report of the Comptroller and Auditor General* contains data on the audits and prosecutions and discusses a number of issues including the random audit programme, special investigations and individuals who availed of an amnesty under the *Waiver of Certain Tax, Interest and Penalties Act 1993* and then were the subjects of recent liability reviews by the Revenue Commissioners.²⁴

1.10 As mentioned above,²⁵ the *Report of the Review Group on Auditing* (commissioned by the Minister for Enterprise, Trade and Employment in the wake of the DIRT Inquiry) led to the enactment of the *Companies (Auditing and Accounting) Act 2003*²⁶ and the Report of the Working Group on a Single Financial Regulatory Authority was the basis for certain provisions of the *Central Bank and Financial Services Authority of Ireland Acts 2003 and 2004*.²⁷

1.11 In light of the various Reports relating to the Revenue Commissioners in recent years, the Revenue Commissioners have responded with a comprehensive reform programme, much of which was detailed in our Consultation Paper. However, even in 2003, many of the plans for reorganisation were still embryonic. They have now been implemented in the main.

²⁴ See *Report on Investigations Into the Affairs of National Irish Bank Limited and National Irish Bank Financial Services Limited* (Government Publications 2004) at Chapter 3.

²⁵ Paragraph 1.06, above.

²⁶ For example, section 45 of the 2003 Act requires directors to file compliance statements that the company is in compliance with, amongst other things, its 'relevant obligations'; defined as including tax law. The Office of the Director of Corporate Enforcement has published draft guidance on the matter; see *Draft Guidance on the Obligations of Company Directors to Prepare Compliance Policy and Annual Compliance Statements under the Companies (Auditing and Accounting) Act 2003* (Office of the Director of Corporate Enforcement 2004). This is available at www.odce.ie.

²⁷ Thus, section 26 of the 2004 Act obliges a regulated service provider to provide compliance statements when required to do so by the Central Bank.

B The Revenue Commissioners: Modernisation and Restructuring

1.12 The Revenue Commissioners have restructured in a number of ways in recent years.²⁸ They have described this as “... the most significant change programme ever undertaken in Revenue.”²⁹ The Board of the Revenue Commissioners comprises three Commissioners, including the Chair. In addition, there is a staff complement of over 7,000 spread throughout over 100 Revenue offices in the State.

(1) National Office Divisions

1.13 As part of the restructuring, two new National Office Divisions have been established. The Strategic Planning Division is responsible for supporting “the Board in setting and reviewing corporate strategy and performance, including research, risk, security, governance issues and co-ordination of the annual business plans.”³⁰ The Operations Policy Division co-ordinates the development of operational policy and support and guides the operational area in the identification and dissemination of best practice.³¹ The four Legislation Service Divisions are Direct Taxes Policy and Legislation Division, Direct Taxes Interpretation and International Division, the Indirect Taxes Division and the Customs Division.³²

²⁸ For an overview of the new Revenue structure, see *Annual Report of the Revenue Commissioners 2003* (Government Publications 2004) at Appendix 1.

²⁹ *Ibid* at 8.

³⁰ “Revenue’s New Structure” (2003) *52 Tax Briefing* 1 at 3.

³¹ *Ibid*.

³² The role of the Direct Taxes Policy and Legislation Division is to provide advice on legislation and policy for all direct taxes (including capital taxes) to the Revenue Commissioners; the Direct Taxes Interpretation and International Division concentrates on the interpretation of direct taxes (including capital taxes); the Indirect Taxes Division concentrates on policy, interpretation and international matters in relation to all indirect taxes, while the Customs Division deals with the policy, legislation and international functions in relation to Customs. See the “About us” section at www.revenue.ie.

(2) Regionalisation

1.14 Another element of the restructuring is the introduction of regionalisation, with commercial taxpayers having their affairs dealt with in the region where the business is managed and PAYE taxpayers being dealt with in the region in which they are resident.³³

The table below sets out the relevant regions and districts.

Table 1 Revenue Commissioners' Regional Structure

| <i>Region</i> | <i>District</i> |
|-----------------------------|---|
| Border-Midlands-West Region | Cavan, Donegal, Galway, Leitrim, Longford, Louth, Mayo, Monaghan, Offaly, Roscommon, Sligo, Westmeath |
| Dublin Region | Dublin (City & County) |
| East & South East Region | Carlow, Kildare, Kilkenny, Laois, Meath, Tipperary, Waterford, Wexford, Wicklow |
| South West Region | Clare, Cork, Kerry, Limerick |

1.15 The employment figures for each of the divisions are as follows:

- East & South East Region: 723 staff;
- Border Midlands: 871 staff;
- South West Region: 751 staff and
- Dublin Region 1,409 staff.³⁴

1.16 Not all sections of the Revenue Commissioners are regionalised in the above format. For example, the stamping of documents is still conducted at the Stamp Duty Offices in Dublin, Cork and Galway.

³³ See the "About Us" section at www.revenue.ie. The previous system was structured in two principal sections, namely: Taxes and Customs and Excise.

³⁴ *Annual Report of the Revenue Commissioners 2003* (Government Publications 2004) at 10.

(3) *Large Cases Division*

1.17 The Large Cases Division is a significant development in the reform of the Revenue Commissioners.³⁵ The reason for it was described by its head as being to achieve the right balance between co-operation and support, audit and investigation and seeking to encourage tax compliance of large businesses and wealthy individuals.³⁶ The units established within this Division were subdivided into the following categories: “General Business” (businesses with turnover in excess of €125 million), “Financial Services” (due to the complexity of this area, all businesses in the banking, insurance and pensions sector are included), “High Wealth Individuals” (wealth in excess of €50 million) and also “Anti-Avoidance” (which is subdivided into Direct Taxes Anti-Avoidance Unit and Indirect Taxes Anti-Avoidance Unit). Overall, the Large Cases Division deals with taxpayers who contribute over 60% of Revenue receipts.³⁷

1.18 The Large Cases Division attempts to achieve its objectives in a number of ways. These include the use of increased knowledge and expertise, creating new forms of relationships with the management of large businesses, audit and investigation, dialogue with tax advisers and also by creating an awareness of the risks of non-compliance. The Division proposes to establish “Frameworks of Compliance” whereby in return for agreed standards of compliance by large businesses and wealthy individuals, the Division agrees to offer higher levels of service and support.

1.19 This approach by the Large Cases Division (seeking to increase the co-operative relationship between tax collector and taxpayer) has not received universal support. For example, one criticism is that blurring the role of Revenue as enforcer with that of adviser, may potentially ‘drive a wedge’ between tax advisers and taxpayers.³⁸ The Commission is expressing no view on this debate

³⁵ 219 staff are employed within the Large Cases Division: *ibid*.

³⁶ Moriarty, “Revenue’s Large Case Division” (2004) 17(1) *Irish Tax Review* 49. This paper is also available at www.revenue.ie.

³⁷ *Annual Report of the Revenue Commissioners 2003 op cit* fn 34 at 72.

³⁸ See Henahan and Walsh, “Beware of Tax Officials Bearing Gifts in Large Cases” available at www.ey.com/global/content.nsf/ireland/tax_overview.

other than to suggest that this is an area in respect of which there should be periodic review and evaluation.

(4) Investigations and Prosecutions Division

1.20 Another important development in the restructuring of the Revenue Commissioners has been the merger of the investigation arms of the Customs & Excise Division and the Taxes Division to form the Investigations and Prosecutions Division. The history of this evolutionary process is discussed in the Consultation Paper,³⁹ which also sets out the process by which the decision to prosecute is made by the Prosecution Admissions Committee. Since the publication of the Consultation Paper, the Prosecution Admissions Committee has been restructured in 2004 to reflect the programme of regionalisation within the Revenue Commissioners.⁴⁰

1.21 The Revenue Commissioners have said in their *Statement of Strategy 2003-2005* that they intend to make “compliance easy while making non-compliance very unattractive.”⁴¹ This raises the question of addressing the appropriate balance between civil penalties on the one hand and criminal prosecution on the other.

1.22 This policy dilemma of choosing between prosecution and civil penalties raises many complex issues which are discussed in further detail in Chapter 5.

(5) Risk Management Unit

1.23 For any organisation, the ability to utilise resources fully and efficiently involves the active use of risk assessment. The Revenue Commissioners have explicitly accepted this requirement in the course of their modernisation programme, particularly in relation to audits and the work being conducted by the Large Cases Division.

³⁹ See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraphs 1.45-1.55.

⁴⁰ The Committee is made up of one officer from the Investigation Liaison and Policy Development (a branch of the Investigations and Prosecutions Division), three officers from each of the three taxes investigative units of the Investigations and Prosecutions Division, one officer from the Case Support Unit of the Investigations and Prosecutions Division and one regional representative.

⁴¹ Office of the Revenue Commissioners, *Statement of Strategy 2003-2005* (Revenue Commissioners 2003) at 5. This is available at www.revenue.ie.

More importantly, they established a Risk Management Unit in 2003 within the Strategic Planning Division and "... a Risk Management Programme to provide assurance that Revenue will not be hindered in achieving its objectives, or in the orderly and legitimate conduct of its business by circumstances which may reasonably be foreseen."⁴² The Risk Management Unit is responsible for co-ordinating and monitoring the Revenue Commissioners' corporate and business level risks.

1.24 In relation to audits, a new computerised risk assessment programme is now in operation which allows the Revenue Commissioners to target particular types of taxpayers. This programme allows for the screening of all tax returns against sectoral and business profiles and will provide a sophisticated selection basis of cases for audit.

1.25 In relation to audit and investigation by the Large Cases Division, separate risk profiles for each large case and for each business sector are being devised and a number of experienced accountants from the private sector have been employed. The Large Cases Division is also investigating the possibility of instigating 'real-time' or contemporaneous audits (*e.g.* where acquisitions or mergers are taking place) that would allow tax-planning decisions to be influenced at the time they are being made.⁴³

1.26 The Investigations and Prosecutions Division selects cases based on general principles of risk analysis as set out in Chapter 5.⁴⁴

(6) e-Revenue

1.27 Another development in recent years has been the rapid increase in e-Revenue (that is, the use of electronic services within the Revenue Commissioners). Since the launch in September 2000 of ROS ("Revenue On-Line Service"),⁴⁵ there has been a huge growth

⁴² *Annual Report of the Revenue Commissioners 2003* (Government Publications 2004) at 68.

⁴³ Moriarty, "Revenue's Large Case Division" (2004) 17(1) *Irish Tax Review* 49. This paper is also available at www.revenue.ie.

⁴⁴ See paragraphs 5.06-5.08, below.

⁴⁵ ROS is an internet facility which enables taxpayers to file returns, pay tax due, have access to their tax details, calculate their tax liability and claim

in electronic filing of tax returns. The fully electronic transactional system is compatible with accounting and returns software packages, data from which can be uploaded directly into the system, saving time and eliminating mistakes in the transfer of information. In 2003, for example, over 40% of all income tax self-assessment returns and 70% of payments by persons subject to vehicle registration tax were paid through the ROS system. In total, over €6 billion was paid through ROS in 2003.⁴⁶ A number of significant enhancements were added to the service in December 2003.⁴⁷ The service's success continued in 2004: at the end of October 2004, 41% of income tax returns were filed using ROS; the final figure is expected to be in excess of 50%.⁴⁸ The Vehicle Registration Tax Enquiry facility introduced in October 2004 has already received over 41,000 on-line enquiries.

repayments 24 hours a day, 7 days a week. It can be accessed at www.ros.ie or through the Revenue website www.revenue.ie.

⁴⁶ See *Annual Report of the Revenue Commissioners 2003* (Government Publications 2004) at 5.

⁴⁷ For example, the ROS Intrastat returns are now available in an offline option, the VIES facility now allows a range of returns to be completed either online or offline. See "ROS Adds Significant Enhancements & Upgrades" at www.accountingnet.ie.

⁴⁸ Communication to the Commission by the Revenue Commissioners.

Table 2 Increase in Use of ROS: 2002-2003⁴⁹

| | <i>2003</i> | <i>2002</i> | <i>% Increase</i> |
|------------------------------------|-------------|-------------|-------------------|
| <i>Digital Certificates Issued</i> | 10,222 | 8,175 | 25% |
| <i>Number of Payments</i> | 97,488 | 77,646 | 26% |
| <i>Value of Payments</i> | €6.2bn | €3.5bn | 77% |
| <i>Repayments</i> | €550m | €319m | 72% |
| <i>Returns</i> | 514,528 | 135,036 | 281% |
| <i>Customer Enquiries</i> | 814,197 | 279,383 | 191% |
| <i>Total Transactions</i> | 1,433,947 | 509,308 | 181% |

1.28 The Revenue Commissioners are currently developing a computer system capable of assisting the 1.4 million individuals who pay tax under the PAYE system. This system is scheduled to be operational by the autumn of 2005.⁵⁰

(7) Conclusion

1.29 The purpose of this chapter has been to provide an overview of recent developments. The Revenue Commissioners' restructuring and modernisation process has had an impact on the recommendations in this Report. This is still a process which requires ongoing review.

⁴⁹ Table obtained from *Annual Report of the Revenue Commissioners 2003 op cit fn 46* at 45.

⁵⁰ *Annual Report of the Revenue Commissioners 2003 op cit fn 46* at 5.

CHAPTER 2 CIVIL PENALTIES

A Introduction

2.01 This chapter is concerned with updating and expanding the debate in the Consultation Paper in relation to the imposition of civil penalties for tax defaulters and the discussion about external review.

2.02 As the Consultation Paper noted, the Revenue Commissioners have a statutory responsibility for the “care and management” of all duties and taxes.¹ In order to fulfil this duty, section 849(3) of the *Taxes Consolidation Act 1997* (“*TCA 1997*”) provides that:

“the Revenue Commissioners may do *all such acts* as may be deemed necessary and expedient for raising, collecting, receiving and accounting for tax in the like and in as full and ample a manner as they are authorised to do in relation to any other duties under their care and management...”²

2.03 ‘All such acts’ includes civil claims for the amount of all tax due and the imposition of a civil penalty,³ interest and surcharges. It may also involve a criminal prosecution in accordance with Part 47, Chapter 4 of the *TCA 1997* (which is discussed in Chapter 4, below).

2.04 On the civil side, a taxpayer is subject to the amount due but may in addition be subject to a charge for interest and potentially a penalty payment.

¹ Section 849(2) of the *TCA 1997* provides that “[a]ll duties of tax shall be under the care and management of the Revenue Commissioners.”

² Emphasis added.

³ The legislative framework for the imposition of civil penalties is largely contained in Chapters 1 to 3 (section 1052-1077) of Part 47 of the *TCA 1997*. In relation to Capital Acquisitions Tax, see section 58 of the *Capital Acquisitions Tax Consolidation Act 2003*.

(a) *Interest*

2.05 The late payment of tax imposes a financial burden on the State. Therefore, an interest charge is levied on the outstanding liability in order to recoup costs. The rate of interest on unpaid tax was previously calculated at a monthly rate but since 2002⁴ it has been based on a daily rate of 0.0322% per day or part of a day which amounts to approximately 11.75% per annum. In addition to the costs rationale behind this figure, there clearly is an inherently punitive element involved; it is considerably higher than the current European Central Bank interest rate of 2%.⁵ Indeed, the rate is designed to ensure tax is paid on time. Because the interest follows the tax liability and the interest rate is fixed by statute, the issue of an appeal against the imposition of interest does not arise. However, the coercive nature of the charge to interest raises some questions as to compatibility with the principle of proportionality. The *TCA 1997* makes no provision for a review of the current rate of interest, which was set at time when interest rates generally were high. In the current climate of low interest rates, it seems somewhat excessive. The Commission considers that the rate should be subject to review in order to ensure consistency with prevailing interest rates. A possible example for reform is section 30 of the *Courts and Courts Officers Act, 2002*. Subsection 3 sets out a rate of 2% interest on the amount of costs, charges or expenses awarded pursuant to the *Debtors (Ireland) Act 1840*; however this figure may be varied by the Minister for Justice, Equality and Law Reform having regard to the levels of interest generally.⁶ The Commission considers that this issue should be examined further so that the interest charged on overdue tax is not

⁴ Section 240(3) (as amended by the *Finance Act 1998*), Section 531(9), Section 991 and Section 1080 of the *TCA 1997*, as amended by Section 129 of the *Finance Act 2002*.

⁵ Furthermore, the interest payable by the Revenue Commissioners on any excess preliminary tax paid over the final liability for the relevant year is only 0.0161% for each day or part of day; for repayments of tax made on or after 1 November 2003, a new daily rate of 0.011% applies (Section 865A of the *TCA 1997* as inserted by Section 17(a) of the *Finance Act 2003*). The discrepancy between this rate and the one charged for underpayment is considerable.

⁶ Section 30(3) of the *Courts and Courts Officers Act 2002*.

excessive, thereby ensuring that the State obligations under the European Convention on Human Rights are complied with.⁷

(b) *Penalties*

2.06 The percentage amount of a civil penalty depends on the category of tax default concerned and the level of co-operation by the taxpayer (including whether the taxpayer made a qualifying disclosure in respect of the default).⁸ The Revenue Commissioners must issue court proceedings to recover penalties. In practice, the Revenue and the taxpayer may reach agreement on a monetary settlement. The following table, taken from the *Code of Practice for Revenue Auditors*, summarises the level of net penalties after mitigation, to which a person may be made subject.⁹

⁷ For a further discussion of the European Convention on Human Rights see paragraphs 7.05-7.08, below.

⁸ See Office of the Revenue Commissioners *Code of Practice for Revenue Auditors* (Revenue Commissioners 2002) at 25. On qualifying disclosure, see paragraphs 3.13-3.34, below.

⁹ The Revenue Commissioners' power to mitigate derives from section 1065 of the *TCA 1997* which states:

(1) (a) The Revenue Commissioners may in their discretion mitigate any fine or penalty, or stay or compound any proceedings for the recovery of any fine or penalty, and may also, after judgment, further mitigate the fine or penalty, and may order any person imprisoned for any offence to be discharged before the term of his or her imprisonment has expired.

(b) The Minister for Finance may mitigate any such fine or penalty either before or after judgment.

(2) Notwithstanding subsection (1)—

(a) where a fine or penalty is mitigated or further mitigated, as the case may be, after judgment, the amount or amounts so mitigated shall, subject to paragraph (b), not be greater than 50 per cent of the amount of the fine or penalty, and

(b) in relation to an individual, being an individual referred to in section 2(2) of the Waiver of Certain Tax, Interest and Penalties Act, 1993, or a person referred to in section 3(2) of that Act, who—

(i) fails to give a declaration required by section 2(3)(a) of that Act, or

(ii) gives a declaration referred to in subparagraph (i) or a declaration under section 3(6)(b) of that Act which is false or fails to comply with the requirements of subparagraph (iii) or

Table 3: Penalties¹⁰

| <i>Category of Tax Default</i> | <i>Net Tax-geared Penalty</i> | <i>Net Penalty after mitigation where there is:</i> | | |
|--------------------------------|-------------------------------|---|---|---|
| | | Co-operation only | Co-operation including Prompted Qualifying Disclosure | Co-operation including Unprompted Qualifying Disclosure |
| <i>Deliberate Default</i> | 100% | 75% | 50% | 10% |
| <i>Gross Carelessness</i> | 40% | 30% | 20% | 5% |
| <i>Insufficient Care</i> | 20% | 15% | 10% | 3% |

(c) *Surcharges*

2.07 If a tax return is not submitted by the specified date, a surcharge on the liability arising for the year is applied regardless of the fact that the tax liability may have been paid in full and on time. The amount due is based on a percentage of the total tax payable.¹¹

(iv) of section 2(3)(a) of that Act or subparagraph (III) of section 3(6)(b) of that Act to the extent that any of those subparagraphs apply to that person,

no mitigation shall be allowed.

(3) Moneys arising from fines, penalties and forfeitures, and all costs, charges and expenses payable in respect of or in relation to such fines, penalties and forfeitures, shall be accounted for and paid to the Revenue Commissioners or as they direct.

¹⁰ See *Code of Practice for Revenue Auditors op cit* fn 8 at 26.

¹¹ Section 1084(2)(a) of the *TCA 1997*. For a more complete description, see Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 2.20.

B Publication of Names of Tax Defaulters

(a) Consultation Paper Recommendation

2.08 The Commission in its Consultation Paper provisionally recommended that the Revenue Commissioners be responsible for publishing in full the list of tax defaulters, with a breakdown of the tax, penalties and interest involved, in at least two nationally circulated newspapers.¹²

(b) Discussion

2.09 The authority to publish a list of those people who are subject to a court imposed fine or other penalty for an infringement of the Tax Acts and those who reached a settlement with the Revenue Commissioners was first included in section 23 of the *Finance Act 1983*.¹³ The Revenue Commissioners divide such lists in two; one dealing with court sanctions, the other with settlements. These lists are published on a quarterly basis and are available on the Revenue Commissioners' website,¹⁴ in *Iris Oifigiúil* and are customarily reproduced in the main daily national newspapers. The lists are quite descriptive containing data such as name, address, occupation and the amount of the settlement or fine. The authority to publish is limited in a number of ways and notably the liability involved must, in general, be €12,700 or more.¹⁵

2.10 The practice of publishing a list, or 'naming and shaming' is an inexpensive and effective way of encouraging tax compliance. Its principal benefit lies in its deterrent effect. This power is perhaps more potent in relation to settlements (as court imposed penalties are

¹² Section 1084(2)(a) of the *TCA 1997*. For a more complete description, see Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 2.27.

¹³ See now section 1086 of the *TCA 1997*.

¹⁴ www.revenue.ie.

¹⁵ Publication may not occur in the following cases: where a taxpayer has made a qualifying disclosure; where section 72 of the *Finance Act 1988* or section 3 of the *Waiver of Certain Tax, Interest and Penalties Act 1993* applies; where the liability does not exceed €12,700 or where the amount of the penalty does not exceed 15% of the tax involved in the settlement. See section 1086(4) *TCA 1997*.

likely to be picked up by regional or national media). It is quite an economic procedure as the information is disseminated online and also by the national media at virtually no cost to the Revenue Commissioners.

2.11 The Commission in its Consultation Paper raised the concern that, at some stage, the national media might cease to publish this information. The Revenue Commissioners have indicated that the cost of such publication would amount to approximately €300,000-€400,000 per annum in advertising costs.¹⁶ It can be surmised that the national newspapers publish this data because it is newsworthy and there seems no reason why this practice will not continue. If selective or reduced publication of lists occurs in the future, then the matter could be addressed at that point.

2.12 The Revenue Powers Group have recommended that the threshold for publication be increased to not less than €50,000, on the grounds that the present figure of €12,700 would result (if not index linked) in longer lists of defaulters and that publication would lose its current effectiveness as a deterrent to tax evasion.¹⁷ The list of defaulters published for the second quarter of 2004 includes settlements made with 242 people.¹⁸

2.13 The Commission agrees that that the present figure of €12,700 should be changed. It was originally set down in the *Finance Act 1983* and has not been altered since. The Commission considers that this figure should be increased in line with the Consumer Price Index since 1983.¹⁹ The increase in the Consumer Price Index between 1983 and 2004 indicates that the threshold should be raised

¹⁶ Submission from the Revenue Commissioners to the Law Reform Commission dated 28 November 2003.

¹⁷ *Revenue Powers Group: Report to the Minister for Finance* (Government Publications 2003) at 53.

¹⁸ See “Part II List Complied Pursuant to Section 1086 of the Taxes Consolidation Act 1997 for the period of 1 April 2004 to 30 June 2004” available at www.revenue.ie. Settlements with 606 other persons during this period for amounts in excess of €12,700 were not published because they came within the exclusionary criteria as set out in footnote 15, above.

¹⁹ The Consumer Price Index is the inflation index used in relation to capital acquisitions tax. See, for example, Schedule 2, Part 1 of the *Capital Acquisitions Tax Consolidation Act 2003*.

to €25,000. For the future, the Commission also considers that the figure should be linked to the Consumer Price Index, in order to keep pace with changing rates of inflation. It might be argued that non-publication may have an impact on those contemplating tax evasion and may have a negative impact on the qualifying disclosure scheme, as one of the principal attractions of this scheme is non-publication. However, even the index-linked figure is not particularly high, and should not adversely affect tax compliance. Furthermore, provided that other factors remain the same, if the new threshold is index linked by reference to the Consumer Price Index, then the concern of the Revenue Powers Group about longer lists of names should be resolved. In addition, greater tax compliance arising from the Revenue Commissioners' stated policy of more stringent enforcement should result in shorter lists.

2.14 *The Commission recommends that the threshold for publication by the Revenue Commissioners of the names of persons subject to a court imposed fine or other penalty or those who have reached a settlement with the Revenue Commissioners should be set at €25,000 and this figure should be index linked by reference to the Consumer Price index.*

C External Reviewer

(a) Consultation Paper Recommendation

2.15 The Commission in its Consultation Paper suggested that consideration should be given to the appointment of an External Reviewer becoming a regular and permanent function of a body other than the Revenue Commissioners.²⁰ The function of an External Reviewer is to provide an appeal mechanism for a taxpayer who is dissatisfied with an audit assessment.

(b) Discussion

2.16 The position of External Reviewer was introduced by the Revenue Commissioners in 1999 as a result of the wide increase in their statutory powers. It does not exhaust other rights of appeal such as an appeal to the Appeal Commissioners. Decisions of External

²⁰ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 2.32.

Reviewers are not binding on the taxpayer but as a matter of policy are binding on the Revenue Commissioners. The Commission endorses the view expressed by the Revenue Powers Group that the functions of the External Reviewer are not widely understood and need to be better publicised.²¹

2.17 The present appointment system involves public advertisement and the engagement of reviewers on two-year contracts. The positions are held by persons who hold qualifications in accounting or law.

2.18 The concern underlying the Consultation Paper's recommendation was the perception of institutional independence. It is accepted that an appeal to an External Reviewer by a taxpayer is an optional right and does not preclude a taxpayer from any statutory rights of appeal.

2.19 The Revenue Commissioners in their submission to the Commission stated that the current arrangements regarding appointment of the External Reviewers were transparent. However, they suggested that future appointments of External Reviewers be undertaken not by Revenue, but by an independent body such as the Civil Service Commission. The Commission agrees with this suggestion.

2.20 *The Commission recommends that in future, the appointment of External Reviewers to the Office of the Revenue Commissioners should be undertaken by an independent body such as the Civil Service Commission.*

²¹ *Revenue Powers Group: Report to the Minister for Finance* (Government Publications 2003) Chapter 5 at paragraph 4.11. The Revenue Powers Group noted that External Reviewers deal with cases of wider scope than stated in the Revenue Commissioners' Statement of Practice *Revenue Internal Review Procedures: Audit and Use of Powers* (SP/GEN/2/99).

