
**CONSULTATION PAPER
ON
A FISCAL PROSECUTOR
AND
A REVENUE COURT**

(LRC CP 24 - 2003)

IRELAND
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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 sixty nine Reports containing proposals for reform of the law; eleven Working Papers; twenty three Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and twenty three Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in Appendix D to this Consultation Paper.

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INTRODUCTION

Background to this Paper

1. This Paper 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, asked the Law Reform Commission to consider the following Reference:

“[t]he current programme of the Law Reform [Commission] includes a study of Tribunals of Inquiry which will cover the issues recommended by the Parliamentary Inquiry into D.I.R.T. The Government has recently requested that the Law Reform [Commission] also consider the issues of a fiscal prosecutor and a revenue court which were also among the recommendations of the Parliamentary Inquiry.”¹

Given the reference in the first sentence of this quotation to the Parliamentary Inquiry into D.I.R.T., we think it appropriate to quote, even at length, what the Parliamentary Inquiry said on this subject. It stated that:

“[t]he argument for a Revenue Court is not clear-cut. Indeed there is not even a single vision of what a Revenue Court might be or represent. Furthermore, we were concerned to explore whether a Revenue Court, whatever shape it might take, was the answer or were there other institutional and working reforms that might deal with the matter?”

¹ *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.

A Revenue Court might be constituted to have financial and accountancy assessors available to advise the Court. Likewise a fiscal prosecutor might be singularly focused on Revenue offences and have the necessary specialist expertise in the office ... A Revenue Court raises some very important issues legally and constitutionally. Among these is the question of prosecution. In short would we accompany a Revenue Court with the establishment of a separate prosecution service – a fiscal prosecutor – for that Court? At present all prosecutions of indictable offences go through the DPP ...

Findings of the Sub Committee

The Sub-Committee finds that the case has not been made for the introduction of a Revenue Court and fiscal prosecutor. The Sub-Committee notes the concerns expressed by the DPP and by the Revenue Solicitor in relation to juries and to volume of cases forthcoming and these concerns are recognised in its recommendation

The Sub Committee recommends that –

The Department of Finance in conjunction with the Office of the Attorney General undertake a more detailed study of the benefits of

a Revenue Court and

a fiscal prosecutor

And report to the Public Accounts Committee by 31 March 2002.”² (Original emphasis)

2. Part of the inspiration for this Paper was undoubtedly the growing awareness that some members of the higher echelons of Irish society had successfully evaded tax when high taxes had been afflicting Irish society. This raised questions about the design and operation of the tax system. These questions concentrated, in particular, on the operation of the criminal and civil revenue jurisdiction.

² *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

3. While we have considered the adoption of the two new institutions proposed in the reference, in order to do a thorough analysis we have also examined the possibility of reforming the existing tribunals and courts: on the civil side, the Appeal Commissioners, Circuit Court and Superior Courts; and, in the criminal field, the present system for preparing and bringing revenue prosecutions and the criminal jurisdiction of the District and Circuit Court. Even interpreting our terms of reference thus broadly, we have stopped short of the extensive administrative system by which the Revenue Commissioners settle the tax affairs of the citizen. While we do sketch this system, in the first two chapters, so as to establish the context against which the civil and criminal revenue jurisdictions operate, we do not consider any reform of this system.

4. Another boundary which we have observed concerns customs and excise. This appears to be a discrete area, separate from general revenue matters. Moreover, the bringing of prosecutions in this sphere follows a well established pattern and the system is generally regarded as operating satisfactorily. Our terms of reference did not direct us to deal specifically with this subject.

5. This Paper starts with three chapters describing the present system. Chapter 1 outlines the history of enforcement, from Independence to the present. It describes certain episodes of high profile tax evasion and also emphasises the changes of the last decade or two, in particular the introduction of self assessment and the recent modernisation and reorganisation of the Revenue Commissioners. Chapter 2 deals with civil penalties, highlighting the possible impact of the European Convention on Human Rights. The statutory provisions governing the imposition of penalties is set out in Appendix B, being in column one to Schedule 29 *Taxes Consolidation Act 1997* (“*TCA 1997*”). The appeal mechanisms available to challenge tax assessments are outlined in detail in Chapter 3. In addition to outlining the operation of the present system, Chapter 3 addresses a number of specific reforms to the civil revenue jurisdiction, which is presently vested in the Appeal Commissioners, the Circuit Court and Superior Courts. Chapter 4 considers whether a separate civil revenue court should be created.

6. The remaining chapters deal with the treatment of revenue offences. Chapter 5 scrutinises offences, including statistics in

respect of prosecutions actually brought. It also deals with prosecution policy in Ireland and in the United Kingdom. (Figures for prosecutions in the UK are in Appendix C). Chapter 6 describes the workings of the public prosecution system, and surveys the existing system for bringing revenue prosecutions. It also considers changes, in particular, the possibilities of replacing the Director of Public Prosecutions (in the revenue field) by a separate Director of Fiscal Prosecutions; and secondly raises the question for discussion of merging the prosecution and investigation functions in the one office. Chapter 7 sets out the case for various radical changes to the existing criminal trial system including a specialised revenue court.

7. Chapter 8 summarises our recommendations and conclusions. Our recommendations are relatively moderate. They should perhaps be seen in the following context. First, this is a time of great flux: the new arrangements sketched in Chapter 1 are still bedding down; and other reviews (see paragraph 1.56), including one by the Revenue Powers Group, which is to report to the Minister for Finance by 31 October 2003. Secondly, the core responsibility of the Revenue Commissioners is to enforce compliance with the Tax Acts. Prosecution of tax offences is only one of the many ways of dealing with tax recalcitrance. It is only used, here and in other jurisdictions, in the most serious of cases. The experience in comparable jurisdictions is set out in Appendix A, where we consider the system used for the collection of revenue in two other countries, the Netherlands and New Zealand. Thirdly, we have considered not only the possible ways of improving the prosecution system, but also any points in respect of which the position of the taxpayer requires stronger protection.

8. The Commission invariably publishes in two stages: first, the Consultation Paper and then the Report. The Paper is intended to form the basis for discussion and accordingly the recommendations, conclusions and suggestions contained herein are provisional. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation, including a colloquium attended we hope by a number of interested and expert people (details of the venue and date of which will be announced later). Submissions on the provisional recommendations included in this Consultation Paper are also welcome. Secondly, the Report also gives us an opportunity which is especially welcome with

the present subject not only for further thoughts on areas covered in the Paper, but also to treat topics, not yet covered. In order that the Commission's final Report may be made available as soon as possible, those who wish to make their submissions are requested to do so in writing to the Commission by **31 October 2003**.

CHAPTER 1 HISTORY OF ENFORCEMENT

A The Early Years

1.01 Following the establishment of the First Dáil Éireann, a new Department was created for the collection of income tax which would otherwise have been payable to the Inland Revenue.¹ From April 1920, the IRA carried out raids on Inland Revenue offices, which effectively ended tax collection in southern Ireland until the establishment of the Free State. However, following the ending of the War of Independence and the signing of the Anglo-Irish Treaty,² the Irish and British authorities reached agreement in relation to the collection of taxes. Article 74 of the Constitution of Saorstát Éireann provided that nothing in the Constitution was to affect liability to pay tax in the year 1922-23 or previous years.

1.02 The Irish Free State Government, recognising that it could not function without revenue, established the Revenue Commissioners, even before the establishment of a general civil service structure. The Office of the Revenue Commissioners was established by the *Revenue Commissioners Order 1923*.³ The Order provided for a single Board of Revenue Commissioners, consisting of three Commissioners. One of the three Revenue Commissioners acts as Chairman and Accounting Officer. The Revenue Commissioners were assigned responsibility for tax assessment and collection. This

¹ Dáil Éireann passed a “Decree for the institution of a Department for the collection of Income Tax” in June 1920: Reamonn *History of the Revenue Commissioners* (Institute of Public Administration 1981) at 41. The tax collected in this period was at issue in *In re Reade, a bankrupt* [1927] IR 31, discussed at paragraph 1.06.

² Agreement for a Treaty between Great Britain and Ireland, signed in London, 6 December 1921. See schedule to *the Constitution of the Irish Free State (Saorstát Éireann) Act 1922* for the rest of the Articles of the Agreement.

³ SI No 2 of 1923.

was previously performed in Ireland by the British Inland Revenue and Customs and Excise authorities.

1.03 Although the Order provided for ministerial control over the Revenue Commissioners, it was recognised as essential that there should be no room for favouritism, nepotism or discrimination in the process by which the State collects tax from its citizens. Accordingly, from the early days the principle of independent administration was incorporated into the relationship between the Minister and the Revenue Commissioners. The Minister for Finance, Mr WT Cosgrave explained the relationship in the following manner:

“While the Revenue Commissioners will be responsible directly to the Minister for Finance for the administration of Revenue Services, the Commissioners will act independently of Ministerial control in exercising the statutory powers vested in them in regard to the liability of the individual tax payer.”⁴

1.04 This principle reflects the right of citizens to have their tax liability determined in accordance with statute, “without any political colouration in operations or interpretation.”⁵

1.05 The Office of the Revenue Commissioners was originally divided into the following departments: Customs and Excise, Income Tax, Estate Duty Office, Revenue Secretariat, Common Services, the Stamping Office and the Revenue Solicitor. Customs & Excise represented the largest part of the Office and was responsible for over 75% of revenues then collected. The assessment and collection of income tax, sur-tax and corporation profits tax was controlled by the Chief Inspector of Taxes. The Estate Duty Office dealt mainly with Death Duties. The Revenue Secretariat was involved in framing Revenue legislation, budget proposals and changes in taxation or duties. It was also required to ensure uniformity of practice throughout the country. The Stamping Branch was responsible for Government security printing. The Revenue Solicitor handled the legal issues involved in the assessment and collection of taxes.

⁴ Reamonn *History of the Revenue Commissioners* (Institute of Public Administration 1981) at 59.

⁵ *Ibid* at 285.

1.06 Despite the express provision of Article 74 of the 1922 Constitution, referred to in paragraph 1.01, tax liabilities accrued prior to the Anglo-Irish Treaty remained in arrears. The right of the Revenue Commissioners to collect tax for years prior to 1922 was challenged but upheld by the Supreme Court in the *Reade* case.⁶ The Government introduced an amnesty for those making full disclosures made prior to 20 November 1923. However, this failed to result in the payment of tax arrears. The matter was finally resolved by the 1932 Budget. Taxpayers were required to furnish the Revenue Commissioners, by 31 December 1932, with accounts and information needed to compute the underpaid tax. In return for this, the Revenue Commissioners accepted a sum not exceeding seventy-five per cent of the total of all duties underpaid from 1914 as full settlement. There were no further penalties, and no interest was charged. The Budget purported to deal strictly with those who failed to take advantage of these concessions.

1.07 In 1932 the Minister for Finance, Mr Sean MacEntee, proposed extending the Revenue Commissioners' powers to making Excess Profits Duty assessments in order to facilitate the bringing to book of taxpayers who refused to take advantage of this concession. He also committed himself to exploring "every method by which the law can be tightened up, so as to secure the punishment, if necessary by imprisonment, of taxpayers who in the future offend in this respect [income tax frauds]."⁷ He regarded "the protection of honest taxpayers from the fraudulent practices of dishonest ones [as] clearly the duty of the legislature".⁸

1.08 The Revenue Commissioners continued to pursue tax evaders. Following this objective, an Investigation Branch had already been established in Dublin Castle in the 1920s, as "soon as staffing conditions began to permit".⁹ The Investigation Branch was staffed by experienced tax inspectors. It was given the task of identifying individuals who concealed all or part of their income and

⁶ In re *Reade*, a bankrupt [1927] IR 31.

⁷ 41 *Dáil Debates* Col 1517 (11 May 1932).

⁸ *Ibid.*

⁹ Reamonn *History of the Revenue Commissioners* (Institute of Public Administration 1981) at 106.

was required to assist those individuals in putting their tax affairs in order.¹⁰

1.09 Pursuing a similar theme, the Commission on Income Taxation was established in the 1957-58 to “enquire generally into the [present] system of taxation of profits and income, its scope and structure, including the provision for collection and for the prevention of evasion; its effects on the national economy, and the equity of its incidence...”.¹¹ In response to recommendations contained in the Commission’s First Report, the *Finance (No 2) Act 1959* introduced the “‘Pay As You Earn’ (PAYE) system for taxing salaries and wages.”¹² The Revenue Commissioners reported to the Commission on Income Taxation in January 1958 that there were as many as “80,000 taxpayers who owed tax for one or more years since 1950-51”.¹³

1.10 In response to the recommendations concerning tax evasion contained in that Commission’s Seventh Report, the Revenue Commissioners were granted new powers to tackle evasion by the *Finance Act 1963*. Section 16 of the 1963 Act required taxpayers to either deliver or produce their business records and gave the Revenue Commissioners the power to take copies. A complete review of the penalties section was also undertaken and as a result Part VIII of the 1963 Act introduced penalties for failing to make returns or for fraudulently or negligently making certain returns (see paragraphs 2.14-2.18 and 2.46-2.98 for a discussion on the present law on civil penalties).

1.11 The Revenue Commissioners continued their campaign against tax evasion in the late 1970s. By then, the burden on the PAYE tax-payer was significant and was the subject of high-profile

¹⁰ Reamonn *History of the Revenue Commissioners* (Institute of Public Administration 1981) at 106.

¹¹ Terms of Reference. It issued seven reports between 1958 and 1962. Corrigan *Revenue Law* Volume I (Round Hall Sweet & Maxwell 2000) at 8.

¹² PAYE does not impose a charge to tax it is merely a collection system for tax due under what is currently Schedule E of the *TCA 1997*.

¹³ Reamonn *History of the Revenue Commissioners* (Institute of Public Administration 1981) at 150.

political complaints. One element of these protests was the belief that the self-employed sector of the community, including farmers, was not paying an equitable share. In response to these complaints, the Commission on Taxation was established in 1980.¹⁴ Special Enquiry units to tackle the black economy were also established. The units identified 10,000 new cases of tax liabilities in 1979, their first year of operation.¹⁵

1.12 Prior to 1983, various tax acts had specified penalties for certain revenue offences. However, the maximum penalty was six months imprisonment. The “offences related mainly to making or assisting in the making of false statements or false representations for the purpose of obtaining any allowance, reduction, rebate or repayment of tax.”¹⁶ The *Finance Act 1983* extended the variety of offences and increased the potential penalties to a maximum fine of IR£1,000 (€1,270) and imprisonment not exceeding 12 months on summary conviction and a maximum fine of IR£10,000 (€12,700) and 5 years imprisonment.¹⁷

B New Era

1.13 Self-assessment was introduced in respect of non-PAYE income in 1988, on foot of recommendations contained in the Fifth Report of the Commission on Taxation.¹⁸ It was subsequently adopted for corporation tax and capital gains tax. Prior to the introduction of self-assessment, an amnesty was introduced to clear arrears.¹⁹ The introduction of self-assessment was a watershed. The

¹⁴ The Commission on Taxation published five reports between 1980 and 1985.

¹⁵ O’Hanlon, Ryan and Hodson *Revenue Over the Years* (Ryan Revenue Commissioners 1998) at 64.

¹⁶ *Fifth Report of the Commission on Taxation* (Government Publications 1985) paragraph 14.29, at 204.

¹⁷ Section 94 (2 & 3) of the *Finance Act 1983*.

¹⁸ *Fifth Report of the Commission on Taxation* (Government Publications 1985) paragraph 4.71 at 103. Although there is a common misconception that PAYE taxpayers are exempt from making returns in respect of their other non-PAYE income, self assessment obligations extend, equally, to PAYE taxpayers in respect of non-PAYE income.

¹⁹ Section 72 Finance Act 1988.

onus to ensure compliance with tax obligations was shifted from the Revenue Commissioners to the taxpayer. Taxpayers were obliged to submit returns themselves, without receiving an estimated assessment from the Revenue Commissioners. The self-assessment system was intended to lead to the “more prompt collection of tax, more efficient use of revenue resources, concentrating on where there is a genuine need”.²⁰ The philosophy underlying the system was to shift responsibility for submitting correct returns to the taxpayer and thereby create more time for the Revenue Commissioners to audit cases to verify the accuracy of returns (see paragraphs 2.06-2.11 for a discussion on the functions of audits).

1.14 About the same time, the Revenue Commissioners began to focus on voluntary compliance, improving communications and increasing public confidence. In 1989, the Revenue Commissioners first published a Charter of Rights, to inform customers of their rights when conducting business with the Revenue Commissioners. In 1993, the Government introduced another amnesty, collected IR£260 million (€330.13 million) but also encouraged much cynicism about short-term expediency and unfair favouring of the sector culpable of often deliberate long-term tax evasion.²¹

1.15 As we shall see in paragraphs 1.45-1.47, in the 1990s, side by side with the self-assessment system, the Revenue Commissioners pursued a stronger prosecution policy²²

C High Profile Tax Evasion

(1) *The Tribunals of Inquiry*

1.16 In 1994, a Tribunal of Inquiry into the Beef Processing Industry (the Beef Tribunal) discovered massive tax evasion at

²⁰ 370 *Dáil Debates* Col 2444-2445 (11 December 1986) Minister for Finance Mr John Bruton.

²¹ *Waiver of Certain Tax, Interest and Penalties Act 1993*. See O’Hanlon, Ryan and Hodson, *Revenue Over the Years* (Ryan Revenue Commissioners 1998) at 73.

²² See Chapter 5 for a detailed discussion of the Revenue Commissioners’ prosecution policy.

Goodman International and its subsidiary companies.²³ The company paid employees under the counter, operated a special remuneration scheme for its senior executives and deliberately did not return PAYE and PRSI from many of its employees.²⁴ A total of IR£5.5 million (€6.98 million) of payments were made to employees of the Goodman Group between 1987 and 1990 without the appropriate statutory deductions being made. The Revenue Commissioners did not discover the tax evasion scheme until the evidence was uncovered by the tribunal.

1.17 The Tribunal of Inquiry (Dunnes Payments), popularly known as the McCracken Tribunal, established that payments were made to and benefits conferred on certain persons who were members of the Houses of the Oireachtas between 1 January, 1986, and 31 December, 1996. The former Taoiseach Mr Charles J Haughey was found to have received over IR£1 million (€1.27 million) from Mr Ben Dunne. Payments to the former Fine Gael Minister Mr Michael Lowry were also uncovered. Both men had evaded paying tax on these gifts. However, the terms of reference of the Tribunal did not extend to investigating these payments.

1.18 Therefore, a new Tribunal, the Moriarty Tribunal was established in September 1997 to investigate both the payments to Mr Haughey and Mr Lowry. Its terms of reference include the making of recommendations “for the protection of the State’s tax base from fraud or evasion in the establishment and maintenance of offshore accounts, and to recommend whether any changes in the tax laws should be made to achieve this end.”²⁵ The Tribunal was requested to examine the independence of the Revenue Commissioners and whether the Revenue Commissioners “availed fully, properly and in a timely manner in exercising the powers available to them”²⁶ in collecting tax due by Mr Lowry and Mr Haughey. In addition, it is

²³ See generally *Report of the Tribunal of Inquiry into the Beef Processing Industry 1994* (Prl 1007).

²⁴ O’Toole “How soon we can forget, we Candides” *The Irish Times* 2 July 2002 at 14.

²⁵ Resolution passed by Dáil Éireann on 11 September, 1997 and by Seanad Éireann on 18 September, 1997 pursuant to *Tribunals of Inquiry (Evidence) Acts, 1921 and 1979 (No. 2) Order, 1997* at paragraph p.

²⁶ *Ibid* at paragraph j.

conducting inquiries into Ansbacher deposits to ascertain whether any payments were made to politicians from the deposits, and, if so, from where did the money originally come from.²⁷ Various tax reforms are said to wait on the final report of the Moriarty Tribunal.

(2) *The Ansbacher Report*

1.19 The McCracken Tribunal was the first to uncover what has become known as the Ansbacher deposits.²⁸ This led to the discovery of evidence suggesting that numerous revenue offences were committed by some leading politicians and business people in the 1970s and 1980s, who were taking advantage of a “system whereby Irish depositors could have their money off-shore, with no record of their deposits in Ireland.”²⁹ In the wake of these discoveries, the then Minister for Enterprise, Trade and Employment, Ms Mary Harney, (“the Minister”) appointed an authorised officer in September 1997 to investigate Celtic Helicopters whose debts and a loan had been discharged and supported by Ansbacher deposits.

1.20 Following receipt of the confidential report of the authorised officer the Minister made an application under section 8 of the *Companies Act 1990*, to the High Court for the appointment of Inspectors to investigate and report on the affairs of Ansbacher (Cayman) Limited in September 1999. The Inspectors published their Report in July 2002. The Report concluded, *inter alia*, that the affairs of Ansbacher were conducted with intent to defraud a creditor of some of the bank’s clients, that is the Revenue Commissioners, and

²⁷ The “Ansbacher accounts” refer to accounts which held money on deposit in certain Irish banks by offshore banks in memorandum accounts for the benefit of Irish residents, some of which were used to evade tax. See paragraphs 1.19-1.21.

²⁸ Ansbacher (Cayman) Limited (“Ansbacher”) was established in 1971 in the Cayman Islands as Guinness Mahon Cayman Trust Ltd, a subsidiary of Guinness Mahon (Ireland) Limited (Guinness and Mahon), to provide “trust and corporate services to wealthy customers of the Guinness Mahon Group.” Report of the Inspectors Appointed to Enquire into the Affairs of Ansbacher (Cayman) Limited (Official Publications 2002) at 30. The bank has since both changed names and ownership. For convenience the bank will be referred to as ‘Ansbacher’ in this Paper.

²⁹ Tribunal Report at 38. The money held on deposit would have been taxable if the depositors were resident in Ireland.

that Ansbacher may have committed a number of criminal revenue offences.

1.21 In addition, a Special Project Team within the Revenue Commissioners began investigating the Ansbacher accounts in October 1999.³⁰ At the end of 2001, the Revenue Commissioners were investigating 191 Ansbacher type cases and other cases involving offshore funds and deposits. €21.86 million had been collected by way of settlement.³¹

1.22 As of June 2003, the Revenue Commissioners were dealing with 289 cases: 62 cases involve “non-residents”, 12 availed of the 1993 amnesty, and the identity of account holders is unknown in four cases, six have been settled and 211 are being actively investigated. So far the Ansbacher investigation has yielded approximately €22 million in lost taxes. The Revenue Commissioners are continuing to pursue the tax lost and will consider prosecutions where there is a realistic chance of prosecuting successfully. The Chairman of the Revenue Commissioners, Mr Frank Daly has, however, noted that such prosecutions would be difficult as the evidence and documentation needed to bring a prosecution are offshore and some of the potential defendants are either offshore or dead.³²

(3) *The DIRT Inquiry*

1.23 Press allegations of widespread tax evasion by Irish depositors through the use of bogus non-resident accounts emerged in 1998.³³ There were various reactions to these revelations. First, the

³⁰ The Offshore Assets Unit was set up in response to the Ansbacher revelations. It is a task force headed by five experienced investigators. The Unit’s activities have extended beyond Ansbacher to investigate other possible tax evasion schemes in the Isle of Man, the Channel Islands, Liechtenstein and the Cayman Islands. See *The Sunday Times* 14/07/2002 at 1.

³¹ Committee of Public Accounts 10 April 2003, Chairman of the Revenue Commissioners Mr Frank Daly.

³² Committee of Public Accounts 10 April 2003, Chairman of the Revenue Commissioners Mr Frank Daly.

³³ The Revenue Commissioners defined ‘bogus non-resident accounts’ 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

Finance Act 1999 introduced a number of new powers for the Revenue Commissioners. The Act extended the Revenue Commissioners' powers in relation to: access to information and documents held by financial institutions and other parties with information; access to books, records and information in the possession of the taxpayer; and the verification of the returns made by financial institutions of deposit interest retention tax ("DIRT").³⁴ The Revenue Commissioners would later use these powers both to establish the extent of DIRT underpayments by financial institutions in its look-back audit and to gain access to certain details relating to the Ansbacher accounts.³⁵

1.24 Secondly, the Comptroller and Auditor General ("C&AG")³⁶ and the Committee on Public Accounts ("PAC") carried out investigations which revealed the extent of the tax fraud and the public administration's awareness of serious tax evasion.³⁷ The investigation by the Comptroller and Auditor General led on to the Dáil PAC inquiry into the findings of the Comptroller and Auditor General. A Sub-Committee of the Dáil PAC on Certain Revenue Matters ("DIRT Inquiry") was established for this purpose.

1.25 The DIRT Inquiry revealed large-scale tax evasion by both depositors and financial institutions taking deposits. Accounts had been treated by financial institutions as being exempt from deposit

entitled to interest on the account while, in fact, a person so beneficially entitled was ordinarily resident (or since 1994, resident) in the State." Statement of Practice SP-GEN 1/01 (Revenue Commissioners 2001)

³⁴ Section 207 *Finance Act 1999*.

³⁵ "Revenue Powers" Tax Strategy Group Papers TSG 99/22. See footnote 30.

³⁶ *First Report of Investigation into the Administration of Deposit Interest Retention Tax and Related Matters during the period January 1st, 1986, to December 1st, 1998* (Comptroller and Auditor General, Government Publications 1999).

³⁷ The matter was discussed at meetings of the Committee of Public Accounts in April and October 1998 and at public hearings from 31 August 1999 to 12 October 1999. See *First Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 1999). See also Law Reform Commission *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (LRC CP 22-2003) paragraphs 4.13-4.21.

interest retention tax on the grounds that nobody ‘ordinarily resident’ in the State was beneficially entitled to interest on the account when, in fact, such a person was ordinarily resident in the State.³⁸ According to the Committee of Public Accounts, Sub Committee on Certain Revenue Matters, the Revenue Commissioners were also implicated in the scandal. The inquiry revealed the existence of SIM 263 which was “a general order to inspectors of taxes ... instructing inspectors not to use powers of general inspection given to them under the law of declarations of non-residency, thus ensuring that the evasion would persist”.³⁹

1.26 The DIRT Inquiry issued three reports. In its First Report in December 1999, the Public Accounts Sub-Committee recommended, among other things, that the Revenue Commissioners undertake a full look-back audit of all the financial institutions from April 1986 to 1998; that modern legislation providing a framework for the Revenue Commissioners be introduced; and that a review of the Revenue Commissioners’ independence, accountability, organisation and structure be undertaken. In response to the last of these recommendations, the Minister for Finance established a Steering Group to oversee an examination of Revenue.⁴⁰

1.27 The Steering Group, established by the Minister for Finance, submitted its findings to the Minister in August 2000 in a report commonly known as the “Blue Book”.⁴¹ The Group recognised the need to restore public confidence in the Revenue Commissioners. It recommended the introduction of “greater transparency and accountability in the administration of the tax system to demonstrate that there is an objective and even-handed approach to all taxpayers”;⁴² a radical restructuring of the Revenue

³⁸ Revenue’s Statement of Practice SP-GEN 1/0.

³⁹ *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

⁴⁰ The Steering Group was composed of high level officials from the Department of Finance, the Revenue Commissioners, the UK Institute of Directors and a consultancy firm, Prospectus Strategy Consultants.

⁴¹ *The Report of the Steering Group on the Review of the Office of the Revenue Commissioners* (Department of Finance Government Publications 2000).

⁴² *Ibid* at 4.

Commissioners' organisation in order to meet the changing needs of taxpayers and continual adaptation of its voluntary compliance and tax evasion strategies. Some of its recommendations are discussed at paragraphs 3.31-3.32.

1.28 The Second Report of the DIRT Inquiry reproduced a report outlining the Revenue Commissioners look-back audit, from April 1986 to 1998 which the Revenue Commissioners completed in 2000.⁴³ The Revenue Commissioners recovered a total of €220 million from the financial institutions, comprising DIRT which should have been deducted by the financial institutions, together with interest and penalties thereon. The Revenue Commissioners then sought recovery of the underlying tax liabilities, which related to the funds deposited in the bogus non-resident accounts. Where a holder of a bogus non-resident account availed of the amnesty by making full-disclosure and paying the tax due prior to 15 November 2001, this disclosure was treated as a voluntary disclosure, and the aggregate amount of interest and penalties was limited to a maximum of 100% of the unpaid tax, then the Revenue Commissioners guaranteed not to bring a prosecution against the account holder.⁴⁴ 3,675 account holders availed of the opportunity to disclose voluntarily 8,380 accounts and paid €227 million.⁴⁵ The Revenue Commissioners have stated that they are now pursuing those who failed to make a disclosure or payment, targeting suitable cases with a view to criminal prosecution, recovering settlements with payment of full statutory interest and penalties and publishing the names and liability of defaulters.⁴⁶ Letters were issued in October 2002 and January 2003 to 35,000 accounts. By April 2003, €159 million has been collected as a result of these letters, which were issued after the

⁴³ The report was prepared by the Revenue Commissioners under section 904B of the *TCA 1997*, which was inserted by section 68 of the *Finance Act 2000*.

⁴⁴ *Statement of Practice* SP-GEN 1/01 (Revenue Commissioners 2001) at 3.

⁴⁵ Revenue Commissioners *Annual Report 2001* at 26.

⁴⁶ *Ibid* at 7-8. *Statement of Practice* SP-GEN 1/01. See Part 2 of the quarterly list of defaulters for July-Sept 2002 where the details of 11 settlements involving Revenue NIB Investigation cases and Part 2 of the October-December 2002 quarterly list which included the details of 7 NIB Investigation cases, 31 Revenue Bogus Non-resident Account cases.

incentive ceased in November 2001. The DIRT Inquiry has resulted in the collection of €606 million.⁴⁷

1.29 The DIRT Inquiry issued the final of its three reports in January 2001, in which it recommended a radical restructuring of the Revenue Commissioners. An overhaul of the Board of the Revenue Commissioners was recommended with the setting up of a new Board comprising three executive and three non-executive directors. However, the legislation required to introduce changes to the Board will not be published until after the Moriarty Tribunal has completed its work. It has been decided to await the report of the Tribunal as it may contain suggestions which will influence the content of the legislation since the Tribunal's terms of reference include consideration of the independence of the Revenue Commissioners in the performance of their functions.⁴⁸ The DIRT Inquiry's Final Report also recommended that the Department of Finance and the Office of the Attorney General carry out a more detailed consideration of the benefits of a Revenue Court and Fiscal Prosecutor.⁴⁹ This recommendation was the basis for the Attorney General's Reference in relation to the present Paper.

(4) *The Comptroller and Auditor General's Examination of Revenue Write Offs*

1.30 The C&AG discovered evidence of deliberate abuse of the tax system, when examining the circumstances in which the Revenue Commissioners wrote off larger tax cases in 2000. The C&AG's 2001 Annual Report outlined, among other matters, the case of a property developer who availed of the tax amnesty in 1989 and had €442,000 corporation tax written off although he and his family were involved in 35 active property development companies worth more than €125m during the 1990s. The C&AG made the following observations on his findings to the Committee of Public Accounts:

“[A]ll the information available in Revenue was not brought to bear on the decision to write-off tax at the time ...

⁴⁷ Committee of Public Accounts 10 April 2003.

⁴⁸ Terms of Reference m. See further paragraph 1.18.

⁴⁹ *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

Particular risks to tax that arise in property development and the bar trade need to be addressed. Tax clearance certification needs to be applied more stringently. There is clearly a need for better co-ordination of the work of the Revenue Commissioners and the Companies Registration Office... The specific Revenue programme to combat the phoenix company syndrome needed to be broadened to cover all business activities associated with principals who had previously abused limited liability.”⁵⁰

1.31 In 2003 the Chairman of the Revenue Commissioners, Mr Frank Daly, stated that many of the shortcomings identified by the C&AG had already been rectified and that pursuit of the type of case highlighted would be radically different today. He outlined the Revenue’s response to the C&AG’s findings to the Committee of Public Accounts.⁵¹ The Revenue Commissioners have increased their focus on the directors and principals behind companies. Mr Daly explained that

“[S]ince mid 2002, all limited company write-off cases over €75,000 are subject to a so-called commonality check. This is a check where the case worker examines all the linkages behind the case and, where appropriate, transfers that case to a dedicated pursuit unit now specialising in that type of work.”⁵²

1.32 Legal changes needed to combat deliberate non-payment of tax by companies, particularly in the public house, hotel and property development sectors are being explored. The Revenue Commissioners have had full access to the database of the Companies Registration Office since September 2000. It is anticipated that the “implementation of a new computerised risk analysis system in Revenue together with two data linking tools, links and profiler, already in place, will considerably improve” the availability of information on cases to Revenue staff.⁵³ The Revenue

⁵⁰ Committee of Public Accounts 13 February 2003.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

Commissioners are also “retrospectively applying the commonality checks in a look back at all business write-off cases in 2001 and early 2002 where tax written off exceeded €100,000.”⁵⁴

D The Shadow Economy⁵⁵

1.33 The preceding Part highlighted some instances of high profile tax evasion. More generally, it is difficult to estimate the extent of the shadow economy in Ireland and there is no definitive system for doing so. A number of factors, other than the nature of the phenomenon itself and the complex economic analysis required to measure it, have been identified as contributing to the difficulty of establishing the extent of the shadow economy, including the following:

- (i) until recently the political will to investigate these matters did not exist,⁵⁶
- (ii) the resources available to the Revenue Commissioners and the policies of enforcement

⁵⁴ Committee of Public Accounts 13 February 2003.

⁵⁵ We are defining the shadow economy as money on which tax should have been paid but is not. Although, the terms “shadow economy” and “black economy” are used interchangeably, the 1999 *Annual Report* of the C&AG distinguished the concepts. It stated that the shadow or informal economy has been defined as “that part of total economic activity which is excluded from the official measurement process, [whereas] the term ‘black economy’ is reserved for those components which are not recorded because of the desire of participants to conceal their activities”. C&AG *Annual Report* 1999 at 46.

The Report on the Shadow Economy used the term to refer to “the range of practices which result in a loss of tax and duty revenues to the Exchequer.” See *Report of the Revenue Partnership Intensive Group on the Shadow Economy* (Revenue Partnership Intensive Group on the Shadow Economy October 2001) at 7.

⁵⁶ McCullagh *Crime in Ireland: A Sociological introduction* (Cork University Press 1996) at 82.

operated influence the number of violations unearthed and recorded;⁵⁷

(iii) extensive research by academics and other researchers has not been carried out in the area.

1.34 However, the Report on the Shadow Economy⁵⁸ referred to three studies which contained estimations of the extent of the shadow economy in Ireland. A study carried out in 1993 by economist Gabriel P Fagan, estimated the value of the shadow economy to be somewhere in the range of IR£0.65 billion (€0.83 billion) and IR£1.3 billion (€1.65 billion), which would be between 5% and 10% of GNP. The same economist carried out another study in 1997 which estimated the shadow economy to be between 3% and 11%. A study by another economist concluded that the shadow economy was worth over 17% of GNP for the year 1998-99.⁵⁹ The Report on the Shadow Economy stated that “the shadow economy is an international phenomenon (studies suggest that its scale can vary, 20-30% of GDP in Mediterranean countries, 10% of GDP in the US)”.⁶⁰

1.35 The C&AG summarised the position in the following manner:

“[t]he damaging effect [of the shadow economy] goes further than the loss of tax revenue as an unfair advantage is given to operators in the black economy over compliant businesses and traders; there is a reduction in public confidence in the administration of tax; and, if a perception persists that the Revenue Commissioners are not effectively

⁵⁷ McCullagh “How Dirty is the White Collar? Analysing White Collar Crime” in O’Mahony *Criminal Justice in Ireland* (Institute of Public Administration 2002) at 160.

⁵⁸ *Report of the Revenue Partnership Intensive Group on the Shadow Economy* (Revenue Partnership Intensive Group on the Shadow Economy October 2001).

⁵⁹ Schneider cited in the *Report of the Revenue Partnership Intensive Group on the Shadow Economy* (Revenue Partnership Intensive Group on the Shadow Economy October 2001).

⁶⁰ *Report of the Revenue Partnership Intensive Group on the Shadow Economy* (Revenue Partnership Intensive Group on the Shadow Economy October 2001) at 9.

tackling non-compliance, the numbers operating in the black economy will grow.”⁶¹

E The Moral Shift

1.36 It seems likely, that insofar as such matters may be judged, a moral shift in relation to the attitudes to tax evasion began to occur in the late 1990s. Although there were always compliant taxpayers who strongly resented tax evasion, a culture which failed to discourage tax evasion prevailed during the 1980s and before. However, the introduction of self-assessment, the lowering of tax rates and the introduction of tax clearance certificates which brought more people within the tax net helped to change the public’s attitudes towards tax evasion and tax evaders. For many reasons, those who were traditionally tax-recalcitrant became more eager to come within the system.

1.37 In the first place, compliance was seen as a good commercial choice. In addition to this, there has been a political shift both within the tax administration and the PAYE sector. Under the 1993 amnesty the taxpayer was obliged to pay 15% of the total of arrears without any interest or penalties applying. This amnesty presented a huge opportunity to all errant taxpayers to become compliant. There was a perception that if defaulters did not take advantage of this amnesty they did not deserve a second chance. The

⁶¹ CAG *Annual Report* 1999 at 46. The Report on the Shadow Economy also recognised the self-perpetuating nature of the phenomenon and the distortion of competition resulting from businesses operating in the black economy. *Report of the Revenue Partnership Intensive Group on the Shadow Economy* (Revenue Partnership Intensive Group on the Shadow Economy October 2001) at 8.

Tax evasion is a classic example of ‘white-collar’ crime. Therefore, for the purposes of the following discussion the analysis of ‘white-collar’ crime shall be considered applicable to tax evasion unless the contrary is indicated and vice versa. Although ‘white-collar’ crime and tax evasion in particular, may not seem as threatening to society as conventional crime “at a purely financial level the cost of white-collar crime is...more substantial than that of most conventional crime. One well-organised fraud is likely to cost more and to create more victims than one ‘ordinary’ robbery.” McCullagh *Crime in Ireland: A Sociological introduction* (Cork University Press 1996) at 63.

amnesty contributed to informing public opinion and attitudes on tax evasion.

1.38 The *exposé* of such high profile tax evasion as disclosed by the Beef, McCracken, Moriarty and Flood tribunals and the Ansbacher report and the absence of high profile tax prosecutions led to public discontent based on the perceived inequality in the application of the law as depending on the social status of the perpetrator and whether the accused was a powerful and influential white-collar criminal or a small time common thief.

1.39 However, despite the public abhorrence of the high scale of tax evasion, it has been suggested that a culture of tolerance towards the hidden economy still remains. The Grabiner Report into the “Informal Economy” in the UK concluded in early 2000 that “[m]ost people at some point pay cash in hand for household services, or pay cash in exchange for ‘discounts’. Even in the most trivial way, much of this may amount to turning a blind eye to tax evasion.”⁶²

1.40 Confidence in the administration and enforcement of the tax laws has diminished. It must be recognised that an inefficient tax administration encourages further tax evasion as there is no fear of adverse repercussions. The tax code itself will lose its acceptability if it is not being applied fairly and equally. The converse is that now there is a prosecution policy in place, provided this is implemented properly, a shift in culture should be encouraged. (See paragraphs 1.47-1.54).

F The Revenue Commissioners: Modernisation and Restructuring

1.41 The Revenue Commissioners have modernised and restructured their organisation in a number of ways in recent years. First, the “Revenue On-Line Service” (‘ROS’) was established in September 2000. ROS is an internet facility which enables taxpayers to file returns, pay tax liabilities, have access to their tax details, calculate their tax liability and claim repayments 24 hours a day, 7

⁶² Lord Grabiner QC *The Informal Economy* (March 2000) paragraph 8.15, at 40.

days a week. Secondly, over 400 additional staff have been assigned to the Revenue Commissioners during the past two years.⁶³

1.42 Thirdly, the overall structure of the Office of the Revenue Commissioners is currently undergoing change. Under the old structure the administration had two principal divisions: taxes⁶⁴ and customs and excise. The Chief Inspector of Taxes was responsible for the administration of taxes.⁶⁵ On the other side there was the Customs and Excise division. The restructuring of the Revenue Commissioners has two themes. In the first place, it abolishes the division between taxes and customs and excise and will establish a single administration, with refocused divisions. Secondly, it adopts a more regional approach. The Office will be reorganised into the following divisions: an Investigations and Prosecutions Division, a Large Cases Division, two new National Office Divisions, four Legislation Services Divisions and four new Regional Divisions.

1.43 The Investigations and Prosecutions Division, established on 1 March 2002, was the first division put into operation. Its mandate is to advance tax and duty investigations and prosecutions. The Large Cases Division will be responsible for large businesses and high wealth individuals regardless of geographic location. It is expected that the Large Cases Division will assist the Revenue in its risk assessment and management of large taxpayers. The Division is currently “preparing a comprehensive analysis of the issues relating to

⁶³ 562 *Dáil Debates* col 146 (25 February 2003).

⁶⁴ There is no statutory definition of tax. The *Concise Oxford Dictionary* defines it as: “[a] contribution to state revenue compulsorily levied on individuals, property, or businesses”. However, “for the purposes of returns, assessments and appeals tax is defined to mean income tax, corporation tax and capital gains tax.” Corrigan *Revenue Law* (Round Hall Sweet & Maxwell 2000) Volume I at 332. Section 950(1) *TCA 1997*.

⁶⁵ Capital Gains Tax, Corporation Tax, Income Tax including PAYE and PRSI, and VAT and DIRT, which is not a tax in its own right, were all under the control of the Chief Inspector of Taxes. The DIRT Inquiry described the Office in its final report as “a *corps* or force endowed by law with significant, even special powers. It is a specialised inspectorate with enormous compliance, investigative, inquiry and even prosecuting powers. It engages in intelligence work, has draconian powers of inspection and so on.” *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

large companies and wealthy individuals, in particular those which pose a risk to tax revenues across all the taxes and duties payable to the Exchequer. A computerised risk based selection system is also under development and will be brought into operation” in 2003.⁶⁶ The computerised system will “allow for the screening of all tax returns against sectoral and business profiles and will provide a sophisticated selection basis for cases for audit.”⁶⁷ The two new National Office Divisions are: the Strategic Planning Division, 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”;⁶⁸ and the Operations Policy Division, which will “co-ordinate the development of operational policy and support and guide the operational area in the identification and dissemination of best practice.”⁶⁹ The four Legislation Service Divisions will be: the Direct Taxes Policy and Legislation Division; Direct Taxes Interpretation and International Division; the Indirect Taxes Division; and the Customs Division.

1.44 Four regional units will also be established: Border Midlands West Region; Dublin Region; East South-East Region; and South-West Region. The regional units will have responsibility for customer service, compliance and audit functions for all taxes and duties of customers within their respective geographical areas, with the exception of cases within the remit of the Large Cases Division. The restructuring should be complete by the end of 2003.⁷⁰

G The Evolution of an Investigation and Prosecution Division

1.45 In 1985, the Commission on Taxation had concluded, contrary to popular opinion at the time, that it was “emphatically not the case that the criminal law has no role to play in tax

⁶⁶ 562 *Dáil Debates* col 146 (25 February 2003).

⁶⁷ *Ibid.*

⁶⁸ (2003) 52 *Tax Briefing* 3

⁶⁹ *Ibid.*

⁷⁰ 2001 *Annual Report of the Revenue Commissioners* at 66.

enforcement.”⁷¹ It recommended that the Revenue Commissioners and the Garda Síochána investigate the possibility of establishing a special unit within the Garda Fraud Squad to deal with suspected cases of revenue offences referred by the Revenue Commissioners.⁷² During the period 1990-91, the Revenue Commissioners began to explore the possibility of prosecuting serious tax offenders. Their first port of call was the Garda Fraud Squad, as the Revenue Commissioners themselves did not have the power to refer cases for prosecution directly to the Director of Public Prosecutions (“DPP”). The Revenue Commissioners and the Garda Síochána implemented an arrangement for referring cases in 1991. However, after five years in operation, it was apparent that the arrangement was not a success. The Comptroller and Auditor General’s Annual Report for 1995 illustrated the extent to which the operation was defective. It reported that of the 20 cases, relating to tax evasion and fraud, referred to the Gardaí between 1990 and 1994, only one had reached the Courts by 1995.⁷³ A lack of understanding, on the part of both the Gardaí and Revenue Commissioners, of what was involved in the investigation of serious tax offences with a view to prosecution has been given as a reason for the arrangement’s lack of success. The “underlying tension between the policies and principles of tax collection and criminal justice” also hindered the success of the co-operation between the Revenue Commissioners and the Garda Síochána.⁷⁴

1.46 Accordingly, in 1996, the Revenue Commissioners decided to begin investigating cases themselves with a view to prosecution.⁷⁵

⁷¹ *Fifth Report of the Commission on Taxation* (Government Publications 1985) at 205. See also McCullagh *Crime in Ireland: A Sociological introduction* (Cork University Press 1996) at 83.

⁷² *Fifth Report of the Commission on Taxation* (Government Publications 1985) at 207.

⁷³ *Annual Report of the Comptroller and Auditor General* (Official Publications 1995) at 25.

⁷⁴ Ormerod “Summary Evasion of Income Tax” [2002] Crim LR 3, 24. On this tension, see further paragraphs 5.46-5.48.

⁷⁵ The prosecution culture on the customs and excise side has existed for centuries and is not controversial. The discussion of ‘serious tax offences’ does not include customs and excise offences, unless otherwise indicated. Tax will be used to refer to Income, Corporation, Capital Gains Tax,

An effort to import the investigative prosecution culture, which has always existed on the customs and excise side into the tax side was made. It began to refer cases directly to the DPP.⁷⁶ The prosecution programme was initiated under the Revenue Commissioners' Statement of Strategy, 1997-1999.⁷⁷ In their Statement of Strategy, the Revenue Commissioners committed themselves to turning their attention to the Black Economy, the prosecution of defaulters and the publication of defaulters' names. It promised to “*vigorously pursue non-compliance*, be it for failure to furnish returns, failure to furnish correct returns, failure to comply with statutory obligations or outright evasion”.⁷⁸

1.47 A special Prosecutions Unit was established, within the Investigation Branch of the Chief Inspector of Taxes Office, to investigate cases involving possible revenue criminal offences. Their brief was to gather evidence with a view to reporting cases to the DPP, *via* the Revenue Solicitor.⁷⁹ Revenue officers received training to develop the skills needed to detect serious tax offences and to meet the evidential requirements of criminal investigation. Since early 1997, an officer of the DPP's Office, at Assistant Secretary Level, has been available to the Revenue Commissioners for the purposes of

Capital Acquisitions Tax and VAT as distinct from customs and excise offences.

⁷⁶ (1999) 36 *Tax Briefing* 3 “The former practice of referring files to the Garda for investigation has since 1996 been largely superseded by the reference of Revenue offences, after a full investigation by Revenue officers, directly to the Office of the DPP for a decision on prosecution.” See also the Tax Strategy Group Papers. The Tax Strategy Group is an interdepartmental committee chaired by the Department of Finance, with membership comprising senior officials and advisors from the Departments of Finance, Taoiseach, Enterprise Trade and Employment, Social Community and Family Affairs and the Revenue Commissioners. The Tax Strategy Group prepares papers on various options for the Budget and for the medium and longer term.

⁷⁷ Complied pursuant to Revenue's obligations under the *Public Service Management Act 1997*.

⁷⁸ Revenue's Statement of Strategy, 1997-1999. Emphasis added.

⁷⁹ (1999) 36 *Tax Briefing* 1-3.

case referral and consultation.⁸⁰ This official spends half of the working week in the Revenue Commissioners and meets with officers from what is now the Investigations and Prosecutions Division to discuss individual cases, evidential matters and any other issues which arise.⁸¹ A second officer from the office of the DPP also spends half the working week in the Revenue Commissioners, and meets with officers from the Revenue Commissioners' Investigations and Prosecutions Division to discuss evidential issues and such problems as arise in the course of an investigation.⁸²

1.48 Given the large number of offences which could be prosecuted and the few which actually are prosecuted, the manner of selection is a matter of great importance. Accordingly, at about the same time as the establishment of the Prosecutions Unit, an *ad hoc* body known as the Admissions Committee was also instituted.⁸³ The Admissions Committee was responsible for co-ordinating a nationwide approach to the selection of cases for prosecution. Auditors reported suspicious cases to the Admissions Committee, which performed a gatekeeper function. It examined the evidence and resources available and decided whether the case should proceed with a view to either prosecution or to civil settlement. It assessed whether the criteria for investigation for prosecution, set out in the Code of Practice for Revenue Auditors, were met or not. It remained possible to resume the audit with monetary settlement in mind, if the case was not accepted by the Admissions Committee in Investigation Branch.⁸⁴ The Admissions Committee is to remain after 2002, though in a modified form.

⁸⁰ 1997 *Annual Report of the Revenue Commissioners*, 47. See Chapter 5 which discusses the current arrangements between the Revenue Commissioners and the DPP in more detail.

⁸¹ 1997 *Annual Report of the Revenue Commissioners*, 47.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ See *Code of Practice for Revenue Auditors* 1998 Appendix 3, 54 and *Annual Report* 1999, 35 which states that “[s]elected cases which, after investigation, are considered unsuitable for prosecution are dealt with by way of monetary settlement to cover tax, interest and penalties”.

1.49 The Investigations and Prosecutions Division forms one of the pillars of the reorganised Revenue. Additional staff have been assigned to the new Division “to give it the extra capacity it needs and to ensure that a reasonable number of serious evasion cases are investigated each year with a view to prosecution”.⁸⁵ When a case is identified as appropriate for prosecution by one of the new Regional Divisions,⁸⁶ it will be referred to the new Investigations and Prosecutions Division.

1.50 Currently, there are fourteen tax personnel in the Investigations and Prosecutions Division. These have been augmented by 25 customs and excise personnel. This number is expected to increase in the coming years.

1.51 The Revenue Commissioners employ five accountants on a contract basis. These accountants were recruited to work on complex transactions and not specifically with the Investigations and Prosecutions Division. However, they are available to the Investigations and Prosecutions Division if required. A number of other staff with the Revenue Commissioners are also qualified accountants and the staff in general, although not accountants will be familiar with the principles of accounting as accountancy training is provided to staff working on the tax side. The Revenue Commissioners also organise forensic training courses for staff involved in complex audits across the organisation and not just from the Investigations and Prosecutions Division.

1.52 Although, the only specialist legal expertise within the Revenue Commissioners is provided by the Revenue Solicitor’s Office, the Investigations and Prosecutions Division also employ legally qualified personnel. For example, the head of the Division is a barrister.

1.53 The Investigations and Prosecutions Division also has information technology expertise available to it from within the general organisation. If the Division needs forensic expertise, it will call on the Gardaí for assistance.

⁸⁵ 562 *Dáil Debates* 146 (25 February 2003).

⁸⁶ See paragraphs 1.42-1.44 for a discussion of Revenue Commissioners’ new structure.

1.54 The Revenue Commissioners have committed themselves, to establishing the office “as an organisation which has *no tolerance* of tax evasion”.⁸⁷ It will achieve this through, among other things, the use of prosecutions.⁸⁸ However, it remains worth emphasising that the main drive against tax evasion continues to be conducted through Revenue audit and investigation programmes (see paragraphs 2.06-2.11 and 5.14-5.15).⁸⁹ More recently in its *Statement of Strategy 2003-2005*, the Revenue Commissioners have affirmed their commitment to making “compliance easy while making non-compliance very unattractive”⁹⁰ by pursuing a balanced approach combining “a sharp, uncompromising response to evasion and default while providing high quality services to compliant tax and duty payers.”⁹¹ The first goal outlined by the Revenue Commissioners in its *Statement of Strategy* is to maximise compliance with Tax and Customs legislation. One strategy through which this will be achieved is deterring, detecting and prosecuting tax evasion and smuggling and other breaches of Tax and Customs legislation.⁹²

1.55 One recent development which does not feature in this Paper is the Criminal Assets Bureau (CAB), set up under the Criminal Assets Bureau Act 1996. The CAB adopts an innovative approach to the fight against organised crime. The Garda Síochána, Revenue Commissioners and the Minister for Social and Family Affairs have pooled their expertise, knowledge, resources and statutory powers in order to target the assets of those engaged in crime, and those enjoying the benefits of such assets. The wealth, as distinct from the offender, is the primary target. The powers available to CAB include not only the confiscation of assets, derived or suspected of being derived from criminal activity; but also ensuring that such assets are

⁸⁷ Statement of Strategy 2001-2003, 2. Emphasis added.

⁸⁸ *Ibid* at 4.

⁸⁹ The Revenue Commissioners have reported that these programmes “have proven to be very effective in collecting tax and interest and in penalising tax fraud and tax evasion.” *Statement of Strategy 2001-2003*, at 5.

⁹⁰ *Ibid*.

⁹¹ *Ibid*. For a discussion on the balance between prosecution and settlement see paragraphs 5.46-5.47.