CHAPTER 3 AUDITS

A Introduction

3.01 A revenue audit may be defined as an examination of tax returns, declarations of liability or repayment claims, and statements of liability to other duties such as Stamp Duties. In certain cases, it may also include an examination of the records of a company or an individual in order to establish the correct level of liability.¹ The audit process plays a vital role in the overall functions of the Revenue Commissioners. As a large part of the tax system is based on self-assessment, the unearthing of information by way of an audit process is a crucial mechanism to ensure tax compliance.² This Chapter gives a brief overview of this system, the new ‘random audit’ policy and the qualifying disclosure scheme.

¹ See *Code of Practice for Revenue Auditors* (Revenue Commissioners 2002) at paragraphs 1.1-1.7. See also *Revenue Audit Guide for Small Business* (Revenue Commissioners 2000) at 2.

² Information may also be obtained from information co-operation agreements with other State bodies, such as the Director of Corporate Enforcement. The Director of Corporate Enforcement may pass on a complaint to the Revenue Commissioners in cases of suspected tax offences for investigation. See the section “Company Law Complaints” on the Office of the Director of Corporate Enforcement’s website, available at www.odce.ie. A more recent example relates to the Irish Auditing and Accounting Supervisory Authority established under the *Companies (Auditing and Accounting) Act 2003*. Section 31(1) of the 2003 Act imposes a general obligation to protect confidential information that relates to the Irish Auditing and Accounting Authority, but this does not prevent the disclosure of information to a number of bodies including the Revenue Commissioners where the information is, in the Authority’s opinion, connected with the functions of such bodies: Section 31(3)(b).

B Overview

3.02 A Revenue audit covers the following taxes: Income Tax, Corporation Tax, Capital Gains Tax and Value Added Tax. A slightly modified audit system applies to Capital Acquisitions Tax³ and Stamp Duties. Since 2004, the scope of the Revenue audit has been extended to cover Customs and Excise duties and the Environmental Levy.⁴

3.03 The objectives of a revenue audit have been stated in the *Code of Practice for Revenue Auditors* as:

- determining the accuracy of a return, declaration of tax liability or claim to repayment for VAT, PAYE/PRSI, etc;
- identifying additional liabilities or other matters requiring adjustments, if any;
- collecting the tax, interest, and penalties where appropriate;
- publishing the defaulter's name under the provisions of section 1086 of the *TCA 1997* where applicable;
- specifying remedial action that is required to make a taxpayer compliant;
- considering what procedural or other changes are necessary to facilitate counter-evasion activities;
- possible referral to the Investigations and Prosecutions Division where strong indications of tax evasion have emerged during the course of an audit;⁵
- verifying compliance with customs and excise legislation and Revenue requirements.

3.04 For the majority of taxes, the Revenue Commissioners use three methods to select cases for audit. The first category of cases is

³ As CAT relates to a one-off transaction the tax compliance history and other factors would not apply in the screening process. For CAT, the screening process involves examining returns and then analysing these returns against other available information.

⁴ See *Code of Practice for Revenue Auditors, Addendum No. 1* (Revenue Commissioners 2004).

⁵ *Code of Practice for Revenue Auditors op cit* fn 1 at paragraph 1.2, as amended by *Code of Practice for Revenue Auditors, Addendum No. 1*.

selected by screening tax returns. This “involves examining the returns made by a variety of taxpayers and reviewing their tax compliance history. The figures are then analysed in the light of trends and patterns in the particular business or profession and evaluated against other available information.”⁶ The Revenue Commissioners will generally review returns of taxpayers who have previously filed late, inaccurately or not at all. Secondly, the Revenue Commissioners also carry out examinations of particular trades or professions from time to time. Thirdly, the Statistics Branch of the Revenue Commissioners select a certain number of cases at random for audit.⁷ Until 2004, this “Random Audit” selection method was not on a purely random basis but selected from a specified number from each tax district and income parameters were also included. From 2004, selection for future random audit programmes will be on a purely random basis.⁸ This will incorporate a new risk analysis system which will include all data in generating a person’s profile, analyse risk over time, identify deterioration in compliance levels, measure compliance levels year on year and also apply consistent risk scoring. As a result the Revenue will be able to target cases most suitable for audit.⁹ This random audit will apply to a PAYE taxpayer who is a chargeable person in respect of non-PAYE income but only in respect of that income.

⁶ *Revenue Audit Guide for Small Businesses* (Revenue Commissioners 2000) at 2.

⁷ See paragraphs 3.07-3.12, below.

⁸ See *Annual Report of the Comptroller and Auditor General 2003* (Government Publications 2004) at 11.

⁹ “Revenue’s New Risk Analysis System” (2003) *53 Tax Briefing* 18.

The following table gives the number of audits completed between 1998 and 2003.¹⁰

Table 4: Audits Conducted 1998-2003

| | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 |
|---------------------------|--------|--------|--------|--------|--------|--------|
| <i>Comprehensive</i> | 2,844 | 2,512 | 2,270 | 2,200 | 2,424 | 4,359 |
| <i>VAT</i> | 6,886 | 5,101 | 4,409 | 4,223 | 4,300 | 3,951 |
| <i>PAYE Employers</i> | 2,824 | 2,768 | 2,104 | 1,443 | 862 | 874 |
| <i>RCT</i> ¹¹ | 261 | 384 | 352 | 383 | 169 | 231 |
| <i>Combined Fiduciary</i> | 735 | 892 | 670 | 626 | 582 | 544 |
| <i>Verification</i> | 4,314 | 5,248 | 6,126 | 7,107 | 7,594 | 5,695 |
| <i>Total</i> | 17,864 | 16,905 | 15,931 | 15,982 | 15,931 | 15,654 |

¹⁰ *Annual Report of the Office of Comptroller and Auditor General 2002* (Government Publications 2003) at 22. The 2003 figures were supplied by the Revenue Commissioners.

¹¹ RCT stands for Relevant Contracts Tax.

A verification audit is one whereby the Revenue Commissioners verify particular items in a taxpayer's accounts or returns.

3.05 The Revenue Commissioners have explained to the Commission that the drop in the number of audits undertaken in 2003 was due to revenue restructuring in 2003. There was, in addition, a transfer of experienced auditors to prepare material for new staff and the deployment of auditors in special investigations such as the Offshore Assets Inquiry.

3.06 If strong indications of possible tax offences emerge during the course of an audit, the Revenue Commissioners' prosecution strategy requires the auditor to refer the case to the Investigations and Prosecutions Division.¹² If the Investigations and Prosecutions Division decide that a case is suitable for investigation with a view to prosecution, it will take over the case and an audit will be terminated.

C Random Audit

3.07 As previously mentioned, the Revenue Commissioners have for many years conducted random audits using limited selection criteria. From 2004 onwards, the random audits will not be selected on any pre-determined basis, thus becoming truly random.¹³

3.08 The purpose of the random audit programme will be to test compliance in respect of the relevant taxes on three fronts, that is, payment compliance, filing compliance and reporting compliance. The Revenue Commissioners, in response to a query from the Commission, have stated that the following broad criteria will apply:

- Cases will be selected purely on a random basis from cases which had a live registration for one of the business taxes (Income Tax, Corporation Tax, Employers PAYE/PRSI, VAT and Relevant Contracts Tax) during the year and
- Random samples will be selected for each of the geographic regions adopted by the Revenue Commissioners.

3.09 The Revenue Commissioners have also stated that for the random audit programme for 2004, the likelihood is that cases will be

¹² *Code of Practice for Revenue Auditors* (Revenue Commissioners 2002) at paragraph 5.1.

¹³ See *Annual Report of the Comptroller and Auditor General 2003* (Government Publications 2004) at 11.

chosen from all regions and that income parameters will not apply to pre-selected cases.

3.10 Although PAYE taxpayers are obliged under the self assessment system to file returns and pay the correct amount of tax in respect of all non-PAYE income, those paying tax within the PAYE system are generally not selected for audit. This prevents a truly global random audit from operating and also patently ignores the issue of tax evasion amongst PAYE taxpayers. It is important that every type of taxpayer be subject to some type of direct audit process as evasion obviously does exist within the PAYE sector. This seems clear from the number of bogus non-resident account holders who were termed “employees” in the list of defaulters published in 2003. Of the 1,030 cases listed under section 1086 of the *TCA 1997*, 134 were PAYE taxpayers and 28 of these were also described as being in receipt of rents;¹⁴ this information was obtained not by audit but by disclosure by financial institutions as a result of a High Court order.

3.11 If widespread evasion is to be tackled and if a global figure for evasion is to be estimated, then it is sensible, fair and reasonable to advocate the extension of random audits to include all taxpayers who pay their tax regardless of the category in which they file their returns.

3.12 *The Commission recommends that a random audit programme should operate with the direct inclusion of all taxpayers regardless of the category in which they file their returns.*

D Qualifying Disclosure Scheme

(1) Outline of Current System

3.13 One of the prominent features of the audit system is the ability for a person to make a ‘qualifying disclosure’ or what was previously termed a ‘voluntary disclosure’. A qualifying disclosure can either be “unprompted” or “prompted”. The Irish *Code of Practice for Revenue Auditors* provides an unqualified assurance that the Revenue Commissioners will not initiate an investigation with a view to prosecution where a qualifying disclosure, for the purposes of

¹⁴ The total settlements in relation to these 134 cases amounted to approximately €6.8 million as opposed to the overall 1,257 cases where the settlement figure amounted to approximately €134 million. These aggregate figures have been obtained from the Revenue Commissioners.

mitigation of penalties, is made by a taxpayer who does not fall within certain specified categories.¹⁵ This policy applies whether the disclosure is unprompted, or made following receipt of an audit notice and before examination of the books and records has commenced.

3.14 An unprompted disclosure is a disclosure made before the taxpayer is (a) notified of an audit or (b) contacted by the Revenue Commissioners regarding an enquiry or investigation in relation to his or her tax affairs. A prompted disclosure is one that is made after an audit notice has been issued but before an examination of the books and records or other such documentation has begun.¹⁶ If an official from the Investigations and Prosecutions Division informs the taxpayer that they are the subject of an investigation with a view to criminal prosecution, there is no question of a qualifying disclosure. Of course an early disclosure and payment of all outstanding liabilities will be regarded favourably by the court.

3.15 The *Code of Practice for Revenue Auditors* states that before the examination of books and records begins the auditor advises the taxpayer of the effects of disclosure.¹⁷ This in effect allows a taxpayer to avail of the benefits of making a qualifying disclosure prior to audit.

3.16 Making a qualifying disclosure is clearly advantageous to taxpayers. A qualifying disclosure entitles the taxpayer to significant mitigation of penalties. Furthermore, the taxpayer's details are not published. The primary benefit deriving from making a qualifying disclosure is that the Revenue Commissioners will not commence an investigation of the taxpayer with a view to prosecution for an offence unless the case is within certain prescribed categories. These categories (where the Revenue Commissioners reserve the right to prosecute) are set out as follows in the *Code of Practice for Revenue Auditors*:

- a disclosure of tax defaults, which is a qualifying disclosure for the purposes of mitigation of penalties has not been made by the taxpayer, or

¹⁵ Office of the Revenue Commissioners, *Code of Practice for Revenue Auditors* (Revenue Commissioners 2002) at paragraph 10.3. These categories are further discussed at paragraph 3.16, below.

¹⁶ *Ibid* at paragraph 10.1.

¹⁷ *Ibid* at paragraph 3.2.

- a disclosure of tax defaults has been made by the taxpayer but then is incomplete, or
- before a disclosure admitting a tax default was made by the taxpayer, Revenue had made an enquiry or begun an investigation relating to the tax default and had contacted the taxpayer, or a person connected¹⁸ with the taxpayer in that regard, or
- the taxpayer is one of a class of taxpayers, such as the Ansbacher cases, being investigated by Revenue and other agencies, or
- the taxpayer comes within the scope of an inquiry wholly or partly carried out in public, or
- the taxpayer is linked, or about to be linked, publicly with matters which may involve tax default.¹⁹

A number of conditions apply to the making of a qualifying disclosure (whether prompted or unprompted). The disclosure must be made in writing and be signed by or on behalf of the taxpayer. It must state the amounts of all liabilities to tax, interest and penalties in relation to all tax heads and periods, which were liabilities previously undisclosed by reason of “deliberate default”.²⁰ In the case of a prompted disclosure, it must also state the amounts of any liabilities previously undisclosed, for any reason other than deliberate default, which are liabilities to tax, interest and penalties. Furthermore, in relation to both prompted and unprompted disclosures, the disclosure must be accompanied by a payment of the total amount of the liability outstanding in respect of tax, interest and penalties.²¹

(2) Revenue Powers Group Report

¹⁸ Within the meaning of Section 10 of the *TCA 1997*.

¹⁹ *Code of Practice for Revenue Auditors* (Revenue Commissioners 2002) at paragraph 10.3.

²⁰ Deliberate default involves either a breach of a tax obligation with indicators consistent with intent to default on the part of the taxpayer or a breach which cannot be explained solely by carelessness. See Office of the Revenue Commissioners, *Code of Practice for Revenue Auditors* at paragraph 9.5.

²¹ See Office of the Revenue Commissioners, *Code of Practice for Revenue Auditors* at paragraph 10.1.2.

3.17 The Revenue Powers Group made a number of recommendations on the issue of qualifying disclosure.²²

- it should be defined in and its consequences regulated by primary legislation supported, where necessary, by subordinate legislation and administrative directions;
- to qualify, the disclosure should be in writing, the payment, of 80% of the estimate of the additional tax, should be within a reasonable time, the provision of full details to the Revenue Commissioners concerning the disclosure should be within a reasonable time and in default of agreement the time appropriate for the delivery of such information should be determined by the Appeal Commissioners;
- full disclosure should involve (other than in ‘legacy’ cases)²³ exemption from publication of names, non-selection for prosecution and the right to enjoy the prescribed rights of penalty mitigation;
- where the Revenue Commissioners intend to undertake the audit of a company, separate notice should be given to the directors of the company to allow them an opportunity to avail of qualifying disclosure;
- verification audits should be clearly designated and not terminate the right to make a qualifying disclosure at a later time and
- that there should be no disclosure of information obtained by the Revenue Commissioners from a qualifying disclosure to other bodies (except where required by law).

3.18 The Commission endorses the view of the Revenue Powers Group that any unresolved dispute as to whether the disclosure is

²² See *Revenue Powers Group: Report to the Minister for Finance* (Government Publications 2003) at 50-53.

²³ ‘Legacy’ cases are those cases still under investigation by the Revenue Commissioners *ie* Clerical Medical International/National Irish Bank, Ansbacher, BNR and any disclosure arising as a result of a current investigation by the Revenue Offshore Assets Group in respect of taxes. See *Revenue Powers Group: Report to the Minister for Finance* (Government Publications 2003) at 4.

voluntary or otherwise should be determined by the Appeal Commissioners. In addition, the Commission is of the view that a further right of appeal by the taxpayer should be allowed to the Circuit Court and from there, by leave, to the High Court and Supreme Court on a point of law. This is consistent with recommendations made in this Report.²⁴

E A ‘Hansard’ Type Warning System

3.19 As discussed above, the qualifying disclosure scheme is very attractive for taxpayers who wish to settle their affairs without the fear of prosecution. Furthermore, from the tax collector’s perspective, the scheme is an effective incentive for tax compliance. However, the qualifying disclosure scheme may possibly be criticised as infringing the privilege against self-incrimination, whether under Irish law or Article 6 of the European Convention on Human Rights (ECHR).

(1) *Freedom from self-incrimination*

(a) *Consultation Paper Recommendation*

3.20 The Commission in its Consultation Paper invited submissions on the impact of the domestic application of the ECHR regarding the taxpayer’s right to silence and freedom from self-incrimination. The Consultation Paper did not recommend any changes in this area as it was unclear whether the incorporation of the ECHR would require any modifications of the practices currently employed by the Revenue Commissioners.²⁵

²⁴ See paragraphs 3.32-3.34 and 7.84-7.96, below.

²⁵ See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 2.98.

(b) *Discussion*

3.21 The Consultation Paper discussed the warning given to taxpayers as to the possibility of prosecution notwithstanding a settlement arising from a disclosure by the taxpayer. This discussion was against the background of the warning contained in the UK Hansard policy which applies to audits and the unsuccessful challenge to this policy on Article 6 ECHR grounds in *R v Allen*.²⁶

3.22 In *Allen*, Lord Hutton stated (although rejecting that there was in fact an infringement of the appellant's Article 6 rights):

“To the extent that there was an inducement contained in the Hansard statement, the inducement was to give true and accurate information to the Revenue, but the accused in both cases did not respond to that inducement and instead of giving true and accurate information gave false information. Therefore, in my opinion, the appellant's argument in this case that he was induced by hope of non-institution of criminal proceedings held out by the Revenue to provide the schedule and that its provision was, therefore, involuntary is invalid. *If, in response to the Hansard statement, the appellant had given true and accurate information which disclosed that he had earlier cheated the Revenue and had then been prosecuted for that earlier dishonesty, he would have had a strong argument that the criminal proceedings were unfair and an even stronger argument that the Crown*

²⁶ [2001] 4 All ER 768. The version challenged in *R v Allen* stated:

“The practice of the board of Inland Revenue in cases of fraud in relation to tax is as follows: 1. The Board may accept a money settlement instead of instituting criminal proceedings in respect of fraud alleged to have been committed by a taxpayer. 2. It can give no undertaking that it will accept a money settlement and refrain from instituting criminal proceedings, even if the case is one in which the taxpayer has made a full confession and has given full facilities for investigation of the facts. It reserves to itself full discretion in all cases as to the course it pursues. 3. Nevertheless, in considering whether to accept a money settlement or to institute criminal proceedings, its decision is influenced by the fact that the taxpayer has made a full confession and has given full facilities for investigation into his affairs and for examination of such books, papers, documents or information as the Board may consider necessary”: [2001] 4 All ER 768, 778. For the revised ‘Hansard’ warning, see paragraph 3.28, below.

*should not rely on evidence of his admission, but that is the reverse of what actually occurred.”*²⁷

3.23 In the subsequent proceedings under the ECHR, *Allen v United Kingdom*, the European Court of Human Rights unanimously declared the application inadmissible.²⁸ The Court stated that:

“Nor does the Court consider that any improper inducement was brought to bear through the use of the so-called ‘Hansard Warning’ which informed the applicant of the practice of the Inland Revenue of taking into account the cooperation of the taxpayer in deciding whether to bring any prosecution for fraud. There is no indication that the applicant was misled as to the effect of the warning, accepting that it could not be interpreted as any kind of guarantee of freedom from prosecution.”

3.24 As outlined above, the ECtHR in the *Allen* case stated that the old Hansard policy (which was more restrictive of taxpayer’s rights than the Irish scheme) did not, in itself, infringe Article 6(1). Consequently, it is unlikely that the comparable Irish policy would infringe Article 6(1).

3.25 *The Commission does not consider that the 2002 Code of Practice for Revenue Auditors is in itself incompatible with Article 6 of the European Convention on Human Rights in relation to the privilege against self-incrimination.*

(2) A Modified Qualifying Disclosure Scheme

3.26 While it seems that the *Code of Practice for Revenue Auditors* is in itself compatible with Article 6 of the European Convention of Human Rights in relation to the privilege against self-incrimination, the Commission still has reservations about the general nature of the current qualifying disclosure scheme from a policy perspective. It may be criticised as being open-ended. Moreover, as stated above,²⁹ while the making of a qualifying disclosure does not always prevent a prosecution, the taking of a subsequent prosecution in

²⁷ [2001] 4 All ER 768, 784. Emphasis added.

²⁸ Application 76574/01; decision of 10 December 2002.

²⁹ See paragraph 3.21, above.

certain circumstances could raise issues as to admissibility of evidence collected during the qualifying disclosure phase. To overcome these concerns, the Irish Taxation Institute in its submission to the Law Reform Commission recommended that the Revenue Commissioners adopt a warning system, akin to the ‘Hansard’ policy adopted by the UK Revenue authorities.³⁰ This warning indicates that the Revenue authorities reserve the right to prosecute in certain circumstances.

3.27 The Commission has concluded that the reservations expressed about the current policy operated by the Revenue Commissioners are valid (regardless of whether the current policy infringes Article 6 of the ECHR). One option for reform is a new qualifying disclosure scheme. A modified qualifying disclosure scheme would guarantee the taxpayer that if a full and frank disclosure is provided then a prosecution will not ensue. Certainty would alleviate not just evidential concerns but also further encourage people to come forward as participants in the scheme.

3.28 The Commission considers that the present qualifying disclosure scheme should be replaced with a statement similar to the revised Hansard warning in the United Kingdom. The latest version was drafted in response to the challenge in the *Allen*³¹ case and states:

“The Board reserves complete discretion to pursue prosecutions in the circumstances it considers appropriate.

Where serious tax fraud has been committed, the Board may accept a money settlement instead of pursuing a criminal prosecution. The Board will accept a money settlement and will not pursue a criminal prosecution, if the taxpayer, in

³⁰ The Irish Taxation Institute has published a booklet on qualifying disclosure which contains the following provision: “The advice we have received is that, before the day of the audit, it would be prudent for any member to request from the Revenue Inspector likely to conduct the audit an identification of the status in terms of admissibility of evidence in criminal proceedings of anything that might be given in qualifying disclosure. We suggest this be done in writing. The Institute recommends seeking such clarification in all cases. The clarification should be sought irrespective of whether or not it is intended to make a qualifying disclosure...” This extract is reproduced and discussed in Keegan “TaxFax Highlights” (2003) 16(6) *Irish Tax Review* 536.

³¹ [2001] 4 All ER 768.

response to being given a copy of this Statement by an authorised officer, makes a full and complete confession of all tax irregularities.”³²

3.29 The following five questions are asked in conjunction with the issuing of the Hansard statement to a person subject to an audit.³³

(i) Have any transactions been omitted from or incorrectly recorded in the books of any business with which you are or have been concerned whether as director, partner or sole proprietor?

(ii) Are the accounts sent to the Inland Revenue for each and every business with which you are or have been concerned whether as director, partner or sole proprietor, correct and complete to the best of your knowledge and belief?

(iii) Are all the tax returns of each and every business with which you are or have been concerned whether as director, partner or sole proprietor correct and complete to the best of your knowledge and belief?

(iv) Are all your personal tax returns correct and complete to the best of your knowledge and belief?

(v) Will you allow an examination of all business books, business and private bank statements and any other business and private records in order that the Revenue may be satisfied that your answers to the first four questions are correct?

3.30 However, the qualifying disclosure scheme should not operate in relation to all tax offences; certain categories of defaulter should be excluded. The Commission considers that in the Irish context the following criteria could be used to decide whether or not to prosecute:

- nature of the offence (perhaps linked to a financial threshold);
- duration of the offence and

³² Response to a Parliamentary Question to the Chancellor of the Exchequer on 7 November 2002.

³³ See *Special Compliance Office Investigations: Cases of Suspected Serious Fraud* (Inland Revenue Code of Practice 9 December 2003) at 15.

- previous convictions or settlements for tax or tax related offences.³⁴

3.31 The approach just outlined seems a sensible one to adopt. The drawback from the Revenue Commissioners' perspective is that it removes their discretion. Nevertheless, the Commission considers that the certainty afforded by an amended qualifying disclosure scheme outweighs any concerns about loss of discretion.

3.32 *The Commission recommends that the current qualifying disclosure scheme be modified along the lines of the revised 2002 'Hansard' statement employed by the Inland Revenue in the United Kingdom and should include the questions asked as part of the 'Hansard' statement.*

3.33 *The Commission further recommends that a list of offences which would be liable for prosecution even where a qualifying disclosure is made, could be based on the following criteria:*

- *nature of the offence (perhaps linked to a financial threshold);*
- *duration of the offence and*
- *previous convictions or settlements for tax or tax related offences.*

3.34 *The Commission recommends that a taxpayer should have a right of appeal to the Appeal Commissioners, in respect of whether the taxpayer falls within the qualifying disclosure scheme, and from the Appeal Commissioners to the Circuit Court and with leave of the Circuit Court to the High Court and Supreme Court by way of case stated on a point of law.*

³⁴ On recidivism, see paragraphs 4.30-4.34, below.

CHAPTER 4 PROSECUTION: NON-FILING

A Introduction

4.01 In the Consultation Paper, the Commission noted the view in the Report of the Steering Group¹ that prosecutions concerning the non-submission of returns were “routine and non-problematic”. The 2002 *Annual Report of the Comptroller and Auditor General*,² published after the Consultation Paper, has indicated that this is not the case. This chapter discusses the importance of prompt and proper filing of tax returns by all taxpayers (including those who pay tax predominantly through the PAYE system) in ensuring the smooth operation of the Revenue collection system.

B The Filing System: Theory and Practice

4.02 The filing system³ is the bedrock on which the Revenue system operates. Usually, it is only through the filing of a return that the existence of a taxpayer’s income which is not subject to PAYE becomes known to the Revenue Commissioners.⁴ While non-filing may seem a trivial offence in isolation, from a global perspective, large scale non-filing clogs the system by creating extra enforcement work for Revenue staff and thus hinders the smooth operation of the system. Furthermore, and perhaps more importantly, it results in a loss of revenue for the exchequer.

¹ *Report of the Steering Group on the Office of the Revenue Commissioners* (Government Publications 2000) at paragraph 3.45.

² *Annual Report of the Office of Comptroller and Auditor General 2002* (Government Publications 2003).

³ After a taxpayer has initially submitted an annual return, an income tax return form is generally sent to a taxpayer in subsequent years.

⁴ A taxpayer’s existence may also become known, for example, through the investigative activities of the Special Compliance Districts, of which there is one in each Region.

4.03 The income tax system operates, in the main, in the following manner:⁵ persons are either obliged to pay tax by way of self assessment (the pay and file system) or PAYE (Pay as You Earn). Those in the pay and file category, known as ‘chargeable persons’,⁶ must calculate their tax liability and file their tax returns by 31 October. In addition to filing returns by 31 October, taxpayers are also obliged to pay preliminary income tax⁷ for the current year and to pay any balance of tax due in respect of the previous year.⁸

4.04 The PAYE system operates on the basis that income tax is deducted at source from payments made in respect of annuities, salaries, wages and pensions. However, taxpayers from whom income tax is deducted under the PAYE system may also be chargeable

⁵ Sections 876-884 of the *TCA 1997* deal with the issue of the filing of income tax and corporation tax returns. In relation to income tax, section 876 obliges every person who is chargeable to income tax for any year of assessment and who has not been given a notice under section 877 or 879 (in relation to that year) and who has not made a return of their total income to give notice to the Inspector of Taxes that they are chargeable to tax. Section 877 deals generally with notices given to persons by an inspector and section 878 deals with notices given to persons acting for incapacitated persons and non-residents. Returns in relation to partnerships are dealt with in section 880 and returns by married persons are governed by section 881.