⁹² *Statement of Strategy 2003-2005*, Strategy 1.2 at 13.

subjected to tax. Thus the Revenue officers in the Bureau are empowered to charge to tax, profits or gains from an unlawful or unknown source. The reason why we are saying no more in this Paper about the CAB is that, while its statutory remit is characterised broadly as: “criminal activity”, in practice, it has concentrated on activity which is suspected as being the result of organised crime. As indicated above, its armoury includes the powers of the Revenue Commissioners; but it is most unlikely that the CAB would ever take action against a person for revenue offences, unless there was some underlying suspicion of other, general crime.⁹³

H Recent Reviews⁹⁴

1.56 Recent enquiries include the DIRT Inquiry, the Steering Group and the Revenue Powers Group.⁹⁵ The DIRT Inquiry was established to inquire into evasion of Deposit Interest Retention Tax by both depositors and financial institutions which took and held, and at times encouraged such deposits. (See paragraphs 1.23-1.26). The Steering Group was established in response to a recommendation that a review of the Revenue Commissioners’ independence, accountability, organisation and structure be undertaken in the first of

⁹³ This paragraph draws heavily on Walsh *Criminal Procedure* (Thomson Round Hall 2002), paragraphs 2-06-13.

⁹⁴ As a comparison, we should notice that the UK tax appeals system has been under review since the establishment of the Tax Law Review Committee in 1994. The Lord Chancellor’s Department published a Consultation Paper on “Tax Appeals Tribunals” in March 2000 which considers whether a unified tribunal should be created and if so how onward appeals should be handled. *Tax Appeals Tribunals* (A Lord Chancellor’s Department Consultation Paper March 2000). The third section of the Consultation Paper deals with onward appeals. A Report has not yet been issued.

⁹⁵ As outlined in Part Chapter 1A of this Chapter, the Irish tax system and the organisations responsible for administering it, have been the subject of numerous inquiries over the years. The Committee of Inquiry into the Taxation on Industry reported in 1956. Another Committee established in 1957 issued seven reports. Another Commission was created in 1980. It published five reports between July 1982 and 1985. The reports recommended significant changes to the tax system. Corrigan *Revenue Law* (Round Hall Ltd 2000) Volume I at 72, paragraphs 1-201; see also paragraph 1-14.

the DIRT Inquiry's three reports. (See paragraph 1.27). The Minister for Finance established the Revenue Powers Group in April 2003 to examine the main statutory powers available to the Revenue Commissioners. The Group is composed of individuals with a broad range of professional and practical experience and has been requested to report by the end of October 2003.

CHAPTER 2 CIVIL PENALTIES

A Introduction

(1) *Taxes Acts*

2.01 The *Taxes Consolidation Act 1997* (“TCA 1997”) was introduced to consolidate the voluminous legislation on Income Tax, Corporation Tax and Capital Gains Tax.¹ Gift and Inheritance Tax is governed by the *Capital Acquisitions Tax Consolidation Act 2003*.² VAT is governed by the *Value-Added Tax Act 1972*, as amended, and the legislation governing stamp duty was consolidated in the *Stamp Duties Consolidation Act 1999*. This chapter discusses the penalty provisions of the TCA 1997.

(2) “*Care and Management*”

2.02 The primary function of the Revenue Commissioners is to enforce compliance with the Taxes Acts through collecting taxes and a key objective of the Revenue Commissioners is to meet the annual budget target set for them by the Department of Finance. To this end the Revenue Commissioners have been assigned responsibility for the

¹ Tax deducted under the PAYE system falls within Schedule E of the *TCA 1997*. PRSI is deducted by employers and the self-employed under the *Social Welfare (Consolidation) Act 1993*. Employers are obliged to return PRSI deductions to the Revenue Commissioners. SI No 298/1989 *Social Welfare (Collection of Employment Contributions by the Collector-General) Regulations 1989*. Section 20 of the *Social Welfare Consolidation Act 1993* provides that “a self employment contribution in respect of reckonable income is to be assessed charged and paid in all respects as if it were an amount of income tax.” McAteer, Reddin, Deegan *Income Tax Finance Act 2002 Taxation Series* (The Institute of Taxation Ireland 15 ed. 2002) at 619

² CAT was formerly governed by the *Capital Acquisitions Tax Act 1976* as amended by subsequent *Finance Acts*.

“care and management” of all duties and tax.³ Section 849(2) provides that “[a]ll duties of tax shall be under the care and management of the Revenue Commissioners.” Section 849(3) goes on to provide 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...”

2.03 The Tax legislation provides the Revenue Commissioners with an impressive armoury of powers with which to perform their functions: and the ‘care and management’ provision allows the Revenue Commissioners extensive discretion in relation to the manner in which they perform those functions. The Revenue Commissioners can choose to proceed either by way of a civil claim or a criminal prosecution. ‘Civil’ is used to distinguish civil from criminal sanctions; one could, perhaps, have used the expression ‘non-criminal’ in the place of ‘civil’ since the so-called civil penalties come very close to the borderline between civil and criminal classification as is clear from the case law on the issue (see paragraphs 2.47-2.58 and 2.65-2.81). This Chapter will consider civil breaches of the tax code and the corresponding civil penalties.

(3) Self-Assessment

2.04 It is a fundamental principle of the self-assessment system that returns filed by taxpayers form the basis for the calculation of tax liability. The self-assessment system imposes a legal obligation on all

³ Section 849(1) *TCA 1997* defines tax for the purposes of this section as “income tax, corporation tax and capital gains tax.” The exact meaning of “care and management” is imprecise but it is the traditional catch-all used here. The Revenue described one aspect of the exercise of the care and management provision in the response given to the Ombudsman’s draft investigation report into *Redress for Taxpayers*. It provided that “[w]here the exercise of care and management creates a precedent, Revenue publish the details of the precedent on the Revenue website. This ensures that everybody is aware of the precedent and that everybody who falls within the criteria published will be able to benefit from the precedent –although nor strictly falling within the letter of the law.” Special Report by the Ombudsman *Redress for Taxpayers* (Government Publications November 2001) 63.

taxpayers to return a signed declaration of tax liability in respect of all non-PAYE income.⁴ If the Inspector of Taxes accepts the tax liability calculation in the taxpayer's return, the taxpayer receives a short Notice of Assessment, setting out the sum due. On the other hand if the Inspector does not agree with the taxpayer's calculation and believes that an 'underpayment of tax' arises, the Inspector will issue a detailed Notice of Assessment.

2.05 The Revenue Commissioners are heavily reliant on the filing of accurate tax returns. Unless taxpayers voluntarily comply with their obligations to file accurate tax returns, the self assessment system could not function as a reliable means of collecting taxes. To encourage voluntary compliance and to verify the accuracy of the returns submitted, the Revenue Commissioners place a large emphasis on audit and investigation programmes. The prominence of the audit function in the enforcement of tax law arises because of the nature of the self-assessment system itself. It would defeat the purpose of self-assessment if the Revenue Commissioners were obliged to check the accuracy of every return. Instead, the Revenue Commissioners select only a percentage of all tax returns filed and check the accuracy of the returns.

(4) Audits

2.06 "A Revenue audit is a crosscheck of the information and figures shown by you in your tax returns against those shown in your business records."⁵ A Revenue audit covers returns for the following taxes: Income Tax, Corporation Tax or Capital Gains Tax, VAT, PAYE/PRSI or Relevant Contracts Tax ("RCT"). The Revenue Commissioners conduct, on average, 17,000 audits per year, in other words, 4 to 5 per cent of the self-assessed tax base.⁶

2.07 The Revenue Commissioners use three methods to select cases for audit. The first category of cases are selected by screening the tax returns. This "involves examining the returns made by a

⁴ Non-PAYE income includes income for PAYE taxpayers who have sources of income other than that which falls within the PAYE system.

⁵ Revenue Audit Guide for Small Businesses (2000) at 2. Taxpayers whose main source of income is taxed under the PAYE sector but who have income from other sources would fall outside the audit net

⁶ Report of the Steering Group (Government Publications, 1998) at 3.25.

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.”⁷ The Revenue Commissioners will generally analyse returns which have previously been filed late, inaccurately or not at all. Secondly, the Revenue Commissioners also carry out examinations of particular trades or professions from time to time (under the ‘projects on business sectors’). Thirdly, the Revenue Commissioners select certain cases, at random. Since 2001, 6 per cent of the audits have been selected randomly.⁸ Additionally, the Revenue Commissioners are in the process of developing a computerised risk based selection system. A significant point to note is that taxpayers whose main source of income comes within the PAYE sector are generally not selected for audit 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.

2.08 Revenue audits can take a number of different forms, such as desk or field audits⁹ and they can range from an audit under a single tax head to a comprehensive audit covering several tax heads.¹⁰ Audits are not defined in the *TCA 1997* but the Revenue Commissioners’ capacity to carry out audits derives from its legal capacity to gain access to information and to question the taxpayer and others in order to carry out its statutory functions.

2.09 The audit programme has a range of functions which include:

- “determining the accuracy of a return, declaration of tax liability or claim to repayment for VAT, PAYE and PRSI;
- identifying additional liabilities or other matters requiring adjustments, if any;
- collecting the tax, interest, and penalties, where appropriate;

⁷ Revenue Audit Guide for Small Businesses, at 2 (2000).

⁸ The Comptroller and Auditor General Report 2000 at 17. Prior to 2001, only 2% of the cases audited were selected randomly.

⁹ Desk audits are audits which are conducted by letter or telephone. A field audit will involve a visit to the taxpayer’s premises.

¹⁰ The Revenue Commissioners comprehensive audits in 2000 resulted in a IR£53.8 million (€68.31 million) settlement yield.

- publishing the defaulter's name under the provisions of *Section 1086 Taxes Consolidation Act 1997*, where it applies;
- specifying remedial action required to put taxpayers on a compliant footing where errors or irregularities are discovered during the course of the audit;
- considering what procedural or other changes are necessary to facilitate counter-evasion activities;
- where strong indications of serious tax evasion emerge in cases, referring them to Prosecution Division to evaluate suitability for prosecution.”¹¹

2.10 If an underpayment of tax is discovered, the auditor and the taxpayer will typically enter negotiations in order to reach a monetary settlement to cover the underpayment of tax, interest and penalties. Settlements are considered a pragmatic and effective way for the Revenue Commissioners to collect unpaid tax while garnering the overall revenue of the State. The total net revenue receipts collected in 2000 were IR£21,420 million (€27,198 million). IR£283.2 million (€359.59 million) of this total was collected as a result of revenue audits.

2.11 The Code of Practice for Revenue Auditors identifies the limits of an Audit Manager's authority to approve monetary settlements. An Audit Manager may approve settlement offers which do not exceed €50,000 inclusive of tax, interest and penalties. An Assistant Secretary may approve offers up to €100,000 but acceptance of offers in excess of €100,000 requires the approval of a Revenue Commissioner. Where publication in accordance with Section 1086 TCA 1997 is being considered all offers are also submitted to an Assistant Secretary or Revenue Commissioner for approval. Such offers are accompanied by a report which carries the auditor's recommendation for acceptance or otherwise.

(5) *Assessment to Tax*

2.12 Where in the opinion of the auditor, there is an underpayment of tax and where no voluntary disclosure or offer to make good the underpayment of tax is forthcoming, the Revenue auditor will quantify the underpayment, in addition to the interest and penalties, if any, which are due. The taxpayer is obliged to make

¹¹ 2002 Code of Practice for Revenue Auditors at 4.

good the difference between the amount of tax actually paid and the amount payable. After the assessment is raised the taxpayer may agree with the Revenue Commissioners' assessment and pay the amount due. If the taxpayer disagrees with the assessment, he or she may invoke one of the available appeal mechanisms.

2.13 In enforcing this obligation, the Revenue Commissioners have a number of options.¹² The main alternatives are either criminal prosecution or civil methods. Civil recovery may result from a monetary settlement reached between the Revenue Commissioners and the taxpayer. When faced with the choice of proceeding *via* criminal prosecution or civil recovery the Revenue Commissioners have in the past usually opted for civil methods. However, in recent years, (see paragraph 1.45-1.54) a greater emphasis has been placed on identifying cases with a view to investigation for prosecution.

B Civil Sanctions

(1) Introduction

2.14 The Revenue Commissioners have been granted statutory authority to impose administrative penalties on errant taxpayers in order to encourage compliance with the Tax Acts.¹³ On the civil side,

¹² Booklet IT 23 Main Features of Income Tax Self Assessment (The Revenue Commissioners).

The British Inland Revenue adopt a similar approach. If, at the conclusion of an investigation into an individual's tax affairs, the individual is found to owe tax, the investigating inspector will inform the individual how much tax is owed, the maximum amount of penalties which could be determined under formal procedures and the amount of interest due. In such circumstances it is normal for the inspector to invite the taxpayer to make an offer to pay one sum to cover the liability to tax, interest and penalties. The inspector may suggest an appropriate figure. When the taxpayer and the inspector agree a figure, the taxpayer will send the Inspector a formal letter with the offer to pay the agreed amount and the Inspector will issue a letter of acceptance. The exchange of letters creates a contract between the taxpayer and the Inland Revenue. If the taxpayer fails to abide by the terms of the contract, the Inland Revenue will charge interest for late payment and seek recovery of the full amount due under the contract.

¹³ Part 47 of *TCA 1997*. There are several other statutory penalties for breach of the *TCA 1997*. See Donnelly and Walsh *Revenue Investigations and Enforcement* (Butterworths 2002) at 203, for an illustrative list of the

there are four elements to the amount for which the taxpayer may be liable. First, there is the amount of tax, secondly a civil penalty¹⁴, thirdly interest and finally a surcharge. Chapters 1 to 3 (section 1052-77) of Part 47 *TCA 1997* are principally, concerned with ‘civil penalties’ as opposed to the criminal penalties provided for under the heading ‘Revenue Offences’ in Chapter 4 (sections 1078-79) of the same Part.¹⁵

(2) Part 47 Penalties, Revenue Offences, Interest on Overdue Tax and Other Sanctions

2.15 The following is a list of all the civil penalties contained in Part 47:¹⁶

Chapter 1 Income tax and Corporation tax penalties

- Penalties for failure to make certain returns and other matters (section 1052);
- Penalty for fraudulently or negligently making incorrect returns and other matters (section 1053);
- Increased penalties in the case of a body of persons, for example, companies (section 1054);
- Penalty for assisting in making incorrect returns and other matter (section 1055);
- Fine for obstruction of officers in execution of duties (section 1057);
- Refusal to allow deduction of tax (section 1058);

statutory penalties other than those contained in Part 47 of the *TCA 1997*. Section 240 of the *Finance Act 2001*, amended the Tax Acts consequent on the changeover to the Euro. Schedule 5 of the Act lists the amounts in Euro.

¹⁴ A civil penalty will be imposed only in cases concerning fraud or negligence. See *Code of Practice for Revenue Auditors* (Office of Revenue Commissioners 2002) paragraph 9.1 at 24.

¹⁵ Discussed at paragraph 5.03-5.12.

¹⁶ Extract from the *TCA 1997*. See paragraph 2.80 and also Donnelly and Walsh *Revenue Investigations and Enforcement* (Butterworths 2002) at 204-5.

Chapter 2 Other Corporation Tax Penalties

- Penalties for failure to make certain returns (section 1071);
- Penalties for fraudulently or negligently making incorrect returns and other matters (section 1072);
- Penalties for failure to furnish particulars required to be supplied by new companies (section 1073);
- Penalties for failure to give notice of liability to corporation tax (section 1074);
- Penalties for failure to furnish certain information and for incorrect information (section 1075); and

Chapter 3 Capital Gains tax penalties

- Penalties for failure to make returns and other matters and for fraudulently or negligently making incorrect returns and other matters (section 1077).

(3) *Mitigation of Penalties*

2.16 A major feature of the civil settlement system is that the Revenue Commissioners may mitigate any fine or penalty. The power to do this is found in section 1065 *TCA 1997* which provides that the Revenue Commissioners or the Minister for Finance may:

“mitigate any fine or penalty, or stay or compound any proceedings for the recovery of any fine or penalty, and may also, after judgement, 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.”¹⁷

¹⁷ The *Income Tax Act 1967* introduced legislative support for the Revenue Commissioners’ power to mitigate a civil penalty settlement. This was re-enacted in section 1065 of the *TCA 1997* with restrictions concerning periods within the scope of the 1993 Amnesty.

2.17 The element of discretion is somewhat controlled by the Code of Practice, which contains a number of guidelines as to how an auditor should determine the appropriate level of mitigation in specific cases. The first consideration is the type of ‘tax default’ involved, that is whether the default is considered deliberate, or occurred because of gross carelessness or insufficient care. Secondly, the level of co-operation given by the taxpayer is also taken into consideration.¹⁸ However, a large amount of discretion remains, for example, the line between gross carelessness and insufficient care can be hard to determine. In addition whether a disclosure is considered to be a “qualifying disclosure” can significantly influence the extent to which mitigation is available. The Code of practice provides that in order to amount to a qualifying disclosure, there must be full disclosure, certain mandatory statements must be included; it must be signed by or on behalf of the taxpayer; and be accompanied by payment. The disclosure can either be prompted or unprompted and finally, certain disclosures are excluded. The following table is an extract from the Code of Practice¹⁹ setting out the percentage remaining, after mitigation, in each type of tax default, taking into account the level of co-operation and whether there has been a qualifying disclosure, prompted or unprompted.

Table A: Mitigation of Penalties

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

¹⁸ See *Code of Practice for Revenue Auditors* (Office of Revenue Commissioners 2002), paragraph 9.4 at 25.

¹⁹ *Ibid*, paragraph 10.1-10.2 at 30-33.

2.18 If the aggregate amount of tax in respect of which penalties are computed is less than €3,000 and the default is exclusively in the “Insufficient Care” category, a penalty will not be imposed.

2.19 The British Inland Revenue adopt a similar approach to the mitigation of penalties. However, a significant difference between the Irish and British approaches to the mitigation of fines arises in relation to the avenues of appeal open to the taxpayer in Ireland. Under the Irish *TCA 1997*, the taxpayer can only appeal the Revenue Commissioners’ assessment to tax, not the penalties. The only way in which a taxpayer can challenge the penalties imposed by the Revenue Commissioners would be through the use of judicial review in the High Court or, if the Revenue Commissioners take civil proceedings to enforce the debt, then the taxpayer may seek to argue before the court that the penalty was not actually due. The taxpayer may appeal the penalty through the Revenue Commissioners’ internal appeal mechanisms, outlined at paragraphs 2.29-2.31. By contrast, in the UK the taxpayer has a right of appeal from the Inspector’s assessment of tax,²⁰ penalties²¹ and interest²² to the Tax Appeal Commissioners²³ and from there to the courts.

²⁰ Section 31 Taxes Management Act 1970.

²¹ Section 100B Taxes Management Act 1970.

²² Sections 86-92 Taxes Management Act 1970.

²³ The General and Special Commissioners of Income Tax.

(4) **Surcharge**²⁴

2.20 The Revenue Commissioners may impose a surcharge, under section 1084(2)(a), where a return is not submitted on time.²⁵ The surcharge is based on a percentage increase in the total tax payable for the year for which the return is late and is subject to a gradation of the surcharge by reference to the length of the delay in filing, as well as being subject to an overall cap on the level of the surcharge.²⁶ Where the delay is less than two months, the surcharge will be 5 per cent of that amount of tax, subject to a maximum of €12,695 extra tax for delays in filing of less than two months, and if the delay exceeds two months, the surcharge will amount to 10 per cent of that amount of tax, subject to a maximum of €63,485 extra tax for delays in filing of two months or more.²⁷

²⁴ Section 1084 is the first section listed under Chapter 6 ‘Other Sanctions’. A surcharge is defined by *Black’s Law Dictionary* as “an overcharge; an exaction, impost, or encumbrance beyond what is just and right, or beyond one’s authority or power...” or “the imposition of personal liability on a fiduciary for wilful or negligent misconduct in the administration of his fiduciary duties”. It defines sanctions as “[t]hat part of the law which is designed to secure enforcement by imposing a penalty for its violation or offering a reward for its observance.” A penalty on the other hand is defined as “[a]n elastic term with many different shades of meaning; it involves idea of punishment, corporeal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment.”

Murdoch’s Dictionary of Irish Law defines (at 580) a penalty as “[a] punishment [which] [i]ncludes any fine or other penal sum and, where a fine is ordered to be paid, any compensation, costs or expenses, in addition to such fine: DCR 1997- Interpretation of Terms”. It defines a “sanction” as “A penalty or punishment as a means of enforcing obedience to the law”.

²⁵ The Revenue Commissioners may also impose surcharges in relation to other taxes. For example, section 53 of the *Capital Acquisitions Tax Consolidation Act 2003* provides for a surcharge where the asset which is the subject of the gift or inheritance is undervalued. The surcharge will be a percentage of the tax attributable to the asset, which may be 10%, 20% or 30%. Section 15 *Stamp Duties Consolidation Act 1999* provides for the imposition of a surcharge for undervaluation of the value of property in case of voluntary dispositions *inter vivos*.

²⁶ Revenue web-site “Part 47: Penalties, Revenue Offences, Interest on Overdue Tax” at 1669.

²⁷ Section 1084 2(a)(ii) *TCA 1997*.

(5) Interest

2.21 Where the auditor and the taxpayer agree on an audit settlement an assessment will not be made. However, if the auditor is obliged to make an assessment and to refer the tax for enforced collection, statutory interest will arise from the original due dates up to the date of payment.²⁸ “In general, Auditors (as distinct from investigators operating in Investigation Branch) will not seek to impose penal interest under Section 1082, *Taxes Consolidation Act 1997*.”²⁹

(6) ‘Name and Shame’

2.22 Section 23 of the *Finance Act 1983* introduced the ‘name and shame’ procedure. Section 1086 *TCA 1997* re-enacts the provision, which provides that the Revenue Commissioners shall compile a list with a taxpayer’s details (name, address and occupation) in two situations: first, where a fine or other penalty was imposed by a court under the Acts, in relation to tax; or where the person is someone with whom the Revenue Commissioners have agreed not to initiate proceedings and have reached a settlement involving the payment of any tax, interest on that tax, and a fine or other monetary penalty in respect of that tax. The list is divided into two parts, the first containing details of all fines imposed by the court, whether in criminal proceedings for failing to file returns or evasion

²⁸ The interest will be charged in accordance with sections 1080 and 991 of the *TCA 1997* and section 21 of the *VAT Act 1972*. Interest continues to run under the *Capital Acquisitions Tax Consolidation Act 2003*. Section 129 of the *Finance Act 2002* provides for the imposition of interest on a daily basis as opposed to the traditional monthly basis. The current rate of interest is 12% (pre-1998, it was 15%) and 24% where fraud or negligence are involved. Generally, the Revenue Commissioners do not seek to impose the penal interest of 24% per annum provided for by section 1082. Imposition of this rate of interest would be open to appeal to the Appeal Commissioners and from there to the Circuit Court. It was suggested that the reason the Revenue Commissioners do not seek to impose this higher rate of interest is because the decision to charge penal interest would be open to appeal. However, the Revenue Commissioners have said that this interest rate was introduced into the legislation because of political events and at this stage is merely of historic interest.

²⁹ “Interest, Surcharges and Neglect”, web-site of “Business Access to State Information and Services, Basis” <http://www.basis.ie/>

or in civil proceedings seeking to recover the tax. The second part contains particulars of settlements reached. The list must be published in *Iris Oifigiúil*.³⁰ Once the list is published in *Iris Oifigiúil* it is a matter of public record.

2.23 However, significantly, the obligation to publish in *Iris Oifigiúil* does not apply in the following circumstances:

- a) where a taxpayer has made voluntary disclosure;
- b) where “section 72 of the Finance Act, 1988 or section 3 of the Waiver of Certain Tax, Interest and Penalties Act, 1993, applied”;³¹
- c) the liability does not exceed €12,700 or
- d) where the amount of the penalty does not exceed 15% of the tax involved in the settlement.³²

2.24 Although, the Revenue Commissioners are obliged to publish any settlement falling within the categories of settlements in section 1086(2) *TCA 1997*, there are a number of points at which discretion can be exercised to ensure that a settlement falling outside the scope of settlements which must be published under section 1086 is reached. For example, the settlement figure could be calculated so that the aggregate of the underpaid tax, penalties and interest will not exceed €12,700 and thereby publication is avoided. The Code of Practice contains guidelines as to how penalties will be calculated, however due to the number of considerations which arise in determining the extent to which a penalty can be mitigated, discretion can be exercised, for example, in determining what category of tax default is involved or what level of co-operation will be attributed to the taxpayer’s conduct.³³

2.25 The Revenue Commissioners also have the power to publish the list “in whole or in part, in such manner as they consider appropriate”, that is in places other than *Iris Oifigiúil*. Many citizens

³⁰ *Iris Oifigiúil* is now published on the internet at <http://www.irisoifigiuil.ie/>

³¹ Section 1086(4)(b) *TCA 1997*.

³² Section 1086(4)(d) *TCA 1997* as inserted by section 126 of the *Finance Act 2002*.

³³ See paragraph 2.17.

would undoubtedly be stricken with embarrassment at having their name appear in a list of tax defaulters and such a policy has probably helped to shift public opinion against recalcitrance and tax evasion. The Revenue Commissioners began publishing quarterly lists of defaulters on their website under section 1086 in April 2002. In addition, a copy of Part 2 of the list is provided to the newspapers in electronic form. The newspapers tend to publish Part 2 of the list in full but whether any or all of the names on the actual list is published is a matter for the particular newspaper concerned. *The Irish Times*, *The Irish Independent* and *The Irish Examiner* publish the lists. The figure published is the total amount which includes the tax, interest, and penalties which make up the settlement. The newspapers have freedom to pick the most colourful and not necessarily the most blameworthy of cases and this may detract from the long term effectiveness of the lists. It has been suggested that the impact of naming and shaming has been reduced as the value of the threshold diminishes with inflation. The perceived diminution in the effectiveness of naming and shaming is the basis for the recommendation in paragraph 2.27.

2.26 There are a number of ways in which a taxpayer can avoid publication. For example, if the taxpayer makes a “voluntary disclosure” (see paragraph 5.14), publication will not result. While published Revenue materials contain guidelines as to what is considered to be a voluntary disclosure, there is no statutory or copper-fastened definition upon which a taxpayer can rely. Due to the Revenue Commissioners’ power to accept or reject a disclosure as “voluntary”, they have a large margin of discretion in relation to whether a settlement is published or not. An auditor can also facilitate non-publication if the penalty is computed separately. Auditors are instructed that:

“[g]enerally where the only penalties arising in a case are penalties for failure to lodge returns, the penalties should be computed separately and the taxpayer invited to pay them in full and thereby avoid publication for the year in which the penalty has been paid.”³⁴

³⁴ Office of the Revenue Commissioners, Audit Instructions, Section 1086 Taxes Consolidation Act 1997 (Publication) Publication under Section 16,

2.27 *The Commission recommends that the Revenue Commissioners be responsible for publishing the lists in full, with a breakdown of the tax, penalties and interest involved, in at least two nationally circulated newspapers.*

C Recourse From Assessment

2.28 Where the taxpayer disagrees with the Auditor's assessment, the taxpayer has a number of options, namely, one of the internal review procedures or the statutory appeal mechanism.

(1) Internal and Joint Reviews

2.29 In the first place, the taxpayer may seek an internal review of the Auditor's assessment of the underpayment of tax, the proposed penalties or publication of the settlement. There are a number of avenues of internal review. The review may be carried out, at local level by the District Inspector or Regional Director. If the taxpayer would prefer a review at a more centralised level, a request may be made that the review be undertaken by the Director of Customer Services (or a designated Principal Inspector of Taxes), either alone or jointly with an External Reviewer.

2.30 In 1999, due to the increase in the powers of the Revenue Commissioners and stemming from a perception that some taxpayers were reluctant to avail of these internal review procedures because they were undertaken by a Revenue official, the option of an internal review carried out with an external reviewer was introduced.³⁵ The Revenue Commissioners established a panel of individuals with relevant expertise to work as part-time external reviewers.³⁶ The posts were publicly advertised. One of the current external reviewers is an accountant, another is a solicitor and the third external reviewer

Freedom of Information Act 1997 Rules, Procedures, Practices, Guidelines & Interpretations.

³⁵ The *Official Secrets Act 1963* governs the External Reviewers to ensure that the confidentiality of a taxpayer's affairs is maintained. Statement of Practice SP-GEN/2/99 Revenue Internal Review Procedures, Audit and Use of Powers at 1.4-1.7.

³⁶ Statement of Practice SP-GEN/2/99 Revenue Internal Review Procedures, Audit and Use of Powers at 1.6.

is a barrister. They are employed under two year contracts, which may be renewed by the Revenue Commissioners.

2.31 Whilst there is no suggestion of a lack of independence and impartiality, it is inappropriate that responsibility for the appointment of external reviewers should rest with the Revenue Commissioners as they are a party to the appeal. In its submission to the Revenue Powers Group, the Law Society of Ireland has submitted “that the appointment of such [external] reviewers should be a regular and permanent function of a body other than Revenue.”³⁷

2.32 *The Commission agrees with the recommendation of the Law Society of Ireland.*

2.33 As a matter of policy within the Revenue Commissioners, decisions of the internal and external reviewers are binding on the Revenue Commissioners. These decisions are not binding on the taxpayer. Decisions of the internal and external reviewers may be further examined by the Ombudsman.

2.34 Interest will not be charged during the period of the review. Use of the internal mode of review of the Auditor’s assessment does not prejudice the taxpayer’s right to invoke the statutory appeal mechanisms.

Table B:Case Reviews 2001³⁸

	Total Reviews	In favour Revenue	Against Revenue	Partially Revised	Ongoing
Joint Reviews	22	13	3	2	4
Internal Reviews	17	8	6	1	2

(2) *Statutory Complaint and Appeal Mechanisms*

2.35 There is a statutory right of appeal against the assessment of tax considered in the following paragraph but there is no statutory right of appeal against the level of penalties imposed or the extent to which penalties are mitigated by the Revenue Commissioners. The

³⁷ Law Society of Ireland Submission to Revenue Powers Group at 7.

³⁸ Revenue Commissioners Annual Report 2001 at 72. These statistics do not relate solely to cases where audits and resulting penalties are challenged.

only way in which a taxpayer can challenge the penalties imposed by the Revenue Commissioners is through the use of judicial review or by declining to pay and forcing the Revenue Commissioners to take civil proceedings to enforce the debt under section 1061 *TCA 1997* (See paragraph 2.40). At this point, the taxpayer may seek to argue before the court that the penalty was not actually due. To date this has not arisen because the Revenue Commissioners do not take proceedings under section 1061 frequently.

(a) *The Appeal Commissioners*³⁹

2.36 A taxpayer also has of right to appeal to the Office of the Appeal Commissioners. The Appeal Commissioners are independent of the Revenue Commissioners and are appointed by the Minister for Finance under section 850 *TCA 1997*. The Appeal Commissioners will be discussed in more detail in Chapter 3.

(b) *The Ombudsman*

2.37 The *Ombudsman Act 1980* ('1980 Act') provides the Ombudsman with jurisdiction to investigate acts of the Revenue Commissioners where a complaint has been made under the Act or where it appears to him that an investigation would be warranted.⁴⁰ Section 5 of the 1980 Act prohibits the Ombudsman from investigating any matters where the complainant has initiated legal proceedings or where an aggrieved person or entity has a statutory right of appeal to a court or a party other than a Department of State or other person specified in Part I of the *First Schedule* to the Act.⁴¹ The effect of section 5(1)(a)(iii) of the 1980 Act is to exclude from the Ombudsman's jurisdiction complaints concerning assessments of tax because the aggrieved person or entity can go to the Appeal Commissioners. However, there is an exception to this general exclusion, which empowers the Ombudsman to investigate "if it

³⁹ The Office of the Appeal Commissioners has been examined and discussed by a number of groups in recent times. The Commissioners are appointed by the Minister for Finance in accordance with section 850 of the *TCA 1997*. The two current Commissioners were each appointed in 1993. Both Commissioners are qualified accountants, who were previously involved in private practice. See further paragraphs 3.02-3.84.

⁴⁰ Section 4 of the *Ombudsman Act 1980*.

⁴¹ Section 5(1) of the *Ombudsman Act 1980*.

appears ... that special circumstances make it proper to do so.”⁴² There is no appeal against the Revenue Commissioners’ mitigation of statutory penalties and so there is no bar to the Ombudsman hearing complaints in relation to such issues.

2.38 The Ombudsman has investigated complaints alleging delay on the part of the Revenue Commissioners and has recently issued reports on redress for taxpayers⁴³ and also on the Revenue Commissioners’ refusal to grant tax relief on vehicles adapted for the transport of passengers with disabilities.⁴⁴ If the complaint is found to be valid, the Ombudsman may recommend repayment of the money to the taxpayer.⁴⁵ The following tables give details of the number and outcome of complaints relating to the Revenue Commissioners made to the Ombudsman from 1998-2001.

Table C: Number and Outcome of Completed Complaints⁴⁶

Year	1998	1999	2000	2001
Not upheld	55	33	18	25
Withdrawn	3	3	2	2
Discontinued	44	25	13	12
Assistance provided to complainant	30	39	27	29
Partially Resolved	-	-	6	1

⁴² Section 5(1) of the Ombudsman Act 1980.

⁴³ *Redress for Taxpayers* was the first special report submitted to Dáil Éireann and Seanad Éireann following a rejection by a public body of recommendations by the Ombudsman. (Government Publications November 2001).

⁴⁴ *Passengers with Disabilities* (Government Publications August 2001)

⁴⁵ The Ombudsman may also request the Department of State or other person aforesaid to notify him within a specified time of its or his response to the recommendation. Section 6(3) of the *Ombudsman Act 1980*. Where it appears to the Ombudsman that the measures taken or proposed to be taken in response to a recommendation are unsatisfactory, he may, if he so thinks fit, cause a special report to be included in the annual report. Section 6(5) of the *Ombudsman Act 1980*.

⁴⁶ Compiled from the Annual Reports of the Revenue Commissioners.

Resolved	7	22	18	27
Total	139	122	84	96

D Enforcement

2.39 If the taxpayer fails to pay either the agreed settlement or the amount as assessed by the auditor, the Revenue Commissioners may seek recovery of monies owed (including interest)⁴⁷ in three broad ways. First, where the courts are not involved, a sheriff or county registrar may seize goods, animals or other chattels belonging to the defaulter.⁴⁸ Secondly, again without involving the Courts, the Revenue Commissioners also have the power of attachment of amounts due to the tax defaulter from a third party, a similar process to garnishee.⁴⁹

2.40 Thirdly, the Collector-General or other authorised Revenue official may institute proceedings in the District, Circuit or High Court depending on the limits of the court's jurisdiction for recovery of tax due.⁵⁰ In theory, where judgment is given against a taxpayer for non-payment of income tax, the court may order the imprisonment of the taxpayer.⁵¹ These procedures may only be invoked in order to recover tax and interest.⁵²

⁴⁷ Where an undercharge of tax is referred for enforced collection, statutory interest will arise from the original due date to the date of payment.

⁴⁸ Section 962 of the *TCA 1997*.

⁴⁹ Section 1002 of the *TCA 1997*. If a taxpayer has defaulted in remitting or accounting for any tax, interest on unpaid tax, or penalty, the Revenue Commissioners may attach amounts due to a taxpayer from a third party. A notice of attachment is issued to the third party specifying the name of the taxpayer, the amount due the Revenue Commissioners, a direction to deliver a return to the Revenue Commissioners specifying the amount of the debt owed by the third party to the taxpayer and an order to pay the amount of the debt to the Revenue Commissioners. Payments under a contract of service are not considered to be debts for the purposes of attachment under section 1002.

⁵⁰ Sections 963, 966 of the *TCA 1997*. The Circuit Court Rules apply. The Rules of the Superior Courts apply to civil proceedings commenced in the High Court.

⁵¹ Section 968 of the *TCA 1997* contains a "legislative referral to arrest" (Donnelly and Walsh *Revenue Investigations and Enforcement*

2.41 Separate procedures, involving the courts, are established for the recovery of civil penalties. If a taxpayer refuses to pay a civil penalty, the auditor will report the case to the Revenue Solicitor for approval to initiate civil penalty proceedings. An authorised officer of the Revenue Commissioners may institute civil proceedings in the officer's own name in the High Court for the recovery of the penalty.⁵³ This is a separate procedure from the enforcement of the tax and interest due, and for this reason perhaps, the Revenue Commissioners have not instituted many proceedings to recover civil penalties in the past. This trend may be changing. Penalties which were recoverable from a deceased may be recoverable from the estate.⁵⁴

2.42 The Revenue Commissioners' ability to raise an assessment when a taxpayer has failed to make a return, and the Collector-General's power to issue a certificate to the sheriff to recover the amount due after an assessment has been raised, was challenged as being an administration of justice, which was being discharged by a body other than a court, thereby violating Article 34.1 of the Constitution. However in *Kennedy v Hearne*⁵⁵ and *Deighan v Hearne*,⁵⁶ the Supreme Court rejected the argument that either the Inspector of Taxes or the Collector-General were involved in an administration of justice.

(Butterworths 2002) at 140). It provides that "[w]here in any proceedings for the recovery of income tax judgement is given against the person against whom the proceedings are brought and the judgement provides for the arrest and imprisonment of that person..." The Rules of the Superior Courts provide for Attachment and Committal under Order 44 Part 1. Rule 5 of Order 68 provides for the application of Order 44 Part 1.

⁵² Section 1080 of the *TCA 1997* provides that the machinery for the recovery of tax is applicable to the recovery of interest as if such interest were part of the tax as assessed.

⁵³ Section 1061 of the *TCA 1997*. Section 1063 provides that proceedings for the recovery of penalties or fines incurred under the Tax Acts in connection with income or corporation tax must be instituted within six years from the time they are incurred.

⁵⁴ Section 1060 of the *TCA 1997*.

⁵⁵ [1987] IR 120 (High Ct.); [1988] IR 481 (Sup. Ct.).

⁵⁶ [1986] IR 603 (High Ct.); [1990] 1 IR 499 (Sup. Ct.).

2.43 In *Kennedy v Hearne*, the plaintiff argued that section 7 of the *Finance Act 1968*, now section 989 *TCA 1997*, empowered “the Revenue Commissioners and/or the Collector-General to carry out functions which constitute the administration of justice...”⁵⁷ Section 7 provided that where the Revenue Commissioners had reason to believe that an employer had not remitted tax due, they could issue an estimated assessment. If the employer continued to fail to remit the tax, the Revenue Commissioners could bring section 485, sub-ss. 1 and 2 of the *Income Tax Act 1967* into play. Section 485 empowered the Collector-General to issue a certificate to the sheriff to levy the sum certified as being in default by seizing all or any of the goods, animals and other chattels belonging to the defaulter. The Court rejected the plaintiff’s arguments on the following grounds:

“[t]here was not, at the date of the issue of the certificate to the Sheriff a justiciable controversy about whether any tax had been paid in which the Collector-General decided in favour of one contender against another.

The decision of the Collector-General to issue a certificate did not impose a liability on the taxpayer nor affect any of his rights, those being affected by his default in payment of a levied tax.

The issue of the certificate did not invade or oust any of the functions vested in the judges by Article 34 of the Constitution since even if a certificate were issued to the sheriff, as it was in that case, in error, the courts were empowered to intervene immediately, as they did, to resolve the issue between the taxpayer and the Collector-General.”⁵⁸

2.44 The Supreme Court adopted the same reasoning in *Deighan v Hearne*.⁵⁹ In this case the Collector-General issued a certificate specifying the tax owed by the plaintiff. The sheriff served a notice of seizure on the plaintiff for the sum as assessed by the Revenue Commissioners’ Inspector and certified by the Collector-General.

⁵⁷ Section 989 of the *TCA 1997*.

⁵⁸ *Deighan v Hearne* [1990] 1 IR 499, 505. There has been some academic criticism of the Court’s reasoning. See Morgan *The Separation of Powers in the Irish Constitution* (Sweet & Maxwell 1997) at 94-102.

⁵⁹ [1986] IR 603 (High Ct.); [1990] 1 IR 499 (Sup. Ct.).

The Supreme Court held that the power of the Inspector of Taxes under section 184 of the *Income tax Act 1967*, now section 922 *TCA 1997*, to make an assessment in default of return, and the Collector-General's power to issue a certificate to a sheriff under section 485 of the 1967 Act, did not involve the administration of justice in breach of Article 34 of the Constitution.⁶⁰

2.45 The constitutionality of the Revenue Commissioners' power of attachment was challenged in *Orange v The Revenue Commissioners*.⁶¹ However, Geoghegan J in the High Court saw no merit in the argument that "the attachment procedure, without the intervention of a court order, is some form of executive administration of justice and, therefore, contravenes Article 34 of the Constitution." The tax involved was an admitted liability and accordingly there was no justiciable controversy. Therefore there was no role for the courts in such a situation. Geoghegan J also rejected arguments alleging that section 73 of the *Finance Act 1988*⁶² was an attack on the plaintiff's right to earn a livelihood as guaranteed by Article 40 of the Constitution, nor was this an unjust attack on his property rights contrary to Article 43 of the Constitution.

E Are 'Civil Penalties' Criminal in Character?

(1) Introduction

2.46 The question of whether the penalties that the Revenue Commissioners may impose ought to be properly classified as criminal in character has arisen in a number of cases. The significance of this question concerns the protections available to a taxpayer. If any penalties are properly classified as criminal charges, a taxpayer is entitled to certain minimum due process protections. In the past, this question has been answered by reference to the 1937 Constitution. In the near future, the question will need to be

⁶⁰ First, the court held that a binding liability is not imposed on the taxpayer; secondly, there is no justiciable controversy between the taxpayer and the Revenue Commissioners or Collector-General at the date the power is exercised and thirdly, the courts could intervene immediately where a certificate was issued in error by the Collector-General.

⁶¹ [1995] 1 IR 517.

⁶² Now section 1002 of the *TCA 1997*.

examined under the European Convention on Human Rights, in light of its impending incorporation into domestic law. This Part will discuss relevant Irish constitutional case law, the *European Convention on Human Rights Bill 2003* and the potential consequences which its incorporation will have.

2.47 Article 34.1 provides that “justice shall be administered in courts ...” Article 37.1, however, creates an exception: it allows for this function to be vested outside the courts provided that only “limited functions ... in matters other than criminal matters” are involved.⁶³ The case law on the application of the ‘administration of justice’ concept in the tax administration sphere is a little unclear. However, such case law as we have seems to indicate a judicial attitude against the characterisation of Revenue powers as involving an ‘administration of justice’. An alternative way of addressing the question of Article 34.1 is to ask whether the civil penalties which the Revenue Commissioners may impose are criminal in character: if they are, then there is an administration of justice; if they are not, bearing in mind the level of discretion involved, they will not possess enough characteristics of the conventional administration of justice to be categorised as such. The result is that Article 34.1 does not apply or alternatively the penalty involves a ‘limited function’ under Article 37.1.⁶⁴ Apart from Article 34.1, as we shall see from the case law rehearsed below, there are other constitutional provisions which might be thought to apply. Notably, Article 38.1 states: “[n]o person shall be tried on any criminal charge save in due course of law”.

⁶³ Article 34. 1 provides that:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

Article 37.1 provides that:

“Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.”

⁶⁴ For further detail on those very broad statements, see Morgan *Separation of Powers in the Irish Constitution* 94-102.

Here, too, the basic question is whether or not revenue penalties involve a ‘criminal charge’.

(2) Constitutional Case-law

2.48 The issue of whether a sanction is a criminal or civil penalty has arisen in a number of different contexts. In *Melling v O’Mathghamhna*⁶⁵ the issue was whether the charge was criminal for the purpose of engaging Article 38.5 of the Constitution (the right to jury trial). The accused sought a declaration to the effect that section 186 created a crime and that such was not a minor crime which could be tried summarily, without a jury. He was charged with 15 counts of smuggling butter contrary to section 186 of the *Customs Consolidation Act 1876*. Section 186 provided that:

“[e]very person who shall ... be in any way knowingly concerned in carrying, removing ... concealing, or in any manner dealing with goods with intent ... to evade any prohibition or restriction of or applicable to such goods ... shall for each offence forfeit either treble the value of the goods, including the duty payable thereon, or one hundred pounds, at the election of the Commissioners of Customs: and the offender may either be detained or proceeded against by summons.”⁶⁶

2.49 In considering what is a crime, Kingsmill Moore J set out the following as *indicia* of crimes:

- (i) It is an offence against the community at large and not against an individual;
- (ii) The sanction is punitive, and not merely a matter of fiscal reparation; and
- (iii) *Mens rea* is an element of an offence.

2.50 O’Dalaigh CJ. noted that:

“The vocabulary of section 186 of the Act of 1876 is the vocabulary of the criminal law; the preliminary detention in jail unless bail is found (s. 197) and the right to enter, search

⁶⁵ (1962) IR 1.

⁶⁶ *Melling v O’Mathghamhna* (1962) IR 1, 22.

and seize goods in a defendant's house or premises (ss. 204 and 205) are, as yet, unfamiliar features of civil litigation. In their initiation, conclusion and consequences proceedings under s.186 have all the features of a criminal prosecution."⁶⁷

2.51 The Supreme Court held that an offence under section 186 of the *Customs Consolidation Act* was a criminal offence.

2.52 However, it was argued in *McLoughlin and Tuite v Revenue Commissioners*,⁶⁸ which also concerned the right to jury trial, that section 500 of the *Income Tax Act 1967* (now section 1052 *TCA 1997*), concerned a criminal offence. Carroll J rejected this argument. The plaintiff had been issued with a summons for the payment of a penalty to the Minister for Finance for failing to file tax returns for a number of years. The plaintiff challenged the recovery of the penalties as a liquidated sum in the civil courts, alleging that the penalties were criminal in character. Carroll J held that while the penalty prescribed by section 500 for failing to make income tax returns, has penal consequences, it lacked other essential *indicia* of a crime. The penalty was recoverable in civil proceedings and the section did not use criminal 'vocabulary'. The issue also arose in *Downes v DPP*⁶⁹ and more recently in *DDP v Boyle*.⁷⁰

2.53 In *Downes v DPP*,⁷¹ Barr J was asked to consider whether the recovery of a penalty under section 128 of the *Income Tax Act 1967* as amended, was a "criminal proceeding within the meaning of the Prosecution of Offences Act 1974"⁷² so that the Director of Public Prosecutions was competent to prosecute. Section 128 of the *Income Tax Act 1967* provided for the imposition of a "penalty of £800 together with, in the case of a continuing non-compliance, a penalty of the like amount for every day on which the non-compliance is continued." Barr J held that the issue in *Downes* was essentially the

⁶⁷ Melling v O'Mathghabhna (1962) IR 1, 40.

⁶⁸ [1986] ILRM 304.

⁶⁹ [1987] IR 139, 142

⁷⁰ [1994] IR 221.

⁷¹ *Ibid.*

⁷² [1994] IR 221, 140.

same as that decided by Carroll J in *McLoughlin*. He concurred with the reasoning in that case and concluded that section 128 created “a form of civil liability and not criminal responsibility”.⁷³ The purpose of section 128 was coercive and not punitive. It differed fundamentally from the provisions creating revenue offences. Section 128 did not contain vocabulary or provisions which were commonly found in the criminal law. Barr J also noted that a penalty imposed under section 128 devolves onto the estate of a deceased, which in Barr J’s opinion was “strongly indicative of a non-criminal liability.”⁷⁴

2.54 In *DPP v Boyle*,⁷⁵ the defendant was prosecuted for failing to pay excise duty on bets as required by sections 24 and 25 of the *Finance Act 1926*. Section 24(4) of the *Finance Act 1926* provided that any person who failed to pay the duty would “be guilty of an offence...and shall be liable on summary conviction thereof to an excise penalty of £500.” In the District Court, the defendant argued, as in *Downes*, that the sections did not create criminal offences and therefore the Director of Public Prosecutions (‘DPP’) was not competent to prosecute under the sections. In determining the issue, Murphy J considered whether the penalty equated “more closely with the Customs Acts which were considered by the Supreme Court in *Melling v O’Mathghamhna* [1962] IR 1 or the Income Tax Acts which were considered by Miss Justice Carroll in *McLoughlin v Tuite* [1986] ILRM 304 and Mr Justice Barr in *Downes v The Director of Public Prosecutions* [1987] ILRM 665.”⁷⁶ In concluding that sections 24 and 25 concerned criminal matters, Murphy J held that “[t]he crucial factors in the present case are the presence of the words “an offence” and “summary conviction”.

2.55 In the *DPP v Redmond*,⁷⁷ the DPP applied for a review of a sentence on the basis it was unduly lenient. The defence argued that the sentence was not too lenient by virtue of the fact that a civil revenue penalty already paid by the accused ought to be taken into

⁷³ [1994] IR 221,142.

⁷⁴ *Ibid.*

⁷⁵ [1994] IR 221.

⁷⁶ [1994] IR 221, 223.

⁷⁷ [2001] 3 IR 390.

account. In appraising this, Hardiman J, writing for the Supreme Court, made a number of discursive comments on the civil penalty, which are of relevance. He described the legal nature of a revenue penalty as “a penalty, which is civilly recoverable *i.e.* it is a punitive consequence to the offender.”⁷⁸ He outlined the characteristics of a “revenue penalty”. He stated *obiter* that:

“The revenue penalties may vary, in particular with whether default in compliance is negligently, or fraudulently caused. Such penalties in certain circumstances can exceed three times the difference between the tax paid and the tax actually payable. As Mr Kieran Corrigan remarks in his *Revenue Law* (Dublin, 2000), these are penalties which will be imposed on top of the primary obligation of every tax payer to pay the correct amount of tax. Similarly, a penal rate of interest may be applied where income tax has not been paid as a result of a fraud or neglect of the tax payer. This, too, is in the nature of a penalty.”⁷⁹

2.56 Although there is a distinction between a “revenue penalty chargeable without prosecution and a fine or sentence for a ‘revenue offence’”, a person may be subject to both prosecution for a revenue offence and a revenue penalty chargeable without prosecution for the same default. Hardiman J held that the fact that a revenue fine or sentence under section 1078 may be imposed “‘without prejudice to any other penalty to which the person may be liable’ ... does not mandate a court to exclude from its consideration the fact of the payment of a revenue penalty in assessing the criminal penalty.”⁸⁰

2.57 In an important passage, Hardiman J stated:⁸¹

“[A] fine imposed by a criminal court differs from a revenue financial penalty. Unless there is a specific provision to the contrary (and it has not been submitted that there is any relevant provision here) a court must indeed proportion the fine to the means of the offender. A revenue

⁷⁸ [2001] 3 IR 390, 401.

⁷⁹ [2001] 3 IR 390, 402

⁸⁰ [2001] 3 IR 390, 402.

⁸¹ [2001] 3 IR 390, 403-404.

penalty, however, is generally of fixed amount (whether provided by statute or arrived at as a result of computation) and is payable in that sum without regard to the means of the offender subject only to such statutory mitigation as may be possible. For example, a court would rarely impose a fine which would have the consequence that the defendant would have to sell his or her house because to do so might be regarded as an extraordinary punitive measure. A revenue penalty, on the contrary, arises in a specified amount without regard to the means of the offender or what steps he will have to take to pay it. And there is generally only a limited amount of mitigation available, and that is at the discretion of the Revenue Commissioners.”

2.58 In *Murphy v GM*,⁸² a non-revenue case though from an analogous field, the appellants argued that provisions of the *Proceeds of Crime Act 1996* allowing for the forfeiture of property were criminal in nature. The Supreme Court reviewed a number of authorities, including *Attorney-General v Casey*,⁸³ *Attorney General v Southern Industrial Trust Ltd*⁸⁴ and *McLoughlin v Tuite*,⁸⁵ and held that “*in rem* proceedings for the forfeiture of property, even where

⁸² [2001] 4 IR 113.

⁸³ [1930] I.R. 163. This case turned on the issue of whether or not “an action for a liquidated sum” within the meaning of section 94 of the Courts of Justice Act 1924 was a criminal or a civil proceeding. The Supreme Court held that an action for the recovery of a penalty was a civil proceeding.

⁸⁴ (1957) 94 ILTR 161. In this case it was argued that section 500 of the Income Tax Act 1967, which imposes a fixed monetary penalty on any person who fails to comply with a notice served upon him which requires him to deliver any documents or particulars, was a criminal penalty. The Supreme Court held that the penalty was a deterrent or incentive and not a criminal penalty.

⁸⁵ [1989] IR 82. This case turned on whether or not proceedings for the forfeiture and condemnation of a car under section 207 of the Customs Consolidation Act 1876, and section 5 of the Customs (Temporary Provisions) Act 1945 were civil or criminal in nature. The Supreme Court held that applying the decision of the Supreme Court in *Attorney-General v Casey* the proceedings were civil in nature.

accompanied by parallel procedures for the prosecution of criminal offences arising out of the same events, are civil in character”.⁸⁶

2.59 Apart from *Redmond*,⁸⁷ these cases do not deal directly with civil revenue penalties; but with varieties of penalties imposed by the courts. However, in *Redmond* Hardiman J does address what he calls a “revenue penalty chargeable without prosecution” and characterises it as being distinct from a “sentence for a ‘revenue offence’” (as quoted in paragraph 2.55). The other judgments in *Redmond* are concerned with various penalties imposed by the courts and, apart from *Melling*,⁸⁸ these were characterised as non-criminal penalties. Extrapolating from these we can say that if the penalties imposed by the court are not criminal, then for reasons given by Hardiman J, it is even less likely that penalties imposed by the Revenue Commissioners should be characterised as criminal. Significantly, this probably means that the current arrangement is constitutional because either there is no “administration of justice” so that Article 34.1 is not attracted; or, if there is an administration of justice, since this is not a criminal area and is “limited”, the Article 37.1 exception would apply.⁸⁹

⁸⁶ [2001] 4 IR 113, 153.

⁸⁷ *DPP v Redmond* [2001] 3 IR 390.

⁸⁸ *Melling v O’Mathghamhna* [1962] IR 1.

⁸⁹ Here we might raise a tentative point: if the Revenue Commissioners were found to be administering justice for the purposes of Article 34.1, a right to a fresh appeal to the Circuit Court, as recommended in paragraph 2.90, could be significant. It would mean that there was an appeal from the Revenue Commissioners to the Appeal Commissioners and thence onto the Circuit Court. Since this would be a full fresh appeal it is possible that it would cure any unconstitutionality. The problem is however that this would be not an appeal to a court from the Revenue Commissioners; but an appeal to a non-court and then an appeal on to a court.

See further Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23 - 2003) at 36-37.

F The European Convention on Human Rights

(1) Introduction

2.60 Ireland is a party to the European Convention on Human Rights (“ECHR”). Although the ECHR forms part of the State’s Public International Law obligations, it has not yet, as of July 2003, been incorporated into domestic law. However, while it cannot be relied upon, as binding the State, in Irish Courts,⁹⁰ it is anticipated that the *European Convention on Human Rights Bill 2001*, incorporating the provisions of the ECHR into domestic law, will be enacted by the end of 2003. The incorporation of the ECHR will have a number of consequences for Irish public bodies and the courts.⁹¹ First, section 3 of the Bill requires “every organ of the State”, which presumably includes the Revenue Commissioners, to act in accordance with the ECHR. Secondly, section 2 of the Bill provides that “[i]n interpreting and applying any statutory provision or rule of law, a court shall, in so far as 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.” Section 4 of the Bill requires judicial notice to be taken of: the Convention provisions, any declaration, decision, advisory

⁹⁰ *Re O Laighleas* [1960] IR 93, *Norris v Attorney General* [1984] IR 36. “More simply put, this means that the Convention is law *for* Ireland, but not actually law *in* Ireland.” Explanatory Memorandum to the *European Convention on Human Rights Bill 2001* at 2.

However, there is an argument that the ECHR can be invoked in Irish Courts, in cases involving European Community law, an appellant could seek to rely on their Convention rights as incorporated by the general principles of human rights as recognised and enforced by the European Court of Justice. See *Adams v Director of Public Prosecutions* [2001] 1 IR 47.

The possibility of petitioning the European Court of Human Rights also exists at the moment, provided all available domestic remedies have been exhausted. Decisions of the European Court of Human Rights are binding on the State, but only on the international sphere.

⁹¹ See Kirrane “Human Rights in the Irish Constitution and in the European Convention on Human Rights-A Comparative Study” [2003] 21 *ILT* 7, Murphy “The European Convention on Human Rights Bill 2001” (2001) 6 (9) *Bar Review* 541

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 on matters falling within their respective jurisdiction and principles laid down therein.⁹²

2.61 Article 6 guarantees the right to a fair and public hearing in the determination of an individual’s civil rights and obligations or any criminal charge. Article 6(1) applies to both civil and criminal cases but Article 6 (2) and (3) only applies when an individual is charged with a “criminal offence”.⁹³ As we shall see in following paragraphs,

⁹² National Courts will be bound to take the case law of the ECtHR into account but will not be bound to follow the case law as the doctrine of *stare decisis* will not apply. The ECtHR, itself, does not follow a doctrine of precedent. However, a national court should only depart from a clear principle of the ECtHR where there is strong reason to do so. See Potter LJ at paragraph 25 and Nourse LJ at paragraph 100 of *Customs and Excise Commissioners v Han & Yau* [2001] EWCA Civ 1040, [2001] 1 WLR 2253, 3 July 2001.

Section 5(1) of the Bill provides that “the High Court or, the Supreme Court when exercising its appellate jurisdiction, may ...make a declaration ... that a statutory provision or rule of law is incompatible with the State’s” ECHR obligations (‘declaration of incompatibility’) where there is no other adequate legal remedy available. Section 5(2)(a) provides that a declaration of incompatibility will “not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made ...”

⁹³ Article 6(1) provides:

“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.

Article 6(2) provides:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

Article 6(3) is quoted at footnote 143.

due to the European Court's interpretation of the concept of a criminal charge, outlined below, penalties levied by the Revenue Commissioners may fall within the ambit of the ECHR.

(2) “Civil rights and obligations”

2.62 Article 6 of the ECHR guarantees the right of access to the courts and the right to a fair trial where there is a determination of an individual's ‘civil rights and obligations’. The Court has not provided a definition of what will be considered to fall within one's ‘civil rights and obligations’ but it has held that the concept has a specific meaning under the Convention, which is not determined solely by reference to the particular domestic law.⁹⁴ The Court has distinguished between private and public law for the purpose of bringing rights arising from private law within the scope of the ‘civil rights and obligations’ referred to in Article 6(1).⁹⁵

2.63 In *X v France*,⁹⁶ the Commission on Human Rights held that “Article 6.1 does not apply to proceedings relating to tax assessments”. The ECtHR approved the Commission's reasoning in *Schouten and Meldrum v The Netherlands*⁹⁷ The ECtHR considered

⁹⁴ *Ringeisen v Austria* 16 August 1971 paragraph 94 cited in Mole and Harby “The right to a fair trial. *A guide to the implementation of Article 6 of the European Convention on Human Rights*” (Human rights handbooks, No. 3 Council of Europe 2001) at 11. See also *Ferrazzini v Italy* [2001] ECHR 44759/98 at paragraph 24.

⁹⁵ The Court has not necessarily equated private law with civil law. See Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* (Kluwer Law International 1998) at 404.

⁹⁶ (1983) 32 DR 266.

⁹⁷ (1994) 19 EHRR 432, paragraph 50. It held:

“[t]here may exist ‘pecuniary’ obligations vis-à-vis the State or its subordinate authorities which, for the purpose of Article 6(1), are to be considered as belonging exclusively to the realm of public law and are accordingly not covered by the notion of ‘civil rights and obligations’. Apart from fines imposed by ways of ‘criminal sanction’, this will be the case, in particular, where an obligation which is pecuniary in nature derives from tax legislation or is otherwise part of normal civic duties in a democratic society.”

the issue even more recently in *Ferrazzini v Italy*⁹⁸ and *Vastberga Taxi Aktiebolag and another v Sweden*⁹⁹ and confirmed its previous case law. In *Ferrazzini*, the applicant applied for a reduction in particular tax rates and paid its tax in accordance with the reduced tax rate. The tax authority disagreed and issued the applicant with supplementary assessments and penalties. The applicant sought to have the assessments and penalties set aside in separate proceedings. One set of proceedings lasted more than ten years for a single level of jurisdiction (determination by the District Tax Commission) and the other proceedings, which involved two levels of jurisdiction (determination by the District Tax Commission and appeal lodged with the Regional Tax Commission), began in January 1988 and were still ongoing 12 years and nine months later. The applicant argued that there had been a violation of Article 6(1) because of the length of time taken by the three sets of tax proceedings to which he was a party.

2.64 The Court cited *Schouten and Meldrum* with approval but went on to consider whether, in the light of the passage of time since the Convention was passed, Article 6(1) should “be extended to cover disputes between citizens and public authorities as to the lawfulness under domestic law of the tax authorities' decisions.”¹⁰⁰ However, the Court concluded that “tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant ... tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.”¹⁰¹

⁹⁸ [2001] ECHR 44759/98. Both parties agreed there was no criminal charge involved so the issue was whether there was a civil right within the meaning of 6(1).

⁹⁹ [2002] ECHR 36985/97.

¹⁰⁰ Paragraph 26.

¹⁰¹ Paragraph 29. The reference to pecuniary obligations is explained by the fact that a pecuniary claim is an example of a civil right. A proviso has to be made to the general statement that Article 6(1) does not apply in its civil guise to tax disputes. The Court has found Article 6(1) applicable in cases which are concerned with a private right, albeit in a tax context. For example, in *The National Building Society, The Leeds Permanent Building Society and the Yorkshire Building Society v UK*, the Court held that

(3) ***‘Criminal charge’***

2.65 Thus, it is not open to a taxpayer to argue that his or her ‘civil rights and obligations’ are being determined when the Revenue Commissioners impose a civil penalty. However, protection may be available on the basis that the Revenue Commissioners’ ‘civil’ penalty is actually a criminal penalty. A significant problem here is that although the penalties imposed by the Revenue Commissioners are classified as “civil” for the purposes of Irish domestic law,¹⁰² they may amount to a “criminal charge” for the purposes of the Convention and thus, entitle a taxpayer to the protections specified in Article 6.¹⁰³ The Court held in the *Adolf* Case that ‘criminal charge’ is to be “interpreted as having an ‘autonomous’ meaning in the context of the Convention and not on the basis of their meaning in domestic law.”¹⁰⁴ In the *Engel* Case,¹⁰⁵ the court laid down three criteria which it would use to determine whether a penalty amounted to a criminal penalty for the purposes of the Convention. The Court will consider:

- (i) the domestic classification,
- (ii) the nature of the offence, and
- (iii) the nature and severity of the penalty.¹⁰⁶

Article 6(1) applied to restitution proceedings for the recovery of tax allegedly overpaid because the proceedings “were decisive for the determination of private law rights to quantifiable sums of money” even though the circumstances of the case originated in tax legislation. See Human Rights and Article 6 “The operation of the Human Rights Act 1998 in the tax field” available at <http://www.11newsquare.com/articles.htm> Human Rights and Damages. Grosz, Beatson, Duffy *Human Rights The 1998 Act and the European Convention* (London Sweet & Maxwell 2000) at 227. See also *Editions Periscope v France* (1992) 14 EHRR 597 at 606, 612-613 for another example.

¹⁰² See paragraphs 2.47-2.58.

¹⁰³ Donnelly and Walsh *Revenue Investigations and Enforcement* (Butterworths 2002) at 200.

¹⁰⁴ Judgement of 26 March 1982, A.49, at 14.

¹⁰⁵ (1979) 1 EHRR 706.

¹⁰⁶ These criteria are alternative and not cumulative. However, where a conclusion cannot be reached on a separate analysis of the criteria, a

(4) French, Swiss and Dutch Authorities

2.66 In *Bendenoun v France*,¹⁰⁷ *AP, MP and TP v Switzerland*¹⁰⁸ and *JJ v The Netherlands*.¹⁰⁹ the Court addressed the issue of whether certain national tax and customs civil and administrative penalties amounted to a ‘criminal charge’. In all three cases, the Court held that a ‘criminal charge’ was involved and therefore the taxpayer was entitled to the Article 6 protections.

2.67 In *Bendenoun v France*, the applicant was convicted of customs and exchange control offences in criminal proceedings. The tax authorities also issued supplementary tax assessments, which included penalties.¹¹⁰ The applicant unsuccessfully appealed against the assessments and penalties within the domestic legal system and then challenged the imposition of the penalties before the European Court on the basis that he had been denied the right to a fair trial under Article 6(1). The first issue the Court had to determine was whether the proceedings concerned a ‘criminal charge’ within the meaning of Article 6(1).

2.68 The provisions of the General Tax Code, applicable at the material time, permitted the imposition of a tax surcharge of 200% where the tax debtor was guilty of deception. The Court acknowledged that a system which empowers the Revenue authorities to prosecute and punish tax offences with large penalties “is not incompatible with Article 6 ... so long as the taxpayer can bring any such decision affecting him before a court that affords the safeguards of that provision.”¹¹¹ However, the Court held that cumulatively the predominantly criminal characteristics of the offence and penalty made the charge criminal within the meaning of Article 6 (1).¹¹²

cumulative approach may be adopted. See *Vastberga Taxi Aktiebolag and another v Sweden* [2002] ECHR 36985/97 at paragraph 78.

¹⁰⁷ (1994) 18 EHRR 54.

¹⁰⁸ (1997) 26 EHRR 541.

¹⁰⁹ (1998) 28 EHRR 168.

¹¹⁰ Tax surcharges for the evasion (deception) of VAT and Corporation Tax.

¹¹¹ *Bendenoun v France* (1994) 18 EHRR 54, at paragraph 46.

¹¹² *Ibid* at paragraph 47. See Donnelly and Walsh *Revenue Investigations and Enforcement* (Butterworths 2002) at 200-02.

2.69 In *AM, MP and TP v Switzerland*, the tax authorities investigated the affairs of a deceased individual and concluded that the deceased was guilty of tax evasion. The tax authorities instituted proceedings against the applicants, as heirs of the deceased,¹¹³ for the recovery of the unpaid taxes and imposed fines on the applicants for the tax evasion. The applicants challenged the imposition of the penalties. They claimed that the presumption of innocence enshrined in Article 6(2) was breached as “irrespective of any personal guilt, they had been convicted of an offence allegedly committed by someone else ...”. The applicants also claimed that they were entitled to a public hearing under Article 6(1) and protection of the rights of the defence guaranteed by Article 6(3).

2.70 In determining whether Article 6 was applicable, the Court repeated its earlier case law concerning the autonomous nature of the concept of a “criminal charge” within the meaning of Article 6 and the three criteria to be taken into account when it is being decided whether a person was “charged with a criminal offence” for the purposes of Article 6 (see paragraph 2.65). The Court held that the fines were not inconsiderable and that the penalties were punitive and deterrent in nature. The Court attached weight to the national court’s description of the fine as ‘penal’, in concluding that Article 6 was “applicable under its criminal head.”¹¹⁴

2.71 The Court held that “[i]t is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act” and because the presumption of innocence guaranteed by Article 6(2) requires compliance with this rule, Article 6(2) had been violated.¹¹⁵

¹¹³ At the time the proceedings were instituted and the penalties were imposed the Swiss Civil Code provided that:

“1. The heirs shall automatically acquire the entire estate as soon as it passes.

2. Subject to the statutory exceptions, all claims and actions, property rights and other rights *in rem* and possessions of the deceased shall automatically pass to them, and they shall become personally liable for the deceased's debts.”

¹¹⁴ *Bendenoun v France* (1994) 18 EHRR 54, paragraph 43.

¹¹⁵ Section 1060(1) of the *TCA 1997* provides that where a deceased has incurred a penalty, “any proceedings under the Tax Acts which have been

2.72 In *JJ v Netherlands*,¹¹⁶ Article 6(1) was held to be applicable because “[t]he effect of the decision of the Supreme Court was to ratify the imposition of the fiscal penalty on the applicant. It

or could have been commenced against that person may be continued or commenced against his or her executor or administrator, as the case may be, and any penalty awarded in proceedings so continued or commenced shall be a debt due from and payable out of his or her estate.”

Although the recovery of a penalty against the estate of a deceased is “strongly indicative of a non-criminal liability” (*Downes v DPP* [1987] IR 139, 142 *per* Barr J) for the purposes of Irish law, if a penalty is held to be criminal in character for the purposes of the ECHR, it cannot be recovered against the heirs of the deceased under the principle set out in *AM, MP and TP v Switzerland* that criminal liability does not survive the person who committed the criminal act. Thus, it might seem that once the ECHR is incorporated into Irish law section 1060(1) may be liable to challenge in the Irish Courts.

However, it may be possible to distinguish the decision in *AM, MP and TP v Switzerland* from the position which would arise in Ireland. In *AM, MP and TP v Switzerland* the tax administration sought to impose the penalties on the applicants as heirs of the deceased, whereas in Ireland the estate first passes to the personal representatives of the deceased. Thus, proceedings under section 1060(1) to recover a penalty would be taken against the personal representatives of the estate and not the heirs of the deceased.

¹¹⁶ The tax authorities issued a supplementary tax assessment and a fiscal penalty equal to the amount of the tax assessed. The applicant lodged an appeal with the Taxation Division of the Court of Appeal but it was declared inadmissible because the court registration fee had not been paid. The applicant unsuccessfully appealed to the Supreme Court claiming, *inter alia*, “that it was inappropriate to levy a court registration fee ... concerning the determination of a ‘criminal charge’”. An Advocate General to the Supreme Court submitted an advisory opinion, which was not supplied to the applicant until after the Supreme Court had delivered its judgement. The applicant took the case to the Commission and then to the ECtHR, where he submitted that his Article 6(1) rights were infringed as he was not given an opportunity to respond to the Advocate General’s advisory opinion. The Government, however, disputed the applicability of Article 6(1) on the basis that the Supreme Court was not determining a “criminal charge”. Although none of the parties disputed that the fiscal penalty imposed on the application was a “criminal sanction”, the Government argued that the appeal to the Supreme Court only concerned the payment of the court registration fee and that fee could not be considered to be related to a “criminal charge” within the meaning of Article 6(1).

was thus decisive for the determination of the "criminal charge" leading to the imposition on him of the penalty."¹¹⁷ The fact that the appeal to the Supreme Court was limited to points of law and that the Supreme Court's decision was merely concerned with a preliminary question of a procedural nature was not sufficient to render Article 6(1) inapplicable.

(5) British Authorities

2.73 In two recent British cases,¹¹⁸ it was held, after applying the *Engel* criteria, that 'civil penalties' imposed by the Customs and Excise Commissioners and the Inland Revenue were 'criminal charges' for the purposes of the ECHR.

2.74 In *King v Walden (HM Inspector of Taxes)*,¹¹⁹ the appellant challenged the imposition of penalties under section 95 of the *Taxes Management Act 1970* for fraudulently or negligently making incorrect tax returns. In the High Court, Jacob J was asked to decide, whether penalties under section 95 are a criminal offence for the purposes of Article 6 of the Convention. If the Court found that Article 6 applied, it was then asked to determine whether there was a breach of the presumption of innocence; and whether there was a hearing within a reasonable time.

2.75 Jacob J held that the penalties system for fraudulent or negligent delivery of incorrect returns or statements is "criminal" for the purposes of Article 6(2). In determining whether the penalty in question amounted to a criminal charge for the purposes of Article 6(2), Jacob J relied on the European Court of Human Rights (ECtHR) decisions in *Georgiou v UK*; *Bendenoun v France*; *AP, MP and TP v Switzerland* and the VAT Tribunal decision in *Han & Yau*.¹²⁰ In *Georgiou*, the ECtHR held that penalties for the fraudulent evasion of

¹¹⁷ The Supreme Court could have overturned the Court of Appeal's decision and substituted its own decision on the merits, referred the case back to the Court of Appeal which had originally heard the case or to another Court of Appeal for a complete rehearing.

¹¹⁸ *King v Walden (Inspector of Taxes)* [2001] STC 822 and *Han & Yau*; *Martins & Martins*; *Morris v Customs and Excise Commissioners* [2001] EWCA Civ 1040, [2001] 1 WLR 2253.

¹¹⁹ [2001] STC 822

¹²⁰ Decision No 16990, 5th December 2000.

VAT were criminal for the purposes of Article 6. In *AP, MP and TP v Switzerland*, the Court considered whether fines imposed on heirs of a deceased were criminal in nature. Jacob J applied the *Engel* criteria. He held that the purpose of the penalty system was both punitive and deterrent; the penalties were substantial (STG£58,000)¹²¹ and were not related to any administrative costs. Additionally, the amount of the fine depended on the culpability of the taxpayer and the availability of mitigation. Finally, Jacob J observed that on appeal the burden of proof to show that the penalties were correct rested on the Crown, whereas in appeals against assessments the burden of proof lay on the taxpayer.

2.76 Although Jacob J found that Article 6 was applicable, he did not find any breach of the applicant's Article 6 rights. The appellant argued that reliance on the facts as found in an earlier appeal and the presumption created by section 101 of the *Taxes Management Act 1970*¹²² shifted the burden of proof contrary to Article 6(2) and breached the presumption of innocence.¹²³ Jacob J rejected this argument. He held that the burden of proof lay at all times with the Revenue. In the alternative, the presumptions were "well within the reasonable limits for such presumptions as are permitted by Article 6(2)".¹²⁴ Jacob J concluded that there was a hearing within a reasonable time, although it was very close to being unreasonable, for the purposes of Article 6(1). He took into account the complexity of the case, the nature of the potential punishment and the extent to which the accused contributed to the delay.¹²⁵

¹²¹ €82,000 (approximately).

¹²² Which provided that final and conclusive assessments are evidence that the income or chargeable gains were received for the purpose of penalty determinations.

¹²³ Section 101 provides:

"For the purposes of the preceding provisions of this Part of this Act any assessment which can no longer be varied by any Commissioners on appeal or by order of the court shall be sufficient evidence that the income or chargeable gains in respect of which tax is charged in the assessment arose or were received as stated therein."

¹²⁴ Paragraph 82.

¹²⁵ The Court of Appeal refused leave to appeal. Mance LJ refused leave to appeal on the papers on 5 July 2001 and Jonathan Parker LJ and Bodey J

2.77 The Inland Revenue issued the following statement, in response to *King v Walden*:

“Mr King (King v Walden TCL 3643) was refused leave to appeal to the Court of Appeal. Thus we have been unable to challenge those aspects of the High Court judgement with which we disagreed. Those were that:

- tax-gear penalties under Section 95 TMA are criminal for the purposes of Article 6 of the ECHR, and
- the proceedings were instituted by the Revenue by the issuing of the penalty determinations rather than by Mr King when he appealed against those determinations. As a result, by virtue of Section 22(4) of the HRA, the taxpayer was entitled to rely on the Act in his appeal even though the proceedings commenced before the Act came into force.

We hope to find another case where these points can be further considered by the Court of Appeal. But in any event and even if any of these penalties are “criminal”, our current understanding is that our procedures are consistent with a taxpayer’s Article 6 rights. Further guidance on what to say to customers about those rights is at EM1362. We do not see any immediate reason to make any other changes to our procedures in the light of the King case.

refused leave following an oral hearing on 3 October 2001. [2001] EWCA Civ 518. After the High Court’s decision and prior to the hearing in the Court of Appeal of the application for leave to appeal, the House of Lords held, in *R v Lambert* [2001] UKHL 37, [2001] 3 WLR 206 that the *Human Rights Act* has no retrospective application. The appellants, therefore, did not put forward any arguments concerning a violation of the presumption of innocence enshrined in Article 6(2). The Court of Appeal referred to this, but nevertheless addressed the appellant’s arguments on whether there was unreasonable delay contrary to Article 6(1). In concluding that an appeal based upon delay would not stand any real prospect of success in the Court of Appeal, the Court relied on the High Court’s finding that the delay was not unreasonable and also held that there was little evidence of prejudice caused to the applicant by the delay.

Except in cases where Section 100A TMA EM1375 is in point, you should continue to take Section 95 penalties in appropriate cases, whether by including them in a contract settlement at the conclusion of an enquiry or by making formal penalty determinations having received the necessary authority EM5200.”¹²⁶

2.78 In the second British case, *Han & Yau; Martins & Martins; Morris v Customs and Excise Commissioners*,¹²⁷ the Customs and Excise Commissioners appealed against a VAT and Duties Tribunal decision that civil penalties for the alleged dishonest evasion of VAT and excise duty involved criminal charges for the purposes of Article 6(1).¹²⁸ The English Court of Appeal, by a 2:1 majority (Lord Justice Potter and Lord Justice Mance LJ; Sir Martin Nourse dissenting), upheld the decision of the VAT and Duties Tribunal.¹²⁹ The consequence of this is discussed at paragraph 2.82. In reaching their decisions Potter LJ and Mance LJ relied on the ECtHR decisions in *Ozturk v Germany*,¹³⁰ *Bendenoun v France*,¹³¹ *AP, MP and TP v*

¹²⁶ “EM1401- Rights and Obligations: Tax Cases: King v Walden” (Inland Revenue). Available at:

<http://www.inlandrevenue.gov.uk/manuals/emmanual/em1400/em1401.hm>

¹²⁷ [2001] EWCA Civ 1040, [2001] 1 WLR 2253.

¹²⁸ Section 60 of the *Value Added Tax Act 1994* and section 8 of the *Finance Act 1994*.

¹²⁹ Although Sir Martin Nourse applied the three criteria for determining whether the penalties amounted to a criminal charge, he attached greater importance to the first criterion, namely the national classification of the offence, than Potter and Mance LJ and the decisions of the ECtHR. He held (at paragraphs 109-110):

“In this country we have, since 1689, developed a system of civil administration in which the executive, being subject to review by the courts, acts responsibly and fairly towards the individual citizen, the protection of whose rights is an integral part of the system. It would be folly, in the name of an abstraction, to introduce a further unnecessary protection, whose practical consequence would be to impair the efficiency of the system at no advantage to the taxpayer. For my part, I decline to do so.”

¹³⁰ (1984) 6 EHRR 409.

¹³¹ (1994) 18 EHRR 54.

*Switzerland*¹³² and *Georgiou (trading as Marios Chippery) v United Kingdom*.¹³³ The national classification of the penalties was merely a starting point; the nature of the proceedings were concerned with fraud/dishonesty; the Customs and Excise Commissioners enjoyed a discretion as to whether to apply a civil penalty or prosecute and finally the penalty, whose purpose was both punitive and deterrent, was substantial.¹³⁴

2.79 Potter LJ distinguished the High Court decision in *King v Walden*, which was concerned with imposition of penalties for fraudulent or negligent delivery of incorrect tax returns or statements and confined his decision to penalties imposed in respect of dishonesty.¹³⁵

(6) Irish Civil Penalties

2.80 The central question is what impact a decision that civil revenue penalties are, for the purposes of the ECHR, criminal in character, would have on the civil penalties imposed by the Revenue Commissioners and the manner in which they are imposed. Section 1053(1) provides that where a taxpayer fraudulently or negligently¹³⁶

¹³² (1997) 26 EHRR 541.

¹³³ [2001] STC 80.

¹³⁴ Potter LJ held that the jurisprudence of the ECtHR on whether certain penalties for tax evasion amounted to a “criminal charge” for the purposes of Article 6(1) did not require the penalty in question to result in, or potentially result in, imprisonment. *Han & Yau* at paragraph 78. He cited the ECtHR judgments in *Ozturk*, *Lauko*, *Georgiou*.

¹³⁵ At paragraph 79.

¹³⁶ Fraud or negligence is not defined. If a taxpayer innocently submits an incorrect return and the mistake comes to the taxpayer’s attention, the return will be treated as having been negligently submitted unless the taxpayer corrects the return within a reasonable time. Section 1053(3) of the *TCA 1997*.

If a taxpayer fraudulently or negligently supplies incorrect returns in relation to provisions listed in column 2 or 3 of Schedule 20, a penalty of €125, or €315 where fraud is involved, will be imposed. Sections 1053 and 1054 impose higher penalties on companies and other bodies of persons. Section 1055 provides that any person who assists in or induces the making of incorrect returns shall be subject to a €630 penalty. Section 1059 refers to the Revenue Commissioners’ power to add an increased rate of income or corporation tax to an assessment as a penalty and to collect

makes incorrect returns, specified in column 1 of Schedule 29,¹³⁷ a taxpayer will be liable to a fine of €125 and the difference between the amount paid and the correct amount payable. Where fraud is involved, the penalty is €125 plus twice the difference between the amount paid and the amount payable.¹³⁸ Penalties can also be imposed for the negligent or fraudulent failure to deliver returns under section 1053(1A).¹³⁹

2.81 If one considers the penalties provided for in section 1053, it is probable that they too would be considered ‘criminal charges’ for the purposes of the ECHR. Although domestically they are not classified as criminal charges, the classification for the purposes of the Convention is independent of the domestic view. The tax penalties seem to fall into the same categories as those laid out in *Bendenoun*¹⁴⁰. These provisions:

- (i) cover all citizens in their capacity as taxpayers, and not a given group with a particular status. It lays down certain requirements, to which it attaches penalties in the event of non-compliance;
- (ii) the tax surcharges are intended not as pecuniary compensation for damage but essentially as a punishment to deter re-offending;

that increased rate of tax in the same way as the rest of the tax included in the assessment. Auditors are generally concerned with penalties under sections 986, 987 1053, 1054 of the *TCA 1997*, sections 26 and 27 *Value-Added Tax Act 1972*. 2002 Code of Practice for Revenue Auditors at 23. Section 58 of the *Capital Acquisitions Tax Consolidation Act 2003* provides for the imposition of penalties for negligently or fraudulently filing returns or failure to furnish returns. Section 129 of the *Stamp Duty Consolidation Act 1999* provides for penalties where chargeable instruments are enrolled without being stamped. Section 26 of the *Value-Added Tax Act 1972* also provides for the imposition of penalties.

¹³⁷ See Appendix B.

¹³⁸ Interest, under section 1082(2), may be charged at 2% for each month or part of a month from the date or dates on which the tax undercharged would have been payable where fraud or negligence is involved.

¹³⁹ As inserted by section 130(1)(a)(i) of the *Finance Act 2002*.

¹⁴⁰ (1994) 18 EHHR 54

- (iii) they are imposed under a general rule, whose purpose is both deterrent and punitive”;
- (iv) the penalties are very substantial and in the event of non-payment a tax recalcitrant could be liable to be committed to prison.¹⁴¹

2.82 The question arises whether the procedure for the imposition of civil penalties is compatible with Article 6 of the ECHR. In *Han & Yau*, the Court of Appeal held that the consequences of classifying a case as criminal under the Convention will have to be worked out on a case by case basis.¹⁴² Equally the impact of a similar development in this jurisdiction would have to be worked out on a case by case basis. However if Irish tax ‘civil penalties’ were held to be criminal charges for the purposes of the Convention, certain basic protections, in addition to the minimum rights outlined in Article 6(3),¹⁴³ would have to be afforded such as

¹⁴¹ *Bendenoun v France* (1994) 18 EHHR 54, Paragraph 47.

¹⁴² Mance LJ *Customs and Excise Commissioners v Han & Yau* [2001] EWCA Civ 1040, [2001] 1 WLR 2253, 3 July 2001 at paragraph 88. “But I remain to be convinced that our decision will seriously undermine or disrupt the general nature of existing procedures.”

In the aftermath of *King v Walden* and *Han and Yau* some commentators espoused the view that the application of Article 6 protections could “have wide-reaching implications for the investigation of tax liabilities and for the conduct of penalty hearings. Indeed they may affect the admissibility of evidence obtained through the tax authorities’ exercise of their compulsory powers.” *King v Walden (Inspector of Taxes)* Fraud Intelligence October 2001.

¹⁴³ Article 6(3) provides:

“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;

access to an independent and impartial tribunal, the right to a fair, public trial,¹⁴⁴ (but subject to the very significant point in the tax field, that an individual can waive this right), adversarial proceedings and public pronouncement of a reasoned judgment, within a reasonable time, which are all guaranteed by Article 6(1). We shall elaborate on two of these aspects.

(a) *Right to an independent and impartial tribunal*¹⁴⁵

2.83 Article 6(1) guarantees the right to an independent and impartial tribunal as “a constituent element of the right to a fair trial.”¹⁴⁶ However significantly, the determination of criminal charges by administrative bodies, such as the Revenue Commissioners, will not violate Article 6 provided 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”.¹⁴⁷

2.84 The issue thus becomes whether a taxpayer’s right of access is guaranteed under the current appeal mechanisms in place. There are a number of avenues open to a taxpayer wishing to challenge penalties imposed by the Revenue Commissioners, namely: an internal Revenue review; review by a Board of External Reviewers;

(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.”

¹⁴⁴ The English authorities have recognised that this may become an issue for the General Commissioners. Hearings before the General Commissioners have always been held in private in order to ensure the taxpayers’ privacy. The Lord Chancellor’s Department, Consultation Paper, Tax Appeals Tribunals (March 2000), Q13.5.

¹⁴⁵ This right is commonly referred to as the “right to a court”.

¹⁴⁶ *Deweere v Belgium* (1980) 2 EHRR 439, paragraph 49.

¹⁴⁷ *Vastberga Taxi Aktiebolag and another v Sweden* [2002] ECHR 36985/97, paragraph 93. See also *Bendenoun v France* (1994) 18 EHRR 54, paragraph 46; *Le Compte, Van Leuven and De Mayer v Belgium* (1981) 4 EHRR1, paragraph 51; *Albert and Le Compte v Belgium* (1983) 5EHRR 533, paragraph 29; *Lauko v Slovakia* 4/1998/907/1119 (September 2, 1998). *Umlauf v Austria* [1995] ECHR 15527/89 at paragraphs 37-39)

recourse to the Ombudsman; and a judicial review action challenging the legality of the penalties imposed in the event of enforcement proceedings by the Revenue.¹⁴⁸ Both the internal and joint reviews offered by the Revenue Commissioners would not fall within the meaning of a tribunal referred to in Article 6 since they are part of the administrative body itself. The Ombudsman could not satisfy the requirements of Article 6(1) as the Office does not have the power to issue binding decisions which are not subject to alteration by a non-judicial body.¹⁴⁹

2.85 Nor would judicial review actions suffice either because where a body imposing penalties which amount to a criminal charge does not satisfy the requirements of Article 6, the reviewing tribunal

¹⁴⁸ The Appeal Commissioners do not have jurisdiction on appeals in relation to interest or penalties except in relation to the issue of whether the 2% interest rate for fraud or negligence is applicable under section 1082(5)(b) of the *TCA 1997*: but in practice this is almost never levied.

The State (Calcul International Limited and Solatrex International Limited) v The Appeal Commissioners and the Revenue Commissioner (1984 No 640 SS, December 18, 1986) “it seems to me that their [the Appeal Commissioners] essential function is to decide whether the assessment raised by the tax inspector should be reduced or increased. They do not have power to enforce their decision nor to impose liabilities. Essentially, their decisions are enforced by the institution of legal proceedings to recover the amount of tax determined by them as being payable. Equally in those cases where penalties may become payable proceedings must be instituted before they can be recovered. Nor do the Appeal Commissioners determine the amount of or impose such penalties. It is the statute which does so.”

Under section 1065, the Revenue Commissioners mitigate any fine or penalty after judgment and may order any person imprisoned for any offence to be discharged before the term of his or her imprisonment has expired. The Minister for Finance may also mitigate any fine or penalty either before or after judgment. The mitigation by the Revenue Commissioners or the Minister for Finance may not exceed 50% of the fine or penalty.

¹⁴⁹ *Van De Hurk v Netherlands* (1994) 18 EHRR 481, paragraph 45. “The tribunal must have the power to give a binding decision which can not be altered by a non-judicial body.” *Findlay v UK* 25 February 1997 paragraph 77 cited in Mole and Harby “The right to a fair trial. *A guide to the implementation of Article 6 of the European Convention on Human Rights*” (Human rights handbooks, No. 3 Council of Europe 2001) at 29.

would have to have the power to quash the decision of the body below, on both questions of law and fact.¹⁵⁰ Another possible recourse is section 1061, which provides that officers of the Revenue Commissioners may sue in their own name by civil proceedings for the recovery of the penalty in the High Court.¹⁵¹ But, again, it is doubtful whether access to this judicial process guarantees a taxpayer faced with a criminal charge sufficient protection for the purposes of Article 6 of the Convention. The final, theoretical possibility would be an action under section 1061 *TCA 1997*, which is an action for a liquidated sum and will be for the full amount of the penalty, which can amount to 200% of the underpaid tax where the Revenue Commissioners consider that fraud or negligence was involved. However the use of this provision depends upon the Revenue Commissioners invoking it and the Revenue Commissioners have not taken actions to enforce the payment of penalties in recent years. However, it is anticipated that section 1061 *TCA 1997* will be invoked more frequently in the future.

2.86 *The conclusion, which seems to the Commission to follow is that the European Convention probably requires that there be an appeal from the Revenue Commissioners to an independent and*

¹⁵⁰ *Umlauf v Austria* (1996) 22 EHRR 76, paragraph 39 cited in Grosz, Beatson, Duffy *Human Rights The 1998 Act and the European Convention* (London Sweet & Maxwell 2000) at 238.

¹⁵¹ Section 1077 applies this section to capital gains tax. Section 133 of the *Stamp Duties Consolidation Act 1999* applies this section in relation to Stamp duty on instruments executed on or after 1 November 1991. Section 122 of the *Stamp Duty Consolidation Act 1999* provides for the recovery of penalties imposed in relation to companies' capital duty. Section 29 of the *Value-Added Tax Act 1972* provides for the recovery of penalties in an identical manner to section 1061 of the *TCA 1997*.

Section 1063 requires proceedings to be instituted within 6 years after the date the penalty was incurred. Section 1063 applies to penalties imposed in relation to Income and Corporation Tax. Section 1077 applies this section to Capital Gains Tax.

The Revenue Commissioners power of attachment also applies to penalties. Section 1002 of the *TCA 1997*. Section 1104 of the *TCA 1997* provides that section 102 shall be construed together with the statutes relating to duties of excise; the *Value-Added Taxes Acts 1972-1997*; and the *Capital Acquisitions Taxes Consolidation Act 2003*. See Brennan (ed.) *Tax Acts 2002* (Butterworth Ireland Limited 2002) at 1804.

impartial tribunal, such as the Appeal Commissioners, in respect of penalties. Apart from the requirements of the Convention there are some policy arguments, discussed at paragraph 3.78, which would support this recommendation.

2.87 A further question in relation to appeals arises. Should there, in addition to the appeal to the Appeal Commissioners, be a further appeal from the Appeal Commissioners to the Circuit Court. Article 6(1) does not require an appeal from a tribunal or court which satisfies the requirements of Article 6 although if an appeal is provided for, it must comply with the requirements of Article 6(1).¹⁵² However we have also to consider Article 2 of the Seventh Protocol to the ECHR, which will also be incorporated into Irish law when the ECHR Bill, 2001 becomes law. Article 2 provides that:

1. “Everyone convicted of a criminal offence by a tribunal shall have the right to have conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

2.88 Article 2(2) might apply to exclude the obligation to provide a right of appeal if the tax-geared penalties were considered minor for the purposes of Article 2(2).¹⁵³ The Explanatory Memorandum to the Seventh Protocol suggests that whether an offence is punishable by imprisonment is an important criterion in determining whether a charge is minor or not for the purposes of Article 2(2).¹⁵⁴

¹⁵² *Delcourt v Belgium* 11 A (1970). See Harris, O’Boyle, Warbrick *Law of the European Convention on Human Rights* (Butterworths 1995) at 240.

¹⁵³ Here too, we should emphasise that we are speaking about the European convention and therefore the expression probably has a different meaning from “minor” in Article 38.2 of the Irish Constitution.

¹⁵⁴ Explanatory Memorandum on the Seventh Protocol, CE Doc H (83) 3, 9. See also Harris, O’Boyle, Warbrick *Law of the European Convention on Human Rights* (Butterworths 1995) at 567.

2.89 But the question remains whether, if the Appeal Commissioners are given jurisdiction to hear appeals against the imposition of penalties by the Revenue Commissioners, the ECHR mandates the provision of an appeal from the Appeal Commissioners to the Circuit Court. However, as discussed at paragraph 3.89 the right of appeal to the Circuit Court provides a safeguard against erroneous decisions of the Appeal Commissioners. If we are recommending an appeal in respect of penalties to the Appeal Commissioners then, even on policy grounds alone, there is no reason why appeals against penalties should not fall within the jurisdiction of the Circuit Court, in the same manner as appeals against assessments. Should there be a further appeal to the High (and presumably Supreme) Court, as there is for an assessment? The relevant consideration here is that the appeal to the Superior Courts would be confined to a point of law and not on the full merits. But what is involved in the imposition of civil penalties is the exercise of a discretionary power, conditioned by a set of administrative rules, outlined in paragraphs 2.48-2.59. It seems, therefore that there would be little purpose in an appeal confined to a point of law.

2.90 *Accordingly, the Commission recommends that a fresh right of 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.*

2.91 There is no need to consider these proposed arrangements in the light of the requirements of Article 34.1¹⁵⁵. For, as explained in paragraphs 2.48-2.59, a civil penalty is not considered to be an

¹⁵⁵ Article 34. 1 provides that:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

Article 37.1 provides that:

“Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.”

‘administration of justice’ for the purposes of Article 34.1. Thus the Article is not engaged, in the first place. There is therefore no need to consider whether the proposed arrangements would satisfy it.

(b) *Freedom from self-incrimination*

2.92 Although, the right to silence and the right not to incriminate oneself are not specifically mentioned in Article 6, the Court has held that they lie “at the heart of the notion of a fair procedure.”¹⁵⁶ Thus, if a taxpayer is facing civil penalties, which constitute “criminal charges” for the purposes of the ECHR, the taxpayer will be entitled to rely on the privilege against self-incrimination.¹⁵⁷ It is unclear what effect, if any, this would have on the procedures used by the Revenue Commissioners for determining penalties.

2.93 The issue has been addressed in the UK in the context of the *Human Rights Act 1998*. The Inland Revenue’s Hansard policy¹⁵⁸ was challenged in *R v Allen*¹⁵⁹ on the basis that it violated the appellant’s Article 6 rights. The version of the Hansard Policy challenged in *Allen* dated from 18 October 1990. It provided that:

“The Board may accept a money settlement instead of instituting criminal proceedings in respect of fraud alleged to have been committed by a taxpayer.

They can give no undertaking that they 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

¹⁵⁶ *Saunders v UK* 23 EHRR 313, paragraph 68.

¹⁵⁷ There may, however, be difficulty in determining, at what point, a taxpayer will be entitled to rely on the privilege as it will be difficult to determine at what point an Inspector intends to seek civil penalties. Oates and Levy “A Challenge to the Establishment” 147 (2001) *Taxation* 238, 239.

¹⁵⁸ The Hansard policy outlines the approach taken by the Board of the Inland Revenue to suspected cases of serious tax evasion. It is known as the ‘Hansard Policy’ because the Chancellor of the Exchequer outlines the Inland Revenue’s policy in the Parliamentary Hansard records. See paragraph 5.54.

¹⁵⁹ [2001] UKHL 45, [2002] 1 AC 509.

the facts. They reserve to themselves full discretion in all cases as to the course they pursue (emphasis added)

But in considering whether to accept a money settlement or to institute criminal proceedings, it is their practice to be 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.¹⁶⁰

2.94 The appellant appealed to the House of Lords against his conviction for the common law offence of cheating the public revenue. He argued that he was denied a fair trial under Article 6, as his privilege against self incrimination was violated by the Revenue's request for information under section 20(1) of the *Taxes Management Act 1970* and the Hansard procedure, which he alleged both threatened him and induced him to produce a schedule of assets. Although the House of Lords held that the *Human Rights Act 1998* was not retrospectively effective and therefore the appellant could not rely on Article 6, the House of Lords addressed the arguments based on Article 6. They held, first that the Crown had the right to require citizens to declare their income and could enforce sanctions for failure to do so for the purpose of tax collection and thus rejected the argument alleging that section 20(1) of the *Taxes Management Act 1970* breached the privilege against self incrimination.

2.95 There was a second point in Allen, namely that the Hansard Statement (in the portion italicised above at paragraph 2.93) left open the possibility that a tax recalcitrant might make a confession and shall be prosecuted. On the facts, the House of Lords rejected the argument that the Hansard Statement breached Article 6. Lord Hutton rejected the appellant's argument in the following terms:

“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.

¹⁶⁰ Inland Revenue, Code of Practice 9 Special Compliance Office Investigations, Cases of suspected serious fraud at 17.

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

2.96 However, in the context of the inducement procedure used by the UK Customs and Excise Commissioners, Lord Justice Potter in *Han & Yau*,¹⁶¹ stated that it was unlikely that the argument that the offending paragraph (italicised at paragraph 2.93) violated Article 6.1 would be upheld as the requirements of Article 6(1) “are of a general nature and are not prescriptive of the precise means or procedural rules by which domestic law recognises and protects such rights.”¹⁶² Nonetheless, in response to the House of Lords decision in *R v Allen*¹⁶³ the Inland Revenue has revised its policy and Hansard Statement. The Hansard Statement now provides:

“The Board will accept a money settlement and will not pursue a criminal prosecution, if the taxpayer, in response to being given a copy of this Statement by an authorised officer, makes a full and complete confession of all tax irregularities”.¹⁶⁴

2.97 The analogous statement in 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

¹⁶¹ *Customs and Excise Commissioners v Han & Yau* [2001] EWCA Civ 1040, [2001] 1 WLR 2253, 3 July 2001, paragraph 83.

¹⁶² *Ibid* paragraph 83.

¹⁶³ [2001] UKHL 45, [2002] 1 AC 509.

¹⁶⁴ Response to a Parliamentary Question to the Chancellor on 7 November 2002.

mitigation of penalties, is made by a taxpayer who does not fall within certain specified categories.¹⁶⁵ It therefore goes a good deal of the way to meet any possible difficulties of the type disclosed in the British cases of *Han & Yan* and *Allen*.

2.98 *The Commission does not recommend any changes with regard to self incrimination as it is unclear whether the incorporation of the European Convention will require any modifications of the practices currently employed by the Revenue Commissioners. The Commission invites submissions on the impact of the domestic application of the ECHR in relation to a taxpayers' right to silence and freedom from self incrimination.*

¹⁶⁵ *Code of Practice for Revenue Auditors* (Revenue Commissioners, Government Publications 2002) paragraph 10.3.

CHAPTER 3 APPEALS

A Introduction

3.01 In this chapter, the Commission outlines the present arrangements for the exercise of civil jurisdiction in the revenue field, and considers whether they can be improved. The Commission considers each of the levels of appeal, namely the Appeal Commissioners, the Circuit Court, the High Court and the Supreme Court.¹ To summarise the present system: the taxpayer has a right of appeal from an assessment of the Revenue Commissioners to the Appeal Commissioners. The taxpayer, but usually not the Revenue Commissioners, has the right to have the case reheard by a judge of the Circuit Court.² Alternatively, either the taxpayer or the Revenue Commissioners have the right to have a case stated to the High Court, on a point of law from the Appeal Commissioners. In addition, either side may bring an appeal on a point of law from the Circuit Court to the High Court and from there to the Supreme Court.

¹ The procedures in place for a taxpayer to appeal an assessment have been described as “elaborate” by Keane CJ in *CAB v Hunt* 19 March 2003, 32-33. The constitutionality of the appeal procedure was challenged in the High Court but the High Court did not rule on the arguments and they were not pursued in the Supreme Court.

Another avenue of relief available to a taxpayer through the Court system is judicial review. However, judicial review is entirely separate from the appeals regime, which is concerned with the actual decision made by the relevant body and which is considered in this chapter. Judicial review, on the other hand, considers whether there has been an error in the decision-making process. It is rarely, if ever, used in the context of Revenue cases, possibly because the High Court would be reluctant to grant a review because of the wide range of appeals available to the taxpayer.

² One exception to this general rule is the right of appeal the Revenue Commissioners have to the Circuit Court, in Capital Acquisitions Tax cases.

B The Appeal Commissioners:³ The Present System

(1) History of the Office of the Appeal Commissioners

3.02 The Appeal Commissioners have a similar origin to the Special Commissioners in the UK. The first piece of the machinery to be established was the General Commissioners of Income Tax, who were appointed to implement the UK *Income Tax Act 1799*.⁴ The forerunners of the Appeal Commissioners were the Special Commissioners of Income Tax who were instituted under *Pitt's Act 1805* to act as an alternative to the General Commissioners, and their powers were considerably enlarged in 1842.⁵ Upon Independence, the *Provisional Government (Transfer of Functions) Order 1922* provided that all functions carried out by existing Government Departments were to be exercisable by the appropriate Provisional Government Departments. Accordingly, the Order assigned responsibility to the Provisional Government's Ministry of Finance for the "financial business of the government 'including functions hitherto performed by the following existing Government departments and officers': ... the Commissioners of the Inland Revenue and Special Commissioners of Income Tax, the Commissioners of Customs and Excise."⁶ As can be seen from the 1922 Order just quoted, there has never been any equivalent of the General Commissioners in post-independence Ireland, and there does not seem to have been an equivalent in pre-independence Ireland. Finally, the Special Commissioners were renamed the Appeal Commissioners by the *Finance (Miscellaneous Provisions) Act 1968*.⁷

³ The website address of the Appeal Commissioners is www.appealcommissioners.ie.

⁴ See paragraphs 4.15-4.18 on the UK Tax Appeals System.

⁵ Sections 30 & 73-85 of the *Income Tax Act 1805*; sections 120-133 of the *Income Tax Act 1842*; Sabine *A History of Income Tax* (George Allen & Unwin Ltd 1966) 38, 62.

⁶ Reamonn *History of the Revenue Commissioners* (Institute of Public Administration 1981) at 45.

⁷ Section 1 of the *Finance (Miscellaneous Provisions) Act 1968*.

3.03 The Appeal Commissioners are a classical example of an entity which textbook writers have called a tribunal,⁸ and which have been defined as follows: “a body, independent of the Government or any other entity but at the same time not a court, which takes decisions affecting individual rights, according to some fairly precise (and usually legal) guidelines and by following a regular and fairly formal procedure.”⁹ It should be stressed that the hallmarks of a tribunal are: ease of access, relative inexpensiveness, and specialisation and, by comparison with a court, a fairly informal procedure.

3.04 The following paragraphs will show how far the Appeal Commissioners possess these characteristics.

(2) *Appointment and Qualifications*

3.05 There is no statutory limit on the number of Appeal Commissioners who may be appointed.¹⁰ From 1978 until 1993, three Appeal Commissioners were appointed, but, since 1993, there have been only two Appeal Commissioners. The reason for the reduction in the number of Appeal Commissioners is the reduction in the number of appeals since the introduction of self-assessment. Prior to the introduction of self-assessment, the volume of cases dealt with by the Appeal Commissioners was much greater, because taxpayers were aggrieved at the assessments made by the Revenue. The introduction of self-assessment meant that the issues before the Appeal Commissioners changed from mostly *pro forma* matters to a smaller number of appeals, including a greater proportion of appeals on points of law. There were almost 60,000 cases on hand on 31 December 1986. By the end of 2001, the equivalent figure was estimated at 350.

3.06 The Appeal Commissioners are appointed by the Minister for Finance in accordance with section 850 *TCA 1997*.¹¹ The Act

⁸ A tribunal is different from a ‘tribunal of inquiry’, which merely reaches an authoritative view on the facts of some “matter...of urgent public importance”. *Tribunals of Inquiry (Evidence) Act 1921*.

⁹ Hogan and Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 256-57.

¹⁰ See footnote 11.

¹¹ Section 850(1) provides:

does not require the Minister for Finance to follow any particular selection process. 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. See paragraphs 3.38-3.45 for a discussion of reform of the appointment process.

3.07 Nor does the Act specify any particular qualifications which are necessary for appointment to the post of Appeal Commissioner. It used to be the case, by convention, that one Commissioner was selected from within the Revenue Commissioners, one from the tax profession and one from the Bar.¹² However, since 1993, both of the current Appeal Commissioners are qualified accountants from private practice.

(3) Independence

3.08 The Appeal Commissioners are an independent body. However, the independence of the Office has been questioned in the past for two reasons. First, there appeared inevitably to be a level of familiarity between the Appeal Commissioners and the Revenue Commissioners, due to the fact that the Revenue Commissioners are a party to all tax appeals.¹³ Secondly, there was an element of institutional overlap. For instance, until the 2002-03 Budget, the Chairman of the Revenue Commissioners was the Accounting Officer for the Office of the Appeal Commissioners, and the Office was financed from the Revenue Commissioners' Vote in the Book of Estimates.¹⁴ But in the 2003 Book of Estimates, the Appeal

“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.”

¹² *Ibid.*

¹³ Although, the personnel from the Revenue Commissioners will vary, the concern relating to over familiarity remains relevant.

¹⁴ According to evidence given to the DIRT Inquiry by the Appeal Commissioners at hearings on 18 January 2001, it was estimated that the Office cost IR£230,000 (€292,039.75) annually. In the 2002-03 Book of Estimates, the Government has allocated €560,000 to the Office under its own Vote.

Commissioners were given their own Vote.¹⁵ The Appeal Commissioners will agree amongst themselves which one of them should act as Accounting Officer. Other examples of the overlap between the Appeal Commissioners and the Revenue Commissioners are given at paragraphs 3.53-3.60.