⁶ Section 950 of the *TCA 1997*.

⁷ Section 952 of the *TCA 1997* deals with the issue of preliminary income tax. Preliminary income tax may be described as an ‘up-front’ payment as it is concerned with the current tax year even though the current tax year has not expired. A taxpayer has the following payment options in calculating the amount of tax payable:

90% of the ultimate tax liability for the relevant tax year; or

100% of the tax liability for the preceding tax year; or

105% of the tax liability for the pre-preceding year (but only if paying tax by direct debit).

In order to avoid interest, the preliminary tax payment must be at least equal to an amount using the lowest of the above three and be paid by 31 October in the relevant tax year with the exception of the direct debit system whereby the payment can be paid over 12 months ending on 31 December. See O’Halloran, *Irish Taxation Law and Practice 2003/2004* (Irish Taxation Institute 2004) at paragraph 10.3.2.

⁸ The liabilities for both health contribution and Pay Related Social Insurance (“PRSI”) must also be included in the calculation of preliminary tax.

persons and come within the scope of self assessment if they have a source of investment or rental income where the tax due cannot be recovered under the PAYE system.

4.05 If the deadlines for the filing of returns are not met, the enforcement apparatus of the Revenue Commissioners is used. Initially, reminders are sent to those who fail to file returns (those chargeable to tax and those who receive notice to file a return and fail to do so). After a further three months, those cases still outstanding are forwarded to the relevant tax district for investigation and possible prosecution. During 2003, 13,647 warning letters were issued; follow-up legal proceedings were initiated in 1,931 of these, resulting in 627 convictions.⁹ Table 5 below provides figures for the number of Income Tax return forms issued in recent tax years and also the number of cases with a return outstanding which were referred on to tax districts.¹⁰

⁹ In 47 of these cases court orders requiring the convicted person to submit the outstanding returns were issued: *Annual Report of the Comptroller and Auditor General 2003* (Government Publications 2004).

¹⁰ See *Annual Report of the Office of Comptroller and Auditor General 2002* (Government Publications 2003) at 14. Note that some non-filer cases include returns not submitted during the previous five years.

Table 5: Income Tax Return Forms Issued and Non-Filing

| <i>Year</i> | <i>Forms Issued</i> | | | | |
|------------------|---------------------|---------------|-------------|--------------------|-----------------|
| | All Areas | Dublin | Cork | Letterkenny | Limerick |
| 1999-2000 | 321,398 | 72,434 | 40,129 | 11,022 | 27,290 |
| 2000-2001 | 328,887 | 75,942 | 40,719 | 11,206 | 29,494 |
| 2001* | 343,847 | 121,924 | 42,235 | 11,751 | 31,244 |
| 2002 | 349,367 | 125,322 | 42,511 | 11,990 | 31,695 |
| <i>Year</i> | <i>Non-Filers</i> | | | | |
| | All Areas | Dublin | Cork | Letterkenny | Limerick |
| 1999-2000 | 67,102 | 16,846 | 7,845 | 2,162 | 6,033 |
| 2000-2001 | 72,273 | 22,412 | 8,410 | 2,604 | 6,510 |
| 2001* | 89,503 | 34,058 | 10,696 | 3,448 | 8,829 |
| 2002 | 85,227 | 25,339 | 9,226 | 3,280 | 3,707 |

* This was a 'short tax year' to allow for the changeover to a tax year based on the calendar year

4.06 Subsequent to a referral to the relevant tax district, the tax status of each 'non-filer' is examined on the Revenue Commissioners' databases and those cases which do not require a visit by a Field Officer are excluded (for example tax payers whose income is below the threshold required for liability to pay tax). The Commission is of the view that, at this stage, a rigorous check should occur to examine whether or not exclusions are valid. Field officers compile a report on

each ‘non-filer’ whom they visit with a recommendation as to suitability for prosecution. In general, lists of cases deemed suitable for prosecution are then forwarded to the Revenue Solicitor who issues a warning letter.¹¹ If a taxpayer receives a warning letter, the taxpayer has 21 days to submit a return. If a return is not submitted the case will proceed to prosecution.

4.07 Due to the transfer of powers to individual tax districts, different tax districts may now pursue a different approach in relation to the non-filing collection process. For example, in Limerick, the procedure differs in that a telephone call precedes a warning letter and subsequent to a warning letter a visit occurs for those who fail to submit returns.¹²

4.08 Non filing cases are prosecuted summarily in Dublin by the Revenue Solicitor and outside Dublin by the local State Solicitor. Once a summons has been issued, the Revenue Commissioners will not halt a prosecution even if a taxpayer subsequently files a return.

4.09 Section 1078(3)(a) of the *TCA 1997* provides that a person convicted of a non-filing offence is liable on summary conviction to a maximum fine of €3,000¹³ or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both the fine and the imprisonment. When sentencing a person, most judges will take into account that a defendant has subsequently filed the relevant returns when considering whether to mitigate the statutory fine but some judges will mitigate fines even where returns have not been filed.¹⁴ The 2002 *Report of the Comptroller and Auditor General*

¹¹ The Consultation Paper recommended that a pre-prosecution letter be issued in cases of people with previous non-filing convictions. The Revenue Commissioners have subsequently stated that a pre-prosecution letter is sent to those with previous convictions for non-filing.

¹² See *Annual Report of the Office of Comptroller and Auditor General 2002* (Government Publications 2003) at 16.

¹³ This amount was substituted by section 160(1) of the *Finance Act 2003* (with effect from 28 March 2003) in place of the previous amount of €1,900.

¹⁴ See *Annual Report of the Office of Comptroller and Auditor General 2002 op cit* fn 12 at 16. A distinction should be made between the Revenue Commissioners’ power to mitigate under section 1065 of the *TCA 1997* and the power of a court to do so under section 1078(3)(a) of the *TCA 1997*. See also *Code of Practice for Revenue Auditors* (Revenue Commissioners 2002) at paragraph 9.4.

referred to a statement by the Revenue Commissioners that the average level of mitigation of fines is 62%.¹⁵ Furthermore, fines have been mitigated in cases where the defendant is a repeat offender. It is important in the present climate of encouraging and ensuring increased tax compliance that mitigated fines for recidivists occur only when exceptional circumstances are present or fairness and justice require such mitigation.¹⁶

4.10 A judge may not mitigate the statutory fine to less than 25% of the maximum sum set out in the statute¹⁷ and section 1078(8) provides that the *Probation of Offenders Act 1907* cannot be applied. Therefore, some penalty, whether a fine or a term of imprisonment must be imposed on a defendant convicted of an offence under section 1078.

4.11 The following table compiled from figures in the 2002 and 2003 Reports of the Comptroller and Auditor General provide detailed figures on the 'non-filing' of income tax returns.¹⁸

4.12 From this table it is clear that in recent years the use of the warning letter and issue of summons is efficacious. The number of convictions for non-filing allied with the prospect of a substantial fine has encouraged better compliance.

¹⁵ See *Annual Report of the Office of Comptroller and Auditor General 2002* op cit fn 12at 16.

¹⁶ On the issue of recidivism, see paragraphs 4.30-4.34, below.

¹⁷ Section 1078(3)(a) of the *TCA 1997*.

¹⁸ *Annual Report of the Office of Comptroller and Auditor General 2002* (Government Publications 2003) at 13 and *Annual Report of the Office of Comptroller and Auditor General 2003* (Government Publications 2004) at 11.

Table 6: Prosecution Process of Non-Filing

| | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 |
|--|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| <i>Warning Letter (Revenue Solicitor)</i> | 1,917 | 5,450 | 5,399 | 6,457 | 9,818 | 9,348 | 12,357 |
| <i>Cases Referred for Issue of Summons</i> | 853 | 1,968 | 2,369 | 1,951 | 2,401 | 1,839 | 1,908 |
| <i>Number of Taxpayers Convicted</i> | 223 | 659 | 1,159 | 936 | 1,050 | 972 | 575 |
| <i>Total Fines</i> | €0.2m | €0.9m | €1.5m | €0.9m | €1m | €1m | €0.6m |

C Current Problems with the Filing and Enforcement Process:

4.13 Nevertheless, the 2002 Annual Report of the Comptroller and Auditor General indicates that there are problems with (1) delays in the prosecution of ‘non-filer’ cases, (2) the enforcement of fines and (3) the recalcitrance of a hardcore group of recidivists. Each of these issues is now considered with appropriate recommendations for reform.

(1) Delays in the Prosecution of ‘Non-Filers’

4.14 In 1998, as a result of a policy change,¹⁹ it was decided to substantially increase the number of cases being referred for criminal prosecutions for non-filing offences. The 2002 Report of the Comptroller and Auditor General notes that the larger tax districts were, in general, unable to prosecute the total number of cases for 2002.²⁰ Furthermore, the recommended interval of four weeks between the issuing of the warning letter and the referral for summons was generally followed in Letterkenny, Limerick and Cork but not in Dublin where six months elapsed before referral for summons. The period of time from the issuing of a warning letter to proceeding to court varied from three months to over two years. All of the above suggested a “... system under pressure to cope”.²¹

4.15 The Revenue Commissioners have informed the Commission that the extension beyond the 4 weeks in the Dublin District was often at the request of agents of a taxpayer. In order to deal with the backlog in cases, the Revenue Solicitor’s office secured additional court dates in Dublin and the backlog has been cleared. The Revenue Commissioners now intend to meet the 4 week deadline within the Dublin District.

4.16 In addition to these positive developments, another way of alleviating administrative backlogs may be by attempting to reduce the

¹⁹ *Annual Report of the Office of Comptroller and Auditor General 2002* (Government Publications 2003) at 12.

²⁰ *Ibid* at 15.

²¹ *Ibid* at 15. The disparity in the length of time in bringing prosecutions may also be criticised on the grounds of equality before the law, that is, each person should be treated in a similar manner in relation to the prosecution of the same offence.

number of failures to file which require a follow up by the Revenue Commissioners. As Tables 5 and 6 indicate, between 67,000 and 90,000 instances of non-filing have been referred annually to the relevant tax districts. Of these the number of Revenue warning letters in cases of non-filing of income tax returns has increased from just under 2,000 in 1997 to 12,357 in 2003. This clearly indicates an increase in enforcement activity but it remains the case that it represents a small percentage of the total number of non-filings. As noted above, this disparity may be partly attributed to administrative difficulties but it should also be the aim of the Revenue Commissioners to have an accurate assessment of the profile of non-filers categorised as follows:

- those who have no liability to tax as they come within the exempt limits. These should be quickly identified and excluded at a very early stage from any follow up process;
- those who claim to have little or no liability to tax but from whom further information may be required to substantiate that claim and
- those who come clearly within the charge to tax but who have failed to comply with the obligation to file a return within the stipulated period.

4.17 Given that such a small percentage of non-filers received warning letters, it is suspected that a large proportion of these fell within the first category above. If this is the case the tax system should have the capacity to identify at an early stage those for whom the follow up procedure is inappropriate and unnecessary. One possible method of achieving this objective is discussed below.

(a) Notification of Change of Status

4.18 A number of categories of people are exempt from paying tax. For example, the exemption limits for income tax in the 2004 tax year are €5,210 (single/widowed and under 65 years of age), €15,500²²

²² Section 2 of the *Finance Act 2004* increased this figure to €15,500 from €15,000.

(single/widowed and 65 years of age and over), €10,420 (married and under 65 of age) and €31,000²³ (married and 65 years of age or over).

4.19 The obligation to file a return to the Revenue arises in two situations: when notice of this duty is served on the taxpayer by the Revenue and when the taxpayer is a chargeable person.²⁴ People whose status changes from that of a chargeable person in one tax year to being exempt from tax in the following year assume that there is no need to file a return. However, this is not the case – if notice has been served on them, there is an obligation to file a return even if they are no longer a chargeable person.²⁵ The return should of course confirm the change of status. The fact that the Revenue Commissioners do not always receive such information of change of status means that resources may be expended in following up a person who ultimately has no liability to tax.

4.20 The Revenue Commissioners run a series of public information campaigns throughout the year to raise awareness of tax issues, such as those notifying taxpayers of the duty to file before the end of the tax year. The Revenue also issue press releases, advertising, leaflets, and direct mailings to businesses and individuals in order to inform taxpayers of developments in the Revenue Online Service (ROS).²⁶ The Commission considers that the public awareness campaigns currently in place could be expanded to provide information on the duty to file, so that each person who has been served notice is aware of their duty to file. This would ensure that a far greater number of people would be excluded from follow up investigations, saving time and expense.

²³ Section 2 of the *Finance Act 2004* increased this figure to €31,000 from €30,000.

²⁴ Every chargeable person is obliged to file a return in respect of income and chargeable gains: Section 951 of the *TCA 1997*, unless they are notified under section 951(6) of the *TCA 1997* that they are excluded from this statutory duty. There is also an obligation to file a return in accordance with section 877 of the *TCA 1997* where required to do so by the Revenue Commissioners. See also paragraph 4.03, above.

²⁵ The current practice of the Revenue is to serve notice on all persons who were taxpayers in the preceding year.

²⁶ See www.ros.ie.

4.21 The Commission is therefore of the view that the Revenue Commissioners should consider publicising the obligation to file upon receipt of notice from the Revenue. This could be done by expanding their current publicity campaign in relation to the timely filing of returns to include information on the duty to file even where no charge to tax arises. This vital information would thus alleviate the burden on the administrative system arising from the unfruitful investigation and prosecution of non-filers.

4.22 *The Commission recommends that the Revenue Commissioners should consider publicising the obligation to file upon receipt of notice from the Revenue. This could be done by expanding their current publicity campaign in relation to the timely filing of returns to include information on the duty to file where notice has been served but no charge to tax arises.*

(2) Enforcement

(a) Court Orders

4.23 Where an offender has been convicted for non-filing, a court order may be sought for all outstanding returns of income.²⁷ Since 2002,²⁸ it is an offence to fail to comply with such a Court order.²⁹

4.24 The 2002 *Annual Report of the Comptroller and Auditor General* indicated that in 2002 districts had different policies in regard to seeking court orders. In Dublin and Limerick court orders were sought in all cases. In Cork such orders were sought in larger cases or cases involving previous convictions. In Letterkenny, court orders had not been sought.³⁰ For the purposes of encouraging compliance, while acknowledging some toleration for regional differences, a greater consistency in practice would be preferable. The practice in Cork and

²⁷ Section 1078(3A) of the *TCA 1997*, inserted by section 211(c) of *Finance Act 1999*.

²⁸ Section 1078(3B) of the *TCA 1997*, as amended by section 133(2) of the *Finance Act 2002*.

²⁹ The Revenue Commissioners have stated to the Commission that three cases are being prepared for prosecution on this matter.

³⁰ See *Annual Report of the Office of Comptroller and Auditor General 2002* (Government Publications 2003) at 17.

Letterkenny, although understandable from a resource perspective, lacked a countrywide consistency.

4.25 The Revenue Commissioners have informed the Commission that since the publication of the 2002 *Report of the Comptroller and Auditor General* a more coherent policy applies. This is to be welcomed. The Revenue Solicitor's office has advised all State Solicitors to seek orders in all cases.

4.26 *The Commission recommends that the recent introduction of a standardised policy across all tax districts of pursuing court orders for all outstanding returns should continue.*

(b) *Enforcement of Court Fines*

4.27 Fines resulting from summary conviction and conviction on indictment are collected by the Department of Justice, Equality and Law Reform (and then transferred to the Revenue Commissioners on a quarterly basis).³¹ Under the present system one third of fines are not paid.³² The Comptroller and Auditor General has commented that there "... is little point in having fines imposed by the courts if there is no follow-up to ensure that fines are paid."³³ The Commission is aware that the enforcement of criminal fines is a general problem and not peculiar to non-filing in respect of revenue offences.³⁴

³¹ This is in accordance with the section 1065(3) of the *TCA 1997* which states:

"Moneys arising from fines, penalties and forfeitures, and all costs, charges and expenses payable in respect of or in relation to such fines, penalties and forfeitures, shall be accounted for and paid to the Revenue Commissioners or as they direct."

³² See *Annual Report of the Office of Comptroller and Auditor General 2002 op cit* fn 30 at 17.

³³ *Ibid.*

The present rate of failure to collect fines imposed by the Courts is unacceptable. The figures in respect of uncollected fines bring the system into criticism at the least. Simple methods of ensuring payment of fines can and should be devised and implemented. For example, in Western Australia, an applicant for a driving licence and insurance must have paid all outstanding fines due before the licence is issued.

³⁴ See Comptroller and Auditor General *Report on Value for Money Examination: Collection of Fines* (Government Publications 2000).

4.28 One way to deal with the general low rate of collection of fines would be to include the payment of a Revenue fine as a necessary requirement before the issue of a ‘tax clearance certificate’.³⁵ A Tax Clearance Certificate³⁶ is a vital document required by certain taxpayers, for example in applying for public works contracts. If the Revenue Commissioners were able to link the issuing of such certificates to the payments of outstanding revenue fines, it is likely that there would be an improvement in the current low payment rate. The Courts Service is currently in the course of computerising the issue of District Court summonses and the Revenue Commissioners are contributing to this worthwhile work. In time it should be possible to link unpaid fines to individuals. The Commission recommends that consideration should be given to amending section 1094(2)(i) and section 1095(3)(a) of the *TCA 1997* which set out the circumstances in which the clearance certificates are issued to include fines in addition to the payment or remittance of any taxes, interest or penalties required to be paid under the Acts or as a result of any court order. The Commission expects that these amendments will have come into operation within 5 years.³⁷

4.29 *The Commission recommends that consideration be given to amending section 1094(2)(i) and section 1095(3)(a) of the TCA 1997 to include the payment or remittance of any taxes, interest, penalties or*

³⁵ Such certificates are required under the sections 1094 and 1095 of the *TCA 1997*.

³⁶ A tax clearance certificate is a document issued by the Revenue Commissioners which confirms that a taxpayer has complied with all of his obligations under the Tax Acts in relation to the payment of tax, interest, penalties and the delivery of returns. See Corrigan *Revenue Law* (Butterworths 2000) Vol I at 451-458. The Revenue Commissioners have recently instituted changes in the procedure for applying for tax clearance certificates. It is now generally the case that a taxpayer applies to their local Revenue District for a tax clearance certificate (the exception being non-residents and applicants under the *Standards in Public Office Act 2001* who apply to the Office of Collector-General and also taxpayers who are subject to the Large Cases Division who apply to the said Division). A taxpayer or agent may also apply online at www.revenue.ie. See Heaphy “Revenue Change Tax Clearance Procedures” 5 March 2004 available at www.accountingnet.ie under the “Taxation News” section.

³⁷ See also paragraph 6.17, below.

finer required to be paid under the Acts or as a result of any court order.

(3) Recidivism

4.30 The 2002 *Report of the Comptroller and Auditor General* noted that the number of non-compliant individuals has increased substantially in recent years.³⁸ A number of individuals had several convictions for non-filing with one particular individual having seven previous convictions. Up to 10% of those convicted were repeat offenders.³⁹ He ascribes this high figure of recidivism to the weak sanctions imposed by courts⁴⁰ and the poor collection rate of fines, which is plainly undesirable from a societal viewpoint. The prosecution may point out the specific circumstances of a particular offender to the Court. In addition, however, the Commission considers that the prosecution should draw attention to the importance of making tax returns, as non-compliance in filing facilitates tax evasion. This aspect needs to be drawn to the attention of the Court by appropriate representations so that serious non-compliance receives a less sympathetic response.⁴¹

4.31 One possible option suggested to address this matter would be that those with numerous convictions for non-filing receive a mandatory prison sentence (save in exceptional circumstances). While such a provision might be regarded as sending a clear signal that repeated non-filing is not a petty offence, the Commission does not favour such an approach.

4.32 In its *Report on Sentencing*,⁴² the Commission recommended against introduction of mandatory or minimum sentences of

³⁸ *Annual Report of the Office of Comptroller and Auditor General 2002* (Government Publications 2003) at 15.

³⁹ *Ibid.* 13% of non-filers on the Dublin prosecution database had previous 'non-filer' convictions.

⁴⁰ See also *Annual Report of the Office of Comptroller and Auditor General 2002 op cit* fn 38 at 16 where the high number of adjournments in relation to non-filing cases is referred to.

⁴¹ See further Law Reform Commission *Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court* (LRC CP 33-2004) at paragraphs 8.28-8.37.

⁴² (LRC 53-1996).

imprisonment for summary offences.⁴³ The rationale for this recommendation was that it was illogical to have a different view on mandatory sentences in relation to indictable and summary offences. Also, mandatory sentences often cause injustice in individual cases.

4.33 A more attractive option would be that those convicted of multiple non-filing offences be audited and fast-tracked for prosecution perhaps with representations in Court for stiffer penalties. For example, prosecution on indictment under section 1078 of the *TCA 1997* may result on conviction to a fine not exceeding €126,970 or, at the discretion of the court, to imprisonment for a term not exceeding 5 years or to both the fine and the imprisonment.⁴⁴ Consideration of the increased use of this option, if necessary, in the case of persistent non-filers and other egregious cases which lack mitigating circumstances (such as illness or other adversity) could help decrease recidivism as the penalties actually imposed are likely to be higher than in the past.

4.34 *The Commission recommends that the Revenue Commissioners pursue a different strategy for those being prosecuted for a third or more non-filing offence. This strategy should include an automatic audit and a fast-tracked prosecution system with consideration of prosecution on indictment in egregious cases which lack mitigating circumstances.*

⁴³ (LRC 53-1996) at paragraph 5.16.

⁴⁴ Section 1078(3)(b) of the *TCA 1997*.

CHAPTER 5 PROSECUTION OF SERIOUS TAX EVASION

A Introduction

5.01 The issue of serious tax evasion is the background against which the Attorney General requested the Commission to consider the issues discussed in this Report. The levels of evasion documented in previous years expose issues relating to the balance between prosecution and settlement operated by the Revenue Commissioners. This chapter addresses this balance but, in advancing the discussion beyond this point, also seeks to examine how prosecutions could be made less onerous. In this regard, the Commission has examined four potential areas: arrest and detention, evidential changes, prosecution expenses and a confidential phone-line.

B Serious Tax Evasion

5.02 The prosecution of ‘serious tax evasion’ has proved more problematic than prosecutions for either failing to file returns or for customs and excise offences. Serious tax evasion is not confined to indictable cases. The Revenue Commissioners generally use the term to refer to all cases of tax evasion other than the failure to submit returns or the late submission of returns.¹ The Steering Group defined it as involving actions “knowingly taken by taxpayers with the intention of defrauding the State.”²

5.03 Table 7 lists the prosecution figures for serious tax evasion since 1997. As can be seen, a combination of significant fines and custodial sentences have been imposed in recent years.

¹ Classification of an offence as a ‘serious tax offence’ does not preclude it being dealt with in the District Court since this is a matter for prosecutorial discretion.

² *Report of the Steering Group on the Office of the Revenue Commissioners* (Government Publications 2000) at paragraph 3.46.

Table 7: Serious Tax Evasion

| | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 |
|--|------|--------|--------|------|--------|------|--------|
| <i>Cases Under Investigation at Year End</i> | - | 18 | 24 | 33 | 31 | 31 | 38 |
| <i>Convictions</i> | 1 | 6 | 1 | 3 | 4 | 3 | 6 |
| <i>Fines Collected £IR</i> | 500 | 33,750 | 15,000 | 750 | 5,250 | - | - |
| <i>Fines Collected €</i> | 635 | 42,854 | 19,046 | 952 | 6,6666 | - | 30,656 |
| <i>Custodial Sentence [Suspended]</i> | - | 2[2] | 1 | 2[1] | 4[2] | [1] | [1] |
| <i>Acquittal</i> | - | - | 1 | - | - | - | - |

(1) Prosecution Policy

5.04 A policy of using prosecution only as the last resort appears to have existed within the Revenue Commissioners until recently.³ It was felt that the perceived difficulties of prosecution were invariably outweighed by the benefits of settlement. Given that the Revenue Commissioners' primary task is to raise as much revenue for the State as is properly possible, the benefits of a settlement may in the past have outweighed the possible benefits of a protracted prosecution. However, there are important and wide long-term interests other than the immediate collection of revenue. To put it broadly, society needs the reassurance that serious tax evasion is viewed with the utmost gravity and that all tax paying citizens are expected to comply with what is a principal obligation of citizenship, the payment of tax due. The prosecution of an accused tax-evader⁴ in a criminal court is by no means the only serious sanction which may be imposed, yet it is the most visible and formal way in which society can show its disapproval for such anti-social and illegal conduct.⁵ Furthermore, it is likely (although not quantifiable in the Irish context due to lack of data) that an increase in prosecutions will lead to increased tax compliance which in the long run should result in an increase in the amount of revenue collected.

5.05 The Revenue Commissioners are indeed already moving in this direction and have shown an awareness that an increase not just in the number but also in the variety of prosecutions is required. Indeed,

³ On the topic of prosecution policy see the comments of the Chairman of the Revenue Commissioners to the 2004 Small Firms Association Annual Conference, 7 September 2004 available at www.revenue.ie. He commented on the requirement of 'cracking down hard on all evasion'.

⁴ For a list of the prosecution criteria used by the Revenue Commissioners, see paragraph 5.06, below.

⁵ The former President of the Irish Taxation Institute, Ms. Suzanne Kelly spoke about the balance between prosecution and settlement in her 2004 annual address to the Institute on 26 March 2004. The speech is available at www.taxireland.ie. Ms. Kelly describes this balance as a "bird that flies on two wings" (at 4) and argued against too strong a shift from settlement to prosecution.

the climate of public and political opinion in respect of tax evasion has changed from complacency to calls for tax compliance.

(2) Prosecution Criteria

5.06 The Investigations and Prosecutions Division operate a double filter in relation to prosecutions. The *Code of Practice for Revenue Auditors* states: "... as resources are finite, it is important that they are employed only on the most important cases. It is equally important that the approach to prosecution is fair and consistent (without being rigid)."⁶ The set of criteria quoted below is taken into account when considering whether or not to investigate a case with a view to prosecution. The criteria are not exhaustive; the stated purpose of the guidelines is "... to give Revenue officials an outline of the type of offences which can be prosecuted and factors which, alone or in combination, can influence a decision to investigate a case with a view to prosecution...."⁷ The Code of Practice identifies the types of tax offences most likely to be prosecuted as:

- (a) use of forged or falsified documents,
- (b) systematic scheme to evade tax,
- (c) false claims for repayment,
- (d) failure (as distinct from minor delays) in remitting fiduciary taxes,
- (e) deliberate and serious omissions from tax returns,
- (f) use of off-shore bank accounts to evade tax,
- (g) insidious schemes of tax evasion;
- (h) aiding and abetting the commission of a tax offence and
- (i) offences under the *Waiver of Certain Tax, Interest and Penalties Act 1993*.⁸

5.07 Even if an offence with such aggravating factors is identified, a number of other factors will be considered before a decision to

⁶ *Code of Practice for Revenue Auditors* (Revenue Commissioners 2002) Appendix 1 at 43.

⁷ *Ibid* Appendix 1 at 44.

⁸ *Ibid* at 43.

investigate with a view to prosecution is taken. The following considerations will influence the decision:

- (i) whether sufficient evidence is or will be available to prove that the accused committed the alleged offence beyond reasonable doubt;
- (ii) the length of time since discovery of the alleged offence and any damage consequent on a delay in initiating proceedings;
- (iii) assessment of the cost of prosecution;
- (iv) culpability, responsibility and experience of the accused;
- (v) deterrent effect of prosecution for the particular offence and
- (vi) whether full disclosure has been made, whether co-operation has been given and whether the tax, interest and penalties due have been paid.⁹

5.08 Some of the above criteria are comparable to the criteria used by the Director of Public Prosecutions in deciding to prosecute criminal offences in general.¹⁰

⁹ See *Code of Practice for Revenue Auditors op cit* fn 6 Appendix 1 at paragraphs 10.1-10.1.4 outlines what amounts to a qualifying disclosure.

¹⁰ See Director of Public Prosecutions, *Statement of General Guidelines for Prosecutors* (October 2001) at Chapter 4. The decision whether to prosecute is influenced by the following factors: the public interest (“... it will generally be in the public interest to prosecute a crime where there is sufficient evidence to justify doing so, unless there is some countervailing public interest reason not to prosecute”); the strength of the evidence (“in addition to being satisfied that a bare *prima facie* case exists, the prosecutor should not lay a charge where there is no reasonable prospect of securing a conviction before a jury or judge in cases heard without a jury”) and whether there is a public interest reason not to prosecute (this is decided after it has been established that there is sufficient evidence to justify the institution or continuance of a prosecution). There are a number of aggravating factors that tend to increase the seriousness of an offence and make it more likely that a prosecution is required in the public interest. These factors include where the accused was a ringleader or an organiser of the offence; where the accused has previous convictions or cautions which are relevant to the present offence. A number of mitigating factors reduce the likelihood of a

C Further Reform of the Prosecution Process

5.09 As the Revenue Commissioners move towards greater use of prosecution, certain obstacles will have to be overcome. The prosecution of tax offences often presents unusual problems.¹¹ These include the resource-intensive and time-consuming work involved in every prosecution, the absence of a specific victim to report the commission of the crime to the authorities, the difficulties of obtaining evidence to a criminal standard beyond all reasonable doubt¹² and the lack of a general power of arrest and detention in respect of revenue offences. Particular problems arise where information may need to be obtained outside the State in the investigation of a revenue offence, although this has become less significant with the recent advent of the OECD, EU and international co-operation and mutual assistance. For example, where offshore accounts are involved, the Revenue Commissioners will need the co-operation of foreign authorities, and while in the past this may not have been forthcoming, recent initiatives have resulted in greater co-operation and mutual assistance.¹³

public prosecution being in the public interest; these include if the court is likely to impose a very small or nominal penalty; where the offence is a first offence, if it is not of a serious nature and is unlikely to be repeated. Other factors which are important in considering the public interest include the availability and efficacy of any alternatives to prosecution; the prevalence of the offence in question and the need for deterrence both generally and to the particular circumstances of the offender; if the length and cost of a trial would be disproportionate in view of the seriousness of the alleged offence and the strength of the evidence.

¹¹ The Revenue Powers Group also noted the special problems associated with the prosecution of revenue offences. They stated that these include the major competing factor of a financial settlement (such dual objectives do not exist for the majority of crimes); that Revenue investigators do not have Garda powers such as the power of arrest and detention; the weighing of heavy resource implications of preparing cases for criminal trial against the need for resources to establish and collect tax liabilities and the existence of civil penalties for the same default as a prosecution offence. See *Revenue Powers Group: Report to the Minister for Finance* (Government Publications 2003) at Chapter 2, paragraph 5.3.

¹² *Report of the Steering Group on the Office of the Revenue Commissioners* (Government Publications 2000) at paragraph 7.41. This is a problem pertaining to 'white collar' crime generally.

¹³ Significant advances have been made internationally through the Organisation for Economic Co-operation and Development ("OECD")

5.10 We now consider four ways in which the law and practice may be adjusted in relation to criminal prosecution.

(1) *Arrest and Detention*

(a) *Introduction*

5.11 This section is concerned with propositions whether officials of the Revenue Commissioners should have the right to arrest a person suspected of tax evasion and pose questions to them under Garda detention or whether the Garda Síochána should be responsible for the arrest and detention of such suspects with a memorandum of understanding operating between the Garda Síochána and the Revenue Commissioners.

5.12 As to whether the Revenue Commissioners should have the power to detain a suspect for the purpose of questioning, the Commission is of the view that this should not occur because it would involve an unjustified departure from the general principle that the Gardaí alone are empowered to deprive persons of their liberty.¹⁴ Secondly, there is the practical reason that the Revenue Commissioners do not have the facilities to operate a detention system. Currently, in relation to customs offences, those arrested are brought to a Garda station.

5.13 Before addressing the question of reform of the law in relation to arrest and detention for Revenue offences, the current legal

campaign for global financial transparency. Transparency in this context refers to the demand for increased tax information exchange. The OECD initiated this policy in 1998 when it published its study on *Harmful Tax Competition: An Emerging Global Issue* and has continued this through its Harmful Tax Practices Project. See also section 912A of the *TCA 1997* as amended by section 82 of the *Finance Act 2004* and also sections 898B-898R of the *TCA 1997* (as substituted by section 90(1) and Schedule 4 of the *Finance Act 2004*) which incorporate EU Directive 2003/48/EC on Mutual Assistance into domestic law. This topic is further discussed in the *Annual Report of the Revenue Commissioners 2003* (Government Publications 2004) at 31, which outlines the progress Revenue are making in agreeing Tax Information Exchange Agreements (TIEAs) with a number of jurisdictions including the Isle of Man, Guernsey and the Cayman Islands.

¹⁴ On the general power of arrest without warrant, see section 4 of the *Criminal Law Act 1997*.

position needs to be set out. In *People v Walsh*¹⁵ O’Higgins C.J. summarised the common law rationale for the power as follows:

“... an arrest and detention is only justified at common law if it is exercised for the purpose for which the right exists, which is the bringing of an arrested person to justice before a court. If it appears that the arresting gardaí have no evidence on which to charge the person arrested, or cannot justify the suspicion on which he is arrested, he must be released. He cannot be detained while investigations are carried out. Reasonable expedition is required but more than this cannot be demanded. Regard must be had to the circumstances and to the time of the arrest. If a person is arrested late at night, it scarcely seems unreasonable if he is held overnight and charged before a court the following morning.”¹⁶

5.14 Legislation has been enacted to allow the Garda Síochána to arrest and detain for the purpose of questioning in certain specific circumstances.¹⁷

5.15 In relation to arrest, section 4(3) of the *Criminal Law Act 1997* states that “where a member of the Garda Síochána, with reasonable cause, suspects that an arrestable offence has been committed, he or she may arrest without warrant anyone whom the member, with reasonable cause, suspects to be guilty of the offence.” An arrestable offence is one carrying a penalty or conviction of a term

¹⁵ *People (DPP) v Walsh* [1980] IR 294.

¹⁶ [1980] IR 294, 300.

¹⁷ Indeed, the Gardai have extensive powers under section 30 of the *Offences Against the State Act 1939* which allows detention without charge on suspicion of a scheduled offence for a period of 24 hours. This may be extended for a further 24 hours on the direction of a Chief Superintendent or higher officer. Under the *Criminal Justice (Drug Trafficking) Act 1996*, the initial detention period is 6 hours which may be extended by a further 18 hours where a Chief Superintendent has reasonable grounds for directing this. A further extension of 24 hours may be granted by a Chief Superintendent. Moreover, a further extension of 72 hours is possible by obtaining a warrant from a District Court or Circuit Court judge. Such a judge may issue a further extension of 24 hours detention resulting in a total maximum detention of 7 days.

of imprisonment of 5 years or a more severe penalty.¹⁸ Some revenue offences fall into the category of arrestable offences.¹⁹

5.16 After arrest, a person suspected of an arrestable revenue offence may be detained under the *Criminal Justice Act 1984*. Section 4(3) of the 1984 Act allows for an initial period of detention of up to 6 hours with a further period of detention of up to 6 hours where an officer of the Garda Síochána not below the rank of superintendent has “reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence.” Section 4(5) states “where a member of the Garda Síochána has enough evidence, to prefer a charge for an offence against a person detained in a Garda Síochána station pursuant to this section, he shall without delay charge that person....”

5.17 The *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána) Regulations 1987* provide a number of protections for arrested persons. Regulation 8 sets out the information that must be provided to an arrested person. This includes a right to be informed in “ordinary language of the offence or other matter in respect of which he has been arrested” and the right to consult a solicitor. Regulation 12 sets out the rules in relation to interviews and includes a requirement that not more than 2 members of the Garda Síochána may question an arrested person at any one time and that not more than 4 members shall be present at any one time during an interview.

(b) *Arrest and Questioning for Revenue Offences*

5.18 One possible way of tackling the difficulties of gathering information in tax evasion cases is to allow officials within the Investigations and Prosecutions Division of the Revenue Commissioners to arrest and detain a person for questioning about suspected tax evasion.

5.19 By way of comparison, customs legislation provides Revenue officials with the power of arrest depending on the customs offence

¹⁸ Section 2(1) of the *Criminal Law Act 1997*. Attempts to commit any such offences are included.

¹⁹ For example, section 1078(3)(a) of the *TCA 1997* provides for imprisonment not exceeding 5 years when a person is convicted on indictment of certain offences.

alleged to have been committed.²⁰ For example, section 139(1) of the *Finance Act 2001* allows a customs officer or Garda to arrest without warrant a person whom they reasonably suspect has committed or is committing an offence in relation to the evasion of excise duty. The same power exists in relation to mineral oil (in which a marker has been removed or the removing of such markers).²¹

5.20 During a period of approximately 5 years from the early 1990s, the Garda Síochána pursued prosecutions for serious tax evasion on behalf of the Revenue Commissioners.²² Although for a variety of reasons the practice ceased, it is evident that during this period the Garda Síochána arrested and detained persons suspected of serious tax evasion. Since 1996, no such detention occurs, since the Investigations and Prosecutions division of the Revenue Commissioners is responsible for reporting cases to the Director of Public Prosecutions. As noted above, the recent restructuring of the Revenue Commissioners has been accompanied by a growing emphasis on the need for greater levels of criminal prosecution to tackle tax evasion.²³ However, arrest and detention for questioning is a significant power conferred primarily on the Gardaí and any lessening or impairment of their role must be considered carefully.

5.21 Currently the *Criminal Justice Act 1984* and the *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána) Regulations 1987* apply to the Garda Síochána only. Both the 1984 Act and 1997 Regulations would thus require amendment to facilitate arrest and questioning powers for the Revenue.

5.22 The Revenue Powers Group recommended that Revenue investigators be permitted to question persons detained in Garda custody in connection with an arrestable offence. They also

²⁰ For a useful summary of these powers, see *Customs & Excise Enforcement Procedures Manual* (Revenue Commissioners 2002) at 91.

²¹ Section 139(1) of the *Finance Act 2001*.

²² See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraphs 1.45-1.46.

²³ See, for example, Chapter 1 and paragraph 5.04, above.

commented on the fact that appropriate arrangements would have to be made between the Revenue Commissioners and the Garda Síochána.²⁴

5.23 While there are some arguments in favour of conferring such powers on the Revenue, the Commission considers that an alternative mode of dealing with this issue would be for the authorities to enter into a Memorandum of Understanding.

(c) *Arrest and Detention: Memorandum of Understanding
Between Revenue Commissioners and the Garda Síochána*

5.24 If the process of ‘normalising’ tax evasion as a crime is to continue then there are strong reasons not to separate it from other crimes in relation to the questioning of suspects. However, the factual complexity of criminal tax evasion requires the specialist expertise of the Revenue Commissioners. A possible solution to this problem is the sharing of responsibility for the case file between the Gardaí and the Revenue Commissioners.

5.25 Co-operation between these organisations already successfully exists. For example, in the Criminal Assets Bureau, 9 officials from the Revenue Commissioners work on a full time basis alongside members of the Garda Síochána.²⁵ Obviously, an institutional framework would need to be created to allow for the operation of a joint prosecution scheme but such a framework need not be complex. The Commission suggests that a Memorandum of Understanding between the two organisations should be drawn up which would set out in principle how the process of teamwork in respect of arrest and detention and joint co-operation would work. Of relevance and perhaps acting as a template could be the Memorandum of Understanding between the Health and Safety Authority and the Garda Síochána signed in 2002.²⁶ Under a Memorandum of Understanding drawn up between the two bodies, the Gardaí and the Revenue Commissioners would share information and co-operate to enhance the quality of both the investigation and any subsequent prosecution. The Garda in charge and the Revenue officials would

²⁴ *Revenue Powers Group: Report to the Minister for Finance* (Government Publications 2003) at 73.

²⁵ See *Annual Report of the Revenue Commissioners 2003* (Government Publications 2004) at 4.

²⁶ This memorandum is available at www.hsa.ie.

liaise at the earliest opportunity and agree on the course of action to be followed. While the Gardaí would be responsible for the arrest and detention of the suspect, the Revenue officials would co-operate on the case and contribute to the case file. A member of the Gardaí would conduct the questioning, which would be in compliance with the *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987*. Such an arrangement would ensure the most effective use of resources and retain the benefit of legislative safeguards built into the criminal justice system.

5.26 The division of responsibility with regard to case sharing raises some complex questions and cannot be resolved in the context of this Report. On this basis the Commission has concluded that further discussion and debate about the terms of a Memorandum of Understanding between the Gardaí and the Revenue Commissioners is required before any legislative changes are made.

5.27 *The Commission recommends that the Revenue Commissioners and the Garda Síochána develop a Memorandum of Understanding between them outlining co-operative procedures for the arrest and detention of those suspected of revenue offences with a view to them being questioned by the Garda Síochána in accordance with the Criminal Justice Act 1984.*

(2) Evidential and Procedural Changes

(a) Consultation Paper Recommendation

5.28 In the Consultation Paper, the Commission addressed the question of the evidential burden in Revenue prosecutions. The Commission was of the view that the legislature should be cautious in making any changes in this area.

(b) Discussion

5.29 The Consultation Paper outlined the legal implications of shifting the evidential burden in revenue prosecutions in the context of Article 38 of the Constitution which requires that a trial be carried out in “due course of law.”²⁷ By shifting the evidential burden there is an onus on the accused to adduce evidence in relation to a particular matter. So, for example, under the *TCA 1997*, where a document

²⁷ See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraphs 7.29-7.36.

purports to have been created by a person it shall be presumed, unless the contrary is shown, that the document was created by that person and that any statement contained therein, unless the document expressly attributes its making to some other person, was made by that person.²⁸

5.30 Section 1078B of the *TCA 1997* contains more examples of evidential burdens being shifted. In the Commission's view, such shifts of the evidential burden should be limited in order to reflect the fundamental principles of the presumption of innocence and the legal burden on the prosecution to prove guilt beyond reasonable doubt.

5.31 *The Commission recommends that no further legislation should be enacted that would shift the evidential burden on to an accused charged with tax offences.*

(3) Prosecution Costs

5.32 Order 99, Rule (1) of the *Rules of the Superior Courts 1986* deals with the issue of costs and provides that "the costs of and incidental to every proceeding in the superior courts shall be in the discretion of those courts respectively". In *People (Attorney General) v Bell*,²⁹ the Supreme Court held that the phrase "every proceeding" included the costs of a criminal trial and as a consequence the "High Court may impose a liability for costs on either the prosecutor or the defendant".³⁰ Order 66, Rule 1 of the *Circuit Court Rules 2001* contains a similar provision that "save, as otherwise provided by Statute, or by these Rules, the granting or withholding of the costs of any party to any proceeding in the Court shall be in the discretion of the Judge or in the County Registrar as the case may be".³¹

²⁸ Section 1078B(3) of the *TCA 1997*, inserted by Section 161 of the *Finance Act 2003*.

²⁹ [1969] IR 24.

³⁰ [1969] IR 24, 52 per Walsh J.

³¹ Order 36 Rule 1 of the *District Court Rules 1997* states that "where the Court makes an order in any case of summary jurisdiction (including an order "to strike out" for want of jurisdiction) it shall have power to order that any party to the proceedings other than the Director of Public Prosecutions, or a member of the Garda Síochána acting in discharge of his or her duties as a police officer, to pay to the other party such costs and witnesses' expenses as it shall think fit to award".

5.33 In addition to this clear statutory authority, the legislature has created specific authority for some prosecuting bodies to seek and be awarded costs.³² For example, section 12 of the *Environmental Protection Agency Act 1992* states:

“Where a person is convicted of an offence under this Act committed after the commencement of this section, the court shall, unless it is satisfied that there are special and substantial reasons for not so doing, order the person to pay to the Agency the costs and expenses, measured by the court, incurred by the Agency in relation to the investigation, detection and prosecution of the offence, including costs and expenses incurred in the taking of samples, the carrying out of tests, examinations and analyses and in respect of the remuneration and other expenses of directors, employees, consultants and advisers.”

5.34 The investigative and legal costs of mounting a revenue prosecution can be extremely expensive especially in complex fraud cases. One way of mitigating this problem would be a policy by the Revenue Commissioners of seeking specific expenses where a defendant is found guilty. Such expenses have been recovered in the past by the Revenue Commissioners but only in relation to specific matters such as the fees of an expert witness.

5.35 A more radical option would be to follow the example in section 12 of the *Environmental Protection Agency Act 1992*, which allows the EPA to seek a wide variety of costs (including remuneration of employees).

5.36 A middle approach would be to clarify that the Revenue be allowed the costs specific to a particular case. These could include, for example, expert assistance on a particular matter.

5.37 One significant argument against allowing the Revenue Commissioners the power to seek costs is the possibility of ‘claiming on the treble’ in certain cases, for instance where, arising out of the same facts (for example, failing to file an income tax return), the Revenue Commissioners might pursue a criminal prosecution under

³² Statute has also granted courts the authority to order an offender to pay “such costs of the proceedings as the court thinks reasonable”. See Section 1(3) of the *Probation of Offenders Act 1907*.

section 1078 of the *TCA 1997* and also seek interest and penalties under section 1053 of the *TCA 1997*. This is possible as section 1078(2) allows for the prosecution of certain offences “without prejudice to any other penalty to which the person may be liable”.

5.38 This matter was addressed indirectly in *The People (DPP) v Redmond*.³³ This case concerned a fine imposed by the Circuit Court of £7,250³⁴ after the respondent had pleaded guilty in the District Court to ten charges of failing to make tax returns. In addition to imposition of this fine, the accused paid £782,000 to the Revenue Commissioners as a settlement of his liabilities.

5.39 The DPP brought an unsuccessful appeal to the Court of Criminal Appeal against the sentence imposed on the grounds of undue leniency.³⁵ The Court of Criminal Appeal held that the fact that a portion of the £782,000 was attributable to penalties or penal interest was a legitimate factor to be considered when sentencing. Section 1078(2), quoted above, “... does not mandate a Court to exclude from its consideration the fact of the payment of a revenue penalty in assessing the criminal penalty”.³⁶

5.40 The court referred to O’Malley in *Sentencing Law and Practice*³⁷ where it is stated:

“Most of the case law and commentary on proportionate punishment proceeds on the assumption that the sole official response to an offence is a judicially imposed sentence usually in the form of a fine or a term of imprisonment. Increasingly, however, responses to crime are

³³ [2001] 3 IR 390, 402. For a more detailed discussion of this case in the context of the indexation of fines; see Law Reform Commission *Report on the Indexation of Fines: A Review of Developments* (LRC 65-2002) at paragraphs 1.10-1.13.

³⁴ £500 each in respect of the first nine charges and £1,000 in respect of a tenth charge. The first nine charges related to the breaches of section 94(2)(e)(i) of the *Finance Act 1983* and the tenth charge related to a breach of section 1078(2)(g)(i) of the *TCA 1997*.

³⁵ Pursuant to section 2 of the *Criminal Justice Act 1993*.

³⁶ [2001] 3 IR 390, 402.

³⁷ O’Malley, *Sentencing Law and Practice* (Round Hall Press, 2000).

becoming more complex and multi-layered. Several offences carry disqualifications as well as formal punishment and many, potentially at least, may be the subject of civil proceedings resulting in an award of damages against the offender ... the existence of such measures, which seem set to become more prevalent, together with the growth of civil penalties, poses a problem for any sentencing system claiming to be guided by proportionality standards.”³⁸

5.41 The Court of Criminal Appeal also referred to the means of a defendant and the necessity for this to be taken into account when imposing a monetary sanction: “... a fine imposed by a criminal court differs from a revenue penalty. Unless there is specific provision to the contrary ... a Court must indeed proportion the fine to the means of the offender.”³⁹

5.42 Although not directly relevant to the issue being addressed here, the Commission considers that, in order to ensure that any provision for costs meets a proportionality test, allowance should be made for the fact that a person convicted also paid interest and penalties to the Revenue Commissioners (arising out of the same offence). In addition, the means of the convicted person should also be taken into account. On that basis, the Commission has concluded that express provision should be made in legislation for the recovery of specific and exceptional costs by the Revenue (excluding remuneration of Revenue officials) in criminal prosecutions, which should also take account of the means of the offender and of any revenue penalties which may have arisen from the conviction.

5.43 *The Commission recommends that, in relation to the award of specific and exceptional expenses to the Revenue on conviction of a person for a revenue offence, the following section should be introduced:*

- (a) *Where a person is convicted of a revenue offence, the Court may, if it is satisfied that there are special or substantial reasons for so doing, order the person to pay to the Revenue Commissioners specific and ascertainable exceptional*

³⁸ O'Malley, *Sentencing Law and Practice* (Round Hall Press, 2000) at 128.

³⁹ [2001] 3 IR 390, 403.

expenses (excluding remuneration and usual expenses), which have been incurred by the Revenue Commissioners in relation to the prosecution of the offence, such expenses to be measured by the Court.

- (b) *In exercising the discretion conferred by paragraph (a), the Court may have regard to:*
- (i) *the imposition of penalties or interest by the Revenue Commissioners in relation to proceedings against the accused arising from the same facts,*
 - (ii) *the means of the accused.*

CHAPTER 6 PUBLIC PROSECUTION SYSTEM

A Introduction

6.01 In this chapter, the current prosecution system is outlined as a prelude to a discussion of the merits of establishing a ‘fiscal prosecutor’. A more comprehensive study of the public prosecution system is contained in the Consultation Paper.¹

B Summary Prosecutions

(1) *The DPP*

6.02 The Office of the Director of Public Prosecutions was established under the *Prosecution of Offences Act 1974* in order to “perform all the functions capable of being performed in relation to criminal matters ... by the Attorney General....” Section 3(1) of the 1974 Act transferred the vast majority of the Attorney General’s functions in relation to criminal matters to the DPP.² The Government appoints the DPP from among candidates selected by a special committee of senior members of the legal profession.³ A number of

¹ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at Chapter 6.

² The Attorney General has retained functions in relation to the prosecution of offences in cases which may have an effect on the State’s international relations. For example, the Attorney General has retained competency in relation to offences under the *Fisheries Acts 1959-1978*, the *Genocide Act 1973* and the *Extradition (Amendment) Act 1987*. Section 5(1) of the *Prosecution of Offences Act 1974* also provides that the Government may, where it is of the opinion that it is in the interests of national security, order that the DPP’s functions under the Act be performed by the Attorney General and not the DPP.

³ Section 2(7) of the *Prosecution of Offences Act 1974* provides that the committee is composed of the Chief Justice, the Chairman of the General Council of the Bar of Ireland, the President of the Law Society of Ireland,

other entities have the power to prosecute summarily. These include the Garda Síochána and the Revenue Commissioners (where a delegation of authority is granted from the DPP), the Health and Safety Authority and the Director of Corporate Enforcement both of whose jurisdictions are statutorily defined. The practice of prosecuting as a common informer⁴ will become virtually redundant when the *Garda Síochána Bill 2004* (discussed below) is enacted.

(2) The Garda Síochána

6.03 The Garda Síochána undertake most summary prosecutions either in the capacity of a common informer, with the result that a prosecution is in their own name, or in the name of the DPP. Under a general authorisation given in 1975, the Gardaí may prosecute in the name of the DPP without having to secure the prior consent of the DPP or bring the case to the DPP's attention.⁵ The Garda Síochána may commence a prosecution in the name of the DPP without receiving directions in a particular case. However, the DPP retains a measure of control over the Gardaí, since he can discontinue any prosecution brought in his name at any stage.

6.04 The *Garda Síochána Bill 2004* contains a number of provisions that relate to the prosecutorial interrelationship between the DPP and the Garda Síochána.

6.05 Section 8 of the *Garda Síochána Bill 2004* provides that a member of the Garda Síochána may institute prosecutions as a Garda only. Thus, the common law power to prosecute as a common informer is removed. It also provides that a member of the Garda Síochána may institute and conduct proceedings in a court of summary jurisdiction (invariably the District Court) but only in the name and under the directions⁶ of the DPP. Furthermore, nothing in section 8

the Secretary to the Government, and the Senior Legal Assistant in the Office of the Attorney General.

⁴ The right of the common informer could be broadly described as a general right to prosecute summarily, available at common law, to all individuals in their private capacity.

⁵ *Report of the Public Prosecution System Study Group* (Government Publications 1997) at 2.1.9 and Appendix 3.

⁶ Section 8(5) states that directions may be of a general or specific nature and may, among other things, prohibit members of the Garda Síochána from

precludes the DPP from assuming the conduct of a prosecution instituted by a member of the Garda Síochána. Finally, no member is authorised to institute a prosecution without the consent of the DPP if an enactment prohibits the institution of the proceedings without the Director's consent.