(4) Functions

3.09 The Appeal Commissioners hear appeals concerning: Income Tax; Corporation Tax; Capital Gains Tax; Stamp Duty; Capital Acquisitions Tax (which covers both Gift and Inheritance Tax and Discretionary Trust Tax); Residential Property Tax; Customs Classification Cases; Excise Duty; Vehicle Registration Tax and VAT.¹⁶ They also hear appeals of decisions of the Revenue Commissioners refusing an application, for example, of a sub-contractor's certificate¹⁷ or an artistic exemption.¹⁸

3.10 The Appeal Commissioners normally categorize appeals as either *quantum*¹⁹ or technical. *Quantum* appeals generally involve

¹⁵ The Book of Estimates provides rather unfortunately that the “subheads under this vote will be accounted for by the Office of the Revenue Appeals Commissioners”. 2003 Abridged Estimates for Public Services and Summary Public Capital Programme at 33.

¹⁶ Section 933 and section 945 of the *TCA 1997* provide for a right of appeal to the Office of the Appeal Commissioners against assessments to income, corporation and capital gains tax assessments. Section 66 of the *Capital Acquisitions Tax Consolidation Act 2003* provides the taxpayer with a right to challenge the value the Revenue Commissioners put on real property before the Land Values Committee under the *Property Values (Arbitration and Appeals) Act 1960*. Section 67 of the 2003 Act provides for a right of appeal to the Appeal Commissioners against the assessment to tax, on all issues except the valuation of the real property. Section 21 of the *Stamp Duties Consolidation Act 1999* and sections 22, 23 and 25 of the *Value-Added Tax Act 1972* provide for a right of appeal to the Appeal Commissioners.

¹⁷ Section 531(17) of the *TCA 1997*.

¹⁸ If the Revenue Commissioners fail to take a decision in relation to an application for an artist's exemption, the individual can appeal to the Appeal Commissioners to issue a determination under section 195 of the *TCA 1997*.

¹⁹ An example of the subject-matter of *quantum* appeals would be the correct amount of income or profit on which the taxpayer should be assessed.

questions of fact only and are resolved quickly. Technical appeals, on the other hand, are more complex and time-consuming, as they involve questions of law concerning the interpretation and application of tax legislation and precedents.²⁰ “A technical appeal may also be a test case brought by the Revenue to seek clarification on a particular point of law. In such cases, the Revenue lists just one case, which may be representative of a significant number of similar appeals. The Appeal Commissioners’ decision is then applied to all such similar cases.”²¹ In addition, appeals involving mixed questions of fact and law naturally arise.

3.11 Approximately 10% of the cases listed with the Appeal Commissioners actually go to hearing, as an agreement may be reached between the taxpayer and the Inspector at any time. Section 933(3) of the *TCA 1997* provides that an appeal to the Appeal Commissioners may be withdrawn where the Inspector and the taxpayer reach agreement on the assessment. The Appeal Commissioners currently hear about 300 cases annually.²²

(5) *Preconditions for a Valid Appeal and Listing*

3.12 First, the taxpayer must give written notice of his or her intention to appeal, including the grounds of the appeal²³ to the Appeal Commissioners within 30 days of the Notice of Assessment.²⁴

²⁰ Brennan and Hennessy *Forensic Accounting* (Round Hall Sweet & Maxwell 2001) 421, paragraph 11.23.

²¹ *Ibid.*

²² The Appeal Commissioners estimate that they heard 335 cases in the year ending 31 December 2002.

²³ Section 957(4) of the *TCA 1997*.

²⁴ Section 933(1)(a) *TCA* of the *1997*. Section 933(7)(a) contains an exception to the 30-day deadline. Where an Inspector is satisfied that the taxpayer was unable to appeal because of “absence, sickness or other reasonable cause,” and made the appeal within 12 months of the original Notice of Assessment, the appeal application may be granted. A further exception to this 30-day and 12-month deadline is contained in section 933(7)(d). “Where an application would have been allowed under the rules relating to the 12-month procedure, except for the fact that the application was made outside the 12-month period, the application may still be permitted, if, at the time of the application, there has been submitted a return of income, statement of profits and gains and any other information which the inspector/officer deems capable of enabling the

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.²⁵

3.13 The Inspector's permission is needed for an appeal, but refusal of this permission may be appealed to the Appeal Commissioners.²⁶ If an Inspector refuses an application to appeal, the Inspector must specify the reasons for the refusal.²⁷ The Appeal Commissioners hear approximately six to ten appeals from refusals annually. 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. The Appeal Commissioners only hear two to three of these cases per year. There is no statutory guidance on when an Inspector will be considered to have delayed to the extent that a taxpayer is entitled to apply directly to the Appeal Commissioners. Proposals for reform in this area are discussed at paragraphs 3.53-3.60.

3.14 The process of appealing is initiated by a Notice of Appeal signed by the taxpayer, which is given to the Inspector. Receipt of a notice of appeal is acknowledged as a matter of course. An Inspector

appeal to be settled by agreement, and the tax charged under the assessment (to which the appeal relates) has been paid along with any interest due on overdue tax." Corrigan *Revenue Law* Volume I (Roundhall, Sweet & Maxwell 2000) at 355-56.

The Notice of Assessment informs the taxpayer of the right to appeal the assessment: Brennan and Hennessy *Forensic Accounting* (Round Hall, Sweet & Maxwell 2001) at 415.

²⁵ Section 957(2)(a) of the *TCA 1997*. Where a taxpayer fails to give notice of appeal within the 30-day time limit, section 933(7) enables an appeal to be taken, provided certain conditions are met. In those circumstances, section 933(7)(d)(ii) provides that the amount payable includes the tax, together with any interest due on the tax chargeable under section 1080.

²⁶ Section 933(1)(b) & (c) of the *TCA 1997*. This right to appeal a refusal of permission was granted in order to protect a taxpayer from abuse by the Revenue Commissioners. The taxpayer must appeal within 15 days of the date of issue of the notice of refusal. The Appeal Commissioners will then issue written notice to the taxpayer and the Revenue Commissioners of when the hearing to determine whether to accept the application will be held. It seems that the Appeal Commissioners could not hear both the appeal against the refusal and the substantive action together.

²⁷ Section 933(1)(b) of the *TCA 1997*.

of Taxes will then send a form, known as Form AH1 (this is an acronym for Appeal Hearing 1) to the Appeal Commissioners.²⁸ The AH1 form was introduced by the Revenue Commissioners in order to standardise the procedure for seeking a date on which the Appeal Commissioners will hear an appeal.²⁹ 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.

3.15 Once the Revenue Commissioners have checked that the taxpayer has complied with the requirements necessary for the making of a valid appeal, the appeal is referred to the Appeal Commissioners. The Inspector sends the Appeal Commissioners a brief and neutral statement of the case in the Form AH1. It is a submission on the points at issue and the relevant legislation. A completed copy of the Form AH1 and a blank AH1 are sent to the taxpayer. If the taxpayer disagrees with the Form AH1, they may fill out the blank AH1 and forward it to the Inspector.

3.16 Once the Appeal Commissioners have received the AH1, they will write to the Inspector of Taxes, informing the Inspector what is required from the taxpayer in order for the appeal to be listed. The Inspector will then inform the taxpayer. The Appeal Commissioners will communicate with the taxpayer by way of the Inspector of Taxes.

3.17 Formerly the Appeal Commissioners published a list of times for each district, but the system did not work satisfactorily as a district might be assigned half a day, while at least two days would be required to hear a case.³⁰ Under the system currently in place, an

²⁸ The Form AH1 requires the following information to be set out: the name of the appellant; the type of tax involved; the legislation involved; the years of assessment/accounting period; the grounds for appeal as stated by the appellant; the point(s) at issue; tax cases likely to be quoted; estimated time involved; whether counsel will appear for either side, and other relevant details or remarks.

²⁹ *Office of the Revenue Commissioners Taxes Consolidation Act 1997* Part 40 Appeals Publication under section 16 *Freedom of Information Act 1997*. (Office of the Revenue Commissioners 2001) paragraph. 2.1.

³⁰ Section 933(2)(a) envisaged that the initiative would be in the hands of the Appeal Commissioners. It provides that: “[t]he Appeal Commissioners shall from time to time appoint times and places for the hearing of appeals

Inspector will notify the Appeal Commissioners that a case will need (say) three days to be heard, and the Appeal Commissioners will assign the appropriate time to that case.

3.18 A practice has developed whereby the Appeal Commissioners require the parties to an appeal to submit written submissions at least two weeks prior to the hearing of a case. The Appeal Commissioners will usually refuse to hear a case, if the parties do not submit the written submissions. Section 957(4) of the *TCA 1997* now provides a legal basis for the Appeal Commissioners' practice, as it requires the appellant to specify, in detail, the grounds with which they are aggrieved in the notice of appeal.³¹

(6) Hearings³²

3.19 Appeals are reasonably informal and hearings are held *in camera*. Section 857 requires the Appeal Commissioners to make a statutory declaration upon taking up office to preserve the confidentiality of the taxpayer's affairs.³³ Section 856 provides that

against assessments and the Clerk to the Appeal Commissioners shall give notice of such times and places to the inspector or other officer.”

³¹ Section 957(4) *TCA 1997* provides: “Where an appeal is made against an assessment or an amended assessment on a chargeable person for any chargeable period, the chargeable person shall specify in the notice of appeal- (a) each amount or matter in the assessment or amended assessment with which the chargeable person is aggrieved, and (b) the grounds in detail of the chargeable person’s appeal as respects each such amount or matter.”

³² The Appeal Commissioners travel around the country, sitting in about 14 different locations. Hearings are held in Dublin, Dundalk, Letterkenny, Sligo, Castlebar, Galway, Athlone, Limerick, Tralee, Killarney, Cork, Thurles, Waterford, Wexford, and Kilkenny. In Dublin, hearings are held in the Appeal Commissioners’ offices, and outside Dublin they typically sit in Circuit Court buildings.

³³ Schedule 27 Part 1 Form of Declaration to be Made by Appeal Commissioners Acting in Respect of Tax under Schedule D. "I, A.B., do solemnly declare, that I will truly, faithfully, impartially and honestly, according to the best of my skill and knowledge, execute the powers and authorities vested in me by the Acts relating to income tax, and that I will exercise the powers entrusted to me by the said Acts in such manner only as shall appear to me necessary for the due execution of the same; and that I will judge and determine upon all matters and things which shall be brought before me under the said Acts without favour, affection, or malice;

Appeal Commissioners cannot hear cases in which they have a personal interest. The two Appeal Commissioners sit together only in very large or complex cases.³⁴ In such cases, the Commissioners agree in advance who is to be the Chairman. The Chairman will have a casting vote in the event of a disagreement, which we have been told occurs seldom, if ever.³⁵

3.20 The hearing usually begins with the submission of the taxpayer, followed by the Revenue Commissioners' submission. The taxpayer is typically allowed to respond to the Revenue Commissioners' submission. Either side may call witnesses. Taxpayers may represent themselves at an appeal hearing or may

and that I will not disclose any particular contained in any schedule, statement, return or other document delivered with respect to any tax charged under the provisions relating to Schedule D of the said Acts, or any evidence or answer given by any person who shall be examined, or shall make affidavit or deposition, respecting the same, in pursuance of the said Acts, except to such persons only as shall act in the execution of the said Acts, and where it shall be necessary to disclose the same to them for the purposes of the said Acts, or to the Revenue Commissioners, or in order to, or in the course of, a prosecution for perjury committed in such examination, affidavit or deposition."

The declaration only refers to Schedule D, but section 857(4) specifies that Appeal Commissioners and others employed in the assessment or collection of corporation tax shall be subject to the same secrecy requirements as those applied in relation to income tax.

³⁴ Although section 850(4) of the *TCA 1997* provides that "[a]nything required to be done under the Income Tax Acts by the Appeal Commissioners or any other Commissioners may, except where otherwise expressly provided by those Acts, be done by any 2 or more Commissioners", express provision is made in relation to each of the taxes for the powers of the Appeal Commissioners to be exercised by one Appeal Commissioner and for an appeal to be heard and determined by one Appeal Commissioner. The relevant provisions are section 933(5) of the *TCA 1997* for Income and Corporation Tax appeals, section 945(2)(e) of the *TCA 1997* for Capital Gains Tax appeals, section 67(5) of the *Capital Acquisitions Tax Consolidation Act 2003* for Capital Acquisitions Tax appeals, section 25(2)(e) *Value-Added Tax Act 1972* for VAT appeals, section 21(4) of the *Stamp Duties Consolidation Act 1999* for Stamp Duty appeals and section 22 of the *Finance (No. 2) Act 2000* for Anti-Speculative Property Tax appeals.

³⁵ Appeal Commissioner O'Callaghan's oral evidence to the DIRT Inquiry, 18 January 2001.

choose to be represented by a barrister, solicitor, accountant, member of the Irish Taxation Institute or any other person the Appeal Commissioners permit. In fact, taxpayers will only represent themselves about 3% of the time. Significantly, the taxpayer will only have legal representation in 5-10% of the cases before an Appeal Commissioner.³⁶ In almost all the remaining cases, accountants or tax advisors act as the advocate for the taxpayer. The Inspector of Taxes presents his or her own side of the case.

3.21 The Appeal Commissioners have the power to administer an oath, but only do so rarely, where there is a particular reason. The Appeal Commissioners may issue precepts³⁷ to the appellant, and have the power to summon, and examine on oath, any person whom they think would have relevant information in respect of an assessment made on another person. An individual, who fails to appear, refuses to take the oath or answer lawful questions before the Appeal Commissioners is liable to a fixed €950 penalty.³⁸

3.22 The Appeal Commissioners hear ‘lawful evidence’.³⁹ This is taken to mean that the Appeal Commissioners should follow the rules of evidence as applied by the courts. However, the Appeal Commissioners apply the rules in a more relaxed way than would a court. Section 934(3) *TCA 1997* places the burden of proof on the taxpayer. It provides that:

“[w]here on an appeal it appears to the Appeal Commissioners by whom the appeal is heard ... by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is overcharged by

³⁶ Though since these cases tend to be the weightiest cases, this will probably amount to 10-15% of the time.

³⁷ A precept is a “command; a written order; an order or direction given by one official person or body to another requiring some act to be done.” Murdoch *Murdoch’s Dictionary of Irish Law* (3rd ed Topaz Publications 2000) at 608. See paragraphs 3.82-3.84.

³⁸ Section 939(3) of the *TCA 1997* “Substituted by FA 2001 s 240(1) and 2(k) and Sch 5 Pt 1 as respects any act or omission which takes place or begins on or after 1 January 2002.” Brennan (ed.) *Tax Acts 2002* (Butterworth Ireland Limited 2002) 1804. It was previously IR£750 (€952).

³⁹ Section 934(3) of the *TCA 1997*.

any assessment, the Appeal Commissioners shall abate or reduce the assessment accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand.”⁴⁰

3.23 The Appeal Commissioners may also increase or reduce the amount of an assessment.⁴¹ Section 934(7) of the *TCA 1997* requires the Appeal Commissioners to record every determination of an appeal and transmit the record to the Inspector or other officer within 10 days of the determination. The determinations are recorded on a form provided by the Revenue Commissioners, known as the Form AS1, ‘Appeal Sheets’.⁴² Generally, determinations involve either upholding the appeal or the confirmation of the amount of taxable income. The facts found in each case and the reasoning for such determinations are given orally at the hearings at which the determinations are made, but are not recorded on the relevant Form AS1, as part of the determination.⁴³

(7) Interest

3.24 Both pending and during the appeal, interest will continue to accrue on the amount of tax unpaid. Section 1080(1)(b) (as amended) provides that:

“any tax charged by any assessment to income tax shall, notwithstanding any appeal against such assessment, carry interest at the rate 0.0322 per cent for each day or part of a day from the date when, if there were no appeal against the

⁴⁰ Emphasis added.

⁴¹ Section 934(4) of the *TCA 1997*.

⁴² The AS1 will contain the following information: the appellant’s name and address; their agent’s details; the year/accounting period; the type of tax; the description of profits or income assessed; the amount of assessment or subject of claim; the determination of the Appeal Commissioner(s); the determination of the Circuit Court Judge and details of interim hearings. The determinations of the Appeal Commissioner(s) and the Circuit Court Judge are required to be signed by either the Appeal Commissioner(s) or the Circuit Court Judge or both.

⁴³ See paragraph 3.71 for the Commission’s recommendation on this point.

assessment, the tax would become due and payable under section 960 until payment.”⁴⁴

3.25 In the event of a determination against a taxpayer, the taxpayer will be obliged to pay the difference between the tax indicated as due on the return and the Revenue Commissioners’ assessment, plus the interest on the sum from the date it originally became due and payable. Thus, in those circumstances, the longer the appeal process takes, the more the taxpayer will owe.

3.26 Section 958(9) of the *TCA 1997* provides an exception to this general rule. Where a taxpayer has made a true and accurate return for the relevant year and the tax paid by the taxpayer prior to the appeal amounts to at least 90% of the tax held to be payable on the determination of the appeal, the additional tax will be deemed due and payable within one month of the date of the determination of the appeal.

3.27 Another way in which a taxpayer can avoid the payment of interest on the underpayment of tax, from the date when the original payment of tax became due and payable is if an expression of “doubt” under section 955(4) *TCA 1997* is made. This provides:

“(a) Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable person, that person may deliver the return to the best of that person's belief as to the application of law to or the treatment for tax purposes of that matter *but that person shall draw the Inspector's attention to the matter in question in the return by specifying the doubt* and, if that person does so, that person shall be treated as making a full and true disclosure with regard to that matter.” (Emphasis added).

3.28 There is provision for the payment of interest where a taxpayer has overpaid their tax. Section 865A (3) of the *TCA 1997* as inserted by section 17 of the *Finance Act 2003* provides that the

⁴⁴ The interest rate was substituted by section 129(1)(f)(i) of the *Finance Act 2002*. Previously, the interest rate was 1% for each month or part of a month. The interest rate charged by the Revenue Commissioners on underpaid tax bears no relation to the Euro Inter Bank Offer Rate (EIBOR) for lending, which was 2.06% for the first six months of 2003 year.

interest payable “shall be simple interest payable at the rate of 0.011 per cent per day or part of a day.”⁴⁵ This rate amounts to 4.015 per

⁴⁵ Section 17 *Finance Act 2003* introduced new provisions governing the repayment of tax and interest thereon. It, deleted and replaced section 865, inserted a new section 865A deleted sections 930 (error or mistake) and 953 (notices of preliminary tax) and amended sections 941(statement of case for the High Court) and 942 (appeals to the Circuit Court).

Section 865(2) provides that a person is entitled to repayment of tax which was overpaid because of an error or mistake in a return or statement made by the person for the purposes of an assessment to tax. The Revenue Commissioners will not make a repayment under section 865(2) unless a valid claim is made. A claim for repayment must be made within four years of the end of the chargeable period to which the claim relates. If an individual is entitled to repayment under any other provision of the Act, the claim must be made within four years or if the provision provides for a longer period that longer period will apply.

Section 865(6) provides that the Revenue Commissioners will only make a repayment for tax or pay interest in respect of tax paid to them where it is provided for in the Tax Acts.

A taxpayer aggrieved with a decision of the Revenue Commissioners on a claim to repayment may appeal the decision to the Appeal Commissioners in accordance with section 949 (Section 865(7))

Section 865A deals with interest on repayments. Section 865A provides as follows: “Where a person is entitled to a repayment of tax for a chargeable period and that repayment, or part of the repayment, arises because of a mistaken assumption made by the Revenue Commissioners in the application of any provision of the Acts, that repayment or that part of the repayment shall, subject to section 1006A(2A), carry interest for each day or part of a day for the period commencing with the day after the end of the chargeable period or, as the case may be, the end of each of the chargeable periods for which the repayment is due of the date on which the tax was paid (whichever is the later) and ending on the day on which the repayment is made.

Where, for any reason other than that mentioned in sub-section(1), a repayment of tax or a part of a repayment is due to a person for a chargeable period, that repayment or the part of the repayment shall, subject to section 1006A(2A), carry interest for the period beginning on the day which is 6 months after the day on which the claim to repayment becomes a valid claim and ending on the day the repayment is made.”

Section 1006A(2A) provides that where the Revenue Commissioners may withhold repayment of a sum due to a taxpayer if they are not satisfied that the person has delivered returns required to be made by the Acts. The relevant acts are specified in section 1006A(1). The Revenue

cent annually. Interest will not be repayable if it amounts to less than €10.

(8) Costs

3.29 The Appeal Commissioners do not have the power to award costs. The UK VAT and Duties Tribunal has unlimited power to award costs. However, Customs and Excise do not generally seek costs from the taxpayer. The UK Special Commissioners can award costs against any party to the proceedings if they are of the opinion that the party has acted wholly unreasonably in connection with the hearing in question.⁴⁶

C Previous Reviews of the Appeal Commissioners

3.30 The Office of the Appeal Commissioners has recently been examined by both the Steering Group and the DIRT Inquiry.⁴⁷ The reviews concluded that, while certain improvements could be made, broadly speaking, the current appeal system works well.

(1) The Steering Group

3.31 The Steering Group was composed of high-level officials from the Department of Finance, the Revenue Commissioners, the UK Institute of Directors and a consultancy firm, Prospectus Strategy

Commissioners must give notice that to the taxpayer. Interest will not be payable in respect of any sum withheld from the date of such notice.

Section 856A does not apply where another provision of the Act provides for the payment of interest.

⁴⁶ Section 21 of the *Special Commissioners (Jurisdiction and Procedure) Regulations 1994*. Under the proposed reforms of the UK Tax tribunals, it has been recommended that, if a new general Tax Tribunal is established, it should be able to award costs where there has been a frivolous or vexatious claim. *Tax Appeals Tribunals* (A Lord Chancellor's Department Consultation Paper, March 2000) Q15.3.

⁴⁷ See Chapter 7 of the *Steering Group Report (Blue Book)* August 2000; Transcript of evidence of the two Appeal Commissioners to the DIRT Inquiry 18 January 2001; *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001); Letter from the former President (John Bradley) of the Institute of Taxation to the Department of Finance dated 17 September 2001; IMPACT's submission to the Law Reform Commission on 31 June 2002.

Consultants. It was established by the Minister for Finance in response to a recommendation in the first of the DIRT Inquiry's three reports. The First Report of the DIRT Inquiry recommended that a review of the Revenue Commissioners' independence, accountability, organisation and structure be undertaken. The Steering Group's Report was commented on by the DIRT Inquiry in its Final Report. The Steering Group held discussions with the Appeal Commissioners, the Revenue Commissioners, the Consultative Committee of Accountancy Bodies in Ireland and the Irish Taxation Institute to gauge satisfaction with appeal procedures.⁴⁸ It made the following recommendations:

- (i) the publication of an Annual Report;
- (ii) the Appeal Commissioners should comment on areas of tax law in the Annual Report based on their experience of interpreting the legislation;
- (iii) a separate Vote of Funds and Accounting Officer for the Office be considered; and
- (iv) a review of the adequacy of the Office's resources.⁴⁹

3.32 The recommendation empowering the Appeal Commissioners to comment on tax legislation has not met with approval, since this comes close to asking the Appeal Commissioners to prejudge the issue. As to the remaining recommendations, provision has been made for the Appeal Commissioners to have a separate Vote and Accounting Officer and the resources of the Office have been increased in the 2003 Book of Estimates.

(2) *The DIRT Inquiry*⁵⁰

3.33 The DIRT Inquiry concluded that the "Office of the Appeal Commissioners is currently a small and under-resourced but

⁴⁸ *Report of the Steering Group* (Government Publications August 2000) at paragraph. 7.29, 108.

⁴⁹ *Report of the Steering Group* (Government Publications August 2000) at 109-110.

⁵⁰ Committee of Public Accounts, Sub-Committee on Certain Revenue Matters.

nonetheless vital part of the Irish tax administration system.”⁵¹ It recommended that any new statutory footing for the Revenue Commissioners should also extend to the Appeal Commissioners and also that the following changes be considered as part of any new Bill: transparency in the appointment of Appeal Commissioners should be increased by publicly advertising future vacancies; specifying minimum qualifications and introducing a revised selection procedure; any future selection process should take into account the need for expertise in accountancy, taxation (including Customs and Excise), public administration and law to reside in the Commissioners collectively, and a mechanism for the removal of Appeal Commissioners should be introduced. The Report also recommended the appointment of a third Appeal Commissioner, with one of the three Commissioners acting as the Chairperson and Head of the Office; and an increase in resources to facilitate the preparation of an annual report, publication of determinations, and the establishment of a website.⁵²

3.34 While the Minister for Finance has not yet given effect to these proposals he did established a Revenue Powers Group in April 2003 to examine the main statutory powers available to the Revenue Commissioners. The Group is composed of individuals with a broad range of professional and practical experience and is due to report by the end of October 2003. Consequently, as yet, no new statutory footing has been provided for the Appeal Commissioners, and the DIRT Inquiry’s recommendations regarding the future selection process and appointment of Appeal Commissioners have not been implemented.

3.35 The Department of Finance has requested that interested parties make submissions commenting on the recommendations made in the Final Report of the DIRT Inquiry on the Office of the Appeal

⁵¹ *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

⁵² The DIRT Inquiry considered that “parallel with a published annual report, there must also be developed a comprehensive, up to date web based service including cases and decisions.” It recommended that the Vote and Accounting Officer should be dealt with in time for the 2002 Book of Estimates. *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

Commissioners.⁵³ In response to this, the Irish Taxation Institute made recommendations on the independence of the Appeal Commissioners and the conduct of appeals generally.⁵⁴ It agreed with many of the DIRT Inquiry's recommendations, and concluded that the "appeals system is generally regarded as effective and accessible to the public. The informal nature of appeal hearings is a vitally important option for any taxpayer who has neither the resources nor the tax bill to justify major legal representation."⁵⁵ It recommended a change of name for the Appeal Commissioners and suggested "Tax Court" as an alternative. The Institute made the following recommendations in relation to the conduct of appeal hearing:

- (i) the introduction of a guide to the appeals system aimed at the layperson;
- (ii) the standardisation of the time-limits for lodging an appeal in order to avoid confusion;
- (iii) the introduction of a maximum time-frame within which an appeal is heard, determined and publicised;
- (iv) a statutory obligation on the Revenue Commissioners to state the reasons for the assessment it raised;
- (v) the extension of the subject-matter of appeals to include interest, penalties and fines;

⁵³ Department of Finance press release 12 July 2001. The Appeal Commissioners commented briefly on each of the following areas in its communication to the Department of Finance, dated 30 August 2002: a third Commissioner; procedural guidelines; more effective fact-finding powers; annual report and decisions; appointment of Appeal Commissioners; separate vote and accounting officer; mechanism for the removal of an Appeal Commissioner; comments on tax law and administration; hearings concerning points of law; separate legislation; addressee of appeal notice; change of name; training/expertise of the Appeal Commissioners; written submissions; written determinations; extension of subject-matters for appeal; consultative case stated; fines; sundry; standardisation and confidentiality. *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

⁵⁴ Correspondence dated 17 September 2001 from Mr Patrick Costello, Chief Executive Officer to the Department of Finance.

⁵⁵ *Ibid* at 8.

- (vi) the recognition of Revenue concessions and/or statements of practice by the Appeal Commissioners when hearing an appeal; and
- (vii) the use of the oath for all persons appearing before the Appeal Commissioners in order to avoid a perception of unevenness of treatment.⁵⁶

3.36 In its submission to the Department of Finance, the Institute of Chartered Accountants in Ireland recommended that a body like the Top Level Appointments Committee (“TLAC”) should be responsible for appointing Appeal Commissioners. It also suggested that each Commissioner should have expertise in accountancy and taxation when appointed, and that ongoing training in areas the Appeal Commissioners consider appropriate should be available to the Appeal Commissioners.⁵⁷

⁵⁶ Some of the other issues considered by the Institute concerned the increased use of information technology by the Appeal Commissioners, the introduction of measures to ensure that the Revenue Commissioners do not devote excessive resources to cases of low tax liabilities and the finality and conclusive nature of the Appeal Commissioners’ determinations.

⁵⁷ Commenting on the DIRT Inquiry’s recommendation that “[t]here should reside collectively among the Commissioners expertise in all the relevant areas – accountancy, taxation (including customs & excise), public administration and the law.” The Tax Committee of the Institute of Chartered Accountants of Ireland stated: “[h]owever, individual appeals are heard by individual commissioners. There is no suggestion that specific commissioners with specific expertise would be allocated to such appeals and indeed it would be difficult to do so without creating an imbalance in the work-load of the individual commissioners. There is the further issue that ongoing changes in the taxation system will mean that commissioners will be asked to adjudicate upon legislation, of which they could have had no expertise at the time of their appointment. We believe that it is more appropriate that each individual commissioner should have adequate expertise in the accountancy and taxation areas at the time of appointment and that the budget for the office of the Appeal Commissioners is sufficient for them to undertake whatever ongoing training that they consider appropriate to keep up to date with the areas in question.” “Appeal Commissioners” Chartered Accountants Tax Summary *Accountancy Irl* (2001) 34

D Law Reform Commission's Recommendations for Reform

3.37 The recent studies, just noted, have expressed the view that the Office of the Appeal Commissioners operates efficiently. Accordingly, the Commission thinks that a useful course here is to examine certain intermediate-level proposals for reform, some of which have been made in other reports, but which are considered here in greater detail.

(1) Appointment Process

3.38 The Commission agrees with the recommendations of the DIRT Inquiry concerning the need for a more transparent appointment process for Appeal Commissioners. Broadly speaking, modern systems for selection have as their main theme, a division of authority between some impartial expert group and the Government. This is achieved by the expert group nominating a qualified person or persons, from which the Government selects one. This system ensures that the selection and appointment process is transparent, in contrast to the present system (see paragraph 3.06). In considering what form an improved appointment process for Appeal Commissioners should take, it is worth considering, as models, both the Top Level Appointments Committee ("TLAC") and An Bord Pleanála models. Care should be taken to avoid such a process being subverted into a fig leaf for nepotism. For example, if the nominating body has to name a long list of candidates, then the real selection is by the Minister or Government and is open to the perception of party partisanship. On the other hand it is arguable that the final say in such appointments should rest in the Government acting responsibly.

(a) Models

3.39 The TLAC is an independent non-statutory advisory body which was established in 1984. It is responsible for selecting appointees for senior Civil Service posts subject to certain exceptions.⁵⁸ TLAC is composed of the Secretary General, Public

⁵⁸ The TLAC is not used for the following Secretary General appointments: Secretary General the Department of Finance; Secretary General Public Service Management and Development, the Department of Finance; Secretary General Department of the Taoiseach; Secretary General to the Government; Secretary General Department of Foreign Affairs; and Chairman of the Revenue Commissioners. It is not used for Assistant

Service Management and Development, Department of Finance; Secretary General to the Government; two Secretary Generals of Departments and a person drawn from the private sector; each chosen by the Taoiseach after consultation with the Minister for Finance; and, in the case of the appointment of a Secretary, the outgoing incumbent.⁵⁹ The TLAC has been credited with improving the quality and mobility of top management in the Irish Civil Service.⁶⁰ Its advice has been accepted by the Government in all the cases of which we know. The TLAC will short-list candidates and usually meets them before making a recommendation to the Government. Generally, the TLAC recommends only one person, but in the case of Secretaries General, TLAC makes three recommendations, listed in alphabetical order, from which the Government makes its selection.

3.40 The other system which could be taken as a model is that used for appointment of the Chairperson of An Bord Pleanála.⁶¹ The Government selects from a list of (usually three) candidates drawn up by an independent statutory committee. The committee is composed of the President of the High Court; the Cathaoirleach of the General Council of County Councils; the Secretary-General of the Department

Secretary level appointments within the Department of Foreign Affairs. An example of the TLAC in operation is the appointment of the Director of Agricultural Appeals under the Agricultural Appeals Act 2001. Section 3 of the Act requires the Director of Agricultural Appeals to be appointed by the Minister from within the Civil Service after a selection held by the Top Level Appointments or the Civil Service and Local Appointments Commissioners. On the TLAC, generally, see Hogan and Morgan *op. cit* 60-65.

⁵⁹ *Ibid* at 83.

⁶⁰ *Delivering Better Government Second Report to Government of the Coordinating Group of Secretaries - Programme of Change for the Irish Civil Service May 1996.*

⁶¹ Something slightly similar is now used in a number of other areas. For example, section 2 of the *Prosecution of Offences Act 1974* provides for the establishment of a committee which nominates, to the government, candidates for the post of Director of Public Prosecutions. The Judicial Appointments Advisory Board was established under section 13 of the *Courts and Court Officers Act 1995* for the purpose of nominating individuals for appointment to judicial office. Section 16 requires it to recommend at least seven persons to the Government to fill a judicial vacancy.

of the Environment and Local Government; the Chairperson of the Council of An Taisce – the National Trust for Ireland; the President of the Construction Industry Federation; the President of the Executive Council of the Irish Congress of Trade Unions; and the Chairperson of the National Women’s Council of Ireland.⁶² Section 105(7)(a) requires the committee to select three candidates,⁶³ and inform the Minister of the reasons why the committee believes they are suitable for the appointment.

(b) *Proposed Reform*

3.41 Appeal Commissioners should be appointed for a fixed seven year term, which is renewable.⁶⁴ On the one hand a fixed term of seven years, even renewable, might seem to diminish an Appeal Commissioner’s independence. On the other hand, this does give an opportunity not to reappoint an unsatisfactory Commissioner. The balance is plainly a difficult one. However, we are persuaded by other modern precedents that making the office renewable at seven yearly intervals is a preferable model than a term of office, which runs until retirement age regardless of the quality of the Commissioner’s work.

3.42 We are of the view that a Committee, modelled on the Committee used for the appointment of the Chairperson of An Bord Pleanála, with particular knowledge in the tax field should be established for future appointments of Appeal Commissioners. There would be no need for an elaborate procedure since the various groups

⁶² Section 105 of the *Planning and Development Act 2000*.

⁶³ The Committee may nominate less than three candidates if the committee believes there are insufficient suitable candidates.

⁶⁴ Section 4 of the *Courts (No. 2) Act 1997* provides that the office of the presiding judge of the Supreme Court, High Court, Circuit Court or District Court shall be held for a period of 7 years, or until the age of judicial retirement as a judge of the relevant Court, whichever first occurs.

The Chairperson of An Bord Pleanála is appointed for a fixed seven year term, which may be renewed. Section 105 of the *Planning and Development Act 2000*. Ordinary members of An Bord Pleanála are appointed for fixed five years terms, which may be also renewable. Section 106 of the *Planning and Development Act 2000*. The Ombudsman is appointed for a fixed six year term and may be reappointed for a second or subsequent term under section 2(4) of the *Ombudsman Act 1980*.

affected by tax could be drawn together in one Committee. The Commission believes that an *ad hoc* expert Committee would be more advantageous than the TLAC itself, as it would allow for representation of a greater variety of interests. There is no need to set out precisely the expert bodies in the tax field, but examples of interested bodies would be the Department of Finance, the Revenue Commissioners, the Appeal Commissioners, the Irish Taxation Institute, the Institute of Chartered Accountants in Ireland, IMPACT, the Law Society of Ireland and the Bar Council of Ireland.

3.43 Common to both the TLAC and An Bord Pleanála models is the Government's entitlement to choose from among a number of candidates. The Commission believes that this discretion should be retained and replicated in any new process used for the appointment of future Appeal Commissioners. The Minister for Finance must choose a candidate from among this group. An Appeal Commissioner should only be reappointed by the Minister for Finance following a recommendation of the expert group that reappointment is appropriate.

3.44 It would seem desirable not to establish an entirely separate selection machinery. This selection system would not require a new administrative unit but simply a consultation process, which would be co-ordinated by a senior official in the Department of Finance. It is unlikely that questions could reasonably be raised concerning the impartiality of a senior official responsible for co-ordinating the nomination process, difficulties have not arisen as a result of an official within the Department of the Environment and Local Government co-ordinating the nominations of the prescribed organisations under the Bord Pleanála model. The remaining question is how many candidates the Committee should recommend to the Minister for Finance. The expert group should recommend a maximum of three candidates in order not to undermine too far the influence of the expert groups.

3.45 *The Commission recommends the establishment of an open and formal selection and appointment process for future Appeal Commissioners. An Appeal Commissioner should be appointed for a seven year fixed term, which is renewable. The proposed system would be that a group of experts from the fields of accountancy, law and taxation be used to short-list three possible candidates for*

appointment to the Office of Appeal Commissioner or else if none are eligible for security or other good reasons, the Minister should request the expert group to reconvene and engage again in the process of nomination. The Minister for Finance would then choose the Appeal Commissioner from among this further shortlist. The expert group should recommend whether or not the Minister for Finance should reappoint an Appeal Commissioner.

(2) Qualifications

3.46 In conjunction with the establishment of a more transparent selection process for future Appeal Commissioners, minimum qualifications should be specified. It seems obvious that these qualifications should be in at least one of the following relevant fields: taxation, accounting or legal practice. The Commission has considered the further question of whether it might be appropriate to require all future appointees to have some form of legal qualification⁶⁵ due to the increasing number of tax appeals, which require the Appeal Commissioners to interpret legislation. For example, in the UK, a ten year-qualification as a lawyer is required for appointment as a Special Commissioner. Seven years' legal qualification is required for appointment to the VAT and Duties Tribunal.⁶⁶ District Court judges or experienced lawyers normally make up the membership of New Zealand's Taxation Review Authority.⁶⁷ As against this, the current Appeal Commissioners do not have legal qualifications, and no complaints have been made in relation to their interpretation of the various pieces of legislation before them.

3.47 *The Commission believes that it suffices if an Appeal Commissioner has a professional qualification for a specified period*

⁶⁵ The Employment Appeals Tribunal is composed of three people, at least one of whom is a legally-qualified individual.

⁶⁶ The *Tax Appeals Tribunals Consultation Paper* suggests that the period of professional qualification should be standardised at seven years. *Tax Appeals Tribunals* (A Lord Chancellor's Department Consultation Paper March 2000) Q15.1.

⁶⁷ The New Zealand Taxation Review Authority is comparable with the Appeal Commissioners because it is a taxpayer's first independent port of call outside the Inland Revenue Department. A District Court judge in New Zealand has a comparable jurisdiction to the Irish Circuit Court.

in any of the fields of: legal practice, accountancy or taxation and is otherwise well qualified.

3.48 Another issue concerns the recommendation in the Final Report of the DIRT Inquiry (discussed at paragraph 1.29) that any future selection process should take into account the need for expertise in accountancy, taxation (including Customs and Excise), public administration⁶⁸ and law “to reside in the Commissioners collectively.”⁶⁹ This would seem to mean that each of the Appeal Commissioners would possess qualifications or experience in the different areas specified so that collectively they would cover all or most of the fields mentioned. While the advantage of such a requirement would be that the Appeal Commissioners would have a pool of varied and complementary knowledge, experience and expertise at their disposal, the advantage would be very limited because the Appeal Commissioners very rarely sit together. To put it simply: it would be of no advantage to a taxpayer what qualification was possessed by the Appeal Commissioner who does not hear that taxpayer’s appeal. Moreover, it could result in a system whereby a taxpayer would seek to appear before one Commissioner as opposed to the other, because one Commissioner coming from one profession might take a different approach from the other Commissioner from another profession. This is something which may happen anyway, but we should not wish to build it into the system. Accordingly, the

⁶⁸ “Public administration is that part of government that is concerned with the execution of policy. It implements the legislative framework and the spending and taxation decisions that the government has made. It is the channel through which decisions are brought to reality. It is also the form in which the enterprise sector encounters government in its day to day operations ... the role of public administration is a wide one. It includes the operation of government departments, i.e. the civil service. But it also includes a number of government agencies, as well as local authorities and publicly managed and funded bodies such as County Enterprise Boards, all of which interact with the enterprise sector and by their operations and effectiveness can play a very important role in the success of a business.” The National Competitiveness Council Annual Competitiveness Report 1998. <http://www.forfas.ie/ncc/reports/ncc/public.htm>.

The Commission does not see the need to require candidates to have prior experience in public administration.

⁶⁹ *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001) paragraph 00.

Commission's conclusion is that an attempt should not be made to ensure that each Commissioner comes from a different professional background.

3.49 *When a vacancy appears, the Commission recommends that the qualifications for the new appointee should be specified as minimum qualifications in tax, accounting or law, irrespective of the profession of the remaining Commissioner.*

(3) Removal of Appeal Commissioners

3.50 In the past three or so decades, the requirement of independence for significant quasi-judicial and other public positions has gained prominence. An important safeguard of independence is security of tenure. This is the notion which has underpinned the judiciary since (in Ireland) the *Act of Settlement 1701*.⁷⁰ The more recent examples include: the Ombudsman (*Ombudsman Act 1980*, section 2);⁷¹ the DPP (*Prosecution of Offences Act 1974*, section 2);⁷²

⁷⁰ Article 35.4 of the Constitution provides that: “[a] judge of the Supreme Court or High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.”

Similar protection is provided for Circuit and District Court judges. Section 39 of the *Courts of Justice Act 1924* provides that “[t]he Circuit Court Judges shall hold office by the same tenure as the Judges of the Supreme Court and the High Court” and section 20 of the *Courts of Justice (District Court) Act 1946* provides that “Justices shall hold office by the same tenure as the Judges of the Supreme Court and the High Court.” This is understood to mean that resolutions passed by both Houses of the Oireachtas are needed to remove either a Circuit or District Court judge.

⁷¹ Section 2(3) of the *Ombudsman Act 1980* provides that “[a] person appointed to be the Ombudsman—(a) may at his own request be relieved of office by the President; (b) may be removed from office by the President 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 removal; (c) shall in any case vacate the office on attaining the age of 67 years; (4) subject to the provisions of this section, a person appointed to be the Ombudsman shall hold office for a term of 6 years and may be re-appointed to the office for a second or subsequent term.”

⁷² Section 2(9)(a) of the *Prosecution of Offences Act 1974* provides that “[t]he Director may be removed from office by the Government after consideration by them of the report of a committee under paragraph (b) of this subsection... Whenever the Government so requests, a committee

members of An Bord Pleanála (*Planning and Development Act 2000*, section 105 (Chairperson) and 106 (ordinary members));⁷³ or the RTÉ Authority (*Broadcasting Authority (Amendment) Act 1976*, section 2).⁷⁴

3.51 Common to these provisions is the guarantee that the members hold office, subject to good behaviour and health, and sometimes the avoidance of bankruptcy, as determined by a resolution of each of the Houses of the Oireachtas.

3.52 *Modelled on the similar and unexceptional provisions quoted in the previous footnotes, the Commission recommends that any new legislation ought to give the Office of the Appeal Commissioners the same sort of security as given to the bodies discussed in paragraph 3.50. We recommend that the appointment of the Appeal Commissioners be put on a statutory footing, utilising the following draft statutory provision*

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.”

⁷³ Section 105(15) and 106(15), respectively, provide that the Chairperson or an ordinary member “may be removed from office by the Minister if he or she has become incapable through ill-health of effectively performing his or her functions, or if he or she has committed stated misbehaviour, or if his or her removal appears to the Minister to be necessary for the effective performance by the Board of its functions, and in case an ordinary member is removed from office under this subsection, the Minister shall cause to be laid before each House of the Oireachtas a statement in writing of the reasons for the removal.”

⁷⁴ Section 2 provides that “[a] member of the Authority may be removed by the Government from office for stated reasons, if, and only if, resolutions are passed by both Houses of the Oireachtas calling for his removal.”

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.

(4) Listing

3.53 Currently the taxpayer communicates with the Appeal Commissioners *via* the Revenue Commissioners. One practical reason for this is that the appeal process is closely connected with the collection process. When a Revenue Inspector receives a Notice of Appeal, the Inspector will send notice to the Collector-General's Office to stop collection of the tax. Another benefit of placing responsibility for the listing of appeals with the Inspector is the Inspector's familiarity with the case. Typically, the Inspector will not have to spend a lot of time or resources checking to see if the conditions for appeal (see paragraphs 3.12-3.18) have been complied with, as the Inspector will already be familiar with the case.

3.54 A number of disadvantages of the current system have been identified. The Revenue's responsibility for the listing systems adds to the perception that the Appeal Commissioners are an arm of the Revenue Commissioners. In addition, 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 system⁷⁵ is open to abuse, though it should be emphasised that the

⁷⁵ In instructions published pursuant to a FOI request, it is stated that an Inspector should not send the AH1 to the Appeal Commissioners until the Appeal Committee in the head office of the Revenue Commissioners have determined whether or not counsel will be retained by the Revenue Commissioners. It goes on to state that "[t]his is because there is a danger that the AC's may allocate a date for hearing even before the Revenue Solicitor has had a chance to look for Counsel. The Revenue Solicitor needs about two months, in most cases, to get Counsel engaged." Office

Commission knows of no evidence of abuse. For example, if there are a number of cases which would turn on a similar point, an Inspector could, theoretically, choose to list the case most likely to fail. Another problem with maintaining responsibility for listing in the hands of the Revenue Commissioners arises in relation to delay in listing a case and the interest on the tax due which a taxpayer may be obliged to pay in the event their appeal is unsuccessful (see paragraphs 3.24-3.28). If the Appeal Commissioners ultimately uphold the Revenue Commissioners' assessment, and there was an underpayment of tax, interest will accrue on the underpayment from the date it originally became due and payable until the date it is actually paid, 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 doubt (explained at paragraph 3.27) with their return. Thus, in those circumstances, the longer a taxpayer is waiting for an appeal to be listed and ultimately heard, the more the taxpayer will owe the Revenue Commissioners, the party responsible for contacting the Appeal Commissioners and arranging the time and date for the hearing of the taxpayer's appeal.

3.55 The Appeal Commissioners believe that an improvement could be effected without the upheaval of removing the administration from the Revenue Commissioners. This could be achieved if the existing mechanisms were strengthened to increase the supervision by the Appeal Commissioners, of the discretion exercised by Inspectors when listing cases. In order to assess how this may be achieved, the current statutory protections need to be examined in more detail.

3.56 Section 933(1)(b) deals with cases where permission to appeal is refused because the Inspector thinks that the taxpayer has not complied with the preconditions for appealing.⁷⁶ A taxpayer is

of the Revenue Commissioners *Taxes Consolidation Act 1997* Part 40 Appeals Publication under Section 16, *Freedom of Information Act 1997* Rules, Procedures Practices, Guidelines & Interpretations. Revised October 2001, paragraph 2.5. Emphasis added.

⁷⁶ It provides as follows: “[w]here on an application under paragraph (a) the inspector or his officer is of the opinion that the person who has given the notice of appeal is not entitled to make such an appeal, the inspector or other officer shall refuse the application and notify the person in writing accordingly, specifying the grounds for such refusal.”

entitled to appeal this refusal to the Appeal Commissioners by notice in writing within 15 days of the issue of the refusal. Accordingly, where there is a definite refusal of an appeal, the present law is satisfactory.

3.57 Section 933(2)(b)(ii) empowers an Inspector to refrain from notifying the taxpayer of the time and place for the hearing of an appeal, where it appears to the Inspector that the appeal may be settled by agreement. However, a problem arises where an Inspector fails to respond one way or another. Section 933(2)(c)⁷⁷ may afford a taxpayer protection in these circumstances. It allows taxpayers to apply directly to the Appeal Commissioners where they have given notice of appeal to an Inspector and the appeal has not been listed.⁷⁸ Although this appears to work satisfactorily in practice, the system is open to abuse. While receipt of a notice of appeal will be acknowledged as a matter of course, there is no obligation on an Inspector of Taxes to act on the notice of appeal within any particular time since an Inspector of Taxes is not obliged to submit the AH1 to

⁷⁷ Section 933(2)(c) *TCA 1997* provides: “[w]here, on application in writing in that behalf to the Appeal Commissioners, a person who has given notice of appeal to the inspector or other officer in accordance with subsection (1)(a) satisfies the Appeal Commissioners that the information furnished to the inspector or other officer is such that an appeal is likely to be determined on the first occasion on which it comes before them for hearing, the Appeal Commissioner may direct the inspector or other officer to give the notice in writing first mentioned in paragraph (b) and the inspector or other officer shall comply forthwith with such direction, and accordingly subparagraph (ii) of that paragraph shall not apply to that notice of appeal.”

⁷⁸ Section 933(2)(c) is curiously arranged in that, read literally, it seems to allow the taxpayer to go straight to the Appeal Commissioners. Interpreted another way, it does not. It has been suggested that the Revenue Commissioners take the view that the provision means that the taxpayer must have the information and evidence in order at the time of seeking a listing rather than being confident that the taxpayer will have it in order by the earliest foreseeable date on which the case will be heard. The latter interpretation appears to be a sensible one, but we think that, properly read, this is how the law is: “the information ... is such that an appeal is likely to be determined on the first occasion on which it comes before them [the Appeal Commissioners] for hearing....” It seems to us that, read properly, the present form of words need no improvement; though we would be open to discussion on this point.

the Appeal Commissioners within any particular time-limit. A way in which the protection provided by section 933(2)(c) could be strengthened would be to require the Inspector of Taxes to issue the taxpayer with a formal notice within a specified time, indicating either that the time and place of the appeal or the reasons why the appeal has not been listed. This would increase the accountability of the Inspector and make it easier for the taxpayer to invoke the protections available.

3.58 *We suggest that three months would be an appropriate period as it would afford an Inspector a reasonable amount of time to assess the case.*

3.59 The question is whether a more radical approach should be adopted, namely removing the listing of appeals from the Revenue Commissioners and placing it in the hands of the Office of the Appeal Commissioners. An independent registrar could be employed by the Appeal Commissioners for this purpose. The taxpayer could notify the registrar of the intention to appeal. The registrar could then communicate with the Revenue Commissioners to determine whether the taxpayer has satisfied the pre-conditions 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. An independent registrar within the Appeal Commissioners would solve any real or perceived problems which exist with the current arrangements for listing appeals. The argument against this proposal is that the present system is working at the moment, and can be improved by the fairly minor proposal made in paragraph 3.57. There would, if that were done, be no need for the more radical proposal.

3.60 *This is very much a practical question. The Commission would welcome views of the informed public as to whether responsibility for listing appeals before the Appeal Commissioners should be removed from the Revenue Commissioners as considered in paragraph 3.59, or whether, as discussed in paragraph 3.57, the introduction of a three month time-limit within which an Inspector must respond in relation to listing an appeal would be sufficient.*

(5) Administration of the Oath

3.61 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. Generally, only the taxpayer will be requested to take the oath: that is to say, an Inspector will rarely be asked to take an oath. This arises simply because the evidence of the Inspector depends on written documentation. However, this may create a perception of inequality between the taxpayer and the Inspector. Accordingly, as a matter of principle, the Commission thinks it important to stress that, in appropriate circumstances, even if they are exceptional, the Inspector of Taxes may be required to take the oath. Such an exceptional case might arise if the Inspector were asked to give evidence of what they have claimed to have seen on visiting the taxpayer's residence or business.

3.62 The Commission recommends that the Appeal Commissioners should specify, (perhaps in their procedures manual/explanatory guide - see paragraph 3.73) that, in appropriate and defined circumstances, the oath may be administered to the taxpayer or the Inspector of Taxes or both.

(6) Recording of determinations

3.63 The Appeal Commissioners are currently required to record every determination of an appeal (see paragraph 3.23). Determinations are recorded on a Form AS1, a form which is essentially within the control of the Revenue Commissioners. The practice originated because the Revenue had large clerical resources and was involved in all cases. But the practice that one side in the case should have the decision recorded on 'its' form, is unjustifiable. It contributes incidentally to the impression that the Appeal Commissioners are not independent. Moreover today, with the ready availability of information technology and the proposed increase in staffing at the Appeal Commissioners, there seems to be no reason why the natural position – that is to say, that the Appeal Commissioners should control their own records and should make them freely available to each side – should not prevail. It is also arguable that the current reduced workload of the Appeal Commissioners, an average of 350 cases per year divided among two Commissioners, would mean that the Office of the Appeal Commissioners has time to maintain its own records.

3.64 *The Commission recommends therefore that the Appeal Commissioners should control the record of their own decisions and make them available to both parties as of right.*

3.65 While the facts found in each case and the reasoning for such determinations are given orally at the hearings by the Appeal Commissioners, they are not recorded in writing. (See paragraph 3.23). Throughout public administration or the administration of justice, it has become increasingly accepted that where decisions are taken which significantly affect an individual's rights, the reasons for such decisions should be given in writing. In its recent *Report on Penalties for Minor Offences*, the Commission recommended that District Court judges should be required to give concise written reasons for any decision to impose a prison sentence rather than a non-custodial sentence.⁷⁹ As noted in the Report, one of the classical arguments in favour of written reasoned decisions is that "a decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out."⁸⁰ Additionally, the requirement to give reasons is an aspect of the general constitutional and human rights obligation to give reasons for a decision:

"[P]rior to the entry into force of the *Freedom of Information Act 1997*, a wide doctrine requiring administrative bodies to give reasons for their decisions had been deduced from the notion of constitutional justice. Decisions such as *The State (Creedon) v Criminal Injuries Compensation Tribunal*⁸¹ and *International Fishing Vessels Ltd v Minister for the Marine*⁸² had brought Irish jurisprudence to a level whereby nearly all tribunals or public bodies could be asked to provide at least some kind

⁷⁹ Law Reform Commission *Report on Penalties for Minor Offences* (LRC 69 - 2003) at 41.

⁸⁰ *The Franks Report*, 1957 (Cmnd. 218), paragraph 98 and Law Reform Commission *Report on Penalties for Minor Offences* (LRC 69 - 2003) at 41.

⁸¹ [1988] IR 51.

⁸² [1989] IR 149.

of explanation for their decisions, at any rate where judicial review proceedings were in prospect.”⁸³

3.66 By now, under the *Freedom of Information Act 1997*, this is a statutory obligation, in respect of the public bodies specified in the Act to give reasons for their decisions. While the specified public bodies do not include the Appeal Commissioners, the general obligation, from constitutional justice just quoted would seem to apply. There is no reason why the Appeal Commissioners should be an exception to the principle. However, in the interests of greater certainty, it would be better if this obligation were expressed in statute.

3.67 Comparisons with the appeal system in the UK support the Commission’s recommendation. The Special Commissioners in the UK issue and circulate written determinations in all cases. *The Special Commissioners (Jurisdiction and Procedure) Regulations 1994* provide that the Tribunal may give its final determination orally at the end of the hearing or may reserve it. In either event,⁸⁴ the determination is recorded in a document which contains a statement of the facts found by the Tribunal and the reasons for the determination, and is signed by the Tribunal. The Clerk of the Tribunal will send a copy of the document recording the final determination to each party.

3.68 A second point at which the lack of written reasons becomes important is in connection with the preparation of a case stated from the Appeal Commissioners to the High Court (though this is a device which attracts only some 5-10 cases annually). Facts as decided by the Appeal Commissioners become central to cases when a party is seeking to have a case stated to the High Court. The lack of a written record of the Appeal Commissioners’ decision on the facts and legal reasoning has contributed to parties experiencing significant delays when trying to reach agreement on a case stated. While the parties may agree to employ a stenographer, this is not a desirable

⁸³ Law Reform Commission *Report on Penalties for Minor Offences* (LRC 69 - 2003) at 41.

⁸⁴ Subject to a limited exception for determinations in principle outlined in s.18(5-7) of SI 1994 No. 1811 *The Special Commissioners (Jurisdiction and Procedure) Regulations 1994*.

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).⁸⁵ If the Appeal Commissioners produced, at or about the time of the determination, a summary of the facts, its determination and reasons, the delay in agreeing a case stated would be substantially reduced. Given the workload of the Appeal Commissioners, as discussed in paragraph 3.05, it would not seem unreasonable to require the Appeal Commissioners to produce written determinations, which would include a summary of the facts found and the reasoning followed in arriving at such determinations for circulation to the parties. The Commission appreciates that producing a detailed summary entails some extra work, but written reasoned determinations could be produced inexpensively, if, for example, the scope of the AS1, currently used by the Revenue Commissioners, was expanded and circulated to all parties.

3.69 The next question which arises is how detailed the reasons should be. The general guidance here is that the duty to give reasons in an administrative context will be satisfied so long as the reasons given are meaningful. The reasons should be given in “general and broad terms,”⁸⁶ so that the “gist”⁸⁷ of the basis for a decision is

⁸⁵ Developments in the family law area could be considered. A pilot programme has been introduced to increase the recording of decisions. Although the concern in relation to family law was that the operation of the *in camera* rule was resulting in a lack of awareness of the workings of the courts in the family law area and not the procedure for stating cases, the means used to increase the recording of decisions is instructive. A qualified solicitor or barrister has been employed to record and report family law decisions and assemble statistics for publication. The reporter may only attend hearings with the consent of the parties. The parties’ confidentiality is preserved as publication of any identifying material is prohibited: McDiarmada “The Role of the Courts Service” in *Focus on the In Camera Rule* Papers on the European Convention on Human Rights and Irish Family Law delivered to a seminar at Buswell's Hotel, Dublin, 20 October 2000 (Parental Equality 2002) at 16.

⁸⁶ *The State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] IR 51.

⁸⁷ *Faulkner v Ministry for Industry and Commerce* [1997] ELR 107.

apparent.⁸⁸ At the same time, the reasons given should not be merely formulaic, since this would defeat the purpose of the recommendation.

3.70 Safeguards should be built into the system to ensure that there is no delay in issuing the written determination. A reasonable time-limit, within which the Appeal Commissioners must issue the written determination, should be established, since it would not be in the interests of the taxpayer or the Revenue for the process to continue *ad infinitum*. We propose that this time-limit should be three months. Additionally, in order to ensure that this time-limit is complied with an appeal should be deemed to have been determined in favour of the taxpayer if a written determination is not issued within three months. Section 34(8)(f) of the *Planning and Development Act 2000* is an example of where this mechanism is used in order to ensure decisions are given within specified periods.⁸⁹

3.71 *The Commission recommends 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.*

(7) Publication of determinations

3.72 This last recommendation will also help in the present context. The Appeal Commissioners were given the power to publish details of their determinations under section 944A of the *TCA 1997*.⁹⁰ However, to date only twenty nine determinations have been

⁸⁸ Law Reform Commission *Report on Penalties for Minor Offences* (LRC 69 - 2003) at 48.

⁸⁹ Section 34(8)(f) of the *Planning and Development Act 2000* provides that “[w]here a planning authority fails to make a decision within the period specified in paragraph (a), (b), (c), (d) or (e), a decision by the planning authority to grant the permission shall be regarded as having been given on the last day of that period.”

⁹⁰ Section 944A of the *TCA 1997* provides: “[t]he Appeal Commissioners may make arrangements for the publication of reports of such of their determinations as they consider appropriate, but they shall ensure that any such report is in a form which, in so far as possible, prevents the identification of any person whose affairs are dealt with in the determination.”

Section 944A was inserted by section 134(1)(a) of the *Finance Act 1998*.

published. There is no register of precedents⁹¹ and there seems to be a lack of public knowledge of the Appeal Commissioners' decisions, even among accountants and other professionals. Certain practitioners, especially in Dublin, may hear about the decisions on the 'grapevine', but there is no reliable access to a very large number of cases. It has been suggested that this situation gives the Revenue Commissioners an added advantage over the taxpayer, due to the Revenue Commissioners' having greater familiarity with previous determinations of the Appeal Commissioners and the procedure before the Appeal Commissioners.⁹²

3.73 The Appeal Commissioners have acknowledged this difficulty, and are in the process of establishing a reporting and tracking system for determinations, and a number of determinations

⁹¹ "The making and retention of comprehensive reports of cases and decisions at Appeal Commissioner and CCJ level has been considered but had to be rejected as neither practicable nor desirable." *Office of the Revenue Commissioners Taxes Consolidation Act 1997 Part 40 Appeals* Publication under Section 16, *Freedom of Information Act 1997* Rules, Procedures, Practices, Guidelines & Interpretations. Revised October 2001, paragraph 1.2.

⁹² Evidence of this advantage is borne out in a response to a section 16 FOI request, where the Revenue Commissioners stated as follows: "[t]he copies of forms AH1 sent to Head Office (together with the subsequent notes of the hearings) will be retained centrally and indexed under the relevant headings. The copies of forms AH1 as they are received in Head Office will be checked against the index. Where the check shows that a case on a similar or related topic has appeared on a previous AH1, the Inspector will be advised of the details on that AH1. The Inspector may then obtain the papers relating to the previous case and may consult with the Inspector who argued the case with a view to preparing his own case to deciding whether to continue the case.

It is again stressed that the purpose of the procedure is not to enable Inspectors to quote previous decisions in argument. The citing before the Appeal Commissioners or Circuit Court Judges of what are, in effect, unreported cases would not prove acceptable. *The purpose of the procedures is to enable an Inspector to benefit from the experience of other Inspectors in framing his own argument or in determining where a particular line of argument is sustainable.*" Emphasis added. *Office of the Revenue Commissioners Taxes Consolidation Act 1997 Part 40 Appeals* Publication under Section 16, *Freedom of Information Act 1997* Rules, Procedures, Practices, Guidelines & Interpretations. Revised October 2001, paragraphs 5.1-5.2.

have been published on the website of the Appeal Commissioners, which is hosted by the Irish Taxation Institute.⁹³ The Commission understands that the Appeal Commissioners intend to increase the number of determinations published when additional administrative staff are recruited and to publish a procedural manual and explanatory guide.

3.74 *The Commission recommends the establishment, without delay, of an effective system for reporting decisions of the Appeal Commissioners, since knowledge of relevant precedents ought to be more widely accessible.*

(8) ‘What’s in a Name?’

3.75 The Commission believes that the Appeal Commissioners are independent, and that the present reforms which are in train will help dispel any lingering feeling on the part of the public that they are less than independent. However, there is one further simple change which could be made. The similarity in the names of the Office of the Revenue Commissioners and the Office of the Appeal Commissioners is part of the basis for the perception that the Appeal Commissioners are an arm of the Revenue Commissioners, and not an independent, impartial forum.⁹⁴ We suggest a change of name. The question is: ‘what ought the new title be?’ The use of the term ‘Court’ ought to

⁹³ Prior to the introduction of section 944A of the *TCA 1997*, which permits the publication of determinations of the Appeal Commissioners, there was no provision for publication of the Appeal Commissioners’ determinations or the principles upon which determinations were based.

The Institute of Taxation has stated that “availability of determinations to taxpayers as a whole is not something which is merely ‘nice to have’ – it is an intrinsic element if the appeals process is to be fully fair and impartial.” It suggested that a timeframe should be put in place to regulate the timely publication of determinations. Vol. 2-Part 1 of 2 at 2 *Correspondence from the Institute of Taxation to the DIRT Inquiry*, 7 February 2001, 4.

⁹⁴ The Canadian tax appeal tribunal, the ‘Tax Review Board’, experienced similar difficulties prior to the establishment of the Tax Court of Canada. The name of the Tax Review Board led to the mistaken public perception that it was an extension of the Department of National Revenue and in 1983 the Government decided to make the board a court in both name and status, in order to establish its judicial independence. Bill C 167, an *Act respecting the Tax Court of Canada and to amend the Federal Court Act, the Judges Act and the Unemployment Insurance Act, 1971*

be avoided, as the courts have already held that the Appeal Commissioners are not involved in the administration of justice.⁹⁵ Thus, the use of the description ‘Court’ would cause confusion about the status of the Office of the Appeal Commissioners. Of the alternative names, ‘tribunal’ or ‘board’ seem the most likely and, although “tribunal” has the more definite and precise meaning,⁹⁶ it could risk confusion with tribunals of inquiry. The Commission, therefore, prefers the term “board”. As to the adjective, the Commission prefers ‘tax’ to ‘revenue’, again to avoid identification with the Revenue Commissioners.

3.76 *The Commission recommends a change in the name of the Office of the Appeal Commissioners to the Tax Appeals Board. The Commission invites submissions on this point.*

(9) *Scope of Appeal Commissioners’ Jurisdiction*

3.77 The limited scope of review which the Appeal Commissioners may carry out has also been subject to criticism. Although interest and penalties often exceed the amount of the tax, the Appeal Commissioners have no jurisdiction to hear an appeal in relation to interest or penalties (except in relation to the issue of whether the 2% interest rate for fraud or negligence is applicable under section 1082:⁹⁷ but in practice this is almost never levied). There are, however, other avenues open to a taxpayer wishing to challenge penalties imposed by the Revenue Commissioners, namely: an internal or joint review by an Inspector of Taxes and/or an External Reviewer (see paragraph 2.29-2.34); the Ombudsman or a judicial review action alleging that they have been unfairly penalised by the Revenue Commissioners. Nor, at the moment, do the Appeal Commissioners have jurisdiction to consider Revenue discretions, statutory or extra statutory, exercised in accordance with the “the care and management” provision of section 849 of the *TCA 1997*. The

⁹⁵ *The State (Calcul) International Limited and Solatrex International Limited v The Appeal Commissioners and the Revenue Commissioners* (1984 No 640 SS December 18, 1986) In the alternative, Barron J. held that the Appeal Commissioners’ powers and functions are limited within the meaning of Article 37.

⁹⁶ See paragraph 3.03 for a definition.

⁹⁷ Section 1082(5)(b) of the *TCA 1997*.

Appeal Commissioners' remit is confined to the interpretation and application of the law.

3.78 In the context of reform, the question to be asked is whether the Appeal Commissioners' remit ought to be extended to cover appeals on penalties and hardship. A major argument for extending the Appeal Commissioners' remit would be that a taxpayer should have a right of appeal from every decision of the Revenue to a body independent of the Revenue, and that the Appeal Commissioners would be an appropriate body to hear appeals on these issues, as they do on other matters. Additionally, as discussed at paragraphs 2.80 - 2.98, if civil penalties are held to be criminal charges for the purposes of Article 6(1) of the ECHR, a right of appeal to an impartial and independent tribunal will have to be provided.

3.79 On the other hand, it may be said that the matters excluded from the Appeal Commissioners' jurisdiction are discretionary, and so not appropriate to be dealt with by way of a tribunal, such as the Appeal Commissioners, which is designed to apply rules. Moreover, the existing appeal mechanisms, which have been listed in paragraph 3.77, may be considered to be sufficient. It is arguable that the current system of appeals strikes a balance between the Revenue Commissioners' right to enforce penalties, utilising their discretion under the 'care and management' provisions and, on the other hand, a taxpayer's right to be treated fairly.

3.80 If an appeal to the Appeal Commissioners on the issue of penalties were created, a further question would arise, namely whether an appeal from the Appeal Commissioners to the Circuit Court and also the High Court and Supreme Court should also be allowed. See paragraphs 2.87-2.90 for a discussion on this point.

3.81 The Commission recommends that the Appeal Commissioners' jurisdiction be extended to cover appeals against penalty determinations made by the Revenue Commissioners. A further fresh appeal should lie from the Appeal Commissioners to the Circuit Court and from there an appeal on points of law to the High Court and Supreme Court. The Commission looks forward at the consultation phase to hearing views on whether the Appeal Commissioners jurisdiction should be further extended to, for example, hardship cases.

3.82 Another point arises in relation to the Appeal Commissioners' jurisdiction to issue precepts. Once a Notice of Appeal has been issued, the Appeal Commissioners have the power under section 935 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."

3.83 A precept is a "command; a written order; an order or direction given by one official person or body to another requiring some act to be done."⁹⁸ Precepts are very rarely used. However, the Appeal Commissioners only have the power to issue precepts to appellants and not to other witnesses.⁹⁹ The Appeal Commissioners

⁹⁸ Murdoch, *Murdoch's Dictionary of Irish Law* (3rd ed Topaz Publications 2000) at 608.

⁹⁹ Section 939(1)(a) of the *TCA 1997* only grants the Appeal Commissioners the power to summon other witnesses. A summons is "a written command issued to a defendant for the purpose of getting him to attend court on a specified date to answer a specified complaint." *DPP v Clein* [1983] ILRM 76. Murdoch *Murdoch's Dictionary of Irish Law* (3rd ed. Topaz Publications 2000) at 772-773.

It has been suggested that the Appeal Commissioners should be granted the right to *subpoena* witnesses. This is compatible with the Commission's recommendation that the Appeal Commissioners be given the power to compel all witnesses to produce documents. A *subpoena duces tecum* would entitle the Appeal Commissioners to compel the attendance of a witness and the production of certain documents by that witness, and thus would perform the same function a precept, allowing the Appeal Commissioners to compel witnesses to produce relevant documents. An amendment to section 939 of the *TCA 1997* to provide the Appeal Commissioners with the power to require witnesses to furnish them with documents was tabled but withdrawn in 1998.

believe that the power to require the production of documents should be extended to include all witnesses.

3.84 *The Commission recommends that the Appeal Commissioners be given the power to issue precepts to all witnesses to assist them in performing their functions.*

E The Circuit Court

(1) The Present Law

3.85 From the Appeal Commissioner, the taxpayer, though not the Revenue Commissioners,¹⁰⁰ has a right to appeal to a Circuit Court judge. The taxpayer may require the case to be reheard by a Circuit Court judge, on giving notice in writing to the inspector within 10 days of the Appeal Commissioners' determination.¹⁰¹ The appeal, which is held *in camera*, is based on a full rehearing of the facts and law.¹⁰² Only about 10 to 15 appeals proceed to the Circuit Court from the Appeal Commissioner each year.¹⁰³ Under section 942(3), the judge has the same powers as an Appeal Commissioner (a point to which we return at paragraph 3.105).

(2) Is there a need for an appeal to the Circuit Court at all?

3.86 Historically, the Appeal Commissioners were regarded as being very close to the Revenue Commissioners. However, it may be that until the proposed reforms are implemented, there would be room for suspicion that the appeal to the Appeal Commissioners was not an appeal to a perceptibly independent body.¹⁰⁴ But in the past decade

¹⁰⁰ Except in relation to cases involving Capital Acquisitions Tax. See paragraph 3.91.

¹⁰¹ Section 942(1) of the *TCA 1997*.

¹⁰² Section 942 (3 & 9) of the *TCA 1997*.

¹⁰³ *Report of the Steering Group* (Government Publications August 2000) at paragraph. 7.27, 107.

¹⁰⁴ The Minister for Finance, Mr McCreevy suggested that the background to the approach in this area is "that the advantage would be to the State and the Revenue Commissioners. The purpose of the appeals to the court is to balance out the advantage by giving it to the taxpayer. That is the basis of much of our laws particularly with revenue law ... [Thus] the background going back 100 years which is to balance out the advantage to the State and more or less tip the balance in favour of the taxpayer which is a

there has been a great deal of progress - and more in prospect - in terms of putting the independence of the Appeal Commissioners beyond question. Once the reforms in prospect have been implemented, then the question arises: why should a taxpayer have two opportunities at a complete re-hearing?¹⁰⁵

3.87 To make comparisons with similar situations: if an applicant is refused a welfare benefit or planning permission, there is one appeal to an appeals officer¹⁰⁶ or to An Bord Pleanála respectively but there is no possibility of a further full re-hearing before a court. The only right of appeal from the social welfare appeals officer is on a point of law to the High Court.¹⁰⁷ A decision of An Bord Pleanála

reasonable approach to law”: Select Committee on Finance and the Public Service, Committee Debate 4 March 1999 on the *Finance Bill 1998*. Available at <http://www.gov.ie/oireachtas/frame.htm>.

¹⁰⁵ If one looks at the appeal system in the UK, there is no comparable right to a full rehearing after a decision of either the General or Special Commissioners. See paragraph 3.88.

¹⁰⁶ If a deciding officer within the Department of Social and Family Affairs refuses an individual’s application for a benefit, the individual has a right to appeal that decision to an Appeals Officer. An Appeals Officer is a civil servant following a career within the Department of Social and Family Affairs, but is independent of the Department. The Appeals Officer will hear the claim in its entirety at an informal hearing. Section 271 of the *Social Welfare (Consolidation) Act 1993* provides an individual with the right to appeal a decision of an Appeals Officer to the High Court on a point of law. Thus, if one compares the two systems, the following two points stand out: (1) the social welfare system of appeals does not seem to be as independent as the Appeal Commissioners, as presently constituted; (2) There is no appeal from an Appeals Officer to the Circuit Court; there is merely an appeal on a point of law to the High Court. By contrast, within the tax system, there is an appeal on a point of law either directly from the Appeal Commissioners or from the Circuit Court to the High Court - see paragraph 3.01.

¹⁰⁷ On the other hand, the right to a fresh appeal is available within the Court system. If an individual brings a civil claim before the District Court, the individual has two appeal options from the District Court, namely: a new hearing in the Circuit Court or an appeal to the High Court on a point of law. In general, if a case starts in the Circuit Court, an appellant has a fresh right of appeal to the High Court or a right to appeal on a point of law to the Supreme Court: Byrne & McCutcheon *The Irish Legal System* (4 ed Butterworths 2001) at 245.

may only be challenged by way of judicial review.¹⁰⁸ However, on the other hand, there is fresh right to appeal, from a decision of the Employment Appeals Tribunal to the Circuit Court. And in the case of another taxation system – business rates – there is an appeal from the Commissioners of Valuation to the Valuation Tribunal,¹⁰⁹ and thereafter an appeal to the High Court on a point of law,¹¹⁰ and hence to the Supreme Court.¹¹¹

3.88 Another relevant set of comparisons concerns the United Kingdom. Here, there is no entitlement to have a tax appeal re-heard anew: appeals from the General Commissioners take the form of cases stated to the High Court, but appeals from the Special Commissioners are heard on the basis of the Special Commissioners' decision, and the papers which the Special Commissioners had before them. If a taxpayer wishes to appeal a decision of the Commissioners, different procedures apply, depending on whether the appeal was decided by the General or Special Commissioners. A taxpayer has 30 days to appeal a decision of the General Commissioners. The taxpayer must write to the Clerk of the Commissioners, requesting a case to be stated for the opinion of the High Court (in Scotland the Court of Session, or, in Northern Ireland, the Court of Appeal (Northern Ireland)). The taxpayer may be asked to identify the legal basis for the case stated. After a process involving the exchange of documents, the taxpayer must send the application to the relevant court. If a taxpayer wishes to challenge a decision of the Special Commissioners, a notice must be sent within 56 days, to the High Court, stating the grounds for the appeal.

3.89 As against this, it has been argued that the right of appeal to the Circuit Court is a useful right for the taxpayer. Both the expertise of the Appeal Commissioner and the generality of the Circuit Court have benefits. The advantage of an appeal to the Circuit Court is that it involves a fresh, dispassionate look at the issues, in contrast to cases at the Appeal Commissioner level, where an Appeal

¹⁰⁸ The right to appeal a decision of An Bord Pleanála to the High Court on a point of law was removed in 1994. *Ibid* at 276.

¹⁰⁹ Section 34 of the *Valuation Act 2001*.

¹¹⁰ Section 39(1) of the *Valuation Act 2001*.

¹¹¹ *Ibid*.

Commissioner may have set views on the matter. Another advantage lies in the – admittedly rare – case in which a question of law, other than revenue law, impacts in a revenue dispute. The wider experience of the Circuit Court judge might make for a ‘better’ decision. Practitioners to whom the Commission has spoken believe that, in practice, the appeal is useful, and a fairer result is achieved. The appeal to the Circuit Court Judge is a valued right among taxpayers and provides a safeguard for those aggrieved by a decision of the Appeal Commissioners. Furthermore tax appeals to the Circuit Court are usually dealt with locally with expedition.

3.90 *The Commission recommends the retention of the taxpayer’s right to appeal to the Circuit Court. See also paragraphs 2.87-2.90.*

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

3.91 This last recommendation leads to a discussion of whether the Revenue Commissioners should have a right to appeal a decision of the Appeal Commissioners to the Circuit Court. Significantly, 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 the limited area of capital acquisitions tax cases.¹¹² In all other cases, the Revenue Commissioners are bound by the Appeal Commissioners’ findings of fact, save in the unlikely event that they bring a successful action in the High Court, establishing that no reasonable Commissioner could have found as the Appeal Commissioner did on the facts.¹¹³

¹¹² Section 67(5)(b) of the *Capital Acquisitions Tax Consolidation Act 2003*. The taxpayer and the Revenue 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.

¹¹³ In *Mara (Inspector of Taxes) v Hummingbird Limited* [1982] ILRM 421,426 Kenny J described a case stated from the Appeal Commissioners to the Circuit Court in the following manner: “[a] case stated consists in part of findings on questions of primary facts ... These findings on primary facts should not be set aside by the Courts unless there is no evidence whatsoever to support them. The Commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the Court should approach these in a different way. If they are based on the interpretation of

IMPACT, the trade union which represents the Association of Inspectors of Taxes, has advocated the extension of the Revenue Commissioners' right of appeal from the Appeal Commissioners in a range of cases beyond capital tax cases.

3.92 In addition, it has been suggested that there is a higher rate of success in appeals to the Circuit Court than in appeals to the Appeal Commissioners. It is recognised that the Appeal Commissioners' decisions can be the most important decisions as "many critical aspects of Revenue law are matters of fact".¹¹⁴ Generally, issues of fact, which do not go in the Revenue Commissioners' favour end with the Appeal Commissioners. It ought also to be noted that an exception for Capital Acquisitions Tax in which the Revenue Commissioners did have a right of appeal proved invaluable in securing an IR£1 million (€1.27 million) settlement with Mr Haughey in 2000:¹¹⁵ Mr Haughey had appealed the Revenue

documents, the Court should reverse them if they are incorrect where it is in as good a position to determine the meaning of the document as is the Commissioner. If the conclusions from the primary facts are ones which no reasonable Commissioner could draw, the Court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If, however, they are not based on a mistaken view of the law or a wrong interpretation of the documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable Commissioner could draw."

¹¹⁴ Brennan and Hennessy *Forensic Accounting* (Round Hall Sweet & Maxwell 2001) at 423, paragraph 11.26.

¹¹⁵ The Revenue Commissioners accepted an interim settlement of IR£1,009,435 (€1,281,718) from Mr Charles J Haughey for gift tax and interest arising out of payments identified by the McCracken tribunal. Moriarty J described the interim settlement in the following terms: "Revenue indicated that the agreement under s942(8), related to the civil liability for the tax and interest as assessed. S942(8) provided a statutory basis for varying the assessments, without recourse to the Circuit Court. In effect under the agreement, four of the assessments would be amended to limit the interest element to 100% of the tax, while the remaining three assessments would stand good. If all sides were agreed and it was otherwise considered appropriate, the CCJ [Circuit Court Judge] could be asked to accept the assessments so revised on the 4th April. Settlement under s942(8) would not and could not be used for any other purpose such as an admission of guilt for the purposes of criminal proceedings.

Commissioners' assessment to tax to the Appeal Commissioners. The Appeal Commissioner hearing the case reduced the assessment to nil on the grounds that the evidence of the McCracken Report to the effect that the donor of the capital was Mr Dunne, the beneficiary Mr Haughey and that both were domiciled in Ireland) was an insufficient ground for the assessment to capital acquisitions tax. In the case of any other type of tax, the Revenue Commissioners would not have been in a position to challenge the Appeal Commissioner's finding of fact. But in this case, the Revenue Commissioners were able to initiate an appeal from the Appeal Commissioners to the Circuit Court just because it was the exceptional case of capital acquisitions tax which was involved. Ultimately, a settlement of the Revenue Commissioners' appeal to the Circuit Court was reached, because the Revenue Commissioners would have had a second opportunity to argue the case, and could have addressed the evidential shortcomings identified by the Appeal Commissioner.¹¹⁶

3.93 A countervailing point is that if the Revenue Commissioners were given a right to appeal to the Circuit Court in all cases, the issue of costs would become much more important in appeal cases. Costs will be granted at the discretion of the Court. At the moment, the parties to a Circuit Court appeal from the Appeal Commissioners do not generally seek costs, unless there is a feeling that the other party's behaviour was unreasonable or vexatious. If appeals to the Circuit Court became a more common occurrence, the incidence of the parties seeking costs would probably increase. The potential amount of those costs should not be underestimated.

Effectively under s942(8) the client was accepting that a tax liability existed which he would have to discharge, but such acceptance did not amount to an admission by him that he had "knowingly or wilfully" failed to deliver returns within the statutory time limits. The Revenue indicated that when the client's legal advisers were brought on board, they would undoubtedly give him comfort in that regard." Moriarty Tribunal 16/03/2001.

¹¹⁶ In contrast to the situation here, the Inland Revenue in the UK have the same rights of appeal as the taxpayer from decisions of the General or Special Commissioners. On the other hand, as mentioned in paragraph 3.88, there is no right to a fresh appeal in UK tax appeals. See Inland Revenue, IR37 *Appeals against tax, National Insurance contributions, Statutory Sick Pay and Statutory Maternity Pay*.

3.94 *In principle, it would seem appropriate to extend the Revenue Commissioners' right of appeal to the Circuit Court beyond Capital Acquisitions Tax cases. The Commission would welcome submissions on this point.*

3.95 Section 942(5) of the *TCA 1997* requires the Circuit Court Judge to make a special declaration to preserve the confidentiality of the taxpayer's affairs.¹¹⁷ In the light of the constitutional declaration judges are required to make before entering into office, which supersedes all other declarations,¹¹⁸ this seems to the Commission to be an invidious requirement: no other legal provision requires a judge to make a particular declaration when performing a statutory function.

3.96 *Accordingly, the Commission recommends that the requirement that the Circuit Court judge make this special declaration be terminated.*

3.97 The Revenue Commissioners are responsible for listing appeals from the Appeal Commissioners to the Circuit Court Judge. The listing system operates in an analogous way to that which exists in the context of the appeal from the Revenue Commissioners to the Appeal Commissioners at paragraphs 3.53-3.60. If the taxpayer wishes to appeal a decision of the Appeal Commissioners, the taxpayer must write to the 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 the Circuit Court Judge, at or before the time of the rehearing of the appeal the form on which the Appeal Commissioner's determination was recorded.

¹¹⁷ The Circuit Court Judge is supposed to make the declaration set out in Schedule 27 Part 1 of the *TCA 1997* for Appeal Commissioners Acting in Respect of Tax under Schedule D. In practice, the judge is not required to make the declaration.

¹¹⁸ Article 34.5.1 provides that: Every person appointed a judge under this Constitution shall make and subscribe the following declaration:

“In the presence of Almighty God I, do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (or as the case may be) without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me.”

3.98 Where an Inspector is delaying in listing a case for the Circuit Court, there is no explicit right for a taxpayer to apply directly to the Circuit Court (equivalent to that contained in section 933(2)(c) where an Inspector is delaying in listing an appeal before the Appeal Commissioners: see paragraph 3.57). Thus, it would seem that, theoretically, an Inspector may delay indefinitely in listing a case. In an effort to counteract this, as one possible proposal, an equivalent protection to that contained in section 933(2)(c) should be provided for appeals to the Circuit Court Judge.

3.99 There is, however, a more radical alternative. Tax appeals to the Circuit Court Judge are unique within the Court system, in the sense that no file is created nor is any record of the proceedings kept by the Courts Service. The Revenue Commissioners perform a dual function in these cases: they are both a party to the appeal and the administrator of the appeal in that they have the entire responsibility for organising the Court time and venue with the Courts Service and for notifying the parties of the arrangements for the hearing. Comparable considerations arise in relation to the appropriateness of the listing of appeals remaining in the hands of the Revenue as were discussed in paragraphs 3.53-3.60.

3.100 In the light of the above discussion, the Commission recommends, at a minimum that an equivalent to section 933(2)(c), with the amendment suggested at paragraph 3.57, be extended to appeals before the Circuit Court Judge. The question arises 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. The Commission looks forward to receiving submissions on this point.

3.101 Section 942(4) provides that section 934(2), which stipulates who may represent a taxpayer before the Appeal Commissioners, will apply to a rehearing of an appeal before a Circuit Court Judge. Thus, a taxpayer may appear in person, or may choose to be represented by a barrister, solicitor, accountant, member of the Irish Taxation Institute or any other person whom the Circuit Court Judge may permit. In many cases at Circuit Court hearings lawyers represent the parties. The Revenue Commissioners do not

employ independent counsel in all cases, but are likely to employ counsel where there is counsel on the other side, or where there are important issues at stake.

(4) Hearing by a “Judge of the Circuit Court”

3.102 Appeals from the Appeal Commissioners are heard by Circuit Court Judges under an unusual provision. Section 942(1) provides that a person may require that an appeal from a decision of the Appeal Commissioners “be reheard by the judge of the Circuit Court” rather than the Circuit Court.

3.103 The significant case in this field is *Inspector of Taxes v Arida Limited*.¹¹⁹ This was a case stated from the Circuit Court to the High Court and, subsequently, the Supreme Court. The question of law to be determined was “whether a Circuit Court Judge sitting to hear an appeal pursuant to the provision of section 429 of the Income Tax Act, 1967, has any jurisdiction to award costs.”¹²⁰ The substantive case concerned an appeal to the Circuit Court from the decision of the Appeal Commissioners confirming assessments. The Circuit Court Judge upheld the appeal, and awarded the costs in favour of *Arida*. The Inspector of Taxes took a case stated to the High Court, asking whether a Circuit Court Judge hearing an appeal pursuant to section 429 of the *Income Tax Act 1967* (“1967 Act”) had jurisdiction to award costs.¹²¹

3.104 First, the respondent *Arida* argued that the Circuit Court Judge had express power to award costs under the Rules of the Circuit Court, and in particular under Order 58, rule 1 of the *Circuit Court Rules 1950*, which provides that a judge may award costs in any proceedings ‘save as otherwise provided by statute’. Secondly, the 1967 Act did not expressly or implicitly prohibit the Circuit Court from awarding costs. In the alternative, the respondent argued that the Circuit Court judge had express power, under its inherent jurisdiction, to award costs.

3.105 In response, the appellant argued that under section 429(2) the Circuit Court Judge heard the appeal *qua* Appeal

¹¹⁹ [1992] 2 IR 155.

¹²⁰ *Ibid* 157.

¹²¹ *Ibid*.

Commissioner.¹²² Accordingly, the Circuit Court Judge could only exercise the same powers as an Appeal Commissioner, who did not have the power to award costs under the 1967 Act. Secondly, the appellant relied on section 428(6) of the 1967 Act which expressly granted the High Court the power to award costs in a case stated from the Appeal Commissioners. The appellant alleged that it was to be inferred, on the basis of the maxim *expressio unius est exclusio alterius*,¹²³ that the Circuit Court Judge had no such power.¹²⁴

3.106 The Circuit Court judge accepted both of the respondent's arguments as outlined in paragraph 3.104, namely that a Circuit Court judge had inherent jurisdiction to award costs and, alternatively, that a Circuit Court judge had power to award costs under the rules of court. In the High Court, Murphy J answered the question in the affirmative. The Supreme Court also upheld the decision of the High Court on the basis that the phrase "any proceedings in the Court" in O. 58 of the Circuit Court Rules was wide enough to embrace appeals from the Appeal Commissioners, and there was no indication that the Circuit Court Rules were to be disappplied.¹²⁵ Egan J held that:

"It is inconceivable, in the absence of any indication to the contrary, that the Oireachtas intended that the whole paraphernalia of procedural regulation provided for by the Circuit Court Rules, 1950, should be disappplied merely

¹²² Section 429(2) *Income Tax Act 1967* provides: "[t]he said judge shall, with all convenient speed, rehear and determine the appeal, and shall have and exercise the same powers and authorities in relation to the assessment appealed against, the determination, and all matters consequent thereon, as the Special Commissioners might have and exercise, and his determination thereon shall, subject to section 430, be final and conclusive."

Section 429(2) has been re-enacted by section 942(3) of the *TCA 1997*, with the substitution of the Appeal Commissioners for the Special Commissioners.

¹²³ A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.

¹²⁴ [1992] 2 IR 155, 159.

¹²⁵ It was also held that the application of rules to the exercise of jurisdiction conferred on the Circuit Court other than by the Courts Act was not *ultra vires* the rule-making body.

because a particular jurisdiction is conferred upon *the Circuit Court* by legislation other than the Courts Act.”¹²⁶

3.107 In short, the Supreme Court decision seems to reject the notion of a distinction between the Circuit Court and a Circuit Court judge.¹²⁷

3.108 While it is now clear that a Circuit Court judge can award costs when hearing an appeal from the Appeal Commissioners, the wider question remains as to whether the Circuit Court Rules apply in their entirety to such proceedings. It is at least arguable that one can infer from the *Arida* decision that the Circuit Court Rules apply when a Circuit Court judge hears an appeal from the Appeal Commissioners. The significance of this might arise, for instance, in relation to discovery, which has, in fact, already been granted by a Circuit Court judge in an appeal from the Appeal Commissioners to the Circuit Court.¹²⁸

3.109 However, these appeals continue to be heard under unusual circumstances. The Registrar is not present, and therefore the Registrar cannot record the case.¹²⁹ As the judge has no Registrar, the judge has no information on the case. The judge does not know how

¹²⁶ [1995] 2 IR 230, 236.

¹²⁷ In the above passage, Egan J proceeds on the assumption that jurisdiction under the Income Tax Act was conferred on the Circuit Court, and not just the Circuit Court Judge.

Section 942 of the *TCA 1997* provides that a taxpayer may: “require that the appeal shall be reheard *by the judge of the Circuit Court*...in whose 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 PT, (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 judge any statement or schedule in their possession which was delivered to them for the purposes of the appeal.” (Emphasis added).

¹²⁸ Limited discovery was granted in *CAB (Inspector of Taxes) v MB* (Circuit Court, McMahon J, 5 December 2000). See Donnelly and Walsh *Revenue Investigations and Enforcement* (Butterworths 2002) at 191.

¹²⁹ In addition to these factors, the case file does not enter the Courts Service at any stage. The Revenue Commissioners administer the file, and organise hearings before the Circuit Court Judge.

many tax appeal cases are pending. When the case has been heard and the judge makes a decision, the Revenue Commissioners send an AS1 to the judge, on which the judge writes the decision, signs it and returns it to the Revenue Commissioners. The judge therefore has no record of the case. Although the intention behind the special arrangements for hearing tax appeals is to keep the appeal as informal as possible, records of the proceedings should be kept.

3.110 *The Commission recommends that a registrar should attend all hearings.*

F The High Court and Supreme Court

3.111 Under the existing system, if either the taxpayer or the Inspector considers the Appeal Commissioner's decision to have been erroneous on a point of law, they may ask the Appeal Commissioner to state a case to the High Court.¹³⁰ The application must be made within 21 days of the Appeal Commissioner's decision. The taxpayer is again obliged to pay the tax as assessed by the Appeal Commissioner before a case stated may be taken.¹³¹ Alternatively, the taxpayer may appeal to the Circuit Court by way of complete rehearing. If the taxpayer remains dissatisfied with the outcome, he may seek a case stated from the Circuit Court to the High Court. Moreover, at this stage, the Revenue Commissioners may seek a case stated. Finally, an appeal will lie at the instance of either party from the High Court to the Supreme Court.¹³²

3.112 Sixty three applications for cases stated were made to the Appeal Commissioners from 1 January 1998 to November 2002 – in other words, an average of 10 applications each year; but the Appeal Commissioners estimate that only three of these cases would have reached the High Court annually, the others being withdrawn or settled. A survey of the reported cases stated reveals that there has been an average of 1-2 cases stated reported annually.

¹³⁰ Section 941 of the *TCA 1997*.

¹³¹ Section 941(9) of the *TCA 1997*.

¹³² Section 941(8) and section 943 of the *TCA 1997*.

3.113 There are few applications for cases stated made to the Circuit Court, with only a very few cases stated a year being signed by a Circuit Court judge.

3.114 Criticisms have been levied at the case stated procedure due to the inordinate length of time it may take the parties to agree a case stated. As a case study, take *O'Connell v Keleghan*.¹³³ The delay between hearing before the Appeal Commissioner's and stating the case to the High Court was just over four and a half years. The Appeal Commissioner's hearing was held in March 1995. The Appeal Commissioner stated a case to the High Court in September 1999. The High Court gave a decision in February 2000, and the Supreme Court issued its decision in May 2001. In another case, the case stated was dated almost five years after the Appeal Commissioner's hearing and decision.¹³⁴ It has been suggested that this is not unusual.¹³⁵

3.115 Currently, Order 62 of the Circuit Court Rules 2001 governs cases stated. Only Rules 6-10 of the Order apply to Revenue cases stated.¹³⁶ Rule 7 requires the party seeking the case stated to send a copy of the notice required by section 428(2) of the *Income Tax Act 1967*. The party seeking the case stated must also send, within three months of the judge's determination, a draft of the case stated to the other party and to the County Registrar for transmission to the judge. In the event of the parties failing to reach agreement on the text of the

¹³³ [2001] 2 IR 490.

¹³⁴ *O'Siochain (Inspector of Taxes) v Neenan* [1999] 1 IR 533.

¹³⁵ In the UK, the time between a hearing before the Special Commissioners and the case stated to the High Court is much shorter. For example, in the *Barclays Mercantile* case, the hearing before the Special Commissioners was in July 2001. The Special Commissioners gave their decision in October 2001. The High Court hearing was held in June 2002, and a decision was given in late July 2002. The Court of Appeal hearing was held in November 2002, and that decision was given in December 2002. *Barclays Mercantile Business Finance Ltd v Mawson (Inspector Taxes)* [2002] EWCA Civ 1853, [2003] STC 66.

¹³⁶ Curiously, Rule 6 refers only to the judge's power to state a case under the *Income Tax Act*, and not the *TCA 1997*. It provides: "This Rule and the subsequent Rules apply to a Revenue case stated, or where the context so requires, proposed to be stated, by the Judge, pursuant to Section 428 of the *Income Tax Act, 1967*, as applied by Section 430 of the same Act."

case stated, the final word lies with the Circuit Court judge, who must draft, sign and state the case.¹³⁷

3.116 One way of addressing the problem of delay difficulty would be to place more stringent time-limits on the parties to ensure that a case stated is agreed within a reasonable time. An obligation could be placed on the parties to submit the terms of the case stated either to the Appeal Commissioner or the Circuit Court Judge within a specified period of the decision: if the parties fail to comply with this requirement, the case should automatically be relisted before the Appeal Commissioner or the Circuit Court Judge.¹³⁸

3.117 *The delay experienced in relation to a case stated 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 makes no recommendation on this point.*

3.118 Nevertheless, the procedure for agreeing a case stated needs to be improved in order to reduce, at an earlier stage, the scope for excessive delays. The Commission believes that at the root of the delay in the present system is the fact (already mentioned in the context of the Appeal Commissioners at paragraph 3.68) that currently no written, reasoned decisions are produced. For, if both the Appeal Commissioners and the Circuit Court produced written decisions, which included a summary of the facts found and the reasoning leading to the decision, there would be less scope for disagreement between the parties on the facts, the decision or the point of law at issue and, therefore, less delay between the decision of

¹³⁷ If the party seeking the case stated fails to prepare and send this notice, the other party may prepare a draft of the case. Where neither party submits a draft of the case stated within 6 months of the formal request for the case stated, the judge may draft the terms of the case stated and sign and state the case so drafted, extend the time-limit for submitting the case, or treat the request as irrevocably withdrawn.

¹³⁸ Order 84 rule 21(1) of the *Rules of the Superior Court* provides that, in judicial review proceedings, an application has to be made “promptly, and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the court considers that there is a good reason for extending the period within which the application shall be made”.

the Appeal Commissioner or Circuit Court and the case stated to the High Court.

3.119 However, the Commission's recommendation above at paragraph 3.71, recommending that the Appeal Commissioners produce concise written determinations in all cases, would reduce the difficulties that parties experience in agreeing a case stated, and, therefore, should reduce the delays involved in the resolution of a case stated.

CHAPTER 4 A CIVIL REVENUE COURT

A Introduction

4.01 The term “revenue court”, used in the Attorney General’s reference specifying the Commission’s terms of reference, is not further elucidated. However, various possibilities are worth considering here in order to explore the subject comprehensively. A “revenue court” could be assigned either criminal or civil jurisdiction, or both. This Chapter will address the benefits of creating a specialist court for civil revenue cases, and the form which any such court might take. The term “specialist court” can be used in a number of senses and contexts. (See Chapter 7 for a discussion of the forms a specialist criminal court might take). “Specialist Court” will be used to refer to a court staffed by experts or specialists in tax law, with a concentration of all civil tax appeals in this court, which would also encompass the institutional innovation of a Revenue Court “constituted to have financial and accountancy assessor available to advise the Court” considered by the DIRT Inquiry.¹ The question of which of the existing arrangements it would replace is discussed at paragraph 4.19-4.27.

B Is there a need for a specialist civil revenue court?

4.02 A key issue which arises in this discussion is whether there is a need for a specialised court to hear civil tax matters. Would “significant advantages in justice and efficiency”,² not available in the

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

² Auld LJ *A Review of the Criminal Courts of England and Wales* (Lord Chancellor’s Department September 2001) Chapter 9 Decriminalisation and alternatives to conventional trial, 367. Although Lord Justice Auld’s scrutiny was on specialist criminal courts, the principles in relation to a cost-benefit analysis of specialised courts could equally apply in the present context.

current courts' structure, result from the creation of a specialist civil revenue court? If it were established would the advantages outweigh the disadvantages? Before addressing these questions we describe two other sets of courts and tribunals, which offer useful analogies: first, the increasing specialisations in other areas of the civil law in Ireland; and, secondly, tax courts in other jurisdictions.

(1) Specialisation in Other Areas of Law

4.03 The traditional principle of the common law is that, provided that opposing counsel present their cases effectively, the judge's attention will be drawn to all the relevant arguments. Accordingly, the judge only has to follow the competing contentions, and need not be an expert in the relevant area. Despite this traditional view, it is striking that some specialisation within at least two other areas (competition and commercial cases) of the civil jurisdiction of the High Court is under consideration.

(a) Competition Cases

4.04 The Competition and Mergers Review Group recommended that "[w]here possible, competition law cases in the High Court should be determined by a judge drawn from a small panel of High Court judges with a training and/or expertise relevant to competition law and economics, which panel would be nominated for this purpose by the President of the High Court on an informal basis."³ "The OECD in its report on Regulatory Reform in Ireland (April, 2001) also approved of this recommendation."⁴ The President of the High Court has now nominated particular judges for this purpose in competition cases.

(b) Commercial Cases

4.05 The Company Law Review Group ("CLRG") in its First Report⁵ examined the case for establishing a "Commercial Division

³ *Final Report of the Mergers and Competition Review Group* (Government Publications 2000 PN: 8487) 167.

⁴ Legislating for Competitive Advantage in e-Business and Information & Communications Technology" *Forfás The National Policy and Advisory Board for Enterprise, Trade, Science Technology & Innovation* (October 2002), 9.

⁵ *First Report of the Company law Review Group* (December 2001), paragraph 12.2.2.

within the High Court which would deal with a *Companies list* as well as other commercial cases”.⁶ The group approached the issue from two points of view – (i) dedicated treatment of company law within the High Court system and (ii) improving dispute resolution in company law cases.

4.06 The Group noted that it was not proposing reforms “because of a general perception of problems and inadequacies” in corporate litigation in the courts.⁷ Nor did it receive submissions which referred to specific inefficiencies due to delay of process or the lack of specialised company law expertise in the administration of justice. The Group made its recommendations in the context of an expectation that the growth in economic activity in the State and the increasing use of e-commerce, which may have complex or international dimensions, would lead to more commercial law disputes coming into the courts.

4.07 The CLRG Report recommended that a Commercial Division be established within the High Court to deal with a *Companies list* and other commercial cases.⁸ It recommended that a specific judge and dedicated back-up judges should be assigned to the Companies list. The 27th *Interim Report of the Committee on Court Practice and Procedures* also saw merit in a more specialised approach to commercial cases and suggested that a division of the High Court could be developed into a *de facto* Commercial Court under the direction of the President of the High Court, which would

⁶ *First Report of the Company Law Review Group* (December 2001), paragraph 12.9.4.

⁷ *Ibid* at 12.2.2.

⁸ The Report noted that Rules of the Superior Court provide for the assignment of a judge or judges to certain types of cases by the President of the High Court on chancery, company law matters, bankruptcy (Order 76, rule 1 Rules of the Superior Court 1986); winding-up matters (Order 74, rule 3) and examinerships (Order 75A, rule 2). The Report discusses the work of the Working Group on a Courts Commission (“WGCC”), and notes that the WGCC recommended “that serious consideration needed to be given to the creation of a Division of the High Court (the WGCC used the term ‘small Division’) to deal with bankruptcy, company liquidations and matters arising from the Examiner’s list.” The WGCC suggested this should be established as a pilot programme. *First Report of the Company Law Review Group* (December 2001), paragraphs 12.4.4 and 12.9.4.

involve judges with a particular expertise specialising in the area as opposed to the creation of a stand-alone court.⁹

4.08 The Minister for Justice has announced that the President of the High Court intends establishing a Commercial Court as a division of the High Court in 2003 and a Working Group is drafting Court Rules for it. It is envisaged that this court will not be established until later this year.¹⁰ The class of cases falling within the new arrangements for commercial litigation will not necessarily coincide with the recommendations of the Company Law Review Group or the Committee on Court Practice and Procedures. The categories of cases which will be assigned to the new Commercial list will probably be determined by practice directions.

(c) *Conclusion*

4.09 Provision for specialisation in revenue cases also exists. The Rules of the Superior Courts provide that “[s]ubject to the power of transfer, proceedings in Revenue causes and matters shall be assigned to such Judge as the President of the High Court may from time to time assign to hear the same.”¹¹ Additionally, Order 36, rule 41 provides that “[t]rials with assessors shall take place in such manner and upon such terms as the Court shall direct.”¹² Thus in

⁹ 27th *Interim Report of the Committee on Court Practice and Procedures* (February 2002).

¹⁰ *Progress Report on New Connections*, Minister Mary Hanafin TD Government Chief Whip Minister of State at the Department of the Taoiseach, Press Release 17/02/2003:

<http://www.maryhanafin.ie/ncprogressreport.htm>

The *Irish Times* reported that Mr Justice Kelly will head up the new specialist Commercial Court.

¹¹ Rules of the Superior Courts Order rule 21.

¹² Order 64, rule 43 provides for assessors in admiralty cases. It states that a “[j]udge may appoint assessors in any admiralty action either at the instance of any party or in case he shall deem it requisite for the due administration of justice.”

Order 64, rule 44 provides that: “[e]ach assessor shall be paid such sum as may be fixed by the Judge for each day on which he shall attend, and the fees of each assessor shall be paid by the party for whom or in whose favour judgment shall be given, and shall be costs in the cause; but when damages are divided such fees shall be paid by the parties equally.”

theory, a judge could appoint an assessor, if a case required the technical assistance of an expert in accounting or tax matters.

4.10 Although these specialisations exist or are in contemplation in the High Court, they are not present in the organisation of the Circuit Court. The case for the assignment of a particular judge to tax appeal cases in the Circuit Court will be discussed below at paragraphs 4.28-4.31.

(2) Models from other jurisdictions

4.11 In this Part, the Tax Court of Canada and the United Kingdom's General and Special Commissioners are described in order to illustrate the advantages associated with the different approaches of a specialist court and a specialist tribunal for civil tax appeals.

(a) Specialist Tax Court: Canada

4.12 The Tax Court of Canada provides an example of a specialist tax court.¹³ Its predecessor was the Tax Review Board, which was itself preceded by the Income Tax Appeal Board.¹⁴ The name of the Tax Review Board led to the mistaken public perception that it was an extension of the Department of National Revenue. The Government decided to make the Board a court in both name and status in order to establish clearly its judicial independence. Accordingly, the Tax Court was created in 1983 under the *Tax Court of Canada Act*.

4.13 When the Tax Court was established, the Government was eager to retain the advantages which flowed from the use of informal procedures before the Tax Review Board. With this in mind, two forms of procedure, the informal and formal, exist before the Tax Court. The informal procedure may only be selected under certain circumstances. One of the advantages of the informal procedures is a

¹³ The United States and Germany also have specialised civil tax courts.

¹⁴ The Tax Court of Canada is independent of the Canada Customs and Revenue Agency and all other government departments. It is the first level of appeal for taxpayers. It possesses all the powers of superior courts. The Court was established in 1983 pursuant to the *Tax Court of Canada Act (section 4)* as a successor to the Tax Review Board. The Tax Court of Canada has exclusive original jurisdiction to hear and determine references and appeals on matters arising under the *Income Tax Act*.

guarantee that the entire procedure will be completed within certain time-limits. The taxpayer is also entitled to be represented by an accountant instead of a lawyer. Legal rules are not applied strictly, but rather flexibly. Decisions do not set a precedent. The taxpayer cannot be ordered to pay the costs incurred by the Canadian Customs and Revenue Agency (“CCRA”). By contrast, under the formal procedure all the legal rules that normally apply to a procedure before the Federal Court of Appeal apply. Only lawyers may represent the taxpayer. There are no set time-limits. Rulings do set precedents. The taxpayer has to pay a court fee of between Canadian \$250 and \$550. The Tax Court can order the taxpayer to pay the expenses incurred by the CCRA.¹⁵

4.14 However, when these arrangements were reviewed in a report prepared in 1997 on the Tax Court of Canada, the report concluded that “on balance ... a separate specialized court is not required to hear tax cases or to ensure that such cases are handled efficiently”. Nonetheless, many Tax Court judges and private-sector tax lawyers did not agree with the Report’s conclusion. Their attitude was that:

“In such areas of law, specialized judges are seen as better able to evaluate evidence and legal arguments quickly and astutely, to remain up-to-date with new developments, and to have a better appreciation of how individual issues relate to the overall legal scheme. Further, in the area of tax law, uniform interpretation is important and a specialized court

¹⁵ Strik “Tax Auditing in Canada” in *Tax Auditing an International Perspective* (Dutch Tax and Customs Administration).