(3) The Revenue Commissioners

(a) Consultation Paper Recommendation

6.06 The Commission in its Consultation Paper provisionally recommended that the Revenue Commissioners continue to prosecute summarily under a delegation from the DPP, rather than under an independent statutory authorisation.⁷ The Commission also recommended that the Revenue Commissioners should issue a pre-prosecution letter in all cases before issuing a summons.

(b) Discussion

6.07 Under Section 1078 of the *TCA 1997*, a wide discretion exists as to whether to proceed with a case summarily or on indictment because most revenue offences are “hybrid offences”, that is, offences which may be prosecuted either summarily or on indictment.⁸ In general, the Revenue Commissioners decide whether or not to prosecute a case summarily. They take prosecutions in the name of the DPP in courts of summary jurisdiction under a general delegation from the DPP. The DPP is not apprised of the existence of a file unless the Revenue Commissioners consider this to be appropriate. In cases where the Revenue Commissioners consider a case should be prosecuted on indictment the file will be referred to an official of the DPP's Office for a decision on whether the case should be prosecuted summarily or on indictment. The DPP has consented, for the purposes of section 13 of the *Criminal Procedure Act 1967* as applied by section 1078(4) of the *TCA 1997*, to the summary disposal, on a plea of guilty, of any

instituting or conducting prosecutions of specified types of offences or in specified circumstances, or conducting prosecutions beyond a specified stage of the proceedings.

⁷ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 6.22.

⁸ On the issue of hybrid offences, see Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (LRC CP18-2002) at 9.

prosecution which is brought on indictment, provided that the Revenue Commissioners consider such summary disposal to be appropriate.

6.08 Since 1997, co-operation between the Office of the DPP and the Revenue Commissioners has been bolstered through the placement of an officer, at Assistant Secretary level, of the Office with the Revenue Commissioners for half the working week, for the purposes of “case referral and for consultation”.⁹ The majority of the consultation work relates to cases being prepared for prosecution on indictment.

6.09 The Commission is of the view that the co-operation that currently exists between the Revenue Commissioners and the DPP is clearly beneficial to both organisations and appears to be working in practice.

6.10 *In relation to summary prosecutions, the Commission recommends that the Revenue Commissioners continue to prosecute under a delegation from the DPP, rather than under an independent statutory authorisation.*

C Director of Fiscal Prosecutions

(a) Consultation Paper Recommendations:

6.11 The Commission in its Consultation Paper provisionally recommended that the arrangements currently in place for the prosecution of revenue offences be maintained for a period and then reviewed after a few years. The Commission was of the view that recent reforms should be given a trial period and that there was no impetus for the creation of a new office of a Director of Fiscal Prosecution (“DFP”) separate from the benefit of being a part of the general prosecution system under the scrutiny of the DPP.¹⁰

(b) Discussion

6.12 A Director of Fiscal Prosecutions (DFP) would be a radical departure from the existing prosecution structure for revenue offences. At the time of the publication of the DIRT Report in 1999, it might

⁹ *Annual Report of the Revenue Commissioners 1997* (Government Publications 1998) at 47.

¹⁰ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* *op cit* fn 7 at paragraph 6.22.

have been argued that the historically low level of criminal prosecutions by the Revenue justified consideration of this departure. Since then, there has been considerable organisational change in the Revenue, as evidenced by the creation of the Investigations and Prosecutions Division.

6.13 Regardless of any view of the balance between prosecution and settlement, it is clear that there is now a much greater emphasis on enforcement by the Revenue Commissioners. This is exemplified by the investigations into bogus non-resident accounts, National Irish Bank and Ansbacher.¹¹

6.14 The Commission is of the belief that a convincing argument for the establishment of the Director of Fiscal Prosecutions has not yet been made. Indeed support for the converse view is actually becoming stronger in that the Revenue Commissioners are increasingly adopting a more stringent approach to exposing and tackling tax evasion. Steps are being taken to recruit and train additional expert investigators.

6.15 A possible argument remaining in favour of the creation of a DFP is specialisation, that is, that a specific office holder would be responsible for the prosecution of revenue offences and would have a clear mandate for this. The office could employ expert staff and be directly accountable for the success or failure of unearthing and dealing with tax evasion in this jurisdiction. Against this proposition however, there is an argument that the overall unity of structure offered by the present system is preferable to a fragmented one so as to maintain consistency in prosecution. Indeed, the wealth of experience in bringing prosecutions and the unquestioned independence of the Office of the DPP are significant factors in determining whether a separate Director of Fiscal Prosecutions should be established. Moreover, specialisation does not, in itself, equate to increased effectiveness or increased numbers of prosecutions.

6.16 There is a further possible concern that, by establishing a separate office of the Director of Fiscal Prosecutions to deal

¹¹ For a summary of these investigations, see *Annual Report of the Revenue Commissioners 2003* (Government Publications 2004) at 6 and 7. The Revenue Commissioners have recently announced that they also intend to investigate owners of overseas property in France and Spain who are evading tax on rental income from these properties. See Slattery "Advisers Warn on Non-Declaration" *The Irish Times* 16 June 2004.

exclusively with revenue prosecutions, in the minds of the public this could be seen as an arm of the Revenue Commissioners even if it is independent. Finally the Commission is of the view that as the Investigations and Prosecutions Division of the Revenue Commissioners has recently been restructured, it requires a period of time in order to be assessed.

6.17 The Commission recommends that the arrangements currently in place for the prosecution of revenue offences be maintained. They should be monitored and reviewed over a period of 5 years. The Commission does not recommend the establishment of a Director of Fiscal Prosecutions.

CHAPTER 7 APPEALS

A Introduction

7.01 This Chapter consists of a brief summary of the appeal system in relation to revenue offences with particular focus on the role of the Appeal Commissioners. A more detailed examination of the appeal system can be found in Chapter 3 of the Consultation Paper.¹

7.02 The Appeal Commissioners are an organisation with a long lineage dating back to the *Act of Excise 1662* which envisaged the establishment of Commissioners for Appeals.² The Minister for Finance appoints Appeal Commissioners by virtue of section 850 of the *TCA 1997*.³ The Appeal Commissioners hear appeals by way of full oral hearing from the decisions of the Revenue Commissioners concerning: Income Tax, Corporation Tax, Capital Gains Tax, Stamp Duty, Capital Acquisitions Tax, Residential Property Tax, Customs Classification Cases, Excise Duty, Vehicle Registration Tax and VAT.

7.03 A number of matters are not addressed in the current statutory provisions concerning the Office of Appeal Commissioners. These include: the number of Appeal Commissioners, the selection process⁴

¹ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and Revenue Court* (LRC CP 24-2003).

² This Act was replaced by *46 Geo. III c. 58* (1806). See Réamonn *The Revenue Commissioners* (Institute of Public Administration 1981).

³ Section 850 states “The Minister for Finance shall appoint persons to be Appeal Commissioners for the purposes of the Income Tax Acts (in the Tax Acts and the Capital Gains Tax Acts referred to as “Appeal Commissioners”) and the persons so appointed shall, by virtue of their appointment and without other qualification, have authority to execute such powers and to perform such duties as are assigned to them by the Income Tax Acts.”

⁴ The *TCA 1997* merely provides that the Minister for Finance must lay the appointments of Appeal Commissioners and the amount of their salaries before the Houses of the Oireachtas.

and necessary qualifications for the post.⁵ These and other issues are discussed in this chapter with a view to reform.

7.04 The proposals for reform set out below are aimed at ensuring that the Appeal Commissioners continue to operate to best practice and in particular comply with all relevant requirements of the European Convention on Human Rights (“ECHR”). Pertinent principles of ECHR law are set out to aid the discussion in this Chapter.

B The European Convention on Human Rights

(1) Introduction: ECHR Update

7.05 Ireland incorporated the European Convention on Human Rights “ECHR” into Irish law through the *European Convention on Human Rights Act 2003*. The incorporation of the ECHR has had a number of consequences for Irish public bodies and the courts. First, section 3 of the 2003 Act requires “every organ of the State”, which includes the Revenue Commissioners, to act in accordance with the ECHR. Secondly, section 2 of the 2003 Act provides that “[i]n interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.” Thirdly, section 5 provides that where a court finds, even after following section 2, that there is an incompatibility between the contested law and the ECHR, the court may issue a declaration of incompatibility.

7.06 This declaration of incompatibility has two consequences. First, the declaration must be laid before the Houses of the Oireachtas and secondly, *ex gratia* damages may be paid to anyone who suffers by virtue of the incompatibility.

7.07 Section 4 of the 2003 Act requires judicial notice to be taken of the Convention provisions, any declaration, decision, advisory opinion or judgment of the European Court of Human Rights (“ECtHR”), a decision or opinion of the European Commission of Human Rights and any decision of the Committee of Ministers. A brief

⁵ Until 1993, it was customary that one Commissioner was selected from within the Revenue Commissioners, one from the tax profession and one from the Bar. However, both of the current Appeal Commissioners are qualified accountants from private practice.

discussion of some provisions of the ECHR relevant to this Report follows.

7.08 Article 6(1)⁶ of the ECHR applies to both civil and criminal cases and guarantees the right to a hearing by an independent and impartial tribunal but Article 6(2)⁷ and (3)⁸ only apply when an individual is charged with a “criminal offence”. Significantly, in a series of cases, the ECtHR has held that a taxation dispute does not amount to a determination of a “civil right” for the purposes of Article 6(1) of the ECHR.⁹ The Consultation Paper discussed whether a taxation dispute could amount to a ‘criminal charge’ for the purposes of Article 6(1) and concluded that it could.¹⁰ The concerns in the Consultation Paper were the likely impact of the application of Article

⁶ Article 6(1) states:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

⁷ Article 6(2) states: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

⁸ Article 6(3) states:

“Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and the facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

⁹ See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraphs 2.62-2.64.

¹⁰ See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraphs 2.65-2.79.

6 to two principal areas concerning the Revenue Commissioners, namely: the right to an independent and impartial tribunal and self-incrimination in the context of an audit.

(2) *Independent and Impartial Tribunal: Appeal to the Appeal Commissioners*

(a) *Consultation Paper Recommendation*

7.09 The Commission in its Consultation Paper provisionally recommended that the ECHR probably requires that there be an appeal from the Revenue Commissioners to an independent and impartial tribunal, such as the Appeal Commissioners, in respect of penalties.¹¹

(b) *Discussion*

7.10 The rationale for this recommendation remains the same as at the time of the publication of the Consultation Paper. Under Article 6(1), in order to have a fair trial, there must be a hearing before an independent and impartial tribunal.¹² This can be satisfied, however, where there is a full appeal to “a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision.”¹³ In effect this means that although a determination by the Revenue Commissioners themselves may not be compatible with Article 6, this does not present a problem provided there is a full appeal to an independent body. Assuming that the Appeal Commissioners is restructured in a manner that is consistent with the recommendations made by the Commission in this Report as set out below, then an appeal to the Appeal Commissioners in relation to the imposition of penalties would comply with Article 6 requirements.¹⁴

¹¹ See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 2.86.

¹² *Deweert v Belgium* (1980) 2 EHRR 439 at paragraph 49

¹³ *Vastberga Taxi Aktiebolag and another v Sweden* (2002) ECHR 36985/97 at paragraph 93. See also *Bendenoun v France* (1994) 18 EHRR 54 at paragraph 46; *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1 at paragraph 51; *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 at paragraph 29 and *Lauko v Slovakia* [1998] ECHR 82. See also *Umlauf v Austria* (1995) 22 EHRR 76 at paragraphs 37-39.

¹⁴ See paragraphs 7.78-7.83, below.

7.11 The Commission has concluded that this is the preferred option for reform.¹⁵

(c) *Independence of the Appeal Commissioners*

7.12 As discussed in the Consultation Paper,¹⁶ it has been held that a taxation dispute does not involve a determination of an individual's 'civil rights and obligations' under Article 6(1) of the ECHR but that it may amount to a criminal charge in certain circumstances. A number of issues flow from the view that a revenue civil penalty constitutes a 'criminal charge' under Article 6(1)¹⁷ and in particular, these include whether the Office of Appeal Commissioners is an 'independent and impartial' tribunal for the purposes of the ECHR and whether practices currently employed by the Appeal Commissioners are compatible with Article 6.

7.13 In establishing independence for the purposes of Article 6, regard will be had to a wide variety of factors. These include "... the manner of appointment of its members and the duration of their term of office, (...) the existence of safeguards which protect them against outside pressures and (...) the question whether the body presents an appearance of independence...."¹⁸

¹⁵ Other possibilities were outlined in the Consultation Paper, namely internal review, appeal to the Ombudsman - the Ombudsman does not have the power to issue binding decisions that are not subject to alteration by a non-judicial body, see *Van de Hurk v The Netherlands* (1994) 18 EHRR 481 at paragraph 45; judicial review - the appeal is not a complete one as the reviewing body does not have the power to quash decisions of law and fact, see *Umlauf v Austria* (1995) 22 EHRR 76 at paragraph 39; and an action by the Revenue Commissioners under section 1061 of the *TCA 1997*- this is where a Revenue Commission official sues in personal name: it rarely occurs- in 2003 two cases were taken under section 1061 of the *TCA 1997*. These options are, however, less attractive because they would involve significant additional reform: See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 2.85.

¹⁶ *Ibid* at Chapter 2.

¹⁷ See fn 6, above.

¹⁸ *Incal v Turkey* (2000) 29 EHRR 449 at paragraph 64.

7.14 In *Campbell and Fell v United Kingdom*¹⁹ it was argued unsuccessfully that a British prison Board of Visitors was not an independent and impartial tribunal for the purposes of Article 6. Members of the Board were appointed for a period of three years or such lesser period as the Home Secretary may appoint. The ECtHR held that this term was compatible with Article 6 as "...the members are unpaid...and it might well prove difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period were longer."²⁰ In *Le Compte, Van Leuven and De Meyere*,²¹ it was held that a period of six years as a member of a Medical Appeals Council provided a further guarantee of independence for the body.

7.15 The test of impartiality under Article 6 of the ECHR may be based on a subjective test, that is, whether there is evidence of actual bias. But it may also be determined by an objective test, that is, "...whether, irrespective of the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, including the accused."²² In considering impartiality, account should be taken of questions of internal organisation.²³

7.16 Applying the subjective test of impartiality to the Appeal Commissioners, no suggestion of partisanship has ever arisen. In relation to the objective test of impartiality, however, an argument could be made that the Appeal Commissioners does not fully conform to Article 6(1) on a number of grounds. These include the fact that the Revenue Commissioners, one of the parties to appeals before the Appeal Commissioners, is also responsible for the listing of appeals and the recording of appeals before the Appeal Commissioners.²⁴

¹⁹ (1984) 7 EHRR 165.

²⁰ *Ibid* at paragraph 80.

²¹ (1982) 4 EHRR 1.

²² *Castillo Agar v Spain* (2000) 30 EHRR 827 at paragraph 45.

²³ *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165 at paragraph 85.

²⁴ See paragraphs 7.37-7.46 and 7.50-7.66, below.

C Reform

(1) *Legislative Statement of Independence*

7.17 Following on from the discussion about independence in the context of the ECHR, the Commission is of the view that an express legislative statement of the independence of the Appeal Commissioners in an amended *TCA 1997* would express the actual reality in domestic law. Such a section could be based on section 6(3) of the *Patents Act 1992* which states that:

“The Patents Office shall be under the control of the Controller [of Patents, Designs and Trade Marks] who shall be independent in the discharge of the functions conferred on him by the Act or any other enactment.”

7.18 *The Commission recommends that the independence of the Appeal Commissioners be expressly stated in the TCA 1997 in a similar manner to section 6(3) of the Patents Act 1992, to the effect that “The Appeal Commissioners shall be independent in the discharge of the powers and duties conferred on them by the Tax Acts.”*

(2) *Appointment Process*

(a) *Consultation Paper Recommendation*

7.19 The Commission in its Consultation Paper provisionally recommended the establishment of an open and formal selection and appointment process for future Appeal Commissioners and that an Appeal Commissioner should be appointed for a renewable seven year fixed term.²⁵ The proposed system would be that a committee of distinguished office holders or experts from the fields of law, accounting and taxation be used to short-list three possible candidates for appointment to the Office of Appeal Commissioners. The Minister for Finance would then choose the Appeal Commissioner from this further shortlist. The committee would have a similar role in any decisions as whether to reappoint an Appeal Commissioner.

(b) *Discussion*

7.20 The Consultation Paper referred to and agreed with the DIRT Inquiry’s recommendation that there was a need for a more transparent

²⁵ Law Reform Commission *Consultation Paper on a Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 3.45.

process for the appointment as Appeal Commissioners.²⁶ Examples given in the Consultation Paper of bodies that could put forward representatives as members of the expert appointment body were the Bar Council of Ireland, the Law Society of Ireland, the Irish Taxation Institute, the Institute of Chartered Accountants in Ireland and the trade union IMPACT.²⁷ The Commission sees no reason to change the provisional recommendation in the Consultation Paper.

7.21 *The Commission recommends the establishment of an open and formal selection and appointment process for future Appeal Commissioners. The proposed system would be that a group of experts from the fields of law, accounting and taxation be used to short-list three possible candidates for appointment to the office of Appeal Commissioner. The Minister for Finance would then choose the Appeal Commissioner from among this shortlist. The expert committee should recommend whether or not the Minister for Finance should reappoint an Appeal Commissioner.*

(3) *Qualifications and Vacancies*

(a) *Consultation Paper Recommendation*

7.22 The Commission in its Consultation Paper provisionally recommended that an Appeal Commissioner should have a professional qualification for a specified period in any of the fields of: legal practice, accounting or taxation and is otherwise well qualified.²⁸

7.23 The Commission further provisionally recommended that when a vacancy for an Appeal Commissioner occurs, the qualifications for the post should be specified as qualifications in tax, accounting or law, irrespective of the profession and qualifications of the existing Commissioner(s).²⁹

²⁶ *Final Report of the Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

²⁷ Law Reform Commission *Consultation Paper on a Fiscal Prosecutor and A Revenue Court* *op cit* fn 25 at paragraph 3.42.

²⁸ Law Reform Commission *Consultation Paper on a Fiscal Prosecutor and A Revenue Court* *op cit* fn 25 at paragraph 3.47.

²⁹ Law Reform Commission *Consultation Paper on a Fiscal Prosecutor and A Revenue Court* *op cit* fn 25 at paragraph 3.49.

(b) *Discussion*

7.24 At present, no qualifications are required for the appointment to the position of Appeal Commissioner under section 850 of the *TCA 1997*, but by convention and practice, incumbents have had professional qualifications in accounting or law. If the Office of Appeal Commissioners is generally to be restructured the issue of qualifications should be a principal component of such reform.

7.25 It seems obvious that these qualifications should be in at least one of the following fields: taxation, accounting or legal practice, since they are directly relevant to the position of Appeal Commissioner.

7.26 The Commission has considered the further question of whether it might be appropriate to require all future appointees to have some form of legal qualification due to the increasing number of tax appeals which require the Appeal Commissioners to interpret legislation. For example, in the UK, a 10 year qualification as a lawyer is required for appointment as a Special Commissioner, while 7 years legal qualification is required for appointment to the VAT and Duties Tribunal. The Commission believes a legal qualification for all office holders is not required.

7.27 *The Commission recommends that appointment as an Appeal Commissioner should require a professional qualification for a specified period in any of the fields of legal practice, accounting or taxation and also that the candidate is otherwise well qualified.*

7.28 The provisional recommendation contained in the Consultation Paper concerning future vacancies was aimed at addressing concerns in the Final Report of the DIRT Inquiry that the selection process for new appointments as Appeal Commissioners should take account of the need for expertise in accountancy, taxation (including customs and excise), public administration and law to reside in the Appeal Commissioners collectively.³⁰ Obviously a certain level of knowledge of both law and taxation is required in order to adjudicate on these cases in a proper manner but this should not mean that only an accountant can replace an accountant or a lawyer replace a lawyer. Furthermore, in practice, the Appeal Commissioners very rarely sit together so the benefit to be obtained by this requirement is minimal.

³⁰ See *Final Report of Committee of Public Accounts, Sub-Committee in Certain Revenue Matters* (Government Publications 2001) at Chapter 2.

7.29 *The Commission recommends that when a vacancy for the post of Appeal Commissioner arises, the qualifications for the vacancy should be specified as qualifications in tax, accounting or law, irrespective of the profession of the remaining Commissioner or Commissioners.*

(4) *Tenure of Appointment & Removal of an Appeal Commissioner*

(a) *Consultation Paper Recommendation*

7.30 The Commission in its Consultation Paper provisionally recommended that the appointment of Appeal Commissioners be put on a statutory footing, utilising the following draft statutory provision:

“A person appointed to be an Appeal Commissioner—

(a) shall hold office for a term of 7 years and may be re-appointed to the office on the recommendation of the expert committee for a second or subsequent term,

(b) may at his or her own request be relieved of office by the Minister for Finance,

(c) may be removed from office by the Minister but shall not be removed from office except for stated misbehaviour, incapacity or bankruptcy and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his or her removal.”³¹

(b) *Discussion*

7.31 At present, an Appeal Commissioner can be removed at the will and pleasure of the Minister for Finance. In contrast, the Chairperson of An Bord Pleanála is, for example, appointed by the Minister for the Environment and Local Government for a renewable 7 year term³² and an ordinary member of An Bord Pleanála may be

³¹ Law Reform Commission *Consultation Paper on a Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 3.52.

³² Section 105(12) of the *Planning and Development Act 2000* states “subject to the other provisions of this section, the chairperson shall hold office for a term of 7 years and may be re-appointed by the Government for a second or subsequent term of office, provided that a person shall not be re-appointed

appointed for a period not exceeding 5 years (which is also renewable).³³ Members appointed to the Employment Appeals Tribunal are appointed under section 39 of the *Redundancy Payments Act 1967* and the term of office “shall be such period as is specified by the Minister³⁴ when appointing such member.”

7.32 Furthermore, the Chief Justice and the Presidents of the High Court, Circuit Court and District Court are subject to 7 year fixed term appointment (although they revert back to the Supreme Court, High Court, Circuit Court and District Court respectively, after the term of Chief Justice and President expires).³⁵

7.33 The recommendation by the Commission in its Consultation Paper regarding a 7 year fixed term is in line with modern practice that balances independence and accountability.³⁶ Fixed term appointments are commonplace throughout business and in existing legislation. They seek to ensure that those subject to a fixed term maintain the standard that is expected of them. Furthermore, the Commission considers that the nomination as to appointment on the recommendation of an expert committee is compatible with Article 6 of the ECHR.³⁷ The Commission is of the view that the 7 year appointment should be renewable, in line with the situation of the Chair of An Bord Pleanála.

under this subsection unless, at the time of his or her re-appointment, he or she is or was the outgoing chairperson.”

³³ Section 106(12) of the *Planning and Development Act 2000* states “subject to Section 108(4)(b), an ordinary member shall hold office for such term (not exceeding 5 years) as shall be specified by the Minister when appointing him or her to office and may be re-appointed by the Minister for a second or subsequent term of office provided that a person shall not be re-appointed under this subsection unless, at the time of his or her re-appointment, he or she is or was an outgoing member of the Board.”

³⁴ Minister for Enterprise, Trade and Employment.

³⁵ See Section 4(1) of the *Courts Act (No.2) 1997*.

³⁶ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003).

³⁷ It is possible that the current appointment process under section 850 of the *TCA 1997* is incompatible with Article 6 as it possibly grants the Minister for Finance excessive discretion in relation to the length of appointment, salary and removal of an Appeal Commissioner.

7.34 A further option mentioned in the Consultation Paper³⁸ includes a removal process based on the removal process for the Director of Public Prosecutions. Section 2(9)(b) of the *Prosecution of Offences Act 1974* states:

“Whenever the Government so request, a committee appointed by them and consisting of the Chief Justice, a Judge of the High Court nominated, by the Chief Justice, and the Attorney General shall—

(i) investigate the condition of health, either physical or mental, of the Director, or

(ii) inquire into the conduct (whether in the execution of his office or otherwise) of the Director, either generally or on a particular occasion, and,

in either case, with particular reference to such matters as may be mentioned in the request and the committee may conduct the investigation or inquiry in such manner as it thinks proper, whether by examination of witnesses or otherwise, and in particular may conduct any proceedings in camera and for this purpose shall have all such powers, rights and privileges as are vested in a Judge of the High Court on the occasion of an action and, upon the conclusion of the investigation or inquiry, the committee shall report the result thereof to the Government.”

7.35 As to problems allegedly arising in respect of the conduct of an Appeal Commissioner, the Commission considers that it would be appropriate for the Minister to appoint a comparable Committee of three persons to inquire into the matter and to report to the Minister. Such a committee should comprise suitably qualified members and be chaired by a judge of the High Court (nominated by the President of the High Court). The benefit of using such a committee approach (rather than dismissal through the Oireachtas) is that it would reinforce the principle of impartiality for the purposes of Article 6(1) of the ECHR. Accordingly, the Commission has concluded that this proposal would best serve the public interest.

³⁸ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* *op cit* fn 36 at paragraph 3.50.

7.36 The Commission recommends that the appointment of Appeal Commissioners be put on a statutory footing, utilising the following draft statutory provisions:

(1) A person appointed to be an Appeal Commissioner-

(a) shall be the holder of a professional qualification in law, accounting or taxation and be otherwise qualified to perform such functions and carry out such duties as are required to be performed or carried out by an Appeal Commissioner;

(b) shall hold office for a term of 7 years and may, on the recommendation of an expert committee established under this Act, be re-appointed for a second term of 7 years;

(c) may at his or her own request be relieved of office by the Minister for Finance.

(2) Whenever a vacancy for an Appeal Commissioner occurs, the qualifications for a person to fill the vacancy shall be specified by the Minister for Finance as minimum qualifications in law, accounting or taxation, irrespective of the qualification of the remaining Commissioner or Commissioners.

(3)(a) The Minister for Finance shall appoint an expert committee qualified in law, accounting or taxation, which shall at the request of the Minister compile and submit to the Minister a list of three candidates suitable for appointment as an Appeal Commissioner, from among whom the Minister shall appoint one person to be an Appeal Commissioner.

(b) Where in the opinion of the Minister for Finance none of the persons listed under paragraph (a) is eligible for appointment as an Appeal Commissioner, the expert committee shall reconvene and shall compile and submit to the Minister a further list of three candidates suitable for appointment, from among whom the Minister shall appoint one person to be an Appeal Commissioner.

(4) Whenever the Minister for Finance so requests, a committee comprising three suitably qualified persons, chaired by a judge of the High Court (to be nominated by the President of the High Court), shall –

(a) investigate the condition of health of an Appeal Commissioner

or

(b) inquire into the conduct in the execution of office as an Appeal Commissioner of a particular Appeal Commissioner, with particular reference to any matters that may be mentioned in the request.

(5) The committee appointed under subsection (4) may conduct an investigation or inquiry in such manner as it thinks fit, and shall report the results of such investigation or inquiry to the Minister for Finance, who shall, on receipt of such report, take such action, including removal from office of the Appeal Commissioner concerned, as the Minister considers desirable in light of the report.

(5) Listing

(a) Consultation Paper Recommendation

7.37 The Commission in its Consultation Paper provisionally recommended that three months for the listing an appeal before the Appeal Commissioners would be an appropriate period as it would afford an Inspector a reasonable amount of time to assess the case.³⁹

7.38 The Commission further welcomed views as to whether the responsibility for listing appeals before the Appeal Commissioners should be removed from the Revenue Commissioners or whether the introduction of a three month time limit within which an Inspector must respond in relation to listing an appeal would be sufficient.⁴⁰

³⁹ Law Reform Commission *Consultation Paper on a Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 3.58.

⁴⁰ *Ibid* at paragraph 3.60.

(b) *Present System of Appeal*

7.39 At present, a taxpayer must give written notice of his or her intention to appeal, including the grounds of the appeal, to the Appeal Commissioners within 30 days of the Notice of Assessment.⁴¹ Any tax indicated as due on the taxpayer's return which is not in dispute must be paid before a taxpayer is entitled to appeal.⁴²

7.40 Appeals are initiated by a Notice of Appeal signed by the taxpayer, which is given to the Revenue Inspector. An Inspector of Taxes will subsequently send a form known as Form AH1⁴³ to the Appeal Commissioners. On receipt of the Notice of Appeal, the Inspector will stop collection of the tax in dispute, and it is for this reason that notice is sent to the Inspector of Taxes rather than to the Appeal Commissioners directly.

7.41 An Inspector's permission is required for an appeal; however, refusal of this permission may be appealed to the Appeal Commissioners.⁴⁴ If an Inspector refuses an application to appeal, the Inspector must specify the reasons for the refusal.⁴⁵ If an Inspector does not refuse, but rather delays in listing an appeal before the Appeal Commissioners, the taxpayer can appeal directly to the Appeal Commissioners to have the case listed.⁴⁶

7.42 Communication between the Appeal Commissioners and a taxpayer is via the Revenue Commissioners. Although a taxpayer can apply to the Appeal Commissioners to have an appeal listed if an Inspector delays or refuses to list a case, the Inspector's control over the listing system is potentially open to abuse. One particular example arises in relation to the delay in listing a case; this is in the context of the interest on the tax due which a taxpayer may be obliged to pay in the event that the appeal is unsuccessful. If the Appeal Commissioners

⁴¹ Section 933(1)(a) of the *TCA 1997*. Section 933(7)(a) contains an exception to the 30-day deadline.

⁴² Section 957(2)(a) of the *TCA 1997*.

⁴³ This is an acronym for Appeal Hearing.

⁴⁴ A taxpayer is entitled to appeal this refusal by notice in writing within 15 days of the issue of refusal. See section 933(1)(b) of the *TCA 1997*.

⁴⁵ Section 933(1)(b) of the *TCA 1997*.

⁴⁶ Section 933(2)(c) of the *TCA 1997*.

ultimately uphold the Revenue Commissioners' assessment, and there was an underpayment of tax, interest will accrue on the underpayment from the date when it originally became due and payable until the date it is actually paid. This is subject to cases where prior to the appeal, the taxpayer has paid 90% of the tax held to be payable on the determination of the appeal or has included an expression of doubt⁴⁷ with the return.

(c) *Discussion*

7.43 Although the Commission has received no submissions dealing with the current system, best practice would suggest that the Appeal Commissioners should be responsible for the listing of appeals. Moreover, there is an argument that the listing of appeals by the Revenue Commissioners is in breach of Article 6(1) of the ECHR in that a tribunal must be 'independent and impartial'.⁴⁸ If one of the parties to an appeal contributes to the internal organisation and material arrangements of the adjudicator by being responsible for listing appeals, this arguably creates a perception of partiality even if none actually exists.⁴⁹

7.44 Under a proposed new system, there would be a Registrar to the Appeal Commissioners who would be responsible for listing appeals. The taxpayer could notify the Registrar of the Appeal Commissioners by serving a notice of intention to appeal. The Registrar would then communicate with the Revenue Commissioners to determine whether the taxpayer has satisfied the preconditions for making a valid appeal. If satisfied that the taxpayer has met these preconditions, the Registrar could then list the case before the Appeal Commissioners, and communicate the time and place to both the Inspector and the taxpayer. This arrangement would resolve any real or perceived problems which exist with the current arrangements for listing appeals.

⁴⁷ This concept is explained in Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 3.27.

⁴⁸ See paragraph 7.12, above.

⁴⁹ Again, it is important to note that the possible incompatibility of certain procedures of the Appeal Commissioners with Article 6 of the ECHR may not be fatal if a full appeal lies to a tribunal/court which is compatible with Article 6, for example, the Circuit Court.

7.45 One practical reason for the current regime is that the appeal process is closely connected with the collection process. When a Revenue Inspector receives a Notice of Appeal, a notice is sent to the Collector-General's Office to stop collection of the tax. However, this 'stopping' procedure could easily continue under a modified regime with the Registrar sending a notice to the Collector General's Office.

7.46 *The Commission recommends that responsibility for listing appeals from the Revenue Commissioners to the Appeal Commissioners should lie with the Appeal Commissioners.*

(6) Administration of the Oath

(a) Consultation Paper Recommendation

7.47 The Commission in its Consultation Paper provisionally recommended that the Appeal Commissioners should specify (perhaps in a procedures manual or in an explanatory guide) that, in appropriate and defined circumstances, an oath may be administered to the taxpayer or the Inspector of Taxes or both.⁵⁰

(b) Discussion

7.48 The Appeal Commissioners have the power to administer an oath, but they only perceive a need to do so in a small number of cases. In such instances, generally only the taxpayer and not the Inspector of Taxes will be requested to take an oath; this is simply because the evidence of the Inspector usually depends on written documentation. However, as noted in the Consultation Paper,⁵¹ there are circumstances where an Inspector may be required to take an oath. It is for this reason that the Commission recommended clarification that an oath may apply to all witnesses before the Appeal Commissioners. The Commission confirms this recommendation.

7.49 *The Commission recommends that the Appeal Commissioners should specify (perhaps in an explanatory guide to procedures) that, in appropriate and defined circumstances, an Appeal Commissioner may administer an oath to any witness including a taxpayer or an Inspector of Taxes.*

⁵⁰ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 3.62.

⁵¹ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 3.61.

(7) Control of Appeal Commissioners Decisions

(a) Consultation Paper Recommendation

7.50 The Commission in its Consultation Paper provisionally recommended that the Appeal Commissioners should control the record of their own decisions and make them available to both parties as of right.⁵²

(b) Discussion

7.51 Currently, the Office of Appeal Commissioners record every determination on 'Form AS1', a form which is essentially within the control of the Revenue Commissioners since it is produced and retained by them. The practice of one side to an appeal having a decision recorded on an 'in-house' form may be pragmatic but from a policy perspective, is no longer consistent with best practice. The Commission has therefore concluded that the provisional recommendation on this issue should be confirmed.

7.52 *The Commission recommends that the TCA 1997 be amended to provide that the Appeal Commissioners should control the record of their own decisions and make them available to both parties as of right.*

(8) Reasons for Decisions of the Appeal Commissioners

(a) Consultation Paper Recommendation

7.53 The Commission in its Consultation Paper provisionally recommended that the Appeal Commissioners should issue a concise written reasoned determination in all appropriate cases within three months of the determination including reasons and a summary of the facts.⁵³

(b) Discussion

7.54 While the facts in each case and the reasons for a determination are given orally at the hearings by the Appeal Commissioners, they are not recorded in writing. Throughout public administration or the administration of justice, it is regarded as a matter

⁵² Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 3.64.

⁵³ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* *op cit* fn 52 at paragraph 3.71.

of constitutional justice that where decisions are taken which significantly affect an individual's rights, the reasons for such decisions should be given.⁵⁴

7.55 In *O'Mahony v Ballagh*⁵⁵ the Supreme Court held that a District Court judge should give reasons on the arguments made in favour of an application for a non-suit as it was essential for the defence to know which arguments were being accepted or rejected when deciding whether to go into evidence.⁵⁶ Murphy J stated "...every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing."⁵⁷ There is no reason to suppose that the Appeal Commissioners are exempt from the application of this constitutional principle.

7.56 The duty to give reasons is also a requirement under Article 6 of the ECHR. A court or tribunal is obliged to give reasons for its decisions, though it is not required to give a detailed answer to every argument made.⁵⁸ The extent of the duty to provide reasons varies from case to case.

7.57 The duty to provide written reasons (as distinct from oral reasons) is required in cases heard before the Appeal Commissioners for the purpose of certainty and also to facilitate appeals by way of case stated to the High Court.⁵⁹ While the parties may agree to employ a stenographer, this is not a desirable approach as it results in *ad hoc* recording (and only provides a solution to taxpayers who can afford to divide the cost of a stenographer with the Revenue Commissioners). If the Office of Appeal Commissioners produced, at or about the time of

⁵⁴ For a further discussion, see Hogan, G., Gwynn Morgan, D., *Administrative Law in Ireland* (Round Hall Sweet and Maxwell 1998) at 570-577.

⁵⁵ [2002] 2 IR 410.

⁵⁶ On this issue, see Law Reform Commission *Report on Penalties for Minor Offences* (LRC 69-2003) at Chapter 3.

⁵⁷ [2002] 2 IR 410, 416.

⁵⁸ *Van de Hurk v The Netherlands* (1994) 18 EHRR 481 at paragraph 61.

⁵⁹ Section 941 of the *TCA 1997* provides for a case stated from the Appeal Commissioners to the High Court.

the determination, a summary of the facts, the determination and reasons, any delays in agreeing a case stated would be substantially reduced.

7.58 The duty to give reasons in an administrative law context will be satisfied so long as the reasons given are meaningful. The reasons should be given in “general and broad terms”,⁶⁰ so that the “gist”⁶¹ of the basis for a decision is apparent.⁶²

7.59 A number of issues arise in relation to the recommendation regarding a three month time period for the publication of decisions emanating from the Appeal Commissioners. The imposition of a time period for the determination of a case is not unique. For example, section 49 of the *Personal Injuries Assessment Board Act 2003* imposes a general 9 months deadline for the making of an assessment of injury.

7.60 In a submission to the Commission, the Revenue Commissioners noted that as there are no set time limits for the giving of Court judgments, it is difficult to justify a time limit for hearings before the Appeal Commissioners and moreover, even if it was introduced, there would be no realistic sanction to ensure compliance. This argument may be diluted to some extent by the introduction of a Register of Reserved Judgments under section 46 of the *Courts and Court Officers Act 2002*, as amended by section 55 of the *Civil Liability and Courts Act 2004*, which refers to a 2 month time limit. This provision will come into operation on 31 March 2005.⁶³ The Irish Taxation Institute in its submission to the Commission agreed with the three month time limit recommendation.

7.61 It is clear that the European Convention on Human Rights requires that a judicial determination be given within a reasonable

⁶⁰ *The State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] IR 51.

⁶¹ *Faulkner v Ministry for Industry and Commerce* [1997] ELR 107.

⁶² Law Reform Commission *Report on Penalties for Minor Offences* (LRC 69 - 2003) at 48.

⁶³ Courts and Court Officers Act 2002 (Section 46) (Commencement) Order 2004, S.I. No 712 of 2004.

time⁶⁴ and the introduction of a Register of Reserved Judgments in the courts underlines this. The Commission is concerned about delays in the giving and publication of a decision. Such delays could be overcome by increased resources. However the Commission has concluded that in appropriate cases the decision should be given within a reasonable period of time.

7.62 *The Commission recommends that the Appeal Commissioners should issue a concise written reasoned determination in appropriate cases within a short period (ideally three months) of the determination, including a summary of the facts and giving reasons for the decision.*

(9) Publication of Determinations

(a) Consultation Paper Recommendation

7.63 The Commission in its Consultation Paper provisionally recommended the establishment of an effective system for reporting decisions of the Appeal Commissioners, since knowledge of relevant cases which establish precedents ought to be more widely accessible.

(b) Discussion

7.64 The Appeal Commissioners were granted the power to publish their own decisions under section 944A of the *TCA 1997*. However, to date only 30 decisions have been published, none of which were published in 2004. It is important for all the parties concerned that decisions are published. Furthermore, the lack of a register of decisions of the Appeal Commissioners arguably places the Revenue Commissioners at an advantage given that they are likely to be more familiar with previous decisions and precedents, particularly unpublished ones.

7.65 The website of the Appeal Commissioners⁶⁵ has a number of decisions under a “determinations” section, but this is not comprehensive. If the Appeal Commissioners secure resources to improve their website, perhaps an appropriate template could be that of

⁶⁴ See further *H. v France* (1990) 12 EHRR 74, *Pélissier and Sassi v France* (2000) 30 EHRR 715, *Stögmüller v Austria* (1969) 1 EHRR 155 and *Hokkanen v Finland* (1995) 19 EHRR 139.

⁶⁵ www.appealcommissioners.ie.

the Competition Authority's website⁶⁶ or the UK Finance and Tax Tribunals' website⁶⁷ where most, if not all, decisions are published.

7.66 *The Commission recommends that resources be provided so that an effective system for the reporting of decisions of the Appeal Commissioners may be established and every appropriate decision is published.*

(10) Title of Appeal Commissioners

(a) Consultation Paper Recommendation

7.67 The Commission in its Consultation Paper provisionally recommended a change in the name of the Appeal Commissioners to that of Tax Appeals Board.⁶⁸ The Commission invited submissions on this point.

(b) Discussion

7.68 A name or word often acts as a powerful signal. It may suggest independence, or conversely dependence. Whilst not doubting the real independence of the Appeal Commissioners, the Consultation Paper suggested that the present title may be perceived as being too closely intertwined with that of 'Revenue Commissioners' and might lead some to think that a nexus exists between both bodies.⁶⁹ The Irish Taxation Institute in its submission on the Consultation Paper advocated the retention of the name Appeal Commissioners but also suggested in the alternative the title Tax Appeal Commissioners or the Independent Appeal Commissioners. Other possibilities canvassed included Tax Appeals Tribunal, Commission for Tax Appeals and Tax Court.

7.69 Having considered the submissions received, the Commission has concluded that the arguments in favour of retention of the long-

⁶⁶ www.tca.ie.

⁶⁷ www.financeandtaxtribunal.gov.uk.

⁶⁸ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 3.76.

⁶⁹ For example, the Commission is aware that media such as the *Irish Times* and the *Sunday Tribune* have occasionally referred, incorrectly, to the Appeal Commissioners as the 'Revenue Appeal Commissioners'.

established title of the Appeal Commissioners outweigh those for any suggested alternative.

7.70 *The Commission recommends that the title of 'Appeal Commissioners' be retained.*

(11) Power to Issue Precepts

(a) Consultation Paper Recommendation

7.71 The Commission in its Consultation Paper provisionally recommended that the Appeal Commissioners be given the power to issue precepts to all witnesses to assist them in performing their functions.⁷⁰ The Consultation Paper also raised the issue of whether the word 'precept' should be retained in this context.⁷¹

(b) Discussion

7.72 The Appeal Commissioners have the power under section 935(1) of the *TCA 1997* to issue a precept ordering the appellant to deliver to them, within certain time limits, a schedule containing particulars of:

(a) the property of the appellant;

(b) the trade, profession or employment carried on or exercised by the appellant;

(c) the amount of the appellant's profits or gains, distinguishing the particular amounts derived from each separate source or

(d) any deductions made in determining the appellant's profits or gains.

7.73 The word precept is of late Middle English origin from the Latin *praeceptum* meaning to 'instruct' or 'command'. The term as used in section 935 of the *TCA 1997* appears to have originated in the introduction of Income Tax in 1799 whereby if the Commissioners were not satisfied with a taxpayer's general return of income they were entitled to issue a 'precept' in a prescribed form which called for details of income under certain headings.⁷² A provision similar to section 935

⁷⁰ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 3.84.

⁷¹ *Ibid* at paragraph 3.83.

⁷² Communication to the Commission from the Revenue Commissioners.

of the *TCA 1997* was contained in sections 120⁷³ and 128⁷⁴ of the *Income Tax Act 1842*.⁷⁵

7.74 Although the term ‘precept’ has been changed to that of ‘notice’ in the United Kingdom,⁷⁶ the Commission is of the view that ‘precept’ should be retained as it is more of a command than a giving of notice. The term is used in the *TCA 1997* (particularly in the sections dealing with penalties)⁷⁷ and is widely understood. Accordingly, the Commission considers that the term ‘precept’ should be retained.

7.75 As to the scope of the power, currently the Appeal Commissioners only have the power to issue precepts to appellants and not to other parties. For instance, there may be occasions when the taxpayer is a trader and it would be relevant to take evidence from suppliers. The Appeal Commissioners have suggested that this power should be extended.⁷⁸ This may have cost implications but in the

⁷³ Section 120 empowered a Commissioner to direct a ‘precept’ requiring an appellant to produce a schedule of documents.

⁷⁴ Section 128 provided for a penalty for persons in non-compliance with a precept.

⁷⁵ 5 & 6 Vict. c. 35.

⁷⁶ For example, Reg. 10 of the *General Commissioners (Jurisdiction and Procedure) Regulations 1994* uses the term ‘notice’ as the means to obtain certain documents in the context of a tribunal hearing.

⁷⁷ See, for example, section 1052 of the *TCA 1997*.

⁷⁸ In the United Kingdom a similar provision only applies to other parties (except the Inland Revenue). Regulation 10(1) of *The General Commissioners (Jurisdiction and Procedure) Regulations 1994* states:

A Tribunal hearing any proceedings may at any time before the final determination of those proceedings serve notice on any party, other than the Revenue, directing him within the time specified in the notice—

- (a) to deliver to it such particulars as it may require for the purpose of determining any of the issues in the proceedings, and
- (b) to make available for inspection by it, or by an officer of the Board, all such books, accounts or other documents in his possession or power as may be specified or described in the notice, being books, accounts or other documents which, in the opinion of the Tribunal, contain or may contain information relevant to the subject matter of the proceedings.

interests of ascertaining a correct version of relevant facts and documents, the Commission is of the view that an extension of the right to issue precepts should be permitted. The Commission notes in this context that such ‘third party’ orders are used in respect of discovery of documents in litigation. Similar powers are also now conferred on statutory bodies, such as on the Auditing and Accounting Supervisory Authority by the *Companies (Auditing and Accounting) Act 2003*.

7.76 *The Commission recommends that the word ‘precept’ be retained.*

7.77 *The Commission recommends that the Appeal Commissioners power to issue precepts should apply in relation to any party, and, if necessary, appropriate provision should be made in respect of costs.*

(12) Appeal Commissioners Jurisdiction Concerning Penalties

(a) Consultation Paper Recommendation

7.78 The Commission in its Consultation paper provisionally recommended that the Appeal Commissioners jurisdiction be extended to cover appeals against penalty determinations made by the Revenue Commissioners and that a further right of appeal should lie from the Appeal Commissioners to the Circuit Court and from there an appeal by way of case stated on points of law to the High Court and Supreme Court.⁷⁹

(b) Discussion

7.79 At present, the Appeal Commissioners have no jurisdiction to hear appeals in relation to penalties, interest⁸⁰ or general hardship. This is despite the fact that both penalties and interest can amount to a much higher figure than the amount of tax due. Because the imposition of interest follows the tax liability and the Revenue Commissioners have no discretion to mitigate this, no appeal is necessary. In relation to the imposition of penalties, however, the other possible modes of seeking relief, as discussed elsewhere in this Report,⁸¹ do not satisfy the

⁷⁹ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraphs 2.90 and 3.81.

⁸⁰ Except in relation to the imposition of a 2% interest rate for fraud or negligence (which is rarely imposed) under section 1082(5)(b) of the *TCA 1997*.

⁸¹ See fn 15 at 87, above.

requirements of Article 6(1) of the ECHR (requiring a fair hearing in the determination of a civil dispute) and for this reason, an appeal in relation to penalties is required to the Appeal Commissioners from a decision of the Revenue Commissioners. Indeed, the ECHR also requires that any legal sanction imposed must be proportionate to the objective sought. It is important that the principle of proportionality be underpinned by recourse to an independent body such as the Appeal Commissioners.

7.80 The penalties provided for under Part 47 of the *TCA 1997* may be divided into two separate categories: so called ‘fixed monetary’ penalties and ‘tax geared’ penalties. Fixed monetary penalties are set out in statutory form. An example of such a penalty is that of €950 for failure to file a return. Tax geared penalties are penalties calculated as a percentage of the tax liability. According to the *TCA 1997*, the penalty will be 100%, or in the case of fraud, 200% of the underpayment. Under section 1065 of the *TCA 1997* the Revenue Commissioners may mitigate any fine or penalty and may also, after judgment, further mitigate the fine or penalty. The Code of Practice for Revenue Auditors sets out their penalty mitigation policy.⁸²

7.81 The Commission considers that it is appropriate that a taxpayer be given an opportunity to appeal the imposition of both fixed monetary and tax geared penalties.

7.82 In their submission on the Consultation Paper, the Revenue Commissioners drew a distinction between their power to mitigate fines and penalties under section 1065 of the *TCA 1997*⁸³ and the power to mitigate on grounds of general hardship. The Revenue suggested that the extension of the Appeal Commissioners’ jurisdiction to hardship cases is not appropriate. The Commission accepts this point given that the issue of hardship relates to the taxpayer’s ability to pay rather than the question of liability to tax itself and consequent penalties. It is then a matter for the Revenue to decide if it will exercise its discretion to mitigate the tax liability on hardship grounds. The exercise of such discretion is subject to the scrutiny of the Comptroller

⁸² The Code states that the net ‘tax geared’ penalty after mitigation will be treated as including any fixed amount due under Section 1053(1), Section 1054(3)(a) *TCA 1997* and Section 27 *VAT Act 1972*.

⁸³ See fn 9, at 21, above.

and Auditor General and of the Ombudsman and also to judicial review in appropriate cases.⁸⁴

7.83 *The Commission recommends that in light of Article 6(1) of the European Convention on Human Rights as incorporated by the European Convention on Human Rights Act 2003, an appeal should lie from the Revenue Commissioners to the Appeal Commissioners in respect of the imposition of penalties but should not extend to mitigation of penalties on grounds of hardship.*

(13) *Independent and Impartial Tribunal: Further Appeal to Court*

(a) Consultation Paper Recommendation:

7.84 The Commission in its Consultation Paper provisionally recommended that a further appeal on the issue of penalties should lie from the Appeal Commissioners to the Circuit Court but not to the High Court and Supreme Court.⁸⁵

(b) Discussion

7.85 The recommendation contained in the Consultation Paper resulted from a discussion of whether such an appeal is required by Article 6.⁸⁶ Article 2 of the Seventh Protocol to the ECHR, which deals with the right of appeal to a higher tribunal in the case of a criminal conviction, was also considered.

7.86 On policy grounds alone, the Commission considers that an appeal to the Circuit Court in relation to the imposition of penalties would appear sensible and also be consistent with the appeal procedure in relation to assessments.

7.87 A further issue arises as to whether there should be an appeal on a point of law from the Circuit Court to the High Court and

⁸⁴ See fn 15, above.

⁸⁵ See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-1003) at paragraph 2.90.

⁸⁶ Article 6(1) does not require an appeal from a tribunal or court that satisfies the requirements of Article 6, although if an appeal is provided for, it must comply with the requirements of Article 6(1). See *Delcourt v Belgium* (1970) 1 EHRR 355. See Harris, O'Boyle, Warbrick *Law of the European Convention on Human Rights* (Butterworths 1995) at 240.

potentially to the Supreme Court. The Commission in its Consultation Paper concluded that such a right of appeal was not required as the imposition of penalties involves the exercise of discretionary power.⁸⁷ Having considered the matter again, the Commission has concluded that such an appeal should lie, subject to the leave of the Circuit Court. The Commission was persuaded by the argument that in reaching a decision as to penalties, there will be elements of law as well as discretion involved and that the distinction between the two is often elusive.

7.88 *The Commission recommends that in respect of the imposition of penalties, a taxpayer should have a right of appeal from the Appeal Commissioners to the Circuit Court and, with the leave of the Circuit Court, to the High Court and the Supreme Court on a point of law by way of case stated.*

(14) *Should the Right of Appeal be Extended to the Revenue Commissioners?*

(a) Consultation Paper Recommendation

7.89 The Commission in its Consultation Paper provisionally recommended that in principle, it would seem appropriate to extend the Revenue Commissioners' right of appeal to the Circuit Court beyond Capital Acquisition Tax cases to all cases.⁸⁸ The Commission sought submissions on this point.

(b) Discussion

7.90 At present, while the taxpayer can appeal in all cases, the Revenue Commissioners have a right of appeal from the Appeal Commissioners to the Circuit Court only in capital acquisitions tax cases.⁸⁹ The Revenue Commissioners do have a right of appeal by way of case stated on a point of law from decisions of the Appeal

⁸⁷ See Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* op cit fn 87 at paragraph 2.89.

⁸⁸ *Ibid* at paragraph 3.94.

⁸⁹ Section 67(5)(b) of the *Capital Acquisitions Tax Consolidation Act 2003* (consolidated to the Finance Act 2004). The taxpayer and the Revenue Commissioners do not have any right of appeal to the Circuit Court in customs and excise matters but have a right to appeal to the High Court on a point of law.

Commissioners,⁹⁰ however this is of limited value, because the Revenue are still bound by findings of fact.⁹¹

7.91 This situation is problematic for the Revenue Commissioners. First, “many critical aspects of Revenue law are matters of fact”⁹² and therefore the Revenue Commissioners are denied an appeal in a number of cases. The point might be made that adverse findings of fact may be set aside on judicial review, a mechanism which is currently open to the Revenue. However, since judicial review tends to be limited to questions of jurisdiction, it is of little use when the challenge is to findings of fact. A decision based on fraudulent evidence presented may also be set aside, as was argued in the cases of *Waite v House of Spring Gardens Ltd*⁹³ and *Tassan Din v Banco Ambrosiano SPA*.⁹⁴ However, fraud is very difficult to establish (as was the situation in the *House of Spring Gardens* and the *Tassan Din* cases), whereas a *de novo* hearing would allow fresh evidence to be introduced.