The parties can appeal a decision of the Tax Court to the Federal Court of Canada. An appeal will lie on the facts. In certain limited circumstances, the taxpayer can bypass the Tax Court and appeal directly to the Federal Court of Canada. Section 172(3) of the *Income Tax Act* lists the relevant areas. They generally involve technical issues. The parties also have a further right of appeal to the Supreme Court of Canada. The Supreme Court will decide whether it will hear the appeal or not. Where a taxpayer decides to appeal an assessment, the collection procedure will be suspended. However, special provision is made to enable the tax auditor to collect 50% of the tax debt in the case of large companies.

was seen as more likely to lead to consistency and coherence in judicial decisions.”¹⁶

(b) *Specialist Tax Tribunal: United Kingdom*

4.15 In common with the approach adopted in Ireland, the UK, Australia and New Zealand do not have specialised tax courts. Instead, they have specialised tax tribunals, which provide the first level of appeal to a taxpayer seeking to challenge a tax assessment. Then there is an appeal from the specialised tribunal to a general court.

4.16 Although the UK does not have a specialised tax court, it offers a taxpayer the option of an informal or formal appeal procedure in the form of the General and Special Commissioners respectively.¹⁷ In a historically-based arrangement, these are alternative tribunals. The General Commissioners were appointed to implement the *Income Tax Act 1799*.¹⁸ They had sole authority to assess and collect income tax and hear appeals until the establishment of the Special Commissioners in 1842, considered in the next paragraph. Under the *Finance Act 1946*, the General Commissioners became purely judicial officers, hearing and adjudicating disputes between the taxpayer and the Inland Revenue. The current jurisdiction of General Commissioners is contained in the *Taxes Management Act 1970*, as amended by subsequent Finance Acts.

4.17 The Special Commissioners offer the taxpayer a more formal and legalistic alternative to the General Commissioners. They cannot hear appeals from decisions of the General Commissioners.

¹⁶ *Report on the Federal Court of Canada and the Tax Court of Canada*, (Prepared by the Auditor General of Canada 1997) at paragraph 211. The main focus of the Report was the possible regionalisation and/or merger of the Federal Court of Canada Trial Division and the Tax Court of Canada, and consolidation of their administrative services.

¹⁷ “The Office of the Special Commissioners of Income Tax is part of the Court Service Agency and administrative responsibility for the Special Commissioners rests with the Lord Chancellor. The Special Commissioners are not connected with the Inland Revenue, or any other department.” The Court Service, Special Commissioner of Income Tax, “Appeals and other proceedings before the Special Commissioners” Explanatory Leaflet, Issued by the Presiding Special Commissioner at 2.

¹⁸ The General Commissioners are unpaid.

They hear appeals from assessments and decisions made on Income Tax, Corporation Tax, Capital Gains Tax, Inheritance Tax, Development Land Tax, Petroleum Revenue Tax and some Stamp Duty appeals. The Court Service administers the Special Commissioners and the VAT and Duties Tribunal¹⁹ to form the Combined Tax Tribunal, but each retains their distinct jurisdictions.²⁰ The General and Special Commissioners and the VAT and Duties Tribunal are each independent of the Inland Revenue.

4.18 The General Commissioners are appointed to deal with cases arising in a particular area, known as a Division. Their proceedings are generally informal and held *in camera*. The General Commissioners do not have the power to award costs. “Unlike the General Commissioners, who are unpaid laymen, the Special Commissioners are salaried legally qualified judicial officers.”²¹ The Special Commissioners’ proceedings are normally conducted more formally. They are held in public, but the taxpayer or the Inland Revenue may request that the appeal or part of it be heard *in camera*.²² Decisions are published, but, if the need arises, a taxpayer’s identity may be withheld. The Special Commissioners have a limited power to award costs. Generally, a taxpayer may choose whether the General or Special Commissioners hear their case. However, some cases are reserved for the Special

¹⁹ Upon joining the European Community, indirect taxation was introduced into the UK. The *Finance Act 1972* introduced VAT. The VAT Tribunal was set up in 1973 to hear VAT appeals. The *Finance Act 1994* enlarged the tribunal to form the VAT and duties tribunals. Appeals from decisions of the Commissioners of Customs and Excise relating to value added tax, other indirect taxes and duties in the United Kingdom are heard by the VAT and duties tribunals: Lord Chancellor’s Department, *Consultation Paper, Tax Appeals Tribunals* Annex A Historical Background.

²⁰ Lord Chancellor’s Department, *Consultation Paper, Tax Appeals Tribunals*, Annex A, Historical Background.

²¹ The Court Service(s), Special Commissioner of Income Tax, “Appeals and other proceedings before the Special Commissioners” Explanatory Leaflet, Issued by the Presiding Special Commissioner, at 4.

²² Section 15 of the *Special Commissioners (Jurisdiction and Procedure) Regulations 1994* as amended.

Commissioners. In either case, the taxpayer may appear in person, or may choose to be represented.²³

C The Options for Reform

4.19 If a specialised court were established in respect of civil jurisdiction in the revenue sphere, it could play either of two roles. It could take the place in the hierarchy of either the Appeal Commissioners or the Circuit Court. Theoretically, one could also envisage a court with both original and appellate jurisdiction which would take the place of both. However, as the Commission does not favour such basic changes, there is no need to consider whether such a specialist court would fit into the system.

(1) *New Court Instead of the Appeal Commissioners*

4.20 A Court could be created to replace the Appeal Commissioners. However, the Appeal Commissioners represent a more ‘user-friendly’ method of dispute resolution. The advantages of the Appeal Commissioners when compared to a court are: ease of access, relative inexpensiveness, specialist expertise and a fairly informal procedure. The value of these advantages should not be underestimated. (Indeed, when the Tax Court of Canada was created, it retained an informal procedure as one of its two alternatives (see paragraph 4.13)). The first independent level of appeal from an assessment raised by Revenue is intended to provide the taxpayer with an accessible and expeditious avenue of relief. It was never intended to resemble a court or to become a lawyer’s forum. The Commission has made a number of recommendations on improvements to the mechanisms in an appeal to the Appeal Commissioners in Chapter 3. (See also Chapter 7 for a discussion on the benefits of establishing a specialist criminal revenue court).

4.21 *The Commission does not recommend the creation of a specialist civil court to replace the Office of the Appeal Commissioners.*

²³ Section 14 of the *Special Commissioners (Jurisdiction and Procedure) Regulations 1994* as amended.

(2) *New Court Instead of the Circuit Court*

4.22 In today's society, there is an increasing tendency to specialise due to the rate of change and complexity of issues. This tendency has also shown itself in the courts system. For example, the establishment of a commercial court is envisaged by the end of 2003.²⁴ This era of specialisation might support arguments in favour of a specialist court for revenue cases.²⁵ Currently, the judges who hear tax appeals are generally not specialists, but are simply those who happen to be sitting at the time and place the appeal arises. The only element of subject-matter specialisation at the Circuit Court level is an informal arrangement for the assignment of a judge with particular expertise in landlord and tenant issues to landlord and tenant cases. The only form of concentration of work within the courts system in relation to tax appeals occurs in the Dublin Circuit Court. Appeals from the Appeal Commissioners are assigned to a particular courtroom though not necessarily a particular judge. In practice, it is Court number 57, which also hears District Court Appeals and Licensing matters.²⁶

4.23 Arguments for and against the retention of the general Circuit Court as an appellate court are rather different from those for the retention of the Appeal Commissioners, in that the Appeal Commissioners are specialised, but not a court whereas the Circuit Court is a court, but is not specialised.

4.24 Some of 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

²⁴ The Twenty-Seventh Interim Report of the Committee on Court Practice and Procedure recommended establishment of a specialist commercial court, encompassing the transaction of business by electronic means. *The Irish Times* 17 January 2003. See further paragraph 4.07.

²⁵ Edward Cazalet: "Specialised Courts: Are they a "Quick Fix" or a Long-term Improvement in the Quality of Justice? A Case-Study." (2001 World Bank).

²⁶ The Judge who sits in Court Number 26 hears tax appeal cases, licensing cases and appeals from the District Court.

the particular area of law. With time and experience, the specialist judge would become even more familiar with the area of law. It would be easier for the judge to keep up-to-date with the particular developments in the area.²⁷ The potential disadvantages associated with a specialist tax court would include: the loss of a generalist overview; the risk of the development of a ‘cosy’ culture between the specialist judges and advocates and even between the judges and the Revenue Commissioners; 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; 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 insufficient volume of cases.

4.25 In addition, at the moment, appeals from the Appeal Commissioners only form a minor part of the Circuit Court’s work (approximately 15 cases per year).²⁸ There are no delays in getting a case listed before the Circuit Court once the Revenue Commissioners request that a case be listed. One might ask whether this argument might be overcome and a recommendation for a specialised court justified, on the basis that such a court would have both criminal and civil Circuit Court style jurisdiction. Even on this assumption, that a specialist criminal revenue Circuit Court would be established, the case appears weak. For to be precise, and using recent figures; at present there are likely to be about 15 civil appeals to the Circuit Court each year; plus 10-12 trials on indictment when the anticipated increase has been achieved.

4.26 It seems that the current arrangements – which offer the taxpayer the right to appeal to an informal specialist tribunal in the form of the Appeal Commissioners, and from there to the more generalist Circuit Court – provide more advantages than those associated with specialist civil revenue courts.

²⁷ Cazalet “Specialised Courts: Are they a “Quick Fix” or a Long-term Improvement in the Quality of Justice? A Case-Study” (2001 World Bank).

²⁸ There are considerably more appeals from the Employment Appeals Tribunal to the Circuit Court than from the Appeal Commissioners.

4.27 *All in all, the Commission does not recommend a specialised civil revenue court in place of either the Appeal Commissioners or the Circuit Court, as the current avenues of appeal offer the advantages of specialisation at the level of the Appeal Commissioners, coupled with a generalist approach in the Circuit Court. In addition, there is informality in both venues and it remains an accessible forum for taxpayers wishing to challenge tax assessments. Again, the volume of work does not exist at present to justify a separate revenue court. The Commission does not recommend the creation of a specialist revenue court, even on the basis of joint criminal and civil jurisdiction.*

(3) *A List and/or Assessors in the Circuit Court*

4.28 Less radical than a special court would be a ‘revenue list’. The expression ‘a list’ is used to refer to the nomination of particular judges to hear specific types of cases. A revenue list would, like a specialised court, result in a number of advantages, for example the accumulation of expertise and administrative convenience. Increasingly, as the law becomes more and more specialised, lists in such areas as judicial review and commercial law have come into existence in this and other jurisdictions. However, such specialisation has not emerged in the Circuit Court, except perhaps in Dublin.

4.29 The Dublin Circuit Court is initially divided into: the Circuit Court Civil; Circuit Court Criminal; Circuit Court Family; District Court Appeals and the County Registrar's List. However, the only element of subject-matter specialisation at the Circuit Court level is an informal arrangement for the assignment of a judge with particular expertise to landlord and tenant cases. There is no equivalent policy in relation to tax appeals. Tax appeals are simply assigned to a particular courtroom in the Dublin Circuit Court, to which appeals from the District Court are also assigned.

4.30 The classic approach to court proceedings is that the judge need not be an expert in the subject-matter, since counsel on each side will present the alternative arguments. Then the judge has to choose between these arguments. However, especially in a complex area like tax, it is possible that counsel will not always be perfectly informed. More broadly, in other areas, albeit in the High Court, we see that the need for some element of specialisation among the judiciary has been increasingly accepted (see paragraphs 4.03-4.07).

4.31 *Because of the increasing complexity of tax law, the Commission recommends that the assignment of judges should remain within the discretion of the President of the Circuit Court and that, where possible, the President of the Circuit Court should assign judges with some knowledge of tax law to tax appeals by arrangement with judges of each circuit.*

4.32 Additionally, the *Circuit Court Rules* could be amended to provide that a Judge could appoint an assessor where it was deemed necessary for the due administration of justice. As against this, the parties will call their experts where necessary and may even in some cases agree an assessor, thus, obviating the need for the court to appoint an assessor.

CHAPTER 5 OFFENCES AND PROSECUTION

A Introduction

5.01 In principle, revenue offences are prosecuted in the same manner as all other criminal offences. Under the *Prosecution of Offences Act 1974* (the “1974 Act”), the DPP is responsible for the prosecution of criminal offences. The Act transferred nearly all of the functions previously carried out by the Attorney General in relation to criminal matters to the DPP. The Revenue Commissioners are responsible for investigating cases of suspected revenue offences and reporting these cases to the DPP. The Director of Public Prosecutions will only direct a case to be prosecuted if the Director is satisfied, on the evidence, that there is a case to answer. As with all criminal offences, there must be sufficient evidence available to prove the offence ‘beyond reasonable doubt’. Revenue offences, penalties and the manner in which the Revenue Commissioners take the decision to investigate a particular case with a view to prosecution will be outlined in this chapter. The DPP’s role and the potential role of a fiscal prosecutor will be discussed in more detail in Chapter 6.

5.02 Three sets of classifications are worth mentioning here. First, as with other crimes, some revenue offences may be prosecuted summarily, and some on indictment. Secondly, revenue offences may also be classified as the non-submission of returns or serious tax evasion,¹ these being relatively few and including some summary and all indictable offences. Thirdly, revenue offences, in the broad sense, can be divided into ‘tax’ and ‘customs and excise’ offences: in this Paper, we are concerned mainly with tax offences.

¹ This is the categorisation used by the Steering Group for the purposes of its report. *Steering Group Report* at 49 paragraph 3.42.

B Revenue Offences²

5.03 A person, who contravenes section 1078 of the *TCA 1997*,³ shall be guilty of a “revenue offence” and may be liable to either a fine or a prison sentence or both. Breaches of certain other provisions of the Act are referred to simply as “offences”, as opposed to “revenue offences”. There is no statutory definition of a revenue offence given in the *TCA 1997*.⁴ It merely refers to a criminal offence in the revenue area. In principle, there is no difference between revenue offences and ordinary offences in terms of procedure or the rules of evidence; for example, the hearsay rule applies and there is the same requirement of proof beyond reasonable doubt as is required

² The following Part will outline two of the main provisions concerning criminal offences under the *TCA 1997*. However, a number of other statutory provisions outline the contours of criminal offences related to breaches of revenue law. For example, section 531(14) of the *TCA 1997* creates a number of offences in relation to payments made to sub-contractors; section 1066 of the *TCA 1997* provides that a person shall be subject to the same punishment as if convicted of perjury where the deponent “wilfully and corruptly gives false evidence, or wilfully and corruptly swears any matter or thing which is false or untrue” on any examination on oath, or in any affidavit or deposition authorised by the Tax Acts. An individual may also be guilty of offences under the *Stamp Duties Consolidation Act 1999*; section 10 of the *Criminal Justice Act 1951*; and the *Criminal Justice (Theft and Fraud Offences) Act 2001*. A prosecution could also be taken for the common law offences of defrauding the public revenue, “conspiracy to defraud or attempting to commit or conspiring to commit a statutory offence.” Donnelly and Walsh *Revenue Investigations and Enforcement* (Butterworths 2002) at 226.

See further Chapter 6 Donnelly and Walsh *op cit* for a discussion of “Offences and Penalties”.

³ See paragraph 5.04.

⁴ However, a definition is given in the *Extradition (European Union Conventions) Act 2001* for the purposes of that Act. Section 13 defines a “revenue offence” as: “...an offence in connection with taxes, duties, customs or exchange control but does not include an offence involving the use or threat of force or perjury or the forging of a document issued under statutory authority or an offence alleged to have been committed by an officer of the revenue of that country or place in his capacity as such officer or an offence within the scope of Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances done at Vienna on the 20th day of December, 1988”.

to secure a conviction in criminal cases. The term is simply a convenient label.

5.04 Section 1078 provides that a person shall be guilty of a “revenue offence” where that person:

- (i) Knowingly or wilfully furnishes or delivers any incorrect return, statement or accounts or information in connection with any tax (section 1078(2)(a));
- (ii) Knowingly aids, abets, assists, incites or induces another person to make or deliver knowingly or wilfully any incorrect return, statement or accounts in connection with any tax (section 1078(2)(b));⁵
- (iii) Claims or obtains relief or exemption from, or repayment of, any tax to which the taxpayer knows they are not entitled (section 1078(2)(c));
- (iv) Knowingly or wilfully issues or produces any incorrect invoice, receipt, instrument or other document in connection with any tax (section 1078(2)(d));
- (v) Fails to make certain deductions or payments in relation to dividend withholding tax or deposit interest retention tax; (sections 1078(2)(e) and 1078(2)(f));
- (vi) Fails without reasonable excuse to comply with any provisions of the Acts requiring:⁶
 - 1. The furnishing of any return, certificate, notification, particulars or any statement of evidence;
 - 2. The retention or production of books, records, accounts or other documents for tax purposes (section 1078(2)(g));
- (vii) Knowingly or wilfully destroys, defaces or conceals documents or other material from an authorised officer, which the Acts requires a taxpayer to keep for a certain period of time (section 1078(2)(h));

⁵ Section 1078 seems not to provide a catch-all offence for aiding and abetting tax evasion, where documents are not involved.

⁶ The *Finance Act 2002* amended section 1078(2)(g) by substituting “fails without reasonable excuse” for “knowingly and wilfully”.

(viii) Fails to remit VAT or PAYE (section 1078(2)(i));

(ix) Obstructs or interferes with a Revenue Commissioners official or other individual performing their duties under the Acts (section 1078(2)(j)).

5.05 Section 161 of the *Finance Act 2003* inserted a new provision section 1078A. It creates a new offence of concealing facts disclosed by documents.⁷

5.06 Section 1078(3)(a) provides that an individual may be liable to a fine of €3,000 or to imprisonment not exceeding 12 months on summary conviction, or both.⁸ The fine may be mitigated by the court to not less than one fourth of the fine.⁹ If an individual is convicted on indictment, a maximum fine of €126,970 or a prison term not exceeding 5 years, or both, may be imposed under section 1078(3)(b).

5.07 A new subsection was added to the provision quoted in paragraph 5.04 by the *Finance Act 1999*. Section 1078(3A) grants a court the power to order an individual who has been convicted of an offence under section 1078(2)(g)(i), to comply with the obligations arising under the section. A person shall be guilty of an offence under this section 1078(3B) for failure or refusal to comply with a subsection 3A order.¹⁰

5.08 Section 1078(4) provides for the application to revenue offences of the general procedure established in section 13 of the *Criminal Procedure Act 1967*,¹¹ whereby an individual may plead guilty to an indictable offence in the District Court. Section 1078(4)

⁷ Section 161 also adds a new section, section 1078 B which contains substantial presumptions mainly relating to documents. There is also a new section 1078C dealing with the provision of information to juries.

⁸ Section 1078(3)(a) of the *TCA 1997* as amended by section 160(1) of the *Finance Act 2003*, which increased the fine from €1,900.

⁹ Section 1078(3)(a) of the *TCA 1997*, as amended by section 233 of the *Finance Act 2001*.

¹⁰ The *Finance Act 2002* inserted another sub-section, sub-section 1078(3B) of the *TCA 1997*, which reinforces the courts ability to enforce the tax provisions.

¹¹ As amended by *Criminal Justice Act 1984*, section 17.

applies the penalties under section 1078(3) of the *TCA 1997* in lieu of the penalties under the *Criminal Procedure Act 1967*. For offences after the passing of the *Finance Act 2003* 28 March, 2003 the District Court penalty pursuant to section 1078(4) is now €3,000 which may be mitigated to not less than one fourth part of such fine or at the discretion of the Court to imprisonment for a term not exceeding twelve months or to both the fine and imprisonment.

5.09 The Revenue Commissioners may use certificate evidence, in accordance with the provisions of section 987(4), 1052(4) and the new section 1078B inserted by section 161 of the *Finance Act 2003*, when establishing that a revenue offence has been committed.¹²

5.10 Following a pattern used elsewhere in the criminal law, where an offence under section 1078 is committed by a body corporate and the offence is shown to have been committed with the consent or connivance of a director, manager, secretary or other officer of the body corporate, or a member of the committee of management or other controlling authority of the body corporate, the individual shall also be deemed to be guilty of the offence, and may be proceeded against and punished accordingly.¹³

5.11 Liability also attaches to an auditor or tax adviser of a company or friendly society who is aware that the client is not complying with the Acts or is guilty of tax evasion. Section 1079 of the *TCA 1997* obliges the auditor or tax adviser to report such to the company.¹⁴ If the company does not rectify the matter within 6 months, the auditor or tax adviser then has a duty to resign and report the resignation to the Revenue Commissioners.¹⁵ If the auditor or tax adviser fails to take either of these steps an offence is committed, for which the punishment is a €1,265 fine if convicted summarily and a maximum penalty of €6,345 or two years' imprisonment on indictment or both.

5.12 By virtue of section 1056, if individuals knowingly make a false statement in relation to their income or corporation tax in order

¹² Section 1078(9) of the *TCA 1997*.

¹³ Section 1078(5) of the *TCA 1997*.

¹⁴ Section 1079(3) of the *TCA 1997*.

¹⁵ Section 1079(5) of the *TCA 1997*.

to obtain an allowance, they may be subject to either summary prosecution or prosecution on indictment. It provides for a sliding scale of penalties, which vary according to the amount of the difference between the tax actually payable and the tax which would have been due if the statement had been true and accurate. If convicted summarily, there is the possibility of a maximum one-year's imprisonment in addition to the sliding-scale fine. If convicted on indictment, they may be subject to a sliding-scale fine or a maximum of eight years imprisonment, or both.¹⁶

C Decision to Prosecute

(1) Investigation with a view to Prosecution

5.13 Up to the mid-1990s, as explained in Chapter 1G, the Revenue Commissioners followed a very restrained policy in respect of prosecution. In 1996/1997, the Revenue Commissioners adopted a new policy for investigation and the referral of cases of 'serious tax evasion' to the DPP.¹⁷ With the aim of promoting voluntary compliance with the tax system, new procedures were established for the referral of cases to the DPP. These procedures will be discussed in this Part.

(2) Audits

5.14 Audits play an important part in the Revenue Commissioners' selection of cases for investigation with a view to prosecution. Unless there is voluntary¹⁸ or third-party disclosure, the only other method available to the Revenue Commissioners for uncovering tax evasion is the audit process. If strong indications of tax evasion emerge during the course of an audit, the Revenue

¹⁶ If the principle *expressio unius est exclusio alterius* is applied to the wording of section 1056(3)(b) of the *TCA 1997* it suggests that the court must impose a prison sentence. Section 1056(3)(b)(v) only applies where the specified difference is equal to or greater than € 126,970.

¹⁷ 1997 Revenue Commissioners Annual Report, at 16.

¹⁸ In the case of voluntary disclosure, the Revenue Commissioners will not prosecute the individual. (See paragraph 2.26) However, the Revenue Commissioners have a large amount of discretion involved in determining whether a disclosure amounts to a *qualifying disclosure*. See 2002 *Code of Practice for Revenue Auditors* at paragraph 10.3.

Commissioners' prosecution strategy requires the auditor to refer the case to the Investigations and Prosecutions Division.¹⁹

5.15 The Revenue Commissioners' 2002 Auditor's Code of Practice contains instructions for auditors who uncover evidence of evasion.²⁰ If the auditor discovers documentary evidence of tax evasion, the auditor is required to refer the case to the Investigations and Prosecutions Division for assessment. If the Investigations and Prosecutions Division decides that the case is suitable for investigation with a view to prosecution, it will take over the case and the audit will be terminated. If the taxpayer makes an incriminating statement to an auditor and the offence is of the type identified by the Revenue Commissioners as suitable for investigation with a view to prosecution, the Code of Practice provides that the taxpayer should be cautioned. However, an auditor will generally not issue a caution without the prior approval of an Audit Manager or the Investigations and Prosecutions Division.

(3) Prosecution Criteria

5.16 Upon referral, the Investigations and Prosecutions Division will evaluate the case before starting an investigation. The Revenue Commissioners have compiled a set of criteria and factors which are to be taken into account when considering whether or not to investigate a case with a view to prosecution. The criteria are not exhaustive. Each case will be considered on its own merits.²¹ The following is an extract from the Revenue Commissioners' Code of Practice indicating the types of tax offences which should be investigated with a view to prosecution:

- “Use of forged or falsified documents;
- Systematic scheme to evade tax;
- False claims for repayment;
- Failure (as distinct from minor delays) in remitting fiduciary taxes;

¹⁹ 2002 Code of Practice for Revenue Auditors at 4, paragraph 1.2.

²⁰ *Ibid.*

²¹ 2002 Code of Practice for Revenue Auditors Appendix 1, 52. See also (1999) 36 Tax Briefing 4.

Deliberate and serious omissions from tax returns;
Use of off-shore bank accounts to evade tax;
Insidious schemes of tax evasion;
Aiding and abetting the commission of a tax offence;
Offences under the *Waiver of Certain Tax, Interest and Penalties Act 1993*.²²

5.17 If an offence of the type described above is identified, a number of other factors will be considered before a decision to 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) the assessment of the cost of prosecution;
- (iv) the “culpability, responsibility and experience”²³ of the accused;
- (v) the deterrent effect of prosecution for the particular offence;
- (vi) whether full disclosure has been made, whether co-operation has been given and whether the tax, interest and penalties due have been paid.²⁴

D Prosecutions To Date

(1) Failure to File Returns

5.18 Prosecutions concerning the non-submission of returns are routine and non-problematic.²⁵ The Revenue Commissioners

²² 2002 *Code of Practice for Revenue Auditors* Appendix 1 and 36 Tax Briefing 1999, 3.

²³ 2002 *Code of Practice for Revenue Auditors* Appendix 1, 44 and 36 Tax Briefing 1999, 3.

²⁴ 2002 *Code of Practice for Revenue Auditors*, paragraphs 10.1-10.2 outline what amounts to a qualifying disclosure.

prosecute, on average, 1,200 cases for the non-submission of returns annually. These cases are prosecuted summarily in Dublin by the Revenue Solicitor and outside Dublin by the relevant State Solicitor on behalf of the DPP. The Inspector of Taxes will refer the case to the Revenue Solicitor who may either issue a “pre-prosecution warning letter” or may advance the case to the summons stage without a “pre-prosecution warning letter”. The Revenue Solicitor will take the latter course of action where a person has a previous conviction for failing to file a return. 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 the summons stage. Once they have issued a summons, the Revenue Commissioners will not stop a prosecution even if a taxpayer subsequently files a return. The following table sets out the statistics in relation to warning letters, prosecutions and convictions:

Table A: Non Filing Income and Corporation Tax Returns

Year	Revenue Solicitor Warning Letters	Cases Referred for Prosecution	Convictions
1997	2,617	1,208	311
1998	6,577	2,295	857
1999	7,804	2,769	1,244
2000	8,190	2,676	1,017
2001	11,656	2,620	1,101
2002	9589		1051

5.19 *The Commission recommends, in the interests of fairness, that a pre-prosecution letter be issued in all cases.*

5.20 In sentencing a person who has been convicted, some judges will take into account the fact that a defendant has subsequently filed the relevant returns when considering whether to mitigate the statutory fine. However, a judge cannot mitigate the statutory fine below 25% of the sum set out in the statute.²⁶ Section

²⁵ *Steering Group Report*, at 50, paragraph 3.45. Prosecutions for non-filing offences are a regular feature of the Revenue Commissioners’ compliance campaign. “Compliance Campaign” (2001) 43 Tax Briefing.

In one District Court case, involving social welfare fraud and tax evasion, the Judge referred to the defendant as “a shark who has been caught in the net” and sentenced the defendant to prison.

²⁶ Section 1078(3)(a) of the *TCA 1997*.

1078(7) provides that the *Probation of Offenders Act 1907* cannot be applied. Therefore, some penalty, whether a fine or (theoretically) a prison sentence, must be imposed on a defendant convicted of an offence under section 1078.

5.21 Table B sets out information on fines in the District Court for failure to file a return, taken from *Tax Briefing*.²⁷

Table B:Fines

Year	Convictions in District Court	Total Court Fines (after mitigation) IR£ (€)	Average Fine
1997	311	£174,060 (€221,011)	£560 (€711)
1998	857	£709,090 (€900,359)	£830 (€1,054)
1999	1,244	£1,174,530 (€1,835,203)	£944.15 (€1475)
2000	1,017	£734,656 (€1,147,900)	£722 (€1,128)
2001	1,101	£823,283 (€1,286,380)	£748 (€1,167)
2002	1,051	€1,049,922	€999

5.22 In some of these cases, steeper fines than the average were imposed. Between April and June 1999, “40 cases had fines totalling in excess of £1,500 imposed, 12 of these cases had fines totalling in excess of £4,000 imposed and in one of the cases, fines totalling £8,000 were imposed.”²⁸ Jail sentences were also imposed in a number of cases.

(2) *Customs and Excise*

5.23 The prosecution culture on the customs and excise side may be contrasted with prosecutions on the tax side.²⁹ For example, 297 people were prosecuted for various Customs and Excise offences in 1997. These offences included: cigarette smuggling and the illegal selling of cigarettes, illegal use of duty-rebated marked gas oil

²⁷ (1999) 38 Tax Briefing 10.

²⁸ (1999) 38 Tax Briefing 10.

²⁹ Customs and excise offences do not fall within the ‘serious tax offences’ because it is a customs and excise issue and not a tax issue.

(“green diesel”), betting offences, vehicle registration tax offences and unlicensed trading. The Revenue Commissioners secured 358 convictions on the customs and excise side in 2001. Custodial sentences and almost €300,000 in fines were imposed in court. Twenty-five custodial sentences were imposed for customs and excise offences between 1 January 1988 to 30 April 2002.

5.24 The Revenue Commissioners have had a different approach to tax offences from customs and excise offences. They have traditionally concentrated on reaching monetary settlement with the tax recalcitrant. However, as explained at paragraphs 1.54 and 5.48, the Revenue Commissioners are beginning to place a stronger emphasis on the prosecution of ‘serious tax evasion’.

(3) *Serious Tax Evasion*

5.25 The prosecution of ‘serious tax evasion’ has proved more problematic than prosecutions for failing to file returns and in respect of customs and excise offences. The phrase ‘serious tax evasion’, which is not a legal term of art, is frequently used. It is not confined to indictable cases. The Revenue Commissioners seem to use the term to refer to all cases of tax evasion other than the failure to submit returns or the late submission of returns.³⁰ The Steering Group defined it as involving actions “knowingly taken by taxpayers with the intention of defrauding the State.”³¹

5.26 In indictable cases, the DPP decides whether the case should proceed to the Circuit Criminal Court. If the DPP decides to prosecute a case in the Circuit Criminal Court, the Revenue Solicitor or the relevant State Solicitor will instruct counsel in and outside Dublin, respectively.

5.27 There were 18 prosecutions for serious tax evasion during the period January 1995-November 2001, with one case resulting in an acquittal.³² Custodial sentences were imposed in six of these

³⁰ In 1997, the Revenue Commissioners committed themselves to initiating the “prosecution of offenders in cases of serious evasion or fraud as well as cases that do not file timely returns”. 1997 Revenue Commissioners Annual Report, at 43.

³¹ Steering Group report, at 50, paragraph 3.46.

³² In some instances, the cases were dealt with at District Court level, and in other instances at Circuit Criminal Court level. Since 1998, two thirds of

cases, with two of the six attracting suspended sentences and one case being appealed.³³

5.28 In 1995, a defendant was prosecuted under the general criminal law for obtaining VAT repayments under 3 pseudonyms. The defendant was given a 10-month jail sentence. In a summary prosecution in 1996, a defendant was fined IR£1,250 for VAT fraud under section 94 of the *Finance Act 1983*, and for failing to produce books to a Revenue officer. There was only one conviction in 1997. The defendant was convicted of knowingly or wilfully delivering incorrect VAT returns, and was fined IR£500.

5.29 Seven cases, involving three companies and six individuals were concluded in 1998. The offences ranged from knowingly or wilfully failing to keep proper records for tax purposes; knowingly or wilfully producing an incorrect invoice or document in relation to tax on rental income and knowingly or wilfully delivering incorrect income tax; corporation tax, VAT or PAYE/PRSI returns. An individual who had been convicted in 1995 was committed to prison for 10 months for failing to make full restitution of monies defrauded under the VAT system.³⁴ In two other cases suspended sentences were imposed. In the remaining cases fines were imposed on the company or individual concerned. The fines ranged from IR£1,000-12,000 (€1,270-15,237).³⁵

5.30 Three cases were decided in 1999. In the first case the defendant was convicted of submitting false PAYE/PRSI returns and received a fine of IR£15,000 (€19,046). The second case resulted in acquittal. The third case was finalised when the taxpayer withdrew an appeal against an earlier fine of IR£1,000 (€1,270).³⁶

the cases have been disposed of in the District Court, with the remainder going to the Circuit Court. Classification of an offence as a 'serious tax offence' does not preclude it being dealt with in the District Court. The DPP considers the basic test to be whether all the facts are such as to warrant a trial at District or Circuit Court level.

³³ (2001) 46 Tax Briefing 35.

³⁴ (1999) 36 Tax Briefing 5.

³⁵ (1999) 36 Tax Briefing June 4.

³⁶ CAG 1999 Report at 44.

5.31 Convictions were secured in the three cases decided by the courts in 2000. In the first case the defendant, a director of a company, was convicted of submitting false VAT repayment claims. The defendant was sentenced to two years imprisonment. In the second case a director of a company was convicted of delivering an incorrect corporation tax return. The defendant was fined IR£750 (€952). In the third case an individual was convicted of submitting a false VAT repayment claim. A twelve-month suspended sentence was imposed.³⁷

5.32 Convictions were obtained in four cases in 2001. One individual was sentenced to twelve months imprisonment for submitting false PAYE returns. Two defendants were fined and given suspended sentences and another was sentenced to three months imprisonment. In one case in 2001, the defendant pleaded guilty to a revenue offence in the District Court. However, the District Court Judge refused jurisdiction when the case came up for sentencing in April 2002. The defendant successfully sought judicial review of the decision of the District Court Judge's decision. The case was subsequently disposed on a guilty plea in the District Court.

5.33 Three cases were decided in 2002. A suspended sentence was imposed in one case and fines were imposed in the other two cases.

Table C: Serious Tax Offences

Year	1997	1998	1999	2000	2001	2002
Cases Under Investigation at Year End	*	18	24	33	31	31
Convictions	1	6	1	3	4	3
Fines Collected IR£(€)	500 (635)	33,750 (42854)	15,000 (19046)	750 (952)	5250 (6666)	*

³⁷ CAG 2000 Report at 17.

Custodial Sentence (Suspended)	-	2(2)	1	2(1)	4(2)	(1)
Acquittal	-	-	1	-	-	-

(* figures not available).

5.34 The Revenue Commissioners justify the small number of criminal prosecutions by reference to the peculiar difficulties of obtaining evidence to a criminal standard in this field³⁸ and the resource-intensive and time consuming work involved in every prosecution.³⁹ The recent Inland Revenue Report and the Report of Lord Gabor QC into “The Informal Economy” in the UK⁴⁰ reached a similar conclusion in relation to the Inland Revenue’s staff time dedicated to prosecutions.

5.35 Various factors are said to make revenue offences difficult to prosecute. Firstly, unlike conventional crime, there is no specific victim to report the commission of the crime to the authorities. Thus, while ultimately the public are the victims of tax evasion, the lack of a particular victim places the burden of establishing that a crime has been committed, in the first place, on the Revenue Commissioners. Secondly, there is no power of arrest and detention in respect of revenue offences. It is often during the period of arrest and detention that the evidence necessary for a prosecution is uncovered. Thirdly, there were general weaknesses in the law which were not remedied until recently. For example, the *Finance Act 1999* introduced two new ways in which the Revenue Commissioners could obtain information from financial institutions, namely with the consent of a

³⁸ Steering Group Report, at 111, paragraph 7.41. This is a problem which pertains to ‘white collar’ crime generally.

³⁹ In its 1999 Annual Report, Revenue reported that “[w]hile Revenue is pleased with the progress to date of its more active prosecution policy for serious tax evasion, the current arrangements are being reviewed to see how more rapid progress might be made.” Annual Report 1999, 35. See also Revenue Commissioners 1997 Annual Report at 48 and the Steering Group Report at paragraph 3.49.

⁴⁰ The Informal Economy (2000).

Revenue Commissioner or by order of the District or Circuit Court.⁴¹ Particular problems in relation to evidence may arise where foreign jurisdictions, especially tax havens, are involved in the commission of a revenue offence.⁴² For example, if off-shore accounts are involved, the Revenue Commissioners will need the co-operation of foreign authorities, which may not be forthcoming.⁴³ Problems also arise at the later stage of admissibility. If the tax recalcitrant has made statements to the Revenue Commissioners during the course of the Revenue Commissioners' investigation, the evidence may have been tainted. For example, a caution may not have been administered and the evidence may be inadmissible in a criminal trial.

E Revenue Offences: the British Approach

(1) Revenue Offences

5.36 The Inland Revenue, unlike the Revenue Commissioners, is a prosecuting authority in its own right. This independent power to prosecute arose historically. "There is no express statutory power to prosecute; but it is common ground that the Revenue have such power in aid of their overall function."⁴⁴ It was not until recently that a general statutory offence, which can be prosecuted either summarily or on indictment, was introduced in the UK. Prior to the enactment of section 144 of the *Finance Act 2000*, the Inland Revenue were

⁴¹ Sections 906A and 908A *TCA 1997*.

⁴² Long-established conflict of laws principles against the enforcement of foreign revenue law exacerbate this difficulty. See Dicey and Morris *The Conflict of Laws* Volume 1 (13 ed Sweet and Maxwell London 2000) paragraph 5.18 *ff*.

⁴³ However, advances have been made internationally through the Organisation for Economic Co-operation and Development ("OECD") campaign for global financial transparency. Transparency in this context to refer to the demand for increased tax information exchange. The OECD initiated this policy in 1998 when published its study on *Harmful Tax Competition: An Emerging Global Issue* and is continued in the guise of the its *Harmful Tax Practices Project*. The proposed EU Savings Tax Directive will also impact on the exchange of tax information both within and outside the EU.

⁴⁴ *R v Inland Revenue, ex parte Mead and another* [1993] 1 All ER 772, 778. Per Stuart-Smith LJ.

restricted to prosecuting under the *Theft Acts 1968 and 1978*⁴⁵ or the common law offence of cheating the public revenue.⁴⁶

5.37 The common law offence of cheating the public revenue,⁴⁷ which is also recognised under Irish law, was used for the prosecution of many existing income tax frauds. However, this charge could not be tried summarily. As a consequence of this Lord Gribner found that the Inland Revenue was pursuing larger tax frauds to the exclusion of smaller tax frauds. Thus, in response to recommendations contained in the Gribner Report, section 144 of the *Finance Act 2000* introduced a new criminal offence of fraudulent evasion of income tax which may be tried either on indictment or summarily. This provides that:

“(1) A person commits an offence if he is knowingly concerned in the fraudulent evasion of income tax by him or any other person.

(2) A person guilty of an offence under this section is liable-

(a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine, or both.

⁴⁵ For example, prosecuting under section 17 for false accounting.

⁴⁶ Section 72 of the *Value Added Tax Act 1994* contains a statutory offence of the fraudulent evasion of VAT. A similar approach is adopted in the Customs and Excise area. “Civil proceedings were used by the Department in 902 cases in 1998/99, but there were only 127 criminal prosecutions.” Gribner Report at 34.

⁴⁷ “To make a false statement (whether written or not) relating to income tax with intent to defraud the Revenue, or to deliver or cause to be delivered a false document relating to income tax with similar intent, amounts to a common law offence and is indictable as such: *R. v Hudson* [1956] 2 Q.B. 252. *Hudson* was applied in *R. v Mavji*, 84 Cr App R 34, in which the Court of Appeal held that a deception is not a necessary ingredient of the offence of cheating the public revenue. Cheating could include any form of fraudulent conduct which resulted in diverting money from the Revenue and depriving the Revenue of money to which it was entitled.” Archbold *Criminal Pleading, Evidence and Practice* (Sweet & Maxwell Limited 2001)

(3) This section applies to things done or omitted on or after 1 January 2001.”

(2) Prosecution Arrangements

5.38 Like the Revenue Commissioners and other tax authorities,⁴⁸ the Inland Revenue has also adopted a selective prosecution policy for serious tax offences, complemented by publication of the cases.⁴⁹ Within the Inland Revenue, the prosecution arrangements are tripartite, involving the Inland Revenue Solicitor’s Office; the Special Compliance Office (‘SCO’) and the Board of the Inland Revenue.

5.39 The SCO is responsible for investigating the most significant cases of suspected fraud, evasion and avoidance.⁵⁰ Once the SCO has investigated the case, it reports the evidence to the Inland Revenue Solicitor’s Office, which in turn reports to the Board of the Inland Revenue or a representative of the Board. In the Inland Revenue Solicitor’s Office, the specialist crime team’s function, apart from advising the SCO on evidential issues, is to review these cases and give an opinion on them to the Board of the Inland Revenue.

5.40 In deciding whether to prosecute or not, the decision is ultimately taken by a representative of the Board, since the Board has delegated its power to decide on prosecutions to a senior official who is independent of both the SCO and the Inland Revenue Solicitor. One of the issues which the Board's representative has to consider is whether the case falls within the Department’s prosecution policy.⁵¹

⁴⁸ For an outline of the prosecution policy adopted in the Netherlands and New Zealand see Appendix.

⁴⁹ *Inland Revenue Annual Report 1999/2000* at 17. Section 1 of the *Taxes Management Act 1970* provides that the Inland Revenue, like the Revenue Commissioners, have a general statutory responsibility for the “care and management” of taxes. Thus, it may, in appropriate circumstances, waive taxes which are due and payable. *IRC v National Federation of Self-Employed etc* [1982] AC 617.

The value of the amount recovered through action against non-compliance for 1999/00 was STG£371 million (€517,215,425.84) and was STG£378 million (€526,974,207.46) for 2000/01.

⁵⁰ The SCO applies the *PACE Act* when it investigates criminal offences.

⁵¹ The process is different in Scotland, but the end-result is the same.

The representative will also apply the principles contained in the Code for Crown Prosecutors, which requires certain evidential and public interest tests to be satisfied.

(3) *Decision to Investigate with a view to Prosecution*

5.41 The decision to investigate a case with a view to prosecution is taken fairly early in the case but the decision is not irrevocable. A senior manager from within the SCO takes the decision on whether to forward the case for investigation with a view to prosecution or not. The Inland Revenue conducts extensive investigations of its own, using third party sources before any contact is made with the taxpayer. Cases can move from the civil to the criminal investigation group and *vice versa*. On the tax side, the cases, which are selected for prosecution, tend to be the more serious ones and go to the Crown Court. The procedure here is very similar to the Irish arrangement described in Part C of this Chapter.

5.42 Prosecution is more likely to be pursued where evidence exists, or is likely to become available, of:

- deliberate concealment or deception;
- false or forged documents, certificates, statements, or claims, prepared with the intention to deceive;
- conspiracy;
- corruption;
- a second or subsequent serious offence;
- additional books or records for accounting, tax, contribution or tax credit purpose, prepared or used with the intention to deceive;
- organised or systematic fraud against the tax, contribution or tax credit systems;
- unusual frauds of novelty or ingenuity;
- deliberate manipulation of special tax deduction schemes;
- phoenixism.”⁵²

⁵² *Powers to Combat Serious Tax Fraud, A Technical Note by the Inland Revenue* (1999) at 18-19. Other situations where prosecution is likely to be considered are: non-disclosure following Hansard; incomplete disclosure; false certificate of disclosure or false statement of assets; creation of false documents; collusion between taxpayers to defraud the Revenue, and fraudulent actions of tax advisers.

5.43 The Inland Revenue tends to consider a prosecution for fraud cases, where there has been deliberate falsification. For example, where there are two sets of records, or where the taxpayer has previously lied to the Inland Revenue. In its standard civil investigation, the Inland Revenue requires taxpayers to sign a certified statement declaring their entire assets, bank accounts and financial documents.⁵³ If the taxpayer is found to have practised deceit, the Inland Revenue goes into prosecution mode. Previous offences will be taken into account when deciding whether to investigate with a view to prosecution or not.

(4) Prosecutions to Date

5.44 The Inland Revenue prosecute on average 60 cases per year. In 1999/2000,⁵⁴ criminal proceedings were concluded against 55 defendants of whom 37 were found guilty.⁵⁵ In 2000/01, criminal proceedings were concluded against 70 defendants of whom 56 were found guilty.⁵⁶

(5) Sentences

5.45 The sentences tend to average between 12 to 18 months. The most significant recent case was that of *Regina v Allen*,⁵⁷ which involved a company director, who was prosecuted for substantial tax fraud of STG£7 million (almost €10 million). He was sentenced to 7 years' imprisonment, and a confiscation order of STG£3 million (approximately €4.2 million) was also granted. A default sentence of

Phoenixism refers to the syndrome of insolvent companies being wound up and reopening under a different name.

⁵³ The *Code of Practice for Revenue Auditors 2002* requires taxpayers to include a declaration in the following terms with their qualifying disclosure: "I declare that to the best of my knowledge, information and belief all statements that I have made in this disclosure are correct and complete." Paragraph 10.1.4 at 45.

⁵⁴ There are no figures for the number of summary prosecutions under section 144 of the *Finance Act 2000* for the fraudulent evasion of income tax, as the prosecutions are only beginning to reach the courts.

⁵⁵ *Inland Revenue 2000 Annual Report*, 18.

⁵⁶ *Inland Revenue 2001 Annual Report*, 17. See Appendix C for further details on the outcomes of the prosecutions.

⁵⁷ [2001] UKHL 45.

a further 7 years was also imposed in the event of failure to comply with the confiscation order. The default sentence would run consecutively, if triggered. The severity of the punishment handed down by the judiciary is illustrative of a strong disapproval of tax evasion, particularly as it is rare for a custodial sentence to be handed down for first-time offenders. The Inland Revenue have found that the severity of default sanctions tends to act as an effective deterrent, and encourages people to comply with the court order.⁵⁸

F Prosecution Policy

(1) *The Irish Approach*

5.46 The Revenue Commissioners' core responsibility is to enforce compliance with the tax code. However this has to be balanced with the task of collecting revenue for the Exchequer.⁵⁹ They primarily seek to achieve this by maximising voluntary compliance. The audit process and any resultant prosecutions are intended to serve as a deterrent, with the ultimate objective of increasing voluntary compliance and collecting monies owed to the Exchequer.

5.47 If the number of prosecutions for serious tax evasion were to increase, the Revenue Commissioners would have to devote more attention to detecting criminal wrongdoing, and divert resources from other sectors of the Office to the Investigation and Prosecution Division in order to manage the increased number of cases. At the moment, there are fourteen tax personnel in the Investigations and Prosecutions Division. These have been augmented by 25 customs and excise personnel. Before 2002, the separate income tax and customs and excise departments were responsible for investigating and conducting prosecutions in their respective spheres. The Revenue Commissioners believe that interaction between tax and customs and excise personnel will improve the Office's ability to

⁵⁸ See Appendix C for the number and length of sentences imposed in 2002.

⁵⁹ Both the Final Report of the DIRT Inquiry and the Blue Book warned that "the annual budget target is not a comprehensive measure of the collection effectiveness of the Revenue Commissioners because it is influenced by other factors". Submission on the Report of the Steering Group of Dr. Miriam Hederman O'Brien 21 October 2000.

detect and prosecute revenue offences. It is anticipated that the restructuring within the Revenue Commissioners will produce a more integrated approach to investigations and a greater appreciation of the cross-tax-heads dimension. (See paragraphs 1.50-1.53)

5.48 By 2005, the Revenue Commissioners intend to have more cases under investigation, which should lead to an increase in the number of cases before the courts, although not significantly more. The Revenue Commissioners aim to bring between ten and twelve cases per year before the courts. The Revenue Commissioners will continue to concentrate on deterrence, and the bulk of cases will continue to be the subject of monetary settlements, as opposed to prosecution.⁶⁰ As the Revenue Commissioners' resources are limited, they will only employ them on significant prosecution cases. Revenue will not prosecute "less worthy cases ... at the expense of more important cases."⁶¹

5.49 There is undoubtedly a large amount of tax recalcitrance: see paragraphs 1.33-1.35 dealing with the shadow economy. It is anticipated that the arrangements with the DPP, the establishment of the Investigations and Prosecutions Division and the overall restructuring and modernisation of the Revenue Commissioners will yield more prosecutions in an attack on the shadow economy.

⁶⁰ (1999) 36 Tax Briefing 4. An example of a recent high-profile settlement is the Mr Charles Haughey settlement, in which the Revenue Commissioners chose to secure the €5 million settlement and dispense with the prospect of lengthy, time consuming and costly Court proceedings in respect of the assessments. The following statement was made by the Revenue Commissioners, with the agreement of Mr Haughey, on 18 March 2003: "The Board of the Revenue Commissioners wish to announce that Mr. Haughey has agreed to pay €5 million to Revenue in settlement of outstanding tax liabilities. The settlement sum comprises gift tax of €2,470,000 and interest and penalties of €2,530,000. The settlement follows long and complex negotiations between Revenue officials and Mr. Haughey's professional advisors.

The settlement and the terms and conditions governing payment have been recorded in a formal written agreement signed today ... Under an interim settlement dated 3 April, 2000, Mr. Haughey paid the sum of £1,009,435 (€1,281,718), which included interest of £501,772 (€637,119)."

⁶¹ 2002 Code of Practice for Revenue Auditors Appendix 1, 43.

However, the Revenue Commissioners' overall prosecution policy can be summarised in the following manner:

“prosecution in the Courts is not an end in itself but rather one of the means of achieving a level playing pitch for all taxpayers and thus enhancing the public confidence in, and compliance with, the administration of tax laws.”⁶²

5.50 The question of the balance between settlement and prosecution and the conflict between co-operation and conviction are issues the world over for revenue authorities. The principal function of taxation is to raise revenue.⁶³ Taxes are levied to fund the administration of Government and to promote the provision of public services. Although prosecution does not exclude the possibility of achieving a monetary settlement with a recalcitrant taxpayer, and thus collecting the taxes due, the institution of criminal proceedings may result in a taxpayer invoking the privilege against self-incrimination. If the taxpayer is refusing to co-operate and remains silent, the Revenue Commissioners' task is made more difficult and troublesome in that case. Another possible outcome is that the taxpayer either settles, or pleads guilty, or is found guilty by the courts. In such cases, a settlement can be easily achieved at the end of the proceedings. On the other hand, if the Revenue Commissioners prosecute unsuccessfully, the taxpayer will have no incentive to co-operate or to negotiate a settlement, thus resulting neither in a conviction nor collecting the revenue allegedly due. Thus, the decision to investigate with a view to prosecution or the decision to prosecute itself must be taken after due consideration of the most appropriate course of action.

5.51 A further point concerns the sanctions open to a criminal court. If one leaves aside the possibility of imprisonment, which, as illustrated in paragraphs 5.27-5.33, has been rare in the tax field, the available sanctions are a stiff fine and publicity. Yet, to a substantial degree, each of the elements can be achieved without a prosecution. This was recognised in 1994 by the then Minister for Finance, Mr Bertie Ahern TD. He acknowledged that:-

⁶² (1999) 36 Tax Briefing 5.

⁶³ Per Kelly J in *Byrne v Conroy* [1997] 2 ILRM 99 at 114.

“[i]n the majority of cases the most effective way of dealing with evasion is by way of settlement. The fact that the settlements are published and include interest and an amount to cover penalties is an effective deterrent to evasion. In line with the practice in most other jurisdictions only a limited number of cases are selected for prosecution in any one year.”⁶⁴

5.52 The combination of the ‘name and shame’ procedure and the civil penalty system is much cheaper and simpler for the Revenue Commissioners to pursue than prosecuting a taxpayer and recouping a court-imposed fine. Furthermore, the court interest rate is only 8% per annum, whereas the interest rate applicable to the statutory penalties the Revenue Commissioners may apply for each day or part of a day from the date the tax became due and payable is 0.0322% - equivalent to 11.753% per annum.⁶⁵ Thus, the Revenue Commissioners can gather huge amounts of money in the form of civil penalties and interest without the difficulties associated with prosecution. Furthermore, the tax defaulter will be inclined to reach a settlement with the Revenue Commissioners to avoid the uncertainty of facing a judge or jury where the penalty could, potentially, involve a custodial sentence and much adverse publicity.

5.53 However, the imposition of monetary penalties does not preclude the possibility of proceedings under common law. It is a matter for the Director of Public Prosecutions to decide upon and to initiate proceedings in relation to common fraud or conspiracy to defraud. Similarly in the UK, where the Inland Revenue have adopted a policy of monetary settlement in a particular case, this does not preclude the Crown Prosecution Service from later prosecuting the taxpayer.