7.92 A further argument could be made that the Revenue Commissioners, as a State authority, have a wide range of statutory powers of enforcement at their disposal, including powers of criminal prosecution. This panoply of statutory weapons, allied to the resources of the State at the Revenue’s disposal, means that they should be well equipped to bring a prosecution properly. Perhaps this “inequality of arms” needs to be counterbalanced by providing the taxpayer with an additional right of appeal. Nevertheless, while the Revenue Commissioners are a state authority, they act on behalf of the People of Ireland in accordance with the ‘care and management’ principle in section 849 of the *TCA 1997* to ensure that all taxes are collected. Therefore, the conferral of a right of appeal could arguably be in the public interest. Indeed, as cases before the Appeal Commissioners are civil, not criminal, in nature, it is unusual that one litigant (Revenue)

⁹⁰ Sections 941 and 943 of the *TCA 1997*.

⁹¹ Save in the unlikely event that they bring a successful judicial review action in the High Court.

⁹² Brennan and Hennessy *Forensic Accounting* (Round Hall Sweet & Maxwell 2001) at paragraph 11.26.

⁹³ Unreported, High Court, 26th June, 1985.

⁹⁴ [1991] 1 IR 569.

may not appeal a decision, whereas the other litigant (the taxpayer) may appeal. Furthermore, the mechanism of an appeal by way of case stated is currently conferred equally on the taxpayer and the Revenue, so that it is anomalous that the right of appeal by way of re-hearing is conferred on the taxpayer alone.

7.93 Another argument against the extension of the right to a full re-hearing of the case in the Circuit Court to the Revenue is that of finality: there should be a conclusion to litigation without conferring further avenues of appeal on the State. However, if the taxpayer chooses to appeal to the courts, the Revenue may appeal a case by way of case stated to the High Court and Supreme Court, as happened in *Inspector of Taxes v Kiernan*.⁹⁵ Thus, the existing provisions do not indicate that finality of litigation is accorded particular importance.

7.94 Finally, it could be argued that the taxpayer is liable to high costs in taking or defending a further appeal to the Circuit Court, whereas for the Revenue Commissioners the issue of costs will normally be of lesser significance. Nevertheless, the infrequent use by the Revenue of their existing power of appeal by way of case stated indicates that they do not lightly use any powers of appeal.

7.95 Having considered the above discussion, the Commission has concluded that the arguments in favour of changing the current limited right of appeal for the Revenue Commissioners outweigh those against, particularly the argument that many aspects of Revenue law involve questions of fact. On that basis, the Commission is of the view that the Revenue Commissioners should be allowed to appeal decisions involving all types of taxes to the Circuit Court from the Appeal Commissioners.

7.96 *The Commission recommends that the Revenue Commissioners should have the same rights of appeal as a taxpayer from decisions of the Appeal Commissioners.*

(15) Delays in Case Stated

(a) Consultation Paper Recommendation

7.97 The Commission in its Consultation Paper noted that the delay experienced in relation to case stated appeals in revenue matters

⁹⁵ [1981] IR 117.

is a problem common to all cases stated, and more appropriately falls within the ambit of the Working Group on the Jurisdiction of the Courts established in January 2002. Accordingly, the Commission made no recommendation on this point.

(b) Discussion

7.98 The Commission notes that the first Report of the Working Group on the Jurisdiction of the Courts recommended that there be more active supervision by the High Court of cases stated in the criminal context by means of a review hearing within 28 days of the lodgement of a case stated. Similarly, the Report also recommends that rules of court be amended to provide that in the absence of the parties pursuing an application after leave has been granted, by the court to which the application was made, the matter be listed again for further consideration until such time as the case stated is signed and dispatched.⁹⁶

D The Circuit Court

(1) Appeal to a Circuit Court Judge or to the Circuit Court?

(a) Consultation Paper Recommendations

7.99 The Commission in its Consultation Paper provisionally recommended the retention of the taxpayer's right of appeal to the Circuit Court.⁹⁷ The Commission also provisionally recommended that a Registrar should attend all hearings.⁹⁸

(b) Discussion

7.100 From the Appeal Commissioners, a taxpayer, though not the Revenue Commissioners,⁹⁹ has a right of appeal to a Circuit Court

⁹⁶ *Report of the Working Group on the Jurisdiction of the Courts: the Criminal Jurisdiction of the Courts* (Courts Service 2003) at paragraph 358.

⁹⁷ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 3.90.

⁹⁸ *Ibid* at paragraph 3.110. At present a registrar is not in attendance at hearings before a Circuit Court judge and as a consequence, the usual record of the case is not made.

⁹⁹ Except in relation to cases involving Capital Acquisitions Tax.

judge¹⁰⁰ rather than to the Circuit Court. The appeal, which is held *in camera*, is based on a full rehearing of the facts and law.¹⁰¹ Often the dispute concerns a net point and the hearing may be brief. Accountants, lawyers or the parties may appear before a Circuit Court judge.

7.101 The Commission considers that a full appeal should lie to the Circuit Court and not to a Circuit Court judge, principally to remove any uncertainty over whether the Circuit Court Rules apply to such appeals. Under section 942(3) of the *TCA 1997*, the judge has the same powers as an Appeal Commissioner. The issue of whether a Circuit Court judge sits as a Circuit Court judge or as an Appeal Commissioner arose in *Inspector of Taxes v Arida Ltd.*¹⁰² The High Court held that in a revenue appeal a Circuit Court judge has the power to award costs in accordance with Order 58 rule 1 of the *Rules of the Circuit Court 1950*.¹⁰³ Therefore the Court has jurisdiction to award costs to the successful party. This is standard practice in revenue appeals. It may be that as a result of this decision the Circuit Court Rules apply in their entirety in revenue appeals but any uncertainty would be removed by expressly providing for an appeal to the Circuit Court rather than to a Circuit Court judge. This would also allow for adjudication in the Circuit Court with the presence of a Registrar.

7.102 It could be suggested that the current arrangements be retained on the ground that, in light of the independence of the Appeal Commissioners, an appeal to a Circuit Court judge is superfluous. Another suggestion is that parties may use the Appeal Commissioners hearing as a 'dry run' for the Circuit Court.

7.103 The Commission has concluded, however, that the right of appeal to the Circuit Court is a useful right for the taxpayer. The appeal process combines the taxation expertise of the Appeal Commissioners with the general legal knowledge of a Circuit Court judge.

¹⁰⁰ Section 942(1) of the *TCA 1997*.

¹⁰¹ Section 942(3) and (9) of the *TCA 1997*.

¹⁰² [1992] 2 IR 155. On appeal, Murphy J.'s decision was upheld by the Supreme Court: [1996] 1 ILRM 76.

¹⁰³ Since replaced by the *Circuit Court Rules 2001*.

7.104 Furthermore, a full retrial at the Circuit Court is not uncommon. A fresh hearing at the Circuit Court from the District Court is available to a defendant in a criminal case¹⁰⁴ and in civil cases both parties have the option of a rehearing in appeals from the District Court to the Circuit Court.¹⁰⁵ A further argument in favour of allowing a full appeal to the Circuit Court is that it provides taxpayers with a second option in addition to an appeal on a point of law from the Appeal Commissioners to the High Court by way of case stated. A taxpayer who has failed to convince the Inspector Taxes on a point and has appealed and lost again before the Appeal Commissioners may still feel aggrieved. A further appeal to the Circuit Court enables the aggrieved taxpayer to make a case before a judge sitting in the ordinary courts of the State.

7.105 *The Commission recommends that it should be expressly provided that an appeal should lie from the Appeal Commissioners to the Circuit Court and not to a Circuit Court judge.*

(2) Listing of Appeals to the Circuit Court

(a) Consultation Paper Recommendation

7.106 The Consultation Paper provisionally recommended that, at a minimum, a taxpayer should have the right to apply to the Circuit Court when an Inspector of Taxes delays the listing of an appeal to the Circuit Court (similar to the right under section 933(2)(c) of the *TCA 1997* in respect of an appeal to the Appeal Commissioners).¹⁰⁶ The Commission also sought submissions on whether the Courts Service should create a file for each appeal from the Appeal Commissioners to the Circuit Court or whether the less radical reform of enabling the taxpayer to apply directly to the Circuit Court where an appeal has not been listed expeditiously before the Court would suffice.

(b) Discussion

7.107 At present, the Revenue Commissioners are responsible for listing appeals from the Appeal Commissioners to a Circuit Court

¹⁰⁴ Section 18, *Criminal Justice Act 1928*. See further Delany *The Courts Acts 1924-1997* (2nd ed Round Hall Ltd 2000).

¹⁰⁵ Section 84, *Courts of Justice Act 1924*.

¹⁰⁶ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 3.100.

judge. If the taxpayer wishes to appeal a decision of the Appeal Commissioners, a taxpayer must write to an Inspector who will in turn contact the Circuit Court in order to arrange for a judge to hear the appeal and the time and venue for the appeal. Section 942(2) of the *TCA 1997* provides that the Inspector should transmit to a Circuit Court judge, at or before the time of the hearing of the appeal, the form on which the Appeal Commissioner's determination was recorded.

7.108 There is a problem, at least of perception, analogous to the involvement of an Inspector of Taxes in listing appeals to the Appeal Commissioners, that the Revenue Commissioners currently are involved in the internal organisation of the very court which adjudicates cases in which the Revenue are involved. In effect they perform some of the tasks which a registrar would perform in an ordinary appeal process. If, as is recommended, an appeal should lie to the Circuit Court and not to a judge of the Circuit Court, then the listing of appeals should occur in the usual manner, that is with the involvement of the registrar and management of a case file by the Courts Service. If the Courts Service were responsible for the listing and arrangement for appeals to the Circuit Court then the present perceived difficulties would probably be resolved.

7.109 *The Commission recommends that the listing of taxation appeals before the Circuit Court be in accordance with standard practice, that is, that the County Registrar and the Courts Service be responsible for the listing of and arrangements for appeals.*

CHAPTER 8 A REVENUE COURT

A Introduction

8.01 In addition to the request to the Commission to consider the establishment of a fiscal prosecutor, the Attorney General requested an examination of the merits of establishing a ‘revenue court’.

8.02 In this respect, it is suggested that the present system for the adjudication of revenue cases could be replaced with a civil and criminal revenue court or be modified with a formal or informal listing system. The benefits of a listing system are detailed below in addition to the discussion of the alternatives. The Consultation Paper dealt with this topic in two chapters; one dealing with the issues in respect of a civil revenue court, and the other assessing the merits and demerits of a separate criminal court for revenue prosecutions. To avoid duplication, both types of court are discussed in this chapter.

B Civil Revenue Court

8.03 A traditional feature of the common law is that a judge need not be an expert in a particular area on which he or she adjudicates. Instead counsel appearing for the parties are expected to outline the history and the issues and adduce evidence, particularly necessary expert evidence, to elucidate the principal issues in a case. Recently, however, the use of specialised High Court listing systems has increased. For example, certain commercial matters are now listed in special lists for hearing.¹

¹ See, for example, the *Rules of the Superior Courts (Commercial Proceedings) 2004* (S.I. No. 2 of 2004), and for a wider discussion of this area, see Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraphs 4.03-4.08.

8.04 The Consultation Paper canvassed various options as to the form of a civil revenue court, if one were established. These options are discussed below.

C The Options for Reform

(1) Revenue Court to Replace Appeal Commissioners?

(a) Consultation Paper Recommendation

8.05 The Commission in its Consultation Paper examined the possibility of establishing a specialised civil court to replace the Appeal Commissioners, but this did not commend itself to the Commission.²

(b) Discussion

8.06 The Commission has concluded that the view expressed in the Consultation Paper was correct. In brief, the advantages of the Appeal Commissioners when compared to a court are: ease of access; relatively little expense for all parties (including funding by the State in contrast with the creation of a new stand alone civil court); the retention of the existing specialist expertise and the relatively informal procedure.

8.07 The Commission has therefore concluded that the Appeal Commissioners (allied with an appeal to the Circuit Court) represents a better alternative than the creation of a new civil court, particularly in the context of the recommendations for reform made in this Report.

8.08 *The Commission does not recommend the establishment of a specialised Revenue Court to replace the Appeal Commissioners.*

(2) Revenue Court to Replace the Circuit Court?

(a) Consultation Paper Recommendation

8.09 The Commission in its Consultation Paper considered whether a specialised civil revenue court should be established in place of the Circuit Court. The Commission provisionally took the view that this was not justified (taking account of expected volumes of work), even on the basis of joint criminal and civil jurisdiction.³

² Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* *op cit* fn 1 at paragraph 4.19-4.21.

³ *Ibid* at paragraphs 4.22-4.27.

(b) *Discussion*

8.10 Some increased specialisation within the judicial system⁴ might support arguments in favour of a specialist court for revenue cases. At present, judges who hear tax appeals are generally not specialists, but are simply those who happen to be sitting at the time and place where the appeal arises.⁵

8.11 The potential benefits of specialist courts include: a quicker and more effective court process; consistency in the decision-making process; the creation of a corpus of specialist advocates, and a reduced caseload in the general courts. Presumably, if a specialist court were established, judges sitting in the court would be chosen from those with a pre-existing specialist knowledge and expertise in a particular area of law. It would also be easier for the judges to keep up-to-date with developments in the area.⁶

8.12 The potential disadvantages associated with a specialist tax court include: the loss of a generalist overview by the adjudicator; the potential isolation of the specialist area of law from the development of the general law; the potential overlap between the jurisdiction of the general and specialist courts and the requirement for the court either to sit in a centralised location, requiring the parties to travel to the court or requiring the court periodically to travel around the country and administrative difficulties including insufficient volume of cases.

8.13 It should also be noted in this context that appeals from the Appeal Commissioners only form a minor part of the Circuit Court's work. There are no delays in getting a case listed before the Circuit Court once the Revenue Commissioners request that a case be listed. It seems that the current arrangements – which offer the taxpayer the right of appeal to an informal specialist tribunal in the form of the

⁴ See paragraph 8.03 above.

⁵ The only element of subject-matter specialisation at the Circuit Court level is an informal arrangement for the assignment of a judge with pertinent expertise in landlord and tenant cases. The only form of concentration within the courts system in relation to tax appeals occurs in the Dublin Circuit Court where appeals from the Appeal Commissioners are assigned to a particular courtroom (though not necessarily to a particular judge).

⁶ See Cazalet “Specialised Courts: Are they a “Quick Fix” or a Long-term Improvement in the Quality of Justice? A Case-Study” (2001 World Bank).

Appeal Commissioners, and from there to the more generalist Circuit Court – provide more advantages than those associated with specialist civil revenue courts.

8.14 The argument that such a court would deal with a small caseload might be less strong if it was conferred with both civil and criminal jurisdiction. But, even assuming an increased future workload, it is likely that these would only be about 15 civil appeals and 10 to 12 trials on indictment at most in the Circuit Court annually.⁷ On this basis, the argument for a specialised Revenue Court appears weak. Therefore, the Commission has concluded that the current arrangements are preferable and does not recommend the establishment of a specialised (civil) Revenue Court to replace the Circuit Court.

8.15 *The Commission does not recommend the establishment of a specialised civil revenue court to replace the Circuit Court.*

(3) Listing System in the Circuit Court

(a) Consultation Paper

8.16 The Commission in its Consultation Paper provisionally recommended that because of the increasing complexity of tax law the allocation of judges to revenue cases should remain within the discretion of the President of the Circuit Court and that, where possible and appropriate, the President of the Circuit Court should allocate judges with knowledge of tax law to deal with tax appeals by arrangement with the judges of each circuit.⁸

(b) Discussion

8.17 The expression ‘listing system’ is used to refer to the nomination of particular judges to hear specific types of cases. A listing system currently operates in the High Court in such areas as judicial review and certain commercial law matters and at Circuit Court level in Dublin.⁹

⁷ Figures provided by the Revenue Commissioners.

⁸ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 4.31.

⁹ See fn 1, above. The Dublin Circuit Court is divided into: the Circuit Court Civil; the Circuit Court Criminal; Circuit Court Family; District Court Appeals and the County Registrar’s List.

8.18 A revenue list would, like a specialised court, result in a number of advantages, for example the accumulation of expertise and administrative convenience. It would in effect have the advantages of a specialised court without the disadvantages. It would also be less costly than establishing a separate court which would be expensive to set up and operate relative to the limited number of cases likely to arise.

8.19 The Commission is of the view that a structured list system is not required at present, however a list system could operate in an informal but effective manner.

8.20 Temporary assignment of Circuit Court judges is provided for under section 10(3)(a) of the *Courts of Justice Act 1947*, which states that the "... President of the Circuit Court may at any time temporarily assign to any circuit (whether there is or is not a Circuit Judge permanently assigned thereto) any Circuit Judge, whether he is or is not permanently assigned to another circuit."

8.21 Therefore if a complicated tax case arises in a particular circuit, the President of the Circuit Court, made aware of the complexity of the forthcoming case, has the power to assign a judge with particular expertise in revenue law from another circuit to adjudicate on the case. In practice this already occurs for certain cases due to their complexity or length.

8.22 The situation might well be met by the suggestion that when a judge of the Circuit Court is aware that a lengthy or complicated tax case is to be listed, the judge may contact the President of the Circuit Court so that a judge with particular expertise for dealing with the case may be assigned, thus assisting expedition and also the least disruption of the normal Circuit Court work.

8.23 *The Commission recommends that when a judge of the Circuit Court is aware that a lengthy or complicated civil tax case is to be listed, the judge may consult the President of the Circuit Court as to whether a judge with the particular expertise required for dealing with the case may be assigned, by arrangement with the judge of that Circuit, to take the case.*

D Criminal Revenue Court

8.24 While the phrase "revenue offence" is a convenient and often-used expression to describe a criminal offence in the revenue field, it

has no other significance than that. There is, in Irish law, no special category of revenue offences with distinctive substantive and evidential rules.

8.25 A specialist criminal revenue court might theoretically take, in descending order of radical change, these various possible forms: first, such a court could be staffed wholly or partly by experts in areas other than the law, such as accountants; secondly, it could sit without a jury and thirdly a specialist Circuit or District Court could be established whose work would be confined to revenue trials, but otherwise would be unchanged from the present model.

8.26 Discussed below are the various possibilities for reform if a criminal court were instituted.

(I) A Criminal Revenue Court?

(a) Consultation Paper Recommendation

8.27 The Commission in its Consultation Paper discussed the establishment of a specialised criminal revenue court, at either District or Circuit Court level, but ultimately concluded in favour of retaining prosecutions in the courts as currently constituted.¹⁰

(b) Discussion

8.28 The Consultation Paper noted that a court whose jurisdiction was confined to revenue work would probably not be unconstitutional.¹¹ The benefits of establishing such a court are the same as outlined above in relation to specialisation in any area, particularly the accrual of experience and consistency in the case law. Notwithstanding this, there are a number of significant disadvantages, the principal one being that the cost involved would not be commensurate with the low number of cases likely to arise - at most in the order of 10 to 12 trials on indictment annually.¹² The Consultation Paper also noted other disadvantages such as the historical suspicion of specialised criminal courts; the possibility of the stigma value attached

¹⁰ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 7.23.

¹¹ *Ibid* at paragraph 7.19.

¹² Figures supplied as estimates to the Commission by the Revenue Commissioners.

to a conviction being lessened by having a separate court system for revenue offences and also the benefits to be garnered from a judge presiding who has general knowledge and experience in the law and rules of evidence.¹³

8.29 The Commission sees no reason to depart from the view expressed in the Consultation Paper on this point and does not favour the establishment of a specialist Criminal Revenue Court.

8.30 *The Commission does not recommend the introduction of a specialist criminal revenue court.*

(2) A Court Composed of Experts in an Area Other than Law

(a) Consultation Paper Recommendation

8.31 The Commission in its Consultation Paper considered the question whether any specialist court should comprise members who are qualified in a field other than members of the legal profession.

(b) Discussion

8.32 The first issue that arises is whether a court comprised of non-legally qualified adjudicators would be constitutional. While it is true that the Constitution is silent in respect of the qualifications of judges save that they “shall be determined by law”, the judicial declaration set out in Article 34.5.1^o requires all judges to pledge that they “...will uphold the Constitution and the laws.” It would therefore seem sensible that a judge should have some formal qualification in law in order to discharge this duty. Furthermore, if a court was composed of accountants, for example, it is arguable that a defendant’s right under Article 38.1 to be tried “in due course of law” would be infringed.

8.33 It is also pertinent that statute has laid down qualifications for appointment as a judge which differ only in detail; in every case, the appointee must be a practising barrister or solicitor of several years’ standing.¹⁴ To depart from this tradition and practice would be surprising in view of the experience required to preside over a court of law.

¹³ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraphs 7.19-7.21.

¹⁴ See Byrne and McCutcheon *The Irish Legal System* (4th ed Butterworths 2001) at 118-121.

8.34 Another argument against the establishment of a court composed of non-lawyers is that revenue offences should not be treated in a manner different from other crimes. Therefore, revenue offences should be tried in the ordinary criminal courts.

8.35 *The Commission does not recommend the introduction of a court whose members are qualified in a field other than law, such as accounting or tax, without qualification or experience in law, as revenue prosecutions should normally be dealt with in the ordinary courts.*

(3) Retention of Jury Trials

(a) Consultation Paper Recommendation

8.36 The Commission in its Consultation Paper recommended the retention of jury trial in cases of trials on indictment for revenue offences.¹⁵

(b) Discussion

8.37 Article 38.5 of the Constitution provides that “save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.” One of the exceptions to this rule is contained in Article 38.2, which allows “minor offences” or less serious offences (including revenue ones) to be tried in the District Court without a jury.

8.38 While acknowledging and being mindful of this clear constitutional imperative, it is worth considering, from a policy perspective, the removal of the jury in revenue matters. The British Home Office Consultation Document, *Juries in Serious Fraud*¹⁶ considered the particular problems presented by serious fraud trials and possible alternatives to jury trial. This Consultation Document was prompted by a concern that the system in place for the trial of serious fraud offences was not working satisfactorily.

¹⁵ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* (LRC CP 24-2003) at paragraph 7.18.

¹⁶ *Juries in Serious Fraud Trials: A Consultation Document* (Home Office February 1998). Also of interest is New Zealand’s Law Commission *Discussion Paper on Juries in Criminal Trials* (Law Commission 1998) available at www.lawcom.govt.nz.

8.39 In Ireland, the issue of serious revenue offences being too complex for a jury has not arisen (though this may be due to the low number of prosecutions). Moreover, it is worth mentioning the classic arguments in favour of a jury trial, that is to keep the administration of the criminal justice system broadly in line with the standard of morality of the average person and to involve the citizens in the administration of justice in serious criminal cases in their courts and in their State. The Commission considers that this principle is particularly pertinent in the case of revenue matters.

8.40 *The Commission recommends the retention of jury trials in the case of trials on indictment for revenue offences.*

(4) A Listing System

(a) Consultation Paper Recommendation

8.41 The Commission in its Consultation Paper recommended that judges with particular qualifications or experience in revenue law should be assigned to complex revenue trials, should they arise and where it is convenient and practical to do so.¹⁷

(b) Discussion

8.42 Under a listing system, the trial of complex and lengthy criminal revenue offences could be assigned to judges with particular expertise in tax law. The Commission takes the view that the arguments made in favour of an informal civil revenue list are equally applicable to criminal cases appearing before the Circuit Court.¹⁸

8.43 *The Commission recommends that when a judge of the Circuit Court is aware that a lengthy or complicated criminal revenue case is to be listed, the judge may consult the President of the Circuit Court as to whether a judge with the particular expertise required for dealing with the case may be assigned, by arrangement with the judge of that Circuit, to take the case.*

¹⁷ Law Reform Commission *Consultation Paper on A Fiscal Prosecutor and A Revenue Court* op cit fn 15 at paragraph 7.26.

¹⁸ See paragraphs 8.09-8.15, above.

CHAPTER 9 SUMMARY OF RECOMMENDATIONS

9.01 The recommendations contained in this Report may be summarised as follows:

9.02 The Commission recommends that the threshold for publication by the Revenue Commissioners of the names of persons subject to a court imposed fine or other penalty or those who have reached a settlement with the Revenue Commissioners should be set at €25,000 and this figure should be index linked by reference to the Consumer Price Index. [Paragraph 2.14]

9.03 The Commission recommends that in future, the appointment of External Reviewers to the Office of the Revenue Commissioners should be undertaken by an independent body such as the Civil Service Commission. [Paragraph 2.20]

9.04 The Commission recommends that a random audit programme should operate with the direct inclusion of all taxpayers regardless of the category in which they file their returns. [Paragraph 3.12]

9.05 The Commission does not consider that the 2002 Code of Practice for Revenue Auditors is in itself incompatible with Article 6 of the European Convention on Human Rights in relation to the privilege against self-incrimination. [Paragraph 3.25]

9.06 The Commission recommends that the current qualifying disclosure scheme be modified along the lines of the revised 2002 ‘Hansard’ statement employed by the Inland Revenue in the United Kingdom and should include the questions asked as part of the ‘Hansard’ statement. [Paragraph 3.32]

9.07 The Commission further recommends that a list of offences which would be liable for prosecution even where a qualifying disclosure is made, could be based on the following criteria:

- (a) nature of the offence (perhaps linked to a financial threshold);
- (b) duration of the offence and

(c) previous convictions or settlements for tax or tax related offences. [Paragraph 3.33]

9.08 The Commission recommends that a taxpayer should have a right of appeal to the Appeal Commissioners, in respect of whether the taxpayer falls within the qualifying disclosure scheme, and from the Appeal Commissioners to the Circuit Court and with leave of the Circuit Court to the High Court and Supreme Court by way of case stated on a point of law. [Paragraph 3.34]

9.09 The Commission recommends that the Revenue Commissioners should consider publicising the obligation to file upon receipt of notice from the Revenue. This could be done by expanding their current publicity campaign in relation to the timely filing of returns to include information on the duty to file where notice has been served but no charge to tax arises. [Paragraph 4.22]

9.10 The Commission recommends that the recent introduction of a standardised policy across all tax districts of pursuing court orders for all outstanding returns should continue. [Paragraph 4.26]

9.11 The Commission recommends that consideration be given to amending section 1094(2)(i) and section 1095(3)(a) of the *TCA 1997* to include the payment or remittance of any taxes, interest, penalties or fines required to be paid under the Acts or as a result of any court order. [Paragraph 4.29]

9.12 The Commission recommends that the Revenue Commissioners pursue a different strategy for those being prosecuted for a third or more non-filing offence. This strategy should include an automatic audit and a fast-tracked prosecution system with consideration of prosecution on indictment in egregious cases which lack mitigating circumstances. [Paragraph 4.34]

9.13 The Commission recommends that the Revenue Commissioners and the Garda Síochána develop a Memorandum of Understanding between them outlining co-operative procedures for the arrest and detention of those suspected of revenue offences with a view to them being questioned by the Garda Síochána in accordance with the *Criminal Justice Act 1984*. [Paragraph 5.27]

9.14 The Commission recommends that no further legislation should be enacted that would shift the evidential burden onto an accused charged with tax offences. [Paragraph 5.31]

9.15 The Commission recommends that, in relation to the award of specific and exceptional expenses to the Revenue on conviction of a person for a revenue offence, the following section should be introduced:

(a) Where a person is convicted of a revenue offence, the Court may, if it is satisfied that there are special or substantial reasons for so doing, order the person to pay to the Revenue Commissioners specific and ascertainable exceptional expenses (excluding remuneration and usual expenses), which have been incurred by the Revenue Commissioners in relation to the prosecution of the offence, such expenses to be measured by the Court.

(b) In exercising the discretion conferred by paragraph (a), the Court may have regard to:

(i) the imposition of penalties or interest by the Revenue Commissioners in relation to proceedings against the accused arising from the same facts,

(ii) the means of the accused. [Paragraph 5.43]

9.16 In relation to summary prosecutions, the Commission recommends that the Revenue Commissioners continue to prosecute under a delegation from the DPP, rather than under an independent statutory authorisation. [Paragraph 6.10]

9.17 The Commission recommends that the arrangements currently in place for the prosecution of revenue offences be maintained. They should be monitored and reviewed over a period of 5 years. The Commission does not recommend the establishment of a Director of Fiscal Prosecutions. [Paragraph 6.17]

9.18 The Commission recommends that the independence of the Appeal Commissioners be expressly stated in the *TCA 1997* in a similar manner to section 6(3) of the *Patents Act 1992*, to the effect that “The Appeal Commissioners shall be independent in the discharge of the powers and duties conferred on them by the Tax Acts.” [Paragraph 7.18]

9.19 The Commission recommends the establishment of an open and formal selection and appointment process for future Appeal Commissioners. The proposed system would be that a group of experts from the fields of law, accounting and taxation be used to short-list three possible candidates for appointment to the office of Appeal Commissioner. The Minister for Finance would then choose the Appeal Commissioner from among this shortlist. The expert committee should recommend whether or not the Minister for Finance should reappoint an Appeal Commissioner. [Paragraph 7.21]

9.20 The Commission recommends that appointment as an Appeal Commissioner should require a professional qualification for a specified period in any of the fields of legal practice, accounting or taxation and also that the candidate is otherwise well qualified. [Paragraph 7.27]

9.21 The Commission recommends that when a vacancy for the post of Appeal Commissioner arises, the qualifications for the vacancy should be specified as qualifications in tax, accounting or law, irrespective of the profession of the remaining Commissioner or Commissioners. [Paragraph 7.29]

9.22 The Commission recommends that the appointment of Appeal Commissioners be put on a statutory footing, utilising the following draft statutory provisions:

- (1) A person appointed to be an Appeal Commissioner-
 - (a) shall be the holder of a professional qualification in law, accounting or taxation and be otherwise qualified to perform such functions and carry out such duties as are required to be performed or carried out by an Appeal Commissioner;
 - (b) shall hold office for a term of 7 years and may, on the recommendation of an expert committee established under this Act, be re-appointed for a second term of 7 years;
 - (c) may at his or her own request be relieved of office by the Minister for Finance.
- (2) Whenever a vacancy for an Appeal Commissioner occurs, the qualifications for a person to fill the vacancy

shall be specified by the Minister for Finance as minimum qualifications in law, accounting or taxation, irrespective of the qualification of the remaining Commissioner or Commissioners.

(3) (a) The Minister for Finance shall appoint an expert committee qualified in law, accounting or taxation, which shall at the request of the Minister compile and submit to the Minister a list of three candidates suitable for appointment as an Appeal Commissioner, from among whom the Minister shall appoint one person to be an Appeal Commissioner.

(b) Where in the opinion of the Minister for Finance none of the persons listed under paragraph (a) is eligible for appointment as an Appeal Commissioner, the expert committee shall reconvene and shall compile and submit to the Minister a further list of three candidates suitable for appointment, from among whom the Minister shall appoint one person to be an Appeal Commissioner.

(4) Whenever the Minister for Finance so requests, a committee comprising three suitably qualified persons, chaired by a judge of the High Court (to be nominated by the President of the High Court) shall –

(a) investigate the condition of health of an Appeal Commissioner

or

(b) inquire into the conduct in the execution of office as an Appeal Commissioner of a particular Appeal Commissioner, with particular reference to any matters that may be mentioned in the request.

(5) The committee appointed under subsection (4) may conduct an investigation or inquiry in such manner as it thinks fit, and shall report the results of such investigation or inquiry to the Minister for Finance, who shall, on receipt of such report, take such action, including removal from

office of the Appeal Commissioner concerned, as the Minister considers desirable in light of the report. [Paragraph 7.36]

9.23 The Commission recommends that responsibility for listing appeals from the Revenue Commissioners to the Appeal Commissioners should lie with the Appeal Commissioners. [Paragraph 7.46]

9.24 The Commission recommends that the Appeal Commissioners should specify (perhaps in an explanatory guide to procedures) that, in appropriate and defined circumstances, an Appeal Commissioner may administer an oath to any witness including a taxpayer or an Inspector of Taxes. [Paragraph 7.49]

9.25 The Commission recommends that the *TCA 1997* be amended to provide that the Appeal Commissioners should control the record of their own decisions and make them available to both parties as of right. [Paragraph 7.52]

9.26 The Commission recommends the Appeal Commissioners should issue a concise written reasoned determination in appropriate cases within a short period (ideally three months) of the determination, including a summary of the facts and giving reasons for the decision. [Paragraph 7.62]

9.27 The Commission recommends that resources be provided so that an effective system for the reporting of decisions of the Appeal Commissioners may be established and every appropriate decision is published. [Paragraph 7.66]

9.28 The Commission recommends that the title of ‘Appeal Commissioners’ be retained. [Paragraph 7.70]

9.29 The Commission recommends that the word ‘precept’ be retained. [Paragraph 7.76]

9.30 The Commission recommends that the Appeal Commissioners’ power to issue precepts apply in relation to any party, and, if necessary, appropriate provision should be made in respect of costs. [Paragraph 7.77]

9.31 The Commission recommends that in light of Article 6(1) of the European Convention on Human Rights as incorporated by the European Convention on Human Rights Act 2003, an appeal should lie

from the Revenue Commissioners to the Appeal Commissioners in respect of the imposition of penalties but should not extend to mitigation of penalties on grounds of hardship. [Paragraph 7.83]

9.32 The Commission recommends that in respect of the imposition of penalties, a taxpayer should have a right of appeal from the Appeal Commissioners to the Circuit Court and, with the leave of the Circuit Court, to the High Court and the Supreme Court on a point of law by way of case stated. [Paragraph 7.88]

9.33 The Commission recommends that the Revenue Commissioners should have the same rights of appeal as a taxpayer from decisions of the Appeal Commissioners. [Paragraph 7.96]

9.34 The Commission recommends that it should be expressly provided that an appeal should lie from the Appeal Commissioners to the Circuit Court and not to a Circuit Court judge. [Paragraph 7.105]

9.35 The Commission recommends that the listing of taxation appeals before the Circuit Court be in accordance with standard practice, that is, that the County Registrar and the Courts Service be responsible for the listing of and arrangements for appeals. [Paragraph 7.109]

9.36 The Commission does not recommend the establishment of a specialised Revenue Court to replace the Appeal Commissioners. [Paragraph 8.08]

9.37 The Commission does not recommend the establishment of a specialised civil revenue court to replace the Circuit Court. [Paragraph 8.15]

9.38 The Commission recommends that when a judge of the Circuit Court is aware that a lengthy or complicated civil tax case is to be listed, the judge may consult the President of the Circuit Court as to whether a judge with the particular expertise required for dealing with the case may be assigned, by arrangement with the judge of that Circuit, to take the case. [Paragraph 8.23]

9.39 The Commission does not recommend the introduction of a specialist criminal revenue court. [Paragraph 8.30]

9.40 The Commission does not recommend the introduction of a court whose members are qualified in a field other than law, such as accounting or tax, without qualification or experience in law, as

revenue prosecutions should normally be dealt with in the ordinary courts. [Paragraph 8.35]

9.41 The Commission recommends the retention of jury trials in the case of trials on indictment for revenue offences. [Paragraph 8.40]

9.42 The Commission recommends that when a judge of the Circuit Court is aware that a lengthy or complicated criminal revenue case is to be listed, the judge may consult the President of the Circuit Court as to whether a judge with the particular expertise required for dealing with the case may be assigned, by arrangement with the judge of that Circuit, to take the case. [Paragraph 8.43]

APPENDIX A DRAFT LEGISLATION

BILL
entitled

AN ACT TO AMEND CERTAIN PROVISIONS OF THE TAXES
CONSOLIDATION ACT 1997 AND TO PROVIDE FOR RELATED
MATTERS

ARRANGEMENT OF SECTIONS

| | |
|---|--|
| 1 | Short Title and Interpretation |
| 2 | Amendment of section 850 of Act of 1997 |
| 3 | Amendment of section 935(1) of Act of 1997 |
| 4 | Appeals to Circuit Court |
| 5 | Amendment of section 1078 of Act of 1997 |
| 6 | Amendment of section 1086 of Act of 1997 |

Acts Referred To

Taxes Consolidation Act 1997

1997, No. 39

Finance Act 2002

2002, No. 5

Short title &
interpretation.

1.-(1) This Act may be cited as the Taxes
(Miscellaneous Provisions) Act 2004.

(2) In this Act - “Act of 1997” means the
Taxes Consolidation Act 1997;
“Tax Acts” has the meaning assigned to it
by section 1 of the Act of 1997.

Amendment of
section 850 of
Act of 1997.
Appointment of
Appeal
Commissioners

2.- The following sections are substituted for
section 850 of the Act of 1997:

- “850.- (1) The Minister for Finance shall appoint persons to be Appeal Commissioners for the purposes of the Tax Acts and the persons so appointed shall, by virtue of their appointment, and without further qualification, have authority to execute such powers and perform such duties as are assigned to them by those Acts.
- (2) The Appeal Commissioners shall be independent in the discharge of the powers and duties conferred on them by the Tax Acts.
- (3) (a) An Appeal Commissioner shall be paid such sums in respect of salary and expenses as the Minister for Finance directs.
- (b) The Minister for Finance shall cause an account of all appointments of Appeal Commissioners and of their salaries to be laid before each

House of the Oireachtas within 20 days of the next sitting of that House.

- (c) Anything required to be done under the Tax Acts by the Appeal Commissioners or any other Commissioners may, except where otherwise expressly provided by those Acts, be done by any one or more Commissioners.

Qualifications
and Terms of
office of Appeal
Commissioners

850A.-(1)A person appointed to be an Appeal Commissioner-

- (a) shall be the holder of a professional qualification in law, accounting or taxation and be otherwise qualified to perform such functions and carry out such duties as are required to be performed or carried out by an Appeal Commissioner;
- (b) shall hold office for a term of 7 years and may, on the recommendation of an expert committee established under this Act, be re-appointed for a second term of 7 years;
- (c) may at his or her own request be relieved of office by the Minister for Finance.

(2) Whenever a vacancy for an Appeal Commissioner occurs, the qualifications for a person to fill the vacancy shall be specified by the Minister for Finance as minimum qualifications in law, accounting or taxation, irrespective of the qualification of the remaining Commissioner or Commissioners

Expert
committee

850B.- (1)(a) The Minister for Finance shall appoint an expert committee

qualified in law, accounting or taxation, which shall at the request of the Minister compile and submit to the Minister a list of three candidates suitable for appointment as an Appeal Commissioner, from among whom the Minister shall appoint one person to be an Appeal Commissioner.

(b) Where in the opinion of the Minister for Finance none of the persons listed under paragraph (a) is eligible for appointment as an Appeal Commissioner, the expert committee shall reconvene and

shall compile and submit to the Minister a further list of three candidates suitable for appointment, from among whom the Minister shall appoint one person to be an Appeal Commissioner.

Inquiry into
conduct of
Appeal
Commissioners

850C. (1) Whenever the Minister for Finance so requests, a committee comprising three suitably qualified persons, chaired by a judge of the High Court (to be nominated by the President of the High Court), shall –

(a) investigate the condition of health of an Appeal Commissioner

or

(b) inquire into the conduct in the execution of office as an Appeal Commissioner of a particular Appeal Commissioner, with

particular reference to any matters that may be mentioned in the request.

- (2) The committee appointed under subsection (4) may conduct an investigation or inquiry in such manner as it thinks fit, and shall report the results of such investigation or inquiry to the Minister for Finance, who shall, on receipt of such report, take such action, including removal from office of the Appeal Commissioner concerned, as the Minister considers desirable in light of the report.

Decisions of
Appeal
Commissioners

850D.-(1) Records of decisions made by the Appeal Commissioners shall be retained by the Appeal Commissioners and shall be made available to both the taxpayer and the Revenue Commissioners.

- (2) The Appeal Commissioners shall establish and maintain an effective system for the reporting of decisions made by the Appeal Commissioners.

Appeals

850E.- (1) An appeal shall lie to the Appeal Commissioners from a decision of the Revenue Commissioners imposing a penalty and from a decision regarding the qualifying disclosure scheme.

- (2) An appeal shall lie to the Circuit Court from a decision of the Appeal Commissioners under this section.
- (3) This section shall not apply to decisions regarding mitigation of penalties on grounds of hardship.
- (4) In this section, “qualifying disclosure scheme” means the scheme operated

by the Revenue Commissioners under which the taxpayer discloses his or her liability to tax and the Revenue Commissioners accept, or undertake to accept a specified sum of money in settlement of any claim by the Revenue Commissioners in respect of the specified liability of the person under any of the Tax Acts for the payment of any tax, interest, fine or other monetary penalty

Listing of appeals

850F.- (1) Responsibility for the listing of appeals before the Appeal Commissioners shall lie with the Appeal Commissioners.

(2) Responsibility for the listing of appeals from the Appeal Commissioners to the Circuit Court shall lie with the Courts Service.”

Amendment of section 935(1) of Act of 1997

3.- The following is hereby substituted for section 935(1) of the Act of 1997:

“935.-(1) Where notice of appeal has been given against an assessment, the Appeal Commissioners may, whenever it appears to them to be necessary for the purposes of the Tax Acts, issue a precept to the appellant or any other party ordering the appellant or any other party to deliver to them, within the time limited by the precept, a schedule containing such particulars for their information as they may demand under the authority of the Tax Acts in relation to –

- (a) the property of the appellant,
- (b) the trade, profession or employment

carried on or exercised by the appellant,

(c) the amount of the appellant's profits or gains, distinguishing the particular amounts derived from each separate source, or

(d) any deductions made in determining the appellant's profits or gains."

Appeals to
Circuit Court

4.- The following is hereby substituted for section 942 of the Act of 1997:

"942.-(1) Any person, including the inspector or such other officer as the Revenue Commissioners shall authorise in that behalf (in this section referred to as "other officer"), aggrieved by any determination of the Appeal Commissioners may, on giving notice in writing to the Appeal Commissioners within 10 days after such determination, require that the appeal shall be reheard by the Circuit Court (in this section referred to as "the Court") in which Circuit is situate, in the case of—

(a) a person who is not resident in the State,

(b) the estate of a deceased person,

(c) an incapacitated person, or

(d) a trust,

the place where the assessment was made and, in any other case, the place to which the notice of assessment was addressed, and the Appeal Commissioners shall transmit to the Court any statement or schedule in their possession which was delivered to them for the purposes of the appeal.

- (2) At or before the time of the rehearing of the appeal by the Court, the Appeal Commissioners shall transmit to the Court the prescribed form in which the Appeal Commissioners' determination of the appeal is recorded.
- (3) The Court shall with all convenient speed rehear and determine the appeal, and shall (in addition to the powers which the Court otherwise has conferred on it by law) have and exercise the same powers and authorities in relation to the assessment appealed against, the determination, and all consequent matters, as the Appeal Commissioners might have and exercise, and the Court's determination shall, subject to section 943, be final and conclusive.
- (4) Section 934(2) shall, with any necessary modifications, apply in relation to a rehearing of an appeal by the Court as it applies in relation to the hearing of an appeal by the Appeal Commissioners.
- (5) The judge of the Circuit Court hearing the appeal shall make a declaration in the form of the declaration required to be made by an Appeal Commissioner as set out in Part 1 of Schedule 27.
- (6)(a) Notwithstanding that a person has under subsection (1) required an appeal to the Appeal Commissioners against the assessment to be reheard by the Court, income tax or, as the case may be, corporation tax shall be paid in accordance with the

determination of the Appeal
Commissioners.

(b) Notwithstanding paragraph (a), where the amount of tax is altered by the determination of the Court or by giving effect to an agreement under subsection (8), then, if too much tax has been paid, the amount or amounts overpaid shall be repaid and in so far as the amount to be repaid represents tax paid in accordance with this subsection it shall, subject to the provisions of subsection (4) of section 865A, be repaid with interest at the rate specified in subsection (3) of section 865A from the date or dates of payment of the amount or amounts giving rise to the overpayment to the date on which the repayment is made.

(7) Income tax shall not be deductible on payment of interest referred to in subsection (6)(b) and such interest shall not be reckoned in computing income for the purposes of the Tax Acts.

(8) Where following an application for the rehearing of an appeal by the Court in accordance with subsection (1) there is an agreement within the meaning of paragraphs (b), (c) and (e) of section 933(3) between the inspector or other officer and the appellant in relation to the assessment, the inspector shall give effect to the agreement and, if the agreement is that the assessment is to stand or is to be

amended, the assessment or the amended assessment, as the case may be, shall have the same force and effect as if it were an assessment in respect of which no notice of appeal had been given.

(9) Every rehearing of an appeal by the Court under this section shall be held in camera.

(10) Every regulation made under this section shall be laid before Dáil Éireann as soon as may be after it is made and, if a resolution annulling the regulation is passed by Dáil Éireann within the next 21 days on which Dáil Éireann has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.”

Amendment of section 1078 of the Act of 1997

5.- Section 1078 of the Act of 1997 is amended by the insertion of the following subsection:

“10(a) Where a person is convicted of a revenue offence, the Court may, if it is satisfied that there are special or substantial reasons for so doing, order the person to pay to the Revenue Commissioners specific and ascertainable exceptional expenses (excluding remuneration and usual expenses), which have been incurred by the Revenue Commissioners in relation

to the prosecution of the offence, such expenses to be measured by the Court.

(b) In exercising the discretion conferred by paragraph (a), the Court may have regard to:

(i) the imposition of penalties or interest by the Revenue Commissioners in relation to proceedings against the accused arising from the same facts,

(ii) the means of the accused.”

Amendment of section 1086 of the Act of 1997

6.- Section 1086 of the Act of 1997 is amended:

(a) in subsection (4)(c) by the substitution of “€25,000” for “€12,700” (inserted by section 126(1)(d)(iii) of the Finance Act 2002).

(b) by the insertion of the following subsection after subsection (4):

“(4)(A) The amount specified in subsection (4) (c) shall stand increased annually by reference to the All Items Consumer Price Index Number as compiled by the Central Statistics Office and expressed on the basis that the Consumer Price Index Number at mid-November [200x]¹ is 100.”

¹ Insert year preceding enactment of this Act.

EXPLANATORY NOTES

Section 2 refers to recommendations in paragraphs 7.18, 7.36, 7.52, 7.62, 7.83, 3.34, 7.46 and 7.109.

Section 3 refers to the recommendation in paragraph 7.77.

Section 4 refers to the recommendation in paragraph 7.105.

Section 5 refers to the recommendation in paragraph 5.43.

Section 6 refers to the recommendation in paragraph 2.14.

**APPENDIX B LISTS COMPILED PURSUANT TO
SECTION 1086, TAXES CONSOLIDATION
ACT 1997¹**

Table 1: List of Tax Defaulters

| <i>Date Published</i> | <i>Failure to lodge IT</i> | <i>Failure to lodge CT Returns</i> | <i>Failure to lodge P35 Returns</i> | <i>Failure to lodge VAT Returns</i> |
|----------------------------|--------------------------------|--|---|---|
| 31/12/1999 | 279 | 13 | 0 | |
| 31/03/2000 | 248 | 5 | 0 | |
| 30/06/2000 | 237 | 13 | 32 | |
| 30/09/2000 | 175 | 4 | 47 | |
| 31/12/2000 | 257 | 13 | 0 | |
| <i>Yearly Total</i> | 917 | 35 | 79 | 0 |
| 31/03/2001 | 279 | 26 | 24 | |
| 30/06/2001 | 81 | 1 | 18 | |
| 30/09/2001 | 189 | 5 | 6 | |
| 31/12/2001 | 476 | 17 | 10 | |
| <i>Yearly Total</i> | 1,025 | 49 | 58 | 0 |
| 31/03/2002 | 309 | 7 | 17 | |
| 30/06/2002 | 216 | 17 | 29 | |
| 30/09/2002 | 158 | 5 | 12 | |
| 31/12/2002 | 263 | 31 | 9 | |
| <i>Yearly Total</i> | 946 | 60 | 67 | 0 |
| 31/03/2003 | 142 | 11 | 24 | |
| 30/06/2003 | 174 | 15 | 14 | 3 |
| 30/09/2003 | 86 | 15 | 38 | |
| 31/12/2003 | 185 | 11 | 6 | 6 |
| <i>Yearly Total</i> | 587 | 52 | 82 | 9 |

¹ These tables have been obtained from the Revenue Commissioners.

Table 1: List of Tax Defaulters continued

| <i>Date Published</i> | <i>Excise Licence Offences²</i> | <i>Other Offences³</i> | <i>Total No. of Cases Published where a Fine or Penalty was imposed by a Court</i> | <i>Settlements Published</i> |
|-----------------------|--|-----------------------------------|--|------------------------------|
| 31/12/1999 | | 0 | 292 | 60 |
| 31/03/2000 | | 0 | 253 | 77 |
| 30/06/2000 | | 1 | 283 | 60 |
| 30/09/2000 | | 0 | 226 | 68 |
| 31/12/2000 | | 0 | 270 | 53 |
| Yearly Total | 0 | 1 | 1,032 | 258 |
| 31/03/2001 | | 1 | 330 | 75 |
| 30/06/2001 | | 0 | 100 | 55 |
| 30/09/2001 | | | 200 | 73 |
| 31/12/2001 | | 6 | 509 | 92 |
| Yearly Total | 0 | 7 | 1,139 | 295 |
| 31/03/2002 | 3 | | 336 | 46 |
| 30/06/2002 | | 2 | 264 | 72 |
| 30/09/2002 | | | 175 | 66 |
| 31/12/2002 | | 2 | 305 | 88 |
| Yearly Total | 3 | 4 | 1,080 | 272 |
| 31/03/2003 | | | 177 | 285 |
| 30/06/2003 | 74 | 4 | 284 | 419 |
| 30/09/2003 | 84 | 2 | 225 | 371 |
| 31/12/2003 | 114 | 4 | 326 | 182 |
| Yearly Total | 272 | 10 | 1,012 | 1,257 |

² Keeping marked mineral oil in Fuel Tank, Selling Marked Mineral Oil for use in Fuel Tank, Failure to hold Mineral Oil Licence, Cigarette Smuggling, Failure to hold Auctioneers Licence, Failure to display Gaming/Amusement Licence, Failure to hold Liquor Licence, Smuggling.

³ See Table 2.

Table 2: List of Tax Defaulters

| Date Published | Income Tax | | | Delivery of Incorrect VAT & IT Returns | Delivery of Incorrect P35 Returns | Total Other Offences |
|----------------|--|-------------------------------------|-------------------------------|--|-----------------------------------|----------------------|
| | Delivery of Incorrect IT Return and Related Offences | Furnish Incorrect Information re IT | Failure to Furnish IT Returns | | | |
| 30/06/2000 | | | 1* | | | 1 |
| 31/03/2001 | | | | | | 1 |
| 31/12/2001 | 1 | | | 2 | | 6 |
| | | | | | | |
| 30/06/2002 | 1 | 1 | | | | 2 |
| 31/12/2002 | | | | 1 | | 2 |
| | | | | | | |
| 30/06/2003 | 2 | | | | | 4 |
| 30/09/2003 | 1 | | | | | 2 |
| 31/12/2003 | | | 1 | | 1 | 4 |

* Tried on Indictment

Table 2: List of Tax Defaulters continued

| Date Published | VAT | | | | | | CT |
|----------------|--|----------------------|---|-----------------------------|--------------------------------------|----------------------------------|----|
| | Delivery of Incorrect IT Return and Related Offences | Failure to Remit VAT | Consenting in Failure to Lodge VAT Return | Failure to keep VAT Records | Claim for VAT Repayment not entitled | Delivery of Incorrect CT Returns | |
| 30/06/2000 | | | | | | | |
| 31/03/2001 | 1 | | | | | | |
| 31/12/2001 | 3 | | | | | | |
| 30/06/2002 | | | | | | | |
| 31/12/2002 | 1 | | | | | | |
| 30/06/2003 | 1 | 1 | | | | | |
| 30/09/2003 | | | 1 | | | | |
| 31/12/2003 | | | | | 1 | 1 | |

APPENDIX C LIST OF LAW REFORM COMMISSION PUBLICATIONS

| | |
|---|-------|
| First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984) | €0.13 |
| Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977) | €1.40 |
| Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977) | €1.27 |
| Working Paper No 3-1977, Civil Liability for Animals (November 1977) | €3.17 |
| First (Annual) Report (1977) (Prl 6961) | €0.51 |
| Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978) | €1.27 |

| | |
|---|-------|
| Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (December 1978) | €1.27 |
| Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harboursing of a Child (February 1979) | €1.90 |
| Working Paper No 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979) | €1.27 |
| Working Paper No 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979) | €1.90 |
| Second (Annual) Report (1978/79) (Prl 8855) | €0.95 |
| Working Paper No 9-1980, The Rule Against Hearsay (April 1980) | €2.54 |
| Third (Annual) Report (1980) (Prl 9733) | €0.95 |
| First Report on Family Law – Criminal Conversation, Enticement and Harboursing of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981) | €2.54 |

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