(2) *The UK Approach*

5.54 The Inland Revenue, like the Revenue Commissioners, “tends wherever possible to make settlements or use civil proceedings

⁶⁴ Minister for Finance (Mr Bertie Ahern TD): 446 Dáil Debates col 613 (25 October 1994).

⁶⁵ Section 1080 of the *TCA 1997*, as amended by section 129(1)(f)(i) of the *Finance Act 2002*.

against offenders, rather than initiate criminal prosecution.”⁶⁶ The Hansard Policy, contained in Code of Practice 9, provides that the Inland Revenue has absolute discretion on whether to prosecute or not. The Hansard sets out the Inland Revenue’s general approach. It provides that the Inland Revenue will, typically, adopt the following approach in cases of tax fraud:

“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 response to being given a copy of this Statement by an authorised officer, makes a full and complete confession of all tax irregularities.”⁶⁷

5.55 Cases have been brought seeking judicial review of the Inland Revenue’s decision to prosecute. They have in most cases been unsuccessful. The Inland Revenue’s prosecution policy has been considered recently in *R v Inland Revenue, ex p Mead and another*,⁶⁸ *R v IRC, ex p Allen*⁶⁹ and *R v W*.⁷⁰ *Mead* was the first case where judicial review of the decision to prosecute was taken.

5.56 In *Mead*, the Court of Appeal explained the reasoning behind the Inland Revenue’s preferred selective prosecution policy in the following manner:

“[the Inland Revenue does] so for three main reasons: first their primary objective is the collection of revenue and not the punishment of offenders; second they have inadequate resources to prosecute everyone who dishonestly evades payment of taxes; and third and perhaps more importantly

⁶⁶ Grabiner Report at 33. “It has the power to recover the tax owed, together with interest, plus a civil penalty up to the value of the evaded tax.” Interest under the *Taxes Management Act 1970*.

⁶⁷ *Inland Revenue, Code of Practice 9 Special Compliance Office Investigations, Cases of suspected serious fraud* at 17.

⁶⁸ [1993] 1 All ER 772.

⁶⁹ [1997] STC 1141.

⁷⁰ [1998] STC 550.

they consider it necessary to prosecute in some cases because of the deterrent effect that this has on the general body of taxpayers, since they know that if they behave dishonestly they may be prosecuted.”⁷¹

5.57 The applicant had sought judicial review of the Inland Revenue’s decision to prosecute him in circumstances where other taxpayers involved in the same tax evasion scheme were not prosecuted. The Court rejected the applicant’s contention that he was entitled to be treated the same as the other dishonest taxpayers as it would be both inconsistent with the Inland Revenue’s selective prosecution policy and impractical. Stuart-Smith LJ held that: - “[a] decision to prosecute by the prosecuting authority is in theory susceptible to judicial review, albeit the circumstances in which such jurisdiction could be successfully invoked will be rare in the extreme.”⁷²

5.58 While the taxpayer could seek judicial review of the Inland Revenue’s decision to prosecute, Stuart-Smith LJ dismissed the application on the facts. He stated that:

“[i]t is inherent in such a policy that there may be inconsistency and unfairness as between one dishonest taxpayer and another who is guilty of a very similar offence. Nevertheless while not challenging the validity of the policy Mr Beloff [counsel for the taxpayer] submits that there must be grafted onto it a requirement to treat all dishonest taxpayers guilty of similar offences in like manner: either all must be prosecuted or none. I reject this submission for two reasons. First it is inconsistent with the policy and cannot be operated consistently with it: you cannot be both selective and treat every case alike. Second it seems to me to be quite impracticable. How are the Revenue to decide what cases are alike? What is to be the basis of the group of cases that has to be considered?”⁷³

⁷¹ [1993] 1 All ER 772, 783.

⁷² [1993] 1 All ER 772, 782.

⁷³ [1993] 1 All ER 772, 783. The Appeal Committee of the House of Lords refused leave to appeal.

5.59 While Popplewell LJ also held that the court had no jurisdiction to hear the application, he did not do so on the same grounds as Stuart-Smith LJ. He held that, once a prosecution is taken, the criminal courts are seized with jurisdiction and therefore judicial review in the High Court should not be available. Accordingly, he felt that the correct avenue for relief would be an application to the criminal court to stay the proceedings as an abuse of process.

5.60 In *Allen*, the second of the cases listed in paragraph 5.55, the applicant unsuccessfully sought judicial review of the Inland Revenue's refusal to stay criminal proceedings. The applicant was involved with several Jersey-based companies. The Inland Revenue suspected that the applicant was concealing his true income to reduce his tax liability. The applicant was informed in 1991 of the Hansard Policy, and was advised by a member of the Inland Revenue that, although the case was suitable for criminal prosecution, it would proceed along the lines of a monetary settlement, as the Inland Revenue were unlikely to obtain evidence to a sufficient standard so as to prosecute. In a later meeting in November 1992, the Inland Revenue informed the applicant that the case could either be settled between them or go before the Special Commissioners. New facts emerged in 1994, revealing evidence of the applicant's control over several offshore companies. The Inland Revenue then took the view that the investigation should proceed with a view towards criminal prosecution due to the applicant's failure to make a disclosure after he was given the Hansard statement. The applicant was advised of this and was charged in 1995. The applicant's request to the Inland Revenue to stay the proceedings was refused. The applicant then applied for judicial review of the refusal to stay the criminal proceedings. Judicial review proceedings were taken in 1996 on the grounds that:

- (i) The decision to prosecute was contrary to the established practice as set out in the Enquiry Branch's manual, in particular in relation to the Hansard policy, that prosecution would not be taken where the taxpayer was lead to believe that the case was suitable for monetary settlement and;
- (ii) The decision to prosecute was unfair in the light of the history of the investigation.

5.61 Although the application was capable of being disposed of on the basis of delay alone as the application for judicial review was not made until at least ten months after the applicant became aware of the criminal proceedings, the High Court dealt with the merits of the application. It held that the Inland Revenue's decision to prosecute and subsequent refusal to stay the proceedings was not unfair. The Court rejected both of the applicant's contentions and held that the decision to prosecute the applicant was taken in accordance with the Enquiry Branch Manual, which contained both general and particular qualifications to the Hansard policy. In particular, the manual contained the following warning:

“Serious fraud is a matter of grave concern to the Board of Inland Revenue. It is the Board's policy to prosecute the most serious cases covering all types of fraud, but they may accept a monetary settlement instead of starting criminal proceedings. The Board cannot give an undertaking not to pursue such proceedings, even where a disclosure has been made. However, a full disclosure and the extent to which the taxpayer co-operates in the investigation are matters which will be taken into account in deciding whether a particular case should result in prosecution.”⁷⁴

5.62 The Court held that the Enquiry Branch manual could not give rise to a legitimate expectation that a prosecution would not be taken. It remained open to the Inland Revenue to prosecute the applicant when new evidence was discovered, and where there was no tangible co-operation. The Court concluded that:

“The code itself is capable of giving some comfort to a taxpayer who makes full disclosure, co-operates and works towards a monetary settlement. It is careful, however, to identify the Revenue's general discretion. In ordinary common sense the Revenue's attitude at any stage will depend, not only on the extent of disclosure and co-operation, but also upon the Revenue's own assessment of the seriousness and ramifications of any fraud (including the

⁷⁴ Inland Revenue, IR Code of Practice 9 Special Compliance Office Investigations.

range of persons potentially involved) and the strength of all the evidence available.”⁷⁵

5.63 The Court also held that leave to apply for judicial review should only be granted in exceptional circumstances.

5.64 In *R v W*, the Court of Appeal described the Inland Revenue’s common law power to prosecute as “ancillary to, supportive of and limited by their duty to collect taxes.”⁷⁶ The Court held that there was no “dichotomy or logical inconsistency” in the Crown Prosecution Service prosecuting where the Revenue had decided not to do so. However, it was held that an abuse of process might arise if the Crown Prosecution Service prosecuted when the Revenue had accepted settlement and, with the agreement of the Crown Prosecution Service, told the taxpayer that no prosecution would be brought. No such abuse was present on the facts of the case.

G Concluding Comments

5.65 As can be seen from the last Part, the tension between tax collection and criminal prosecution exists in other jurisdictions, and is resolved apparently in a similar way. It is true that a successful prosecution does not prevent the Revenue Commissioners reaching a settlement for the tax outstanding. However, an acquittal could make a settlement more difficult to reach than if there had been no trial, in that a good part of the motive for co-operation is removed from the influences on the tax recalcitrant. Thus, from the Revenue Commissioners’ point of view, settlement without prosecution is often advantageous. The investigation is made easier through the taxpayer’s co-operation and the Revenue Commissioners are not obliged to gather evidence to establish guilt beyond reasonable doubt.

⁷⁵ *R v Inland Revenue Commissioners, ex parte Allen* [1997] STC 1141.

⁷⁶ [1998] STC 550

CHAPTER 6 PUBLIC PROSECUTION SYSTEM

A Law Officers

(1) Introduction

6.01 The central role which public prosecution plays in the criminal justice system is described at the outset of the DPP's *Statement of General Guidelines for Prosecutors*, in the following terms:¹

“[f]air and effective prosecution is essential to a properly functioning criminal justice system and to the maintenance of law and order. The individuals involved in crime - the victim, the accused, and the witnesses - as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution.”²

6.02 The Irish prosecution system is a complex one, with interaction between many different actors and agencies.³ At the apex is the Office of the Director of Public Prosecutions. In 95% of minor and serious cases, the Garda Síochána conducts the investigation. In summary prosecutions, the Garda who investigates a minor offence is

¹ The objective behind the publication of the general guidelines was “to set out in general terms principles which should guide the initiation and conduct of prosecutions in Ireland.” The guidelines were also aimed at increasing the public understanding “of the prosecution process by the citizens on whose behalf prosecutions are brought.” Director of Public Prosecutions *Statement of General Guidelines for Prosecutors* (Government Publications 2001).

² *Ibid* at 1, paragraph 1.1.

³ *Statement of Strategy 2001-2003* (Office of the Director of Public Prosecutions, Government Publications) at 6. See Byrne and McCutcheon *The Irish Legal System* (4 ed. Butterworths 2001) para. 6.74 at 219.

usually also the prosecutor in court (see paragraph 6.13).⁴ In other summary prosecutions, the Chief Prosecution Solicitor's Division of the DPP's Office⁵ or a State Solicitor instructs counsel to present the case.⁶ The Gardaí do not play a prosecutorial role in relation to serious offences: the file, after investigation, is referred by the Gardaí to the DPP, who takes the decision as to whether a prosecution should be initiated or not. If the DPP determines that the case is appropriate for prosecution, the Chief Prosecution State Solicitor or a State Solicitor will usually refer the case to counsel to advise on proofs and appear at the trial.

6.03 Part A of this chapter outlines the role currently played by the DPP. Part E will discuss the possibility of a establishing a 'fiscal prosecutor' who would "be singularly focused on Revenue offences and have the necessary specialist expertise in the office,"⁷ in the light of the arrangements currently in place for the prosecution of revenue

⁴ Order 6, Rule 1(e) of the *District Court Rules 1997* provides: "[t]he following persons shall be entitled to appear and address the court and conduct proceedings ... in proceedings at the suit of the Director of Public Prosecutions in respect of an offence, the said Director or any member of the Garda Síochána or other person appearing on behalf of or prosecuting in the name of the Director."

⁵ In response to recommendations contained in the Nally Report, responsibility for the criminal prosecution functions of the Chief State Solicitor and the administration of the local State Solicitor service has been transferred to the DPP's Office. The Chief Prosecution Solicitor's Division of the DPP's Office was created for this purpose and has been operational since late 2001. The Chief Prosecution Solicitor and her staff provide a solicitor service to the DPP. The Chief Prosecution Solicitor's Division is responsible for "the preparation of books of evidence, the general preparation of indictable cases and attendance on counsel at the hearing, and the conduct of summary prosecutions on the Director's behalf." *Statement of Strategy 2001-2003* (Office of the Director of Public Prosecutions, Government Publications) at 7.

⁶ All counsel are in private practice. The State, thus, can avail of counsel suited to the case with expertise in the area. In Ireland counsel frequently prosecute and defend and this practice helps to promote independence, objectivity and fairness as well as understanding of the process from the point of view of both prosecution and defence and also awareness of duty towards the court.

⁷ *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

offences, namely the interaction between the DPP and the Revenue Commissioners.

(2) *The Attorney General*

6.04 Prior to the establishment of the DPP's Office in 1974 responsibility for prosecution rested with the Attorney General. The Attorney General's Office existed by virtue of section 6 of the *Ministers and Secretaries Act 1924*. The Office of the Attorney General, in its modern form, was created by Article 30 of the 1937 Constitution,⁸ which describes the Attorney General's function as legal adviser of the Government. Article 30.3 provides that all crimes and offences prosecuted on indictment "shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose." The *Criminal Justice (Administration) Act 1924* vested responsibility for the prosecution of offences in the Attorney General.⁹ By virtue of section 9(1) of the 1924 Act, the Attorney General has been held, by the courts, to be the sole prosecutor on indictment.¹⁰ Section 9(2) provides that all summary prosecutions

⁸ Prior to the 1937 Constitution, the Attorney General's Office existed by virtue of section 6 of the *Ministers and Secretaries Act 1924*. Section 6 of the *Ministries and Secretaries Act 1924* provided: "There shall be vested in the Attorney-General of Saorstát Eireann ... the business, powers, authorities, duties and functions formerly vested in or exercised by the Attorney-General for Ireland, the Solicitor-General for Ireland, the Attorney-General for Southern Ireland, the Solicitor-General for Southern Ireland, the Law Adviser to the Lord Lieutenant of Ireland and any or all of them respectively, and the administration and control of the business, powers, authorities, duties and functions of the branches and officers of the public services specified in the Ninth Part of the Schedule to this Act and also the administration and business generally of public services in connection with the representation of the Government of Saorstát Eireann and of the public in all legal proceedings for the enforcement of law, the punishment of offenders and the assertion or protection of public rights and all powers, duties and functions connected with the same respectively, together with the duty of advising the Executive Council and the several Ministers in matters of law and of legal opinion."

⁹ Kelly Hogan & Whyte *The Irish Constitution* (3rd ed Butterworths 1994) at 303.

¹⁰ "Under the Criminal Justice (Administration) Act, s 9, the entire responsibility for a prosecution under a criminal indictment lies with the

will be prosecuted at the suit of the Attorney General, save where a Minister, Department of State, or other person authorised by law is prosecuting.¹¹ Section 9 of the 1924 Act was not repealed and continues to apply insofar as it was not inconsistent with Article 30.

(3) The DPP

6.05 Article 30.3 of the Constitution envisaged a possible substitution instead of the Attorney General in the prosecution of indictable offences by “... *some other person authorised in accordance with law to act.*” The Office of the Director of Public Prosecutions was created pursuant to 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 transferred¹² most of the Attorney General’s functions in relation to criminal matters, election and referendum petitions to the DPP.¹³

Attorney General, whose function it is to determine whether a prosecution should proceed or not.” *Cronin v Shee* [1932] IR 23, *per* Hanna J.

See also Casey *The Irish Law Officers* (Round Hall Sweet & Maxwell 1996) at 253.

¹¹ *Attorney General v Healy* [1928] IR 460, 477-78. Per Sullivan P. Section 9(2) “authorises the Attorney General to prosecute in any court of summary jurisdiction in all cases in which a prosecution is not instituted by a Minister, Department of State, or authorised person.” Thus, the DPP, can, by succession, prosecute summarily in every case, save where a Minister, Department of State, or authorised person has instituted proceedings. Casey *The Irish Law Officers* (Round Hall Sweet & Maxwell 1996) at 282. Casey comments that “[g]iven the independent status of the Director... this may be seen as a safeguard against possible abuses of power by other competent prosecutors.”

¹² See *The People (Director of Public Prosecutions) v Roddy* [1977] IR 177, 189 where Griffin J refers to the 1974 Act as “transferring the functions of the Attorney General to the Director of Public Prosecutions”. See the 2000 Annual Report of the Office of the Director of Public Prosecutions at 7 and Kelly Hogan & Whyte *The Irish Constitution* (3 ed Butterworths 1994) at 308.

¹³ 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 (Amendment) Act 1978*; *Genocide Act 1973* and the *Extradition (Amendment) Act 1987*. Section 5(1) of the

6.06 The DPP is appointed by the Government¹⁴ from among candidates selected by a special Committee made up of legal office-holders.¹⁵ The “Office ... was established to insulate the prosecution system from extra-legal considerations.”¹⁶ The independence of the DPP is spelt out by both the Constitution and the 1974 Act. As regards the former, the Supreme Court held in *McLoughlin v Minister for Social Welfare*¹⁷ that it was implicit in the Constitution that the Attorney General was independent in the exercise of the prosecutorial functions formerly exercised by that office and now exercised by the DPP, and it seems likely that the DPP has inherited the same independence in the performance of prosecutorial functions.

6.07 Section 2(5) of the Act provides that “[t]he Director shall be independent in the performance of his functions”. The independence of the DPP is strengthened by section 6 of the 1974 Act. It makes it unlawful, subject to certain exceptions, to communicate with the DPP or any of his staff, for the purpose of influencing a “decision to withdraw or not to initiate criminal proceedings or any particular

Prosecution of Offences Act 1974 also provides that the Government may, where it is of opinion that it is in the interests of national security, order that the DPP’s functions under the Act will be performed by the Attorney General and not the DPP.

¹⁴ Section 2(2) of the *Prosecution of Offences Act 1974*.

¹⁵ 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 Incorporated Law Society, the Secretary to the Government, and the Senior Legal Assistant in the Office of the Attorney General.

¹⁶ *Report of the Public Prosecution System Study Group* (Government Publications 1999), at 2.2.12. The Public Prosecution System Study Group (PPSSG) was appointed by the government in October 1998 under the auspices of the Office of the Attorney General. It was chaired by Mr Dermot Nally, former Secretary to the Government and is more commonly known as the “Nally Report”. Its terms of reference included: reviewing “the legal and organisational arrangements for the public prosecution system”. The position of the Irish DPP is quite different from that of his English and Northern Irish counterparts, where the Attorney General retains a certain degree of control of the DPP. Casey *The Irish Law Officers* (Round Hall Sweet & Maxwell 1996) at 255.

¹⁷ [1958] IR 1.

charge in criminal proceedings.”¹⁸ The DPP and his officers have a duty not to entertain communications which breach the prohibition.¹⁹

B Summary Prosecutions

(1) Introduction

6.08 A number of persons have been authorised by law to prosecute in courts of summary jurisdiction, for example, the common informer and statutory bodies. The right of the common informer²⁰ could be broadly described as a general right to prosecute summarily, available at common law, to all individuals in their private capacity. And as regards the second category, the Health & Safety Authority, the Director of Corporate Enforcement and other regulatory authorities discussed below have all been granted the power to prosecute summarily under various statutes. In the case of the Gardaí and Revenue Commissioners, the power to prosecute

¹⁸ Section 6(1)(a) of the *Prosecution of Offences Act 1974*.

¹⁹ Section 6(1)(b) of the *Prosecution of Offences Act 1974*.

²⁰ The common informer may commence prosecution of a summary offence. However, in the case of indictable offences, the common informer may only conduct the prosecution up to the order for return for trial. Thereafter, the DPP becomes *dominus litis*. See *The State (Ennis) v Farrell* [1966] IR 107 and the *Criminal Justice Act 1999*. Section 9(1) of the *Criminal Justice (Administration) Act 1924* provides that prosecutions on indictment must be conducted by the Attorney General. The 1974 Act applies the provisions of the 1924 Act to the DPP. In *The State (Ennis) v Farrell* [1966] IR 107 Ó'Dálaigh CJ also held that the Court should require “clear language to abolish the valuable right of private prosecution.” Thus, if a fiscal prosecutor were established, the rights of the common informer would have to be dealt with in a clear manner if the right of private prosecution were to be abolished. *State (DPP) v District Justice Ruane* [1985] ILRM 349. See also Walsh *Criminal Procedure* (Thomson Round Hall Dublin 2002) at 593.

In *Cumann Luthchleas Gael Teoranta v District Justice Windle* [1994] IR 525, the Supreme Court held that a body corporate could not prosecute as a common informer. See Walsh *Criminal Procedure* (Thomson Round Hall Dublin 2002) at 593. Thus, although employees of the Revenue Commissioners are competent to prosecute in their own names as common informers, the Office of the Revenue Commissioners, as a body corporate, would not be competent to prosecute as a common informer. See Walsh *Criminal Procedure* (Thomson Round Hall Dublin 2002) at 599.

summarily in the name of the DPP, arises under their delegations granted by the DPP. Each of these will be described in this Part. A significant difference between an authorisation to prosecute arising from a delegation and authorisation stemming from a statutory provision concerns the measure of control the DPP could in the last resort exercise over the conduct of the prosecution.

(2) Statutory Authorities

6.09 A number of statutory bodies and Government Ministers have been given a statutory power to prosecute for specified criminal offences.²¹ The Health and Safety Authority and the Director of Corporate Enforcement are examples of statutory bodies authorised to prosecute by statute. They are worth describing here because they provide possible models for the prosecution of summary revenue offences.

6.10 These statutory provisions only grant the relevant authorities the right to prosecute summarily and do not exclude the right of the common informer to prosecute summarily in these areas. Additionally, the DPP retains the right to prosecute summarily where “a Minister, Department of State, or person (official or unofficial) authorised in that behalf by the law for the time being in force” has declined to prosecute.²²

(a) Health & Safety Authority

6.11 Section 51 of the *Safety, Health and Welfare at Work Act 1989* provides that the National Authority for Occupational Safety and Health, better known as the Health and Safety Authority (‘HSA’)

²¹ “In the year 2000 alone no less than ten statutes out of a total of 42 confer a power of summary prosecution on bodies such as the Minister for Public Enterprise; the Minister for Enterprise, Trade and Employment; Minister for Social, Community and Family Affairs; Minister for Agriculture, Food and Rural Development; Minister for Justice, Equality and Law Reform;; local Planning Authorities; the Collector-General; the Equality Authority; the Marine Casualty Investigation Board and the National Education Welfare Board”. Walsh *Criminal Procedure* (Thomson Round Hall Dublin 2002) at 598-99.

²² See the dissenting opinion of Higgins CJ in *The People (Director of Public Prosecutions) v Roddy* [1977] IR 177 and Walsh *Criminal Procedure* (Thomson, Round Hall Dublin 2002) at 609 for a discussion of the validity of the DPP’s general delegation to the Gardaí.

may prosecute summary offences under any of the relevant statutory provisions, subject to a limited exception for offences which contravene provisions which are to be enforced by “an enforcing agency”. The HSA sends all files to the Chief Prosecution Solicitor’s Division, which is within the Office of the DPP, with a recommendation on whether the case should be prosecuted summarily or on indictment. The file is considered by the Chief Prosecution Solicitor’s Division and/or the DPP where appropriate and a decision is taken on whether a case should proceed summarily or on indictment.²³ Summary prosecutions are taken in the name of the HSA but the Chief Prosecution Solicitor’s Division will present the prosecutions. Prosecutions on indictment under Health and Safety legislation are taken in the name of the DPP. The HSA publishes the details of these prosecutions in its Annual Reports.

(b) *Director of Corporate Enforcement*

6.12 The Office of the Director of Corporate Enforcement (‘ODCE’) was established in November 2001 under the *Company Law Enforcement Act 2001*. Under section 12(1)(a) of the Act one of the functions of the Director is to “enforce the Companies Acts, including by the prosecution of offences by way of summary proceedings”. The Director may also refer cases to the Director of Public Prosecutions where the Director of Corporate Enforcement has reasonable grounds for believing that an indictable offence under the Companies Acts has been committed.²⁴ Summary prosecutions are taken in the name of the Director of Corporate Enforcement and the details of outcomes of the cases are published on the website of the Office.²⁵

²³ Health and Safety Prosecutions 1999-2001

Year	Summary Prosecutions	Summary Convictions	Prosecutions on Indictment	Convictions on Indictment
2001	85	73	7	7
2000	64	47	2	2
1999	63	56	0	0

²⁴ Section 12(1)(d) Company Law Enforcement Act 2001.

²⁵ www.odce.ie.

(c) *The Gardaí*

6.13 Most summary prosecutions are taken by the Gardaí. They may prosecute as common informers in their own name, or in the name of the DPP. Under a general authorisation given in 1975, 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.²⁶ The Gardaí may commence a prosecution in the name of the DPP without receiving his directions in the particular case.²⁷ However, the DPP retains a measure of control over the Gardaí, since he can discontinue any prosecution brought in his name at any stage.

(d) *The Revenue Commissioners*

6.14 Section 1078 of the *TCA 1997* lists a number of acts and omissions which are revenue offences. Section 1078(3) specifies those offences that are "hybrid offences", that is offences which can be tried either summarily or on indictment.²⁸ Thus, there is a

²⁶ Nally Report 2.1.9 and Appendix 3.

²⁷ *DPP v Roddy* [1977] IR 177. Prior to 1924 unless a prosecution was brought by a person authorised by law, all prosecutions were taken in the name of the King. It was not necessary to obtain the prior consent of the King in order to bring a prosecution in his name. The 1924 Act substituted the Attorney General for the King in relation to prosecutions brought in courts of summary prosecution. Griffin J, in the Supreme Court, held that the practice of summary prosecutions being taken in the name of the Attorney General, without the Attorney General's prior consent being obtained, was acceptable until 1974 and as the 1974 Act merely substituted the DPP for the Attorney General, the practice of Gardaí prosecuting summarily, in the name of the DPP, without prior authorisation was acceptable.

The DPP had argued that the Gardaí had the authority to prosecute summarily, in his name, under a general authorisation granted by the DPP. As the majority of the Supreme Court held that Gardaí could prosecute summarily in the name of the DPP without prior authorisation on the grounds outlined above, this argument was not considered. Thus the status of the general delegation was not determined. See Walsh *Criminal Procedure* (Thomson Round Hall Dublin 2002) at 607-609.

²⁸ It provides that: "A person convicted of an offence under this section shall be liable— (a) on summary conviction to a fine of £1,000 which may be mitigated to not less than one fourth part of such fine or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both the fine and the imprisonment, or (b) on conviction on indictment, to a fine not exceeding £10,000 or, at the discretion of the court, to

considerable scope for the exercise of discretion in deciding whether a case should be taken in a court of summary jurisdiction or on indictment.

6.15 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.²⁹ The DPP is not apprised of the existence of a file unless the Revenue Commissioners consider it 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. But in the case of indictable offences, the Revenue Solicitor provides legal services to the DPP in respect of revenue offences. The Director 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 prosecution which is brought on indictment, provided that the Revenue Commissioners consider such summary disposal to be appropriate.³⁰

6.16 The current arrangements for the summary prosecution of the non-submission of returns are said to be routine and non-

imprisonment for a term not exceeding 5 years or to both the fine and the imprisonment.”

²⁹ *Criminal Justice (Administration) Act 1924* section 9(2) and *Attorney General v Healy* [1928] IR 460. See also Walsh *Criminal Procedure* (Thomson Round Hall Dublin 2002) at 587.

³⁰ Section 1078(4) provides for the application to revenue offences of the general procedure established in section 13 of the *Criminal Procedure Act 1967* whereby an individual may plead guilty to an indictable offence in the District Court. One of the advantages of the application of the section 13 procedure is that the defendant will only be subject to District Court punishments. For offences after the passing of the *Finance Act 2003* the District Court penalty pursuant to section 1078(4) is now €3,000 which may be mitigated to not less than one fourth part of such fine or at the discretion of the Court to imprisonment for a term not exceeding twelve months or to both the fine and the imprisonment. The Director's consent is needed for the application of this section.

problematic.³¹ The Revenue Commissioners prosecute on average 1,200 cases for the non-submission of returns annually. The Inspector of Taxes will refer the case to the Revenue Solicitor who may either issue a “pre-prosecution warning letter” or may advance the case to the summons stage without a “pre-prosecution warning letter”. (See paragraph 5.18). The Revenue Solicitor will take the latter course of action where a person has a previous conviction for failing to file a return. 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 the summons stage. The Revenue Commissioners will not stop a prosecution once it has issued a summons if a taxpayer subsequently files a return.

6.17 The Revenue Solicitor presents all summary cases in the Dublin Metropolitan District, and cases outside Dublin are referred by the Revenue Solicitor to the appropriate State Solicitor for prosecution. Criminal prosecutions amount to about 25% of the Revenue Solicitor’s work.³²

6.18 Since early 1997, an officer of the Office of the Director of Public Prosecutions, at Assistant Secretary level, has been available to the Revenue Commissioners, for half the week, for the purposes of “case referral and for consultation.”³³ Much of the senior official’s work is concerned with cases on indictment. The official is presented with a file after a full investigation by the Revenue Commissioners. In effect, this official decides whether a case is suitable for prosecution and, if so, whether it should be prosecuted summarily or on indictment. Another officer of the Office of the Director of Public Prosecutions also spends half his week in the Revenue Commissioners, and meets with officials from the Revenue Commissioners’ Investigations and Prosecutions Division to discuss

³¹ Steering Group Report. Criminal prosecution for non-filing offences is a regular feature of our compliance campaign. Compliance Campaign (2001) Tax Briefing 43, 50 paragraph 3.45)

³² Nally Report at paragraph 2.2.18.

³³ 1997 Annual Report of the Revenue Commissioners, 47. See Chapter 5 which also discusses the current arrangements between the Revenue Commissioners and the DPP.

evidential issues and any other issues which arise in the course of an investigation.³⁴

6.19 The Nally Report did not recommend any change in the arrangements for the prosecution of revenue offences.³⁵

(3) Conclusion

6.20 The policy point to be considered is whether the *status quo* for the prosecution of revenue offences should be retained. In other words, the alternatives for the prosecution of revenue offences are either the present system of the ultimate control by the DPP over summary prosecutions taken by the Revenue Commissioners (the delegation model); or the independent statutory authorisation, along the lines of the HSA or the Director of Corporate Enforcement.

6.21 In the case of prosecutions on indictment, we shall be taking the policy view that, especially given the peculiarly large element of discretion in the decision to prosecute a revenue offence; it is prudent that in the final resort the independent figure of the DPP should have the last word (see paragraphs 6.06-6.07). There does not seem to be any reason to justify a different policy for summary prosecutions. It is also relevant that we have been told that there is no dissatisfaction with the existing arrangement, under which, as we have seen, the Revenue Commissioners have a good deal of operational independence.

6.22 *The Commission recommends that the Revenue Commissioners continue to prosecute summarily under a delegation from the DPP, rather than under an independent statutory authorisation. The Revenue Commissioners should issue a pre-prosecution letter in all cases before issuing a summons.*

C Prosecution on Indictment

6.23 The DPP will only prosecute if there is sufficient evidence³⁶ and prosecution is in the public interest.³⁷ Where a *prima facie* case

³⁴ 1997 Annual Report of the Revenue Commissioners, 47.

³⁵ Report of the Public Prosecution System Study Group (Government Publications 1999) at paragraph 5.7.11.

³⁶ The presence of sufficient evidence to establish a case beyond reasonable doubt will not, of itself, mandate prosecution. There is no rule which

exists, the discretionary power not to bring a prosecution is not frequently used. The 1999 Annual Report specifies that the DPP's discretionary power not to prosecute may be exercised: where prosecution would not be in the interests of the victim in the case; where the accused is terminally ill; where the accomplices in a crime are granted immunity because their evidence is essential for the successful prosecution of another participant; or in a case where the breach of the law is technical and no real purpose would be served by a trial.³⁸

6.24 Although the Supreme Court has rejected the contention that the DPP's "decisions are not as a matter of public policy ever reviewable by a court",³⁹ the Courts are reluctant to apply the normal standards of judicial review to prosecutorial decisions.⁴⁰ The DPP's discretion is only subject to judicial scrutiny in extremely limited circumstances.⁴¹ Indeed, with particular reference to cases involving State security, the UN Human Rights Committee used the following strong language to describe the circumstances in which judicial review of the DPP's decisions will be granted: "[it] is effectively restricted to the most exceptional and virtually undemonstrable grounds".⁴²

mandates the prosecution of all offences where the evidential burden has been met. DPP *Statement of General Guidelines for Prosecutors* (October 2001)

³⁷ *Annual Report 1999, Office of the Director of Public Prosecutions*, at 14.

³⁸ *Annual Report 1999, Office of the Director of Public Prosecutions*, at 15.

³⁹ *State (McCormack) v Curran* (1987) ILRM 225, 233 *per* Finlay J.

⁴⁰ *Eviston v DPP* [2002] 1 ILRM 134, 141 *per* Kearns J. See also Casey, *The Irish Law Officers* (Round Hall Sweet & Maxwell 1996) at 287-88.

⁴¹ The basis upon which the Court can interfere with decisions of the Director of Public Prosecutions are fully dealt with in decisions of the Supreme Court in *State (McCormack) v Curran* [1987] ILRM 225 and *H v Director of Public Prosecutions* (1994) 2IR 589 and the recent High Court decision in *Eviston v DPP* [2002] 1 ILRM 134, 141 *per* Kearns J.

⁴² *Kavanagh v Ireland* UN Human Rights Committee 04/04/2001 (CCPR/C/71/D/819/1998) cited in the *Report of the Committee to Review the Offences Against the State Acts, 1939 – 1998* (Government Publications 2002).

6.25 The courts will only intervene to review the DPP's decision where it is demonstrated that the decision on whether to prosecute or not was "mala fide or influenced by an improper motive or improper policy ..."⁴³ As a consequence of this the courts have also approved the DPP's policy not to give reasons for his decisions.⁴⁴

6.26 While judicial review of a decision to prosecute or not to prosecute may in reality be difficult to obtain in the present state of the law, the same is not true for judicial review of the reversal of a decision not to prosecute. In the recent case of *Eviston v DPP*,⁴⁵ the Supreme Court granted an injunction to restrain the DPP from proceeding any further with a prosecution against the applicant.

6.27 In addition, the DPP has considerable discretion in relation to 'hybrid offences', which are statutory offences which may be liable to punishment on summary conviction, or on indictment, (with the Act not indicating the circumstances in which the charge should be prosecuted summarily, rather than on indictment or on indictment rather than summarily).⁴⁶ The District Court cannot try an indictable scheduled offence summarily, unless the DPP consents to the accused being tried summarily under section 2(2) of the *Criminal Justice Act 1951* (as amended).⁴⁷

6.28 The DPP bears a number of other functions, the most relevant here being the provision for prosecution appeals in relation to summary cases and appeals against sentence.⁴⁸ The *Summary*

⁴³ *State (McCormack) v Curran* [1987] ILRM 225, 237, Finlay CJ.

⁴⁴ *H v Director of Public Prosecution* [1994] 2ILRM 285, 289-90.

⁴⁵ [2003] 3 ILRM 178 (SC) [2002] 1 ILRM 134 (HC)

⁴⁶ *Woods District Court Practice and Procedure in Criminal Cases* (James V Woods 1994) at 268.

⁴⁷ Section 2 of the *Criminal Justice Act 1951* was amended slightly by section 19 of the *Criminal Procedure Act 1967*, sections 21(6) and 22 of the *Criminal Law (Jurisdiction) Act 1976* and section 8 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*. See also paragraph 5.08 for the application of section 13 of the *Criminal Justice Act 1967* in the context of revenue prosecutions.

⁴⁸ We do not deal with many of these functions, as they are not relevant to this paper. For example, the DPP has a duty under section 46 of the *Offences Against the State Act 1939* to send persons forward for trial in the Special Criminal Court in relation to scheduled offences and the power to

*Jurisdiction Act 1857*⁴⁹ is an example of a statute which provides a statutory right of appeal for the prosecution. In relation to cases on indictment,⁵⁰ section 34 of the *Criminal Procedure Act 1967* provides for a limited *without prejudice* right of appeal in relation to questions of law arising from directed acquittals in Circuit Court and Central Criminal Court trials.⁵¹

6.29 Under section 2 of the *Criminal Justice Act 1993*, the Director may apply to the Court of Criminal Appeal to review a sentence which in his opinion is unduly lenient. The DPP recently sought a review of the sentence imposed for ten revenue offences in *DPP v Redmond*.⁵² The defendant had failed to file returns for nine years contrary to section 94 of the *Finance Act 1983* and section 1078

send non-scheduled indictable offences forward for trial in the Special Criminal Court, where the DPP certifies that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace.

49 Either during or at the conclusion of a District Court hearing, the prosecution or the defence may request an appeal on a point of law by case stated to the High Court: section 2 of the *Summary Jurisdiction Act 1857*. A further right of appeal then lies to the Supreme Court from the decision of the High Court. See, Ryan & Magee, *The Irish Criminal Process* (Mercier Press 1983) at 416-419, and Byrne & McCutcheon, *The Irish Legal System* (4 ed Butterworths 2001) at 248-250. It should be noted that section 4 of the Summary Jurisdiction Act, 1857 was struck down as unconstitutional in *Fitzgerald v Ireland High Court* (Kearns J), 4 May 2001. Section 4 purported to remove from the District Court the discretion to refuse to state a case to the High Court when the request originated from the prosecution. In contrast, the District Court retained the discretion to refuse a defence request on the grounds that the request was frivolous.

50 In relation to trials in the Circuit Court, there is also the possibility of seeking judicial review in the High Court of a trial decision made in excess of jurisdiction. However, this is not a general right of appeal and does not lie to correct errors made within jurisdiction. Furthermore, once a jury trial is embarked upon the High Court is reluctant to intervene by way of judicial review: Director of Public Prosecutions, *Statement of General Guidelines for Prosecutions* (2001) at paragraph 10.2.

51 See generally Law Reform *Consultation Paper on Prosecution Appeals in Cases brought on Indictment* (May 2002) (LRC CP19-2002).

52 [2001] 3 IR 390.

of the *TCA, 1997*.⁵³ He was fined IR£7,500 (€9,523) in total in respect of these offences. In refusing the DPP's application, the Court held that, although the penalties may have been low, the DPP had not established that the trial judge had erred in principle or that the fines were unduly lenient within the meaning of section 2 of the *Criminal Justice Act 1993* as interpreted in *DPP v McCormack*.⁵⁴ The DPP failed to establish, by comparable cases or otherwise, that in the particular circumstances of the *Redmond* case, the fine of IR£7,500(€9,523), was "unduly lenient". **Reforms**

6.30 As a preliminary matter the term 'fiscal prosecutor' ought to be defined. 'Fiscal' can mean a number of things, but in this Paper, the term is used in the sense of an office-holder who would be responsible for the prosecution of revenue offences, (and so the term 'revenue prosecutor' might be as appropriate).⁵⁵

⁵³ The defendant entered signed pleas of guilty in the District Court and was sent forward for sentence.

⁵⁴ In *DPP v McCormack* (Court of Criminal Appeal 18 April 2000), Barron J in the Court of Criminal Appeal referred to undue leniency as connoting a clear divergence by the Court of trial from the norm and which would, save in exceptional circumstances, have been caused by an obvious error in principle." Barron J explained the test as being that: "[e]ach case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon these two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

⁵⁵ It has another usage else where for instance, in Scotland, the Procurator Fiscal is the public prosecutor of a shire or other local district in Scotland. The Nally Report explains that "the title of procurator fiscal has existed since at least the sixteenth century". Nally Report paragraph 3.2.7. The sheriff was responsible for the investigations and presentation of offenders for trial. A procurator fiscal assisted the sheriff on many matters, including the collection of fines. The sheriff's investigative and presentation function passed to the procurator fiscal by the second half of the seventeenth century, who acted in the name of the King's Advocate. The procurator fiscal is currently responsible for the direction of criminal investigations undertaken by the police, and the decision whether to prosecute or not. (Nally Report paragraph 3.2.8). In Italy and Spain, the term is used to describe a legal official having the function of public

6.31 There are a number of options for reform of the current system for the prosecution of revenue offences. There are many stages, involving the exercise of discretion, along the trail which commences with a suspicion (on which see paragraphs 1.48, 5.13-5.17, 5.26 and 6.14) of non-payment or false accounting and culminates in the prosecution of a case before a court. In respect of which one or more of these stages is it suggested that a fiscal prosecutor should replace an actor in the existing structure? Basically, the possible changes may be categorised in the form of two possible models:

- (i) One might involve simply replacing the DPP by a fiscal prosecutor (whom we call the Director of Fiscal Prosecutions or “DFP”) who would specialise in the prosecution of revenue offences, but who would otherwise have a similar status and similar powers to the DPP. We shall consider this option in Part E;
- (ii) The alternative would be to make the changes outlined above and to widen the powers of the DFP, as compared with those of the DPP, in any of three possible ways of which the most important would be to create a single unit for the investigation and prosecution of revenue offences. These options will be considered in Part F. A joint investigation and prosecution office has been established in New Zealand, and this model is outlined in Part G.

E Director of Fiscal Prosecutions

6.32 Here we consider the creation of an office which would “be singularly focused on Revenue offences and have the necessary specialist expertise in the office.”⁵⁶ The proposed reform may be analysed from two perspectives. First, the most likely rationale justifying the creation of a fiscal prosecutor would be to secure the

prosecutor. Under the Holy Roman Empire, a ‘fiscal’ was the highest law officer of the crown. It can also be used to refer to a magistrate who deals with offences against revenue. *The Shorter Oxford English Dictionary* (Oxford University Press 1973) at 757.

⁵⁶ *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

prosecution and conviction of tax evaders who currently go unprosecuted or undetected. Thus from one point of view the efficacy of the Office of the DFP can be gauged by whether it would bring more tax evaders to justice. A second consideration is whether in achieving more tax compliance the DFP would ensure and maintain respect for civil liberties, particularly those of citizens who are suspected of recalcitrance in paying the tax due.

(1) Independence

6.33 In order to meet this second consideration, the DFP would presumably enjoy the same institutional protections to independence as does the Office of the DPP; or such other constitutional offices, as the Ombudsman or the Comptroller and Auditor General.

6.34 The following is a sketch of the DFP's institutional role. The DFP would be chosen from persons whose independence and integrity is beyond question. Recruitment and appointment would be carried out in a fair and impartial manner. Safeguards against government pressure should be built into the method of appointment and removal. Mechanisms to protect the DFP from unjustified interference while in office would have to be provided. The DFP and the staff would be civil servants of the State⁵⁷ and there would be a statutory provision similar to section 6 of the *Prosecution of Offences Act 1974* which would explicitly provide that the DFP would be independent in discharging the functions of the Office.⁵⁸ The conditions of service, including remuneration and pension rights could be governed by law. An annual report would have to be compiled and published. (However, this might be published with that of the DPP). Presumably, the Office of the DFP would have its own grant in aid and the DFP would be the accounting officer of the DFP's Office, in the same way as the DPP is the accounting officer of the DPP's Office, so as to prevent subversion of its independence by any attack on its resources.

⁵⁷ On this term, see *McLoughlin v Minister for Finance* [1958] IR 1.

⁵⁸ See paragraphs 6.06-6.07 for a discussion of the independence of the DPP and especially paragraph 6.07 on the prohibition in section 6 of the 1974 Act of communicating with the DPP or the staff of the Office to influence a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings.

6.35 Even given this institutional independence, a practical query has to be raised. One criticism is that creation of the DFP would lead to further fragmentation of the public prosecution system. At the moment, the DPP has a measure of control over almost the entire prosecution system. The DPP's supervision and control ensures that there is consistency and standards in prosecution policy. The DPP commented on this point before the DIRT Inquiry. He remarked:

“[y]ou suggested the idea of a special prosecutor. I would be quite reluctant to see us go down that road. We have always in this State had the principle of a single prosecutor to deal with indictable crime. ... I certainly would not favour breaking up the prosecution service into different units which would deal with different types of crime. I think it is important that we maintain a consistency and a unity, so far as criminal prosecution is concerned, and the same standards.”⁵⁹

6.36 The Commission favours the standards of consistency and fairness assisted by the unifying experience of the overall supervisory role exercised by the DPP. The DPP has a wide sphere of interest, ranging over the entire field of serious crime. The Office's status, *raison d'être* and reputation is not tethered to one sector. By contrast, if a DFP were established as a prosecutor confined to a single sphere, the DFP would perhaps be, or at least might be perceived as being, over involved in that one sector and as developing over time, too much affinity with those who work in it. Moreover, because there is more discretion involved in deciding whether to prosecute a revenue offence than, say, a robbery charge, more hinges on the independence of the process of determining whether to prosecute. While no doubt a DFP would be careful to establish the independence and integrity of the Office, it seems sensible to keep the benefits of the existing experience and overall supervisory role of the DPP, which help in maintaining high standards, consistency and probity throughout the prosecution system.

6.37 A further point is that those responsible for revenue prosecutions in this jurisdiction have expressed the view that revenue

⁵⁹ *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

offences are no more complicated than other criminal charges, and thus do not need any particular specialisation in order to ensure successful prosecution, (the question of investigation is a separate issue, which we will return to at paragraph 6.51-6.58). Finally, the usefulness of simply replacing the DPP with a DFP must be questioned. Substituting a DFP would not necessarily result in an increase in the number of prosecutions. A change of policy would be needed at the investigation level in order to increase the potential number of cases for prosecution; a change in priorities as well as more personnel and resources might be required.

(2) Conclusions

6.38 The structure sketched at paragraphs 6.34-6.35 at least prompts the question as to whether this would be expedient or worthwhile. Would the proposed new Office do what it is actually intended to do, namely, increase the number of prosecutions and secure more convictions? It seems from present figures that even allowing for the anticipated moderate increase in prosecutions, relatively few cases, would be taken by a DFP.

6.39 A number of reforms, outlined at paragraphs 1.49 and 5.47, have been put in place in recent years. It would be unwise to pronounce on their success or failure until they have had a chance to prove their worth. Subject to that qualification, all that can be said at present is that there are no advantages which would derive from the fiscal prosecutor, with the fairly cumbersome legislative and administrative arrangements already described which this would entail, which could not be achieved by the recent changes. Perhaps the arrangements currently in place for co-operation between the Revenue Commissioners and the DPP should be made better known simply in order to publicise the efforts being made to combat tax evasion. As noted earlier, the DPP has made available experienced senior officers to advise the Revenue Commissioners and this should perhaps be recognised as going part of the way to establishing *de facto* fiscal prosecutor, while still operating under the aegis of the DPP.

6.40 *The Commission recommends that the arrangements currently in place for the prosecution of revenue offences be maintained for a period and then reviewed in a few years. The Commission does not recommend the creation of a DFP.*

F A Director of Fiscal Prosecutions with additional functions

6.41 Let us assume that, contrary to the recommendation made in paragraph 6.40, there is to be a separate Director of Fiscal Prosecutions. The question would then arise as to whether the responsibilities of the new office should go beyond the present powers and duties of the DPP to embrace all or any of the following: (1) the Revenue Solicitor's role; (2) summary prosecutions; or (3) the investigative function.

(1) *Incorporating the Revenue Solicitor's Role in Criminal Prosecutions*

6.42 One possible addition to the DFP's roles, as compared to the functions presently discharged by the DPP, concerns the Revenue Solicitor's role. On the criminal side (there are other functions on the civil side), the Revenue Solicitor provides legal advice to those investigating revenue offences, issues warning letters to tax recalcitrants, and also provides legal services to the DPP in respect of both summary and indictable revenue offences.⁶⁰

6.43 The DPP and the Revenue Solicitor presently enjoy a relationship similar to that which, before 2001, existed between the DPP and the former Criminal Division of the Chief State Solicitor's Office. However in 2001, the Chief Prosecution Solicitor's Division within the DPP's Office was established following the recommendation in the Nally Report that control of the Criminal Division within the Chief State Solicitor's Office be transferred to a new office under the control of the DPP, in "the interest of control, accountability and transparency".⁶¹

6.44 The Nally Report also briefly considered the arrangements for the prosecution of revenue offences but did not recommend any

⁶⁰ "The Revenue Solicitor is a civil servant, with the rank of assistant secretary, who is appointed by the Minister for Finance following a recommendation from the Top Level Appointments Committee and is accountable to the Revenue Commissioners. The Office has 34 staff, including 26 lawyers or legal technicians." Paragraph 2.2.16 of the Nally Report.

⁶¹ Nally report at paragraph 5.7.4.

such change in relation to the Revenue Solicitor.⁶² Thus, the addition of the Chief Prosecution Solicitor's Division to the DPP's Office has not affected the Revenue Solicitor's role in the prosecution of revenue offences.

6.45 It might be asked why the Nally Report did not recommend the transfer of the criminal functions performed by the Revenue Solicitor's Office to the DPP since the same concerns relating to control and accountability seem to arise. The answer is that the Revenue Solicitor provides a wide range of legal advice in respect of civil and criminal matters to the Revenue Commissioners drawing on expertise and experience built up over time. The Revenue Commissioners' function is to ensure compliance with the Tax Acts, whether by way of monetary settlement or prosecution. It would be difficult and undesirable to separate the role played by the Revenue Solicitor in criminal matters from the role the Revenue Solicitor provides in reaching settlements. The dual role performed by the Revenue Solicitor provides for flexibility in dealing with cases either by prosecution or settlement depending on the evidence which emerges in the course of a negotiation or investigation, with the ultimate aim of enforcing compliance with the Tax Acts. The current arrangement has been working satisfactorily and a case for transferring the criminal work performed by the Revenue Solicitor has not been made.

6.46 *Accordingly, the Commission does not recommend any change to the current relationship between the Revenue Solicitor and the DPP and would not recommend the transfer of the functions performed by the Revenue Solicitor's Office to a DFP, if such an office was established.*

⁶² "The Study Group considers that the arrangements currently in place for the prosecution of revenue offences in the name of the DPP by the Revenue Solicitor, in the Dublin Metropolitan Area, and by State Solicitors, outside Dublin, should continue. This is our conclusion whether or not the criminal division of the CSSO is transferred to the DPP and a solicitor to the DPP appointed, as recommended in paragraph 5.7.4." Nally Report, paragraph 5.7.11.

(2) *Summary Prosecutions*

6.47 Presumably, if all activities in relation to the investigation and prosecution of revenue offences were to be centred in one organisation, the question would then arise as to whether the Revenue Commissioners' summary prosecution functions should be transferred to the DFP. However, given the routine manner in which such prosecutions are taken by the Revenue Commissioners, there does not appear to be any practical reason which would require the transfer of the summary prosecutorial function from the Revenue Commissioners.

6.48 *Accordingly the Commission does not recommend the transfer of summary prosecution functions to the DFP, in the event of a DFP being established.*

6.49 There is, however, another point, which might be thought to arise. It would be in the interests of consistency and equal treatment of offenders that, as occurs under the present arrangements, the one authority determines whether a particular offence warrants a summary or indictable prosecution. If a DFP were created, the current arrangement (see paragraph 6.16), whereby the power to prosecute summarily is delegated to the Revenue Commissioners but the DPP remains the final authority, should be replicated with the DFP being the final authority. For if the DFP was not the final authority on whether a prosecution should proceed, and the Revenue Commissioners retained a power to prosecute tax evaders, conflicts could arise. An example of such a conflict arose in the UK in *W v Inland Revenue*.⁶³ Here the Inland Revenue chose not to prosecute, and settled with the taxpayer for tax, penalties and interest. The Crown Prosecution Service later chose to prosecute in respect of the tax evasion. The applicant argued, on the basis of Crown indivisibility, that, once the Inland Revenue had decided not to prosecute and had accepted a monetary settlement, the Crown Prosecution Service could not prosecute. The Court of Appeal disagreed with the applicant and stated:

“the Revenue's common law power to prosecute is ancillary to, supportive of and limited by their duty to collect taxes. In contrast, the Crown Prosecution Service's statutory duty

⁶³ [1998] STC 550 Court of Appeal Criminal Division 12 March 1998.

to take over and conduct criminal proceedings is free-standing, unconfined (for present purposes) and reflects much wider public interests, concerns and objectives.”⁶⁴

6.50 Such a situation could not arise in Ireland at the moment but, if the DPP’s jurisdiction were transferred to a separate DFP, there would be scope for conflicts to arise between the DFP and the Revenue Commissioners and also between the DFP and the DPP. Thus, the relationship between the DFP, the Revenue Commissioners and the DPP would have to be clearly defined.

(3) *Joint Investigation-Prosecution Role*

6.51 The most radical proposal would be to add on to the prosecutorial function the task of investigation. We should make it clear, at the outset that while there have been some well-publicised instances of defective revenue investigation,⁶⁵ the question of investigation is strictly speaking outside our terms of reference and we have not investigated the area. On the other hand, it seemed useful simply to raise the question and to draw the reader’s attention to the New Zealand joint investigation-prosecution unit, which is outlined in paragraphs 6.59-6.66. However, it also seemed appropriate not to make any recommendation on this issue, which affects fundamental principles.

6.52 There are two inter-related arguments in favour of incorporating the investigation and prosecution functions in the same constitutional structure. The first of these is that the employment of specialists in such fields as law, forensic accountancy, information technology or business of the relevant sort would be useful in respect of both investigation and prosecution. Given the inevitable budgetary and bureaucratic constraints, the employment of such specialists can most readily be achieved if they work on both the investigation and prosecution side. Secondly, early and effective communication

⁶⁴ [1998] STC 550 Court of Appeal Criminal Division 12 March 1998.

⁶⁵ See for examples the C&AG Annual Report 2001, which outlines the case of a property developer who had substantial amounts of tax written off by the Revenue Commissioners despite being involved in 35 active property development companies worth more than €125million during the 1990s. It also gives details of two further cases where the incorporation of limited liability companies was used to evade tax. C&AG Annual Report 2001, 24, 27 & 30

between investigators and prosecutors would be improved if many of the staff were employed on both sides of the house.

6.53 The Council of Europe recognised the importance of specialisation in respect of investigation and prosecution in its “Recommendation on the Role of Public Prosecution in the Criminal Justice System.”⁶⁶ It recommends that, in highly technical fields such as business-related and financial crime, including revenue, specialisation is essential in order to ensure effective prosecution. It recommends that the type of:

“specialisation that should be encouraged is the formation, under the direction of prosecutors who are themselves specialists, of truly multi-disciplinary teams whose members are drawn from a variety of backgrounds (a team dealing with financial crime and money laundering, for example, might include chartered accountants, customs officers and banking experts). This pooling of expertise in a single unit is a vital factor in the operational effectiveness of the system.”⁶⁷

6.54 The prosecution system would benefit from the combined skill and expertise of forensic accountants who “are skilled at piecing together transactions and analysing the flow of funds between different parts of an organisation”⁶⁸ and lawyers to assess whether the proofs needed to establish the commission of an offence are present. The Council of Europe’s recommendation observed that “[t]o discover, analyse and prosecute fraud needs a concerted and organised approach, where different but complementary skills can be brought together to construct as full a picture as possible.”⁶⁹

6.55 The next thing to be said about such a proposal is that it would involve blurring the traditional divide in relation to the investigation and prosecution of serious revenue offences. The Nally

⁶⁶ Recommendation 19 and Explanatory Memorandum adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.

⁶⁷ Recommendation 19 and Explanatory Memorandum adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

Report considered the rationale for the separation of the investigation and prosecution functions. It stated that:

“[t]he practical aim of such a separation of functions is to avoid a situation in which the prosecution, instead of objectively assisting the court to arrive at the truth by presenting the facts which constitute the case against the accused, would be committed in advance, as a result of its involvement in the investigation, to securing a conviction.”⁷⁰

6.56 In respect of prosecution for summary offences, the Nally Report did not find any compelling arguments supporting the contention that the separation of investigation and prosecution functions “should be regarded as a basic principle.”⁷¹ In respect of trials on indictment, the Nally Report seems to have reached no firm conclusion either way. However, the demarcation line between investigation and prosecution seems to the Commission to be an important separation which should be respected when this is practicable, although there are bound to be areas of some overlap. Nevertheless, this does not need to be fatal to the suggestion under consideration. For under the New Zealand model described at paragraph 6.59-6.66, it has been possible to combine a common institutional structure with a practical demarcation between investigation and prosecution, particularly when it comes to the critical question of whether to prosecute, in respect of which the Director must be assiduous to exercise objective and independent judgment. No doubt such an arrangement could be developed in Ireland, if necessary.

6.57 On the other side of the argument, the question may be asked whether the new structural reforms, begun in 1996 for investigation and prosecution of revenue offences, already allow for a sufficient level of specialisation without the need for combining the prosecution and investigation functions. The issue which must be borne in mind throughout this discussion is whether any such new model would result in more successful prosecutions. Specifically,

⁷⁰ Nally Report, paragraph 4.4.8.

⁷¹ *Report of the Public Prosecution System Study Group* (Government Publications 1999) at paragraph 4.4.8.

where there has been a failure to prosecute, would this be remedied by a joint investigation-prosecution unit? One should bear in mind that communication is good, under the present scheme between the Investigations and Prosecutions Division of the Revenue Commissioners and the DPP's officer who spends much of his time with Revenue. The question of whether an increase in prosecutions for tax evasion is in the interests of the Exchequer and also of the common good arises, particularly when consideration is given to the delicate balance which must be struck between settlement and prosecution. For example, the Revenue Commissioners may be in a position to ensure that an errant taxpayer complies with his or her obligations under the Tax Acts by reaching a settlement which will lead to the recovery of the underpaid tax, penalties, and interest, without needing to prosecute the errant taxpayer. See further paragraphs 5.48-5.50.

6.58 *As mentioned at paragraph 6.51, since we have insufficient empirical evidence to answer these questions, the Commission makes no recommendations on the benefits of establishing a body with a joint investigation and prosecution role. Instead, we turn to consider a relevant foreign comparison.*

G The New Zealand Serious Fraud Office

(1) Introduction

6.59 The New Zealand Serious Fraud Office ("SFO") has been selected as a possible model for a DFP with investigation-prosecution functions, as its remit covers revenue offences as well as a wide range of other serious frauds. The Serious Fraud Office constituted for England, Wales and Northern Ireland on the other hand, does not investigate or prosecute revenue offences.⁷² The New Zealand SFO

⁷² The Serious Fraud Office for England, Wales and Northern Ireland was established in 1988 under the *Criminal Justice Act 1987*. It was established following recommendations made in the 1986 Fraud Trials Committee report (Her Majesty's Stationery Office London 1986) "Roskill Report", which recommended the establishment of a unified organisation with responsibility for the detection, investigation and prosecution of serious fraud in order to address the public concern over the inefficiency of the system. The SFO for England Wales and Northern Ireland was subject to much criticism, particularly in the aftermath of the failure of the *Blue Arrow* case, over the length of time and the cost associated with serious

was established in 1990, pursuant to the *Serious Fraud Office Act 1990* (“the Act”). Modelled to some extent on the SFO for England, Wales and Northern Ireland, it is an independent government department with responsibility for the expeditious detection, investigation and prosecution of serious fraud, including tax fraud. The Attorney General is responsible for the SFO,⁷³ but the Director is independent of the Attorney General. The Director is not accountable to the Attorney General for any decisions to investigate or prosecute cases.⁷⁴ The Director has no obligation to investigate or prosecute particular fraud cases. Furthermore, any decision of the Director to investigate or prosecute a case which the Director suspects may involve serious or complex fraud may “not be challenged, reviewed, quashed, or called in question in any Court.”⁷⁵

(2) **Multi-Disciplinary Approach**

6.60 The SFO operates a new multi-disciplinary approach to the investigation and prosecution of serious fraud. The Office is staffed by the Director and two Assistant Directors, who lead the Investigations and Prosecutions branches. In line with the basic principle mentioned at paragraph 6.56, the decision as to the bringing of a prosecution is taken by the Director independently of the investigation staff. Within the Investigations branch, there are three subdivisions, namely: forensic accountants, a document management unit and a systems administrator. Initial complaints are handled by a ‘Complaints Officer’. Investigators and forensic accountants work

fraud prosecutions. However, it has received more favourable publicity in recent years. It takes on approximately 20 new cases each year, and has around 80 cases ongoing at any given time. Convictions rates varying from 70 to 90% have been reported.

⁷³ Section 29 of the Act provides “[f]or the purposes of the State Sector Act 1988, the Attorney-General shall be responsible for the Serious Fraud Office.”

⁷⁴ Section 30 of the Act provides that: “(1)[n]otwithstanding section 29 of this Act, in any matter relating to any decision to investigate any suspected case of serious or complex fraud, or to take proceedings relating to any such case or any offence against this Act, the Director shall not be responsible to the Attorney-General, but shall act independently. (2)Nothing in this section shall limit or affect any power exercisable by the Attorney-General in relation to any proceedings.”

⁷⁵ *Ibid* section 29.

together. They interview witnesses, gather documents and analyse financial transactions, under the supervision of management. Independent prosecutors are also engaged and assigned to each investigation. If necessary, they are consulted and give advice on any legal issues which arise in the course of an investigation and usually conduct the prosecution.

(3) Powers

6.61 The Director of the SFO has the power to require the production of documents,⁷⁶ to obtain a search warrant,⁷⁷ and to require attendance before the Director.⁷⁸ The Director may assume responsibility from the Police for investigating certain cases of fraud.⁷⁹ All duties of confidentiality, except for strict legal professional privilege, are overridden by the *Serious Fraud Office Act 1990*. Although proceedings may be taken to challenge the Director's exercise of powers, the Director may continue to use the challenged powers until the final decision in the proceedings.⁸⁰

⁷⁶ Section 5 of the *Criminal Justice Act 1987*.

⁷⁷ *Ibid*, section 6

⁷⁸ Section 9.

⁷⁹ Section 11 of the Act provides: “(1)[t]he Director may, by notice in writing to the Commissioner of Police,— (a)Assume the responsibility for investigating any case that the Director believes on reasonable grounds to involve serious or complex fraud: (b)Require the Commissioner of Police to provide, as soon as reasonably practicable, any information, including Police records, that is held by the Commissioner of Police and that is relevant to the investigation of any case in respect of which the Director has assumed responsibility under this section. (2)If the Commissioner of Police declines to provide any information that is relevant to the investigation of any such case, — (a) The Commissioner shall forthwith inform the Director of the general nature of the information withheld and the reasons for withholding it; and (b) The Director may refer the matter to the Solicitor-General for determination; and (c) The determination of the Solicitor-General shall be binding on the Director and the Commissioner of Police.”

⁸⁰ Section 21 of the Act provides: “(1)[w]here any person commences any proceedings in any Court in respect of— (a)The exercise of any power conferred by this Act; or (b)The discharge of any duty imposed by this Act,— until a final decision in relation to those proceedings is given, the power or duty may be, or may continue to be, exercised or discharged as if no such proceedings had been commenced, and no person shall be excused

6.62 When served with a notice to attend, an individual cannot invoke the privilege against self-incrimination in order not to answer questions, supply information, produce documents or give explanations.⁸¹ Self-incriminating statements given on foot of a notice to attend will generally not be admissible in court. However, where an individual contradicts an earlier incriminating statement, it may be admissible.⁸²

(4) Selection of cases

6.63 Cases are referred to the SFO by “Government Departments, liquidators, receivers, statutory managers, professional associations and the general public. On occasions the Office is also pro-active in undertaking inquiries.”⁸³

6.64 No statutory definition of ‘serious fraud’ is provided. However, section 8 of the *Serious Fraud Office Act 1990* provides that the Director may take the following factors, among other things,

from fulfilling any obligation under this Act by reason of those proceedings. (2) This section shall apply notwithstanding any other provision of any Act or rule of law or equity. (3) The expression “final decision” in subsection (1) of this section does not include a decision in proceedings for an interim order under section 8 of the Judicature Amendment Act 1972.”

⁸¹ Section 27 of the Act provides that: “[n]o person shall be excused from answering any question, supplying any information, producing any document, or providing any explanation pursuant to section 5 or section 9 of this Act on the ground that to do so would or might incriminate or tend to incriminate that person.”

“*Smith v Director of Serious Fraud Office* [1992] 3 All ER (UK). A decision of the House of Lords regarding section 2 of the *Criminal Justice Act 1987* (UK) comparable to section 9 in New Zealand. It was held that the powers of the Director to question a person under investigation did not come to an end when the person was charged, because the investigation itself did not then come to an end. In addition, it was confirmed that, due to the nature of the Director’s powers, a person charged was not entitled to invoke the right to silence when questioned after being charged.” (Website of the Serious Fraud Office TE TAHI HARA TAWARE www.sfo.govt.nz).

⁸² Section 28 of the 1987 Act.

⁸³ New Zealand Serious Fraud Office Leaflet.

into account when determining whether a case involves serious or complex fraud:

- (i) “The suspected nature and consequences of the fraud;
- (ii) The suspected scale of the fraud
- (iii) The legal, factual and evidential complexity of the matter;
- (iv) Any relevant public interest consideration.”⁸⁴

6.65 The following criteria are also taken into account when deciding whether or not to investigate and prosecute a case: whether the fraud involves over \$500,000;⁸⁵ whether the fraud was perpetrated by complex means; and whether the fraud involves major public interest. The decision to prosecute is taken within the framework of the Solicitor General’s Prosecution Guidelines.

(5) Prosecutions to date

6.66 The system appeared to function well, and reported successful prosecutions in its early years. However, its efficacy was called into question between 1994 and 1997 as a result of a failed investigation, which revealed feuds within the organization and diminished public confidence in the office.⁸⁶ Serious fraud trials are lengthy, and tend to last at least several weeks. Multiple defendants are often involved. Nonetheless, the SFO had a 100% prosecution success rate for the year ending 30 June 2002 - an increase on its 91% success rate since its establishment. It completed 15 prosecutions fully, partially completed two other cases, and had 31 prosecution cases on hand. Seven of the prosecutions went to full trial, and frauds of over \$1 million were involved in over half the prosecutions. In a large percentage of SFO prosecutions, the defendant pleaded guilty. In specific cases, the SFO may engage specialist experts as required.

⁸⁴ Section 8.

⁸⁵ Approximately €250,000. However, if the cost of living is taken into account, NZ\$500,000 is akin to €500,000.

⁸⁶ Shameem “New Zealand: A Current Analysis of the New Zealand Serious Fraud Office” *Journal of Financial Crime*, (1998) 6 NO. 2-International 195-199.

6.67 The SFO has a close working relationship with the Inland Revenue.⁸⁷ The following two cases are examples of serious fraud cases prosecuted by the SFO which also involved tax evasion. In May 2001, a defendant was convicted of both corruptly accepting secret commissions, and also of filing false tax returns with intent to defraud the Inland Revenue. The defendant was sentenced to 18 months imprisonment. The conviction and sentence were appealed, but the appeal was dismissed. In June 2001, a former Tax Agent was sentenced to four years imprisonment. He pleaded guilty to 18 representative counts reflecting his theft of \$1.045m from the Inland Revenue among others.⁸⁸ Examples of other cases prosecuted by the SFO include the false representation of self-liquidating loans as successful and the use of documents with intent to defraud.

(6) Conclusion

6.68 *Although a Serious Fraud Office is outside the precise terms of reference of the Paper, it was worthwhile to consider the multi-disciplinary approach to the investigation and prosecution of serious fraud adopted by the SFO in New Zealand. The Commission does not recommend the creation of a Serious Fraud Office in Ireland.*

⁸⁷ See further Appendix Chapter 8A.

⁸⁸ Report of the Serious Fraud Office TE TAHI HARA TAWARE for the year ended 30 June 2001.

CHAPTER 7 CRIMINAL REVENUE COURT

A Introduction

7.01 In this chapter, we consider changes involving or related to a court which is dedicated to the trial of revenue offences.¹ It is worth emphasising that, while the phrase “revenue offence” is a convenient and often-used expression to capture 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. In particular, revenue offences are subject to the same constitutional protection as those which apply in the trial of any offence. Nor is there, at the moment, any specialised revenue court in this jurisdiction, the equivalent, say, of the Special Criminal Court.

¹ While not directed specifically at a revenue court, the classification of specialised courts which Auld LJ used in his discussion on specialised courts in *A Review of the Criminal Courts of England and Wales* is useful. The following are two (out of three categories: the third meaning was alternative dispute resolution in the form of arbitration, mediation or other form of dispute resolution) uses of the term ‘specialised court’, which Auld LJ identified:- “[C]ertain areas of criminal law may be so complex that the decision makers need special expertise. Usually this specialist knowledge refers to technical issues for which the ordinary criminal procedures are ill-suited. This might mean that instead of a judge and jury there would be a judge and lay members chosen for their professional qualifications and/or experience....[S]ome people refer to a specialist court to denote one where a certain type of case is heard at a certain time, for administrative or court users’ convenience, such as traffic courts, or night courts. In this instance there is nothing specialist in the nature of the court, its personnel, or in the powers available to it. It is merely a concentration of work in one time and place that would otherwise have been heard in exactly the same manner at some other time or in some other court. In this sense there is nothing ‘specialist’ about the court at all; it is a convenience of listing.”

Auld LJ *A Review of the Criminal Courts of England and Wales* (Lord Chancellor’s Department, September 2001) Chapter 9 “Decriminalisation and alternatives to conventional trial” at 376.

7.02 A specialist criminal revenue court might take one of at least three forms. First, in descending order of radical change, such a court could be staffed wholly or partly by experts in areas other than the law, such as accountants. The DIRT Inquiry considered whether a Revenue Court with “expert assessors”² or “constituted to have financial and accountancy assessor available to advise the Court”³ would “make a contribution to increasing the level of prosecution and compliance”⁴ with the Tax Acts (Part B). Secondly, it could sit without a jury (Part C). Thirdly, a specialist Circuit or District Court whose work would be confined to revenue trials, but otherwise would be unchanged from the present model, could be created. (Part D) Less radically, a listing system, involving the concentration of revenue trials before a judge with particular qualifications or experience in revenue law, could be established. (Part E) Finally, a list involving the concentration of revenue trials in a particular courtroom at a particular time could be used. (Part F)

7.03 In this Chapter, the Commission examines these models to determine whether certain modifications might be thought to be desirable in the trial of revenue offences. Since any such court would have to respect existing constitutional limitations, in each case we first consider any relevant constitutional objections, and then go on to consider the policy considerations.

B A Court of Accountants

7.04 When an accused is tried for a criminal offence, the Constitution guarantees the accused certain minimum protections, which are detailed in the following paragraphs. In the first place, the Constitution requires that criminal justice must always be administered in a court of law.⁵ This raises the question of what is a

² *Final Report of Committee of Public Accounts, Sub-Committee on Certain Revenue Matters* (Government Publications 2001).

³ *Ibid.*

⁴ *Ibid.*

⁵ Article 34.1 provides that: “Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution....”

‘court’. In particular, it raises the question of what restrictions exist on the sort of modifications which it might seem desirable to make in the institution trying a revenue offence, as compared to a conventional court. The following general points seem clear. First, “in order to fulfil the requirement of being a court, an entity must comply with the precepts as to remuneration, removal, impartiality, etc., [of judges] set out in the Constitution.”⁶ Likewise a court must be independent. Article 35.2 provides that “[a]ll judges shall be independent in the exercise of their judicial functions and subject to this Constitution and the law.” Article 35.5 reinforces the independence of judges by providing that their remuneration shall not be reduced during their continuation in office.⁷ Finally, as a result of

Article 37 establishes an exception to this section but only where what is involved is “the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters”.

⁶ Morgan *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell 1997) at 220. Article 34.1 states “Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and save in such special and limited cases as may be prescribed by law, shall be administered in public.”

⁷ In *Eccles v Ireland* [1985] IR 545, the Supreme Court held that courts have a constitutional guarantee of independence in the performance of their functions apart from the express guarantee of independence contained in Article 35. The Supreme Court based its decision on the defendant’s right to “a trial in due course of law.” The defendant challenged the constitutionality of section 39 of the *Offences Against the State Act 1939*. He argued that the members of the Court were deprived of judicial independence because (i) Article 35 did not apply to them; (ii) section 39 of the Act permitted the Government to remove the members of the Court at will, and (iii) the Minister for Finance fixed the members’ remuneration.

He contended that, as a result of these provisions, he was deprived of his right to a trial in due course of law under Article 38 of the Constitution. Finlay CJ rejected the defendant’s contention, and held that the independence of the members of the Special Criminal Court was constitutionally guaranteed.

By contrast, the Labour Court is an example of an entity which is not a court, notwithstanding its title, as “its members do not enjoy security of tenure, nor security of salary; several of its members are nominated by either the principal employers’ or employees’ organisations; and ‘the principal de facto qualification for membership [is] not legal knowledge but some expertise in industrial relations’” Morgan *The Separation of*

Article 34.1, the entity would have to sit in public, save in those “special and limited” circumstances prescribed by law.⁸

7.05 But the point which arises in the present context is whether judges have to be legally qualified. Would it suffice if they were qualified accountants? It seems probable that the answer would be ‘no’. It is true that the Constitution says nothing about a judge’s qualifications save that they “shall be determined by law”.⁹ However, the first of a court’s obligations is that it administers justice under the law. The judicial oath set out in Article 34.5.5 requires all judges to pledge that they “...will uphold the Constitution and the laws”. It would seem elementary that a judge should have some formal qualification in law in order to discharge this duty. Secondly, if the court were composed of accountants, it is arguable that a defendant’s right under Article 38.1 to be tried “in due course of law” would be infringed.¹⁰ Finally, it is relevant that statute has laid down

Powers in the Irish Constitution (Round Hall Sweet & Maxwell 1997) at 119.

⁸ Article 34.1 is quoted in footnote 5 above.

⁹ Article 36 provides that: “[s]ubject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say: (i) the number of judges of the Supreme Court, and of the High Court, the remuneration, age of retirement and pensions of such judges, (ii) the number of the judges of all other Courts, and their terms of appointment, and (iii) the constitution and organization of the said Courts, the distribution of jurisdiction and business among the said Courts and judges, and all matters of procedure.”

Commenting on Article 36(iii), in *The State (Walshe) v Murphy and the AG* [1981] IR 275, Murphy J: “It seems to me that, since the word “constitution” in Article 36(iii) involves the concept of appointment, formation or making up, it would appear to follow that the determination of the qualifications of any person to be appointed as a judge of any court is clearly within the provisions of Article 36(iii) and that, therefore, not only would a statute providing such qualifications be consistent with the provisions of Article 36 in the manner which I have already outlined, but there would be an obligation on the legislature to provide for such matters by statute.”

¹⁰ Article 38.1 provides that “No person shall be tried on any criminal charge save in due course of law”. See *Shelly v Mahon* [1990] 1 IR 36, holding in rather different circumstances that: “one of the requisites, if that right [the right to be tried in due course of law] was to be respected, was that he should have been tried in a court established by law by a judge appointed

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.¹¹ If a new court were established in order to try revenue offences, and the court were staffed by accountants sitting in a judicial capacity, presiding over criminal trials, it would depart from this tradition and established practice.

7.06 *The Commission does not recommend the establishment of a court whose members are qualified in a field other than law, for instance, accounting.*

C An alternative to jury trials

7.07 Here, the Commission considers whether revenue offences ought to be tried on indictment by a court sitting without a jury. As before, we examine first the constitutional imperatives and then the policy considerations.

7.08 Article 38.5 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 Article 38.2,¹² which allows “minor offences” or less serious offences, including less serious revenue offences, to be tried in the District court without a jury. However, we are discussing indictable offences here.

7.09 Another important exception is contained in Article 38.3, which provides a constitutional basis for the establishment of special criminal courts, with no jury, where “the ordinary courts are

in the manner appointed by the Constitution, since this is how Article 34 provides that justice should be administered.”

¹¹ For example, in order to qualify for appointment to the District Court, the candidate must be a person “who is for the time being a practising barrister or solicitor of not less than ten years' standing”. Section 29(2) of the *Courts (Supplemental Provisions) Act 1961*. Barristers or solicitors of not less than twelve years' standing are eligible for appointment to the High Court and Supreme Court. Section 4 of the *Courts and Court Officers Act 2002* amended section 5 of the *Courts (Supplemental Provisions) Act 1961* to include solicitors.

¹² The other exceptions are the trial of offences in special courts (Article 38.3), and trial before military tribunals (Article 38.4).

inadequate to secure the effective administration of justice, and the preservation of public peace and order.”¹³ For this exception to be invoked, Part V of the *Offences Against the State Act 1939* has to be brought into force.¹⁴ While the current Special Criminal Court was established against a background of subversive crime, its jurisdiction is not confined to subversive crime.¹⁵ Although the creation of a special criminal court to try revenue offences would appear not to fall within the terms of Article 38.3, Walsh J hinted in *The People v Quilligan (No. 1)*¹⁶ that activities which are injurious to the economic position of the State might fall within the terms of the 1939 Act, the wording of which is patterned on Article 38.3. He stated that:

“It is not at all impossible that in the light of the economic conditions in the State there could be activities which would be very injurious to the economic position of the State and might equally well be comprehended by the Act. In fact in the years during the last war and the years following it, the Special Criminal Court was very frequently engaged in the trial of what were called “black market” cases... It is common knowledge, and indeed was discussed in the debates in the Oireachtas leading to the enactment of the Act of 1939, that what was envisaged were cases or situations of a political nature where juries could be open to intimidation or threats of various types. However a similar situation could also arise in types of cases far removed from what one would call ‘political type’ offences.”¹⁷

¹³ Article 38.3 provides: “1 Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order. 2 The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.”

¹⁴ A 1939 proclamation led to the establishment of special criminal courts which functioned until 1946 and fell into disuse until 1961. A year later, the 1939 proclamation was revoked. The present Special Criminal Court was established pursuant to a Government proclamation issued in 1972.

¹⁵ Byrne and McCutcheon *The Irish Legal System* (4th ed Butterworths 2001) paragraph 5.100 at 190.

¹⁶ [1986] IR 495.

¹⁷ [1986] IR 495, 509.

7.10 Nevertheless, this would seem rather slim authority on which to try a revenue offence in a non-jury court, at any rate in present circumstances.¹⁸

7.11 Despite the rather clear constitutional ban imposed by Article 38.5, it is worth considering, from a policy perspective, the removal of the jury in tax prosecutions. In an analogous area of the law, serious fraud, the case for removing the traditional jury was recently considered in the UK. The British Home Office Consultation Paper, *Juries in Serious Fraud*¹⁹ considered the particular problems presented by serious fraud trials and possible alternatives to jury trial. However, in contrast to our own reference, the British Home Office Consultation Paper was prompted by a concern that the system in place for the trial of serious fraud offences was not working satisfactorily.

7.12 Ranging widely, *Juries in Serious Fraud* discusses four possible alternatives to conventional jury trials, namely:

- (i) the use of special juries, who “would be screened for their suitability to sit on a fraud trial jury” or the maintenance of a ‘special jurors’ pool for fraud trials;

¹⁸ The *Report of the Government Advisory Committee on Fraud* seems to have been of the same broad view. It also considered Article 38.5.2 of the Constitution and while it did not mention *Quilligan* it concluded that “[i]t cannot be said, no matter what doubts there may be over the ability of juries to cope with serious fraud trials, [that] the public peace and order are at risk ... [i]t is clear that none of the Constitutional exceptions which permit a departure from trial by jury can reasonably be said to apply to serious fraud trials. Such trials must, therefore, be held before a jury”: *The Report of the Government Advisory Committee on Fraud* (Government Publications 1993) paragraph 8.2.

¹⁹ *Juries in Serious Fraud Trials* A Consultation Document (Home Office February 1998) at paragraph 2.10: “[i]n 1998 the Home Office issued a consultation paper dealing with the method of trial for cases of serious and complex fraud. The paper sought to respond to particular difficulties which had arisen in cases in England and Wales and put forward options based on its law and procedures. The operation of jury trials in respect of other offences was not considered, nor were aspects of fraud trials other than the composition of the fact-finding tribunal. It invited views both on whether an alternative method of trial should be available in serious and complex fraud cases and on the viability of various options.” (<http://www.uk-fraud.info/legislation.htm>).

- (ii) the judicial option considers the possibility of trial by a judge or judges, “who, in either case, may be with or without the assistance of expert assessors.”;
- (iii) the tribunal option would consist of a judge sitting with specially-qualified lay people; and
- (iv) trial by a single judge with a jury for key decisions.

7.13 Using the same framework, an even more recent study by Auld LJ, *A Review of the Criminal Courts of England and Wales*, recommended the third option, namely that serious and complex fraud cases should be tried by a judge sitting with lay members who would be chosen from among a panel of experts established and maintained by the Lord Chancellor in consultation with professional and other bodies. The judge would be the sole judge of law, procedure, admissibility of evidence and sentence, whilst the judge and lay members would decide issues of fact. Alternatively, he recommended that such cases should be heard by a judge alone where a defendant opts for it. The Report also recommended that “judges trying such cases...should be specially nominated for the purpose as now, and provided with a thorough, structured and continuing training for it”.²⁰

7.14 Similarly the issue has arisen in New Zealand in the context of serious fraud. In its 2001-2002 Annual Report, the Director of the Serious Fraud Office had the following to say on the matter:

“[f]rom time to time the suggestion is made that there should be an alternative to ordinary jury trials for the more serious or complex fraud cases. For example, a Judge alone or a Judge sitting with assessors. I have an open mind on this matter. I can see several advantages in terms of the efficiency of the trial process if jury trials were to be

²⁰ Auld LJ *A Review of the Criminal Courts of England and Wales* (2001) Recommendation at 213. However, research conducted in New Zealand is reported to have established that “while complex fraud cases posed difficulties for juries more frequently than other kinds of case, they did not invariably do so...fraud is not the defining characteristic of cases which cause confusion for jurors because of technical evidence. Simply removing cases from juries based on offence category or number of counts is therefore too simplistic.” McEwan, Redmayne and Tinsley “Evidence, jury trials and witness protection—the Auld review of the English criminal courts” (2002) 6 E & P 163.

modified for our trials. It may well be that a professional panel or a Judge sitting with advisors may better understand the complexity of the offending. Against that, however, is the fact that fundamental to any allegation of fraud is the question of basic dishonesty. That is the type of issue that arguably falls fairly and squarely within the domain of a jury. Based on the success rate of the Office to date, I could not claim that jury trials have seriously impeded the work of the Serious Fraud Office.”²¹

7.15 In Ireland, in the handful of prosecutions for serious tax offences brought to date, it has not been established that revenue trials cause special problems for jurors. It is easy to see how this should be so, bearing in mind that criminal cases do not turn on sophisticated points of tax law as, for instance, the distinction between tax avoidance and evasion. In years to come, the type of offences being prosecuted could change so that this sort of difficulty may arise in criminal trials, but, at the moment, no problems have been reported with the workings of the jury. Thus, all that can be said with certainty is that, in the trials of revenue offences which have occurred in this country, it has not been established or suggested that the jury trial system is flawed.

7.16 Another consideration which tells positively in favour of the present (jury) system is the classical argument against non-jury trials, namely that one of the basic reasons for the jury is to keep the administration of the criminal justice system broadly in line with the standard of public morality of the average person on Dublin Bus, even if the jury may incline to do justice rather than to adhere to the strict letter of the law. In plain language, a jury may acquit someone because the law under which the individual is tried is unfair or has been unfairly applied in the particular case.²² In *de Burca v Attorney*

²¹ *Report of the Serious Fraud Office TETAHI HARA TWARE for the year ended 30 June 2002*, 14.

²² “Jury nullification arises where, based on its own sense of justice or fairness, the jury rejects the law and refuses to convict in a particular case even though the facts seem to allow no other conclusion but guilt. In essence, it is where the jury follows its conscience, ignoring the judicial direction on the law.” Carey “Jury nullification – Democracy and Rationality” (1999) 7 ISLR 1, 10. Take, as an example, the acquittal by a jury of the civil servant, Clive Ponting, in 1985, on charges under the

General,²³ Henchy J described the purpose of the constitutional guarantee to a jury trial in the following terms:

“There is no doubt that the primary aim of s. 5 of Article 38 in mandating trial by jury for criminal offences other than minor ones ... is to ensure that every person charged with such an offence will be assured of a trial in due course of law by a group of laymen who, chosen at random from a reasonably diverse panel of jurors drawn from the community, will produce a verdict of guilty or not guilty free from the risks inherent in a trial conducted by a judge or judges only, and which will therefore carry with it the assurance of both correctness and public acceptability that may be expected from the group verdict of such a representative cross-section of the community.”²⁴

Official Secrets Act 1911. The facts concerned the ‘leaking’ of Ministry of Defence documents relating to the sinking of the Argentine ship Admiral *Belgrano* during the Falklands war to the Opposition MP Tam Dalyell. Given the draconian character of the legislation, there is much to be said for the view that Mr Ponting had committed the offence charged. However, the jury simply acquitted.

However, there is an obvious a contrary view in respect of verdicts of this type. Lord Auld described jurors’ ability to acquit and convict “in defiance of the law and in disregard of their oaths, as more than an illogicality. It is a blatant affront to the legal process and the main purpose of the criminal justice system – the control of crime – of which they are so important a part.” The Auld Report recommended that it be declared by law that juries have no such right. Auld LJ *A Review of the Criminal Courts of England and Wales* (2001), paragraphs 105-107.

²³ [1976] IR 38, 74.

²⁴ Trial by jury has been described as “a most valuable safeguard for the liberties of the citizen” (*People (DPP) v O’Shea* [1982] IR 384, *per* Walsh J) and “a hallowed institution which, because of its ancient origin and involvement of 12 randomly selected lay people in the criminal process, commands much public confidence.” (Lord Auld, Chapter 5, paragraph 1). See also Law Reform Commission *Report on Penalties for Minor Offences* (LRC 69 - 2003) at 22-27, for a discussion on the importance of jury trial.

However, it has been held that “the operation of jury trials in criminal cases is not to be regarded as fixed and immutable; this was made clear by the amendment of the law that was brought about as a consequence of *de Burca v Attorney General*”. (*Per* O’Flaherty J in *O’Callaghan v Attorney General* [1993] 2 IR 17). In *O’Callaghan*, the Court upheld the ending of

7.17 Revenue criminal law is deliberately drafted quite strictly, and therefore a good deal depends on convictions occurring only in what might reasonably be regarded as serious cases.²⁵ Bearing this in mind, it seems that the classical justification for the jury, just rehearsed, does have a role to play in the area of revenue offences.

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

D A Specialist Circuit or District Court whose work is confined to Revenue Offences

7.19 A court whose jurisdiction is confined to revenue work would probably not be unconstitutional. While most courts are general, in the sense that they cover a wide range of matters, there is nothing in the Constitution to require this. As to policy, a number of benefits could arise from establishing a specialised division of the Circuit Criminal Court to hear serious tax evasion cases. These would include the accrual of experience and expertise in the area, and the introduction of stability and consistency in the administration of the list.

the unanimity rule. Probably, however, a change to the composition, by which, say, all members have to be graduates to cope with complicated cases or have up-to-date income tax returns, in order to avoid bias in favour of the accused, in revenue cases, would be regarded as constitutionally discriminatory. See *de Burca v Attorney General* [1976] IR 38.

The *Report of the Government Advisory Committee on Fraud* “gave some consideration to recommending the inclusion in each serious fraud trial jury of one or more jurors from a panel of persons, for example accountants, with particular knowledge of the technical matters likely to arise during the trial...attracted to this idea, but felt that it risked falling foul of the criteria of representativeness established by the Supreme Court in the case of *de Burca v the Attorney General* [1976] IR 38.” (*The Report of the Government Advisory Committee on Fraud* (Government Publications 1992/3 paragraph 8.4)).

²⁵ While the offences outlined in section 1078 of the *TCA 1997* seem quite stringent, there might not be a specific offence of aiding and abetting another person to commit one of the revenue offences outlined in the section.

7.20 But there are three arguments in the opposite direction. In the first place, specialised criminal courts have been rare and often unpopular in the history of the common law.²⁶ Experience has thrown up a preference for a general court which hears cases of all or several types. The reasons for this, often depending on the particular historical era, include the dangers that judges would become ‘case-hardened’; controlled by the limb of the Executive with which they constantly work, or even too familiar with the parties and their lawyers. To put the point another way: the view has been taken that dilution with other work enhances or maintains a desirable level of judicial detachment.²⁷ Secondly, revenue offences have been classified as crimes, and therefore should be treated in the same manner as all other crimes. Otherwise, the stigma attached to a conviction for a revenue offence may be less than that attached to other crimes which are processed within the normal criminal justice system.

7.21 The third point requires separate treatment, according to the level at which the court would sit. Would it be a specialised Circuit

²⁶ However, specialisation does exist in Ireland in the form of the Special Criminal Court. In a sense, specialisation in the criminal field has also emerged in the form of the Central Criminal Court. Only certain types of offences may be tried in the Central Criminal Court, for example: murder; attempted murder; conspiracy to murder; rape, aggravated sexual assault and attempted aggravated sexual assault.

In the UK over the past 15 to 20 years, the work of the courts has become increasingly specialised, and certain types of specialised work are limited to judges with authorizations, colloquially known as ‘tickets’. “In the criminal context, this applies to murder, normally tried by a High Court Judge but releasable to one of a small number of Circuit Judges, rape and serious sexual offences... and serious fraud.” In the area of serious sexual offences, however, the number of judges with rape tickets outnumbers those without such tickets. Due to the number of rape cases and the need to deal with these cases expeditiously, about two-thirds of Circuit Crime Judges are authorised to hear rape cases. A number of the remaining third not authorized are judges who have been recently appointed, and have not yet attended the qualifying course. See Mr Justice Christopher Pitchers *Allocating Crime for trial in England and Wales*, 4 at the Irish Working Group on the Jurisdiction of the Courts Conference: *The Criminal Jurisdiction of the Courts: Looking to the Future*, 22-23 November 2002.

²⁷ See Chapter 4 for a further discussion of the advantages and disadvantages of specialised courts.

or District Court; or a court which could sit either as a Circuit Court or a District court? As regards the first of these options, the number of revenue offences prosecuted on indictment has so far been negligible (see paragraphs 5.25-5.33). Thus, as of now a specialised criminal division of the Circuit Court created solely to try revenue offences would be under-employed.

7.22 Alternatively, it has been suggested by one group²⁸ that there may be a greater need for a revenue court at the District Court level. This proposal is based on the difficulty which is said to be associated with getting a case listed in the District Court and the low priority afforded to revenue cases in the District Court. As against this, the Revenue Commissioners have informed the Law Reform Commission that, under the present arrangements, the summary prosecution for failure to file returns is routine and unproblematic. The Revenue Commissioners have not suggested that there is a need for a revenue court at District Court level, and maintain that any delays experienced in the prosecution of summary revenue offences are those common to all offences prosecuted in the District Court.

7.23 *The Commission does not, at the moment, recommend the establishment of a specialised criminal revenue court, at either District or Circuit Court level (or both).*

E A List: The Concentration Of Revenue Trials before a Judge with Particular Qualifications or Experience in Revenue Law

7.24 A compromise, which secures some of the advantages, without the disadvantages, of a separate court would be a separate 'list': the trial of revenue offences would be assigned to judges in order to ensure an appropriate level of expertise for trying revenue offences. In order to avoid over-familiarity between the judges administering the list and the practitioners representing the taxpayers the list ought to be assigned to at least three judges and presumably

²⁸ IMPACT communication to the Law Reform Commission 21 June 2002. IMPACT based its proposal on the need to increase the penalties for failure to file returns and make available the required Court time to enforce an increased sanction. Section 145 of the *Finance Act 2003* increases the maximum fine that can be imposed on a person convicted of a summary revenue offence under section 1078, *TCA 1997* from €1,900 to €3,000.

more. Possibly a specialist revenue court could evolve, with time, from such a listing system.

7.25 While lists are becoming more commonplace in civil cases, they are only beginning to emerge in the criminal field. For example, the President of the High Court has indicated his intent that the judge or judges assigned to hear civil competition cases would also be made available to sit in the Central Criminal Court in cases involving offences under the *Competition Act 2002* triable by that Court. If judges with an expertise emerged on the civil side of revenue law, an arrangement similar to the one intended to be introduced for the trial of offences under the Competition Act could be introduced.

7.26 *The Commission recommends 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.*²⁹

7.27 Least radical would be an arrangement which would simply involve the concentration of work in a particular courtroom. There are no such lists at Circuit Court level. However, currently, at District Court level in Dublin, Revenue prosecutions are all listed on the same day, and, typically, will be listed with other prosecutions by State agencies.³⁰ The cases are assigned to the one courtroom for administrative convenience. A judge could be assigned to that courtroom for a week or two at a time, but typically not longer, as the judges' work in a rota.

7.28 *The assignment of courtrooms and times is an administrative convenience and therefore the Commission does not have any recommendations to make in this respect.*

²⁹ The Commission has made a similar recommendation in relation to the jurisdiction exercised by the Circuit Court in appeals from the Appeal Commissioners at paragraph 4.31.

³⁰ The Revenue Commissioners apply to the Court for a summons, are given a date by the Court Office and the summons is served on the accused.

F Evidential and Procedural Changes

7.29 Apart from changes to the forum, the question arises of whether the evidential and procedural rules should be modified in revenue trials.

7.30 Take first the Constitution: if procedural and evidential rules were adjusted to such an extent as to deny an accused a trial in due course of law, it would violate the guarantee of due process (“due course of law”) in Article 38. While the scope of the Article 38.1 guarantee is difficult to define, it would certainly prevent any departure from the long-recognised protections which an accused enjoys at a criminal trial. Mr Justice Gannon in *The State (Healy) v Donoghue*³¹ had the following to say in relation to the guarantee:

“The phrase “in due course of law”...is a phrase of very wide import which includes in its scope not merely matters of constitutional and statutory jurisdiction, the range of legislation with respect to criminal offences, and matters of practice and procedure, but also the application of basic principles of justice which are inherent in the proper course of the exercise of the judicial function.”

7.31 The accused’s rights include:

“the right to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given.”³²

7.32 Furthermore, one of the cornerstones of a criminal trial is that the accused is presumed innocent until proven guilty, and therefore there could be no departure from this presumption: the prosecution is required to prove its case beyond reasonable doubt.³³

³¹ [1976] IR 325, 335.

³² [1976] IR 325, 335-6. See to similar effect O’Higgins CJ in the Supreme Court at 349.

³³ *Hardy v Ireland* (1994) 2 IR 551, *per* Hederman J.

7.33 However, while this legal obligation to prove guilt must always remain on the prosecution, the evidential burden of proof may, constitutionally, be reversed. In *O’Leary v Attorney General*,³⁴ the constitutionality of section 24 of the *Offences Against the State Act 1939* was challenged. Section 24 provided that possession of an incriminating document would be proof, until the contrary was proven, that the person in possession of the document was a member of an unlawful organisation. O’Flaherty J in the Supreme Court³⁵ held that section 24 only amounted to establishing the evidence, as opposed to proof. He held that “the important thing to note about the section is that there is no mention of the burden of proof changing, much less that the presumption of innocence is to be set to one side at any stage.” In *O’Leary*, Costello J stated that:

“The Constitution should not be construed as absolutely prohibiting the Oireachtas from restricting the exercise of the right of the presumption of innocence. The right is to be inferred from Article 38, which provides that trials are to be held ‘in accordance with law’ and it seems to me that the Oireachtas is permitted in certain circumstances to restrict the exercise of the right because it is not to be regarded as an absolute right whose enjoyment can never be abridged.”³⁶

³⁴ [1993] 1 IR 102; [1991] ILRM 454.

³⁵ [1995] 1 IR 254.

³⁶ The issue was addressed again by the Supreme Court in *Hardy v Ireland* [1994] 2 IR 565, where section 4 of the *Explosive Substances Act 1883* was unsuccessfully challenged. Section 4 provided: “Any person who...knowingly has in his possession or under his control any explosive substances, under such circumstances as to give rise to a reasonable suspicion that he...does not have it in his possession or under his control for a lawful object, shall, *unless he can show that he...had it in his possession or under his control for a lawful object*, be guilty of felony.”

The Supreme Court held that section 4 did not displace the prosecution’s obligation to prove all the elements of the offence beyond reasonable doubt. It merely permitted certain inferences to be drawn from facts proven beyond reasonable doubt, and, as such, did not violate the accused’s right to a trial in due course of law. Hederman J concluded that: “[w]hat is kept in place...is the essential requirement that, at the end of the trial and before a verdict can be entered, the prosecution must prove that it has proved its case beyond all reasonable doubt.”

7.34 An example of a provision of this type in the context of prosecutions for revenue offences is section 1078(6), which provides:

“In any proceedings under this section, a return or statement delivered to an inspector or other officer of the Revenue Commissioners under any provision of the Acts and purporting to be signed by any person shall be deemed until the contrary is proved to have been so delivered and to have been signed by that person.”

7.35 Section 161 of the *Finance Act 2003* introduces a number of other presumptions which will assist the Revenue Commissioners in investigating cases with a view to prosecution. For example, section 1078B(1) provides:

“(3) Where a document 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.

(4) Where a document purports to have been created by a person and addressed and sent to a second person, it shall be presumed, unless the contrary is shown, that the document was created and sent by the first person and received by the second person and that any statement contained therein- (a) unless the document expressly attributes its making to some other person, was made by the first person, and (b) came to the notice of the second person.

(5) Where a document is retrieved from an electronic storage and retrieval system, it shall be presumed unless the contrary is shown, that the author of the document is the person who ordinarily uses the electronic storage and retrieval system in the course of his or her business.”

7.36 No doubt on the basis of such precedents as *O’Leary* (paragraph 7.33), such provision is constitutional. However, on policy grounds, the Commission feels that the legislature should be cautious in making changes to procedural and evidential rules, for revenue offences. An important policy consideration is that a significant aspect of a criminal conviction is the public opprobrium

which the offender attracts, but plainly this feature may be eroded if it is perceived that special rules had been imposed to facilitate conviction.

G Specialisation in Other Jurisdictions³⁷

7.37 Specialised criminal chambers of the courts, which only deal with financial/tax cases have been established in Austria.³⁸ In Germany, legislation providing for the establishment of chambers with special jurisdiction in ‘white-collar’ cases at the Regional Court level was enacted in 1971.³⁹ These chambers are not separate from the general courts “but only form one of the specialised chambers of the general court, acting in the framework of the Landgericht”. The aim behind the establishment of these chambers was “to further or speed up the criminal process in such cases”.⁴⁰ The substantive jurisdiction of the chambers is limited to offences committed in the framework of economic activities, actual or pretended, which damage economic life, the general public, or whose investigation requires specialised commercial knowledge. Offences under customs and tax laws fall within the jurisdiction of the chambers.⁴¹ France created specialised chambers to cater for financial and economic matters in 1975.

7.38 Italy has not created special courts to deal with white-collar crime. “Special courts or special chambers with jurisdiction in the economic crime field do not exist in Spain but there is a *de facto* centralisation of important and complex ‘white collar crime’ cases in

³⁷ See Chapter 8A for a discussion of the procedures in place in New Zealand and the Netherlands.

³⁸ These are known as “Finanzstrafverfahren = Steuerstrafverfahren”. B. Huber Article. *Leitner*, Grundzüge des österreichischen Finanzstrafrechts, Wien 1996.

³⁹ That is the level of the higher entrance courts (Landgericht). Gesetz zur Änderung des Gerichtsverfassungsgesetzes vom 8.9.1971 (BGBl. I p. 1513).

⁴⁰ “Under § 74 c ss. 3 GVG the legislators of the Länder can establish such a specialised chamber for several regional courts of the area with the “aim to further or speed up the criminal process in such cases”.” B. Huber *Leitner*, Grundzüge des österreichischen Finanzstrafrechts, Wien 1996. Article.

⁴¹ With the exception of drug or car tax offences.

the *Audiencia Nacional* in Madrid “for those offences which are committed by groups or organised gangs, or which have or may have effects on the security of trade and commerce, on the national economy or can cause financial disadvantage for a great number of people in the area of more than one Audiencia” (provincial court).⁴²

⁴² B. Huber *Leitner*, Grundzüge des österreichischen Finanzstrafrechts, Wien 1996. Article.

CHAPTER 8 SUMMARY OF RECOMMENDATIONS

8.01 The provisional recommendations contained in this Paper may be summarised as follows:

8.02 **Chapter 2 Civil Penalties**

8.03 The Commission recommends that the Revenue Commissioners be responsible for publishing the lists in full, with a breakdown of the tax, penalties and interest involved, in at least two nationally circulated newspapers. [Paragraph 2.27]

8.04 The Commission recommends that the appointment of external reviewers “should be a regular and permanent function of a body other than Revenue.”¹ [Paragraph 2.31]

8.05 The conclusion, which seems to the Commission to follow is that the European Convention 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. Apart from the Convention there are some policy arguments, discussed at paragraph 3.78, which would support this. [Paragraph 2.86]

8.06 Accordingly, the Commission recommends that a fresh right of 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. [Paragraph 2.90]

8.07 The Commission does not recommend any changes with regard to self incrimination as it is unclear whether the incorporation of the European Convention will require any modifications of the practices currently employed by the Revenue Commissioners. The Commission invites submissions on the impact of the domestic application of the ECHR in relation to a taxpayers’ right to silence and freedom from self incrimination. [Paragraph 2.98]

¹ Law Society of Ireland Submission to Revenue Powers Group, 7.

8.08 Chapter 3 Appeals

8.09 The Commission recommends the establishment of an open and formal selection and appointment process for future Appeal Commissioners. An Appeal Commissioner should be appointed for a seven year fixed term, which is renewable. The proposed system would be that a group of experts from the fields of accountancy, law and taxation be used to short-list three possible candidates for appointment to the Office of Appeal Commissioner or else if none are eligible for security or other good reasons, the Minister should request the expert group to reconvene and engage again in the process of nomination. The Minister for Finance would then choose the Appeal Commissioner from among this further shortlist. The expert group should recommend whether or not the Minister for Finance should reappoint an Appeal Commissioner. [Paragraph 3.45]

8.10 The Commission believes that it suffices if an Appeal Commissioner has a professional qualification for a specified period in any of the fields of: legal practice, accountancy or taxation and is otherwise well qualified. [Paragraph 3.47]

8.11 When a vacancy appears, the Commission recommends that the qualifications for the new appointee should be specified as minimum qualifications in tax, accounting or law, irrespective of the profession of the remaining Commissioner. [Paragraph 3.49]

8.12 Modelled on the similar and unexceptional provisions quoted in the previous footnotes, the Commission recommends that any new legislation ought to give the Office of the Appeal Commissioners the same sort of security as given to the bodies discussed in paragraph 3.50. We recommend that the appointment of the 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. [Paragraph 3.52]

8.13 We suggest that three months would be an appropriate period as it would afford an Inspector a reasonable amount of time to assess the case. [Paragraph 3.58]

8.14 This is very much a practical question. The Commission would welcome views of the informed public as to whether responsibility for listing appeals before the Appeal Commissioners should be removed from the Revenue Commissioners as considered in paragraph 3.59, or whether, as discussed in paragraph 3.57 the introduction of a three month time-limit within which an Inspector must respond in relation to listing an appeal would be sufficient. [Paragraph 3.60]

8.15 The Commission recommends that the Appeal Commissioners should specify, (perhaps in their procedures manual/explanatory guide - see paragraph 3.73) that, in appropriate and defined circumstances, the oath may be administered to the taxpayer or the Inspector of Taxes or both. [Paragraph 3.62]

8.16 The Commission recommends therefore that the Appeal Commissioners should control the record of their own decisions and make them available to both parties as of right. [Paragraph 3.64]

8.17 The Commission recommends 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. [Paragraph 3.71]

8.18 The Commission recommends the establishment, without delay, of an effective system for reporting decisions of the Appeal Commissioners, since knowledge of relevant precedents ought to be more widely accessible. [Paragraph 3.74]

8.19 The Commission recommends a change in the name of the Office of the Appeal Commissioners to the Tax Appeals Board. The Commission invites submissions on this point. [Paragraph 3.76]

8.20 The Commission recommends that the Appeal Commissioners' jurisdiction be extended to cover appeals against penalty determinations made by the Revenue Commissioners. A further fresh appeal should lie from the Appeal Commissioners to the Circuit Court and from there an appeal on points of law to the High Court and Supreme Court. The Commission looks forward at the consultation phase to hearing views on whether the Appeal Commissioners jurisdiction should be further extended to, for example, hardship cases. [Paragraph 3.81]

8.21 The Commission recommends that the Appeal Commissioners be given the power to issue precepts to all witnesses to assist them in performing their functions. [Paragraph 3.84]

8.22 The Commission recommends the retention of the taxpayers' right to appeal to the Circuit Court. [Paragraph 3.90]

8.23 In principle, it would seem appropriate to extend the Revenue Commissioners' right of appeal to the Circuit Court beyond Capital Acquisitions Tax cases. The Commission would welcome submissions on this point. [Paragraph 3.94]

8.24 The Commission recommends that the requirement that the Circuit Court judge make this special declaration be terminated. [Paragraph 3.96]

8.25 In light of the above discussion, the Commission recommends, at a minimum that an equivalent to section 933(2)(c), with the amendment suggested at paragraph 3.57, be extended to appeals before the Circuit Court Judge. The question arises whether the Court Services 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. The Commission looks forward to receiving submissions on this point. [Paragraph 3.100]

8.26 The Commission recommends that a registrar should attend all hearings. [Paragraph 3.110]

8.27 The delay experienced in relation to a case stated 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 makes no recommendation on this point. [Paragraph 3.117]

8.28 **Chapter 4 A Civil Revenue Court**

8.29 The Commission does not recommend the creation of a specialist civil court to replace the Office of the Appeal Commissioners. [Paragraph 4.21]

8.30 All in all, the Commission does not recommend a specialised civil revenue court in place of either the Appeal Commissioners or the Circuit Court, as the current avenues of appeal offer the advantages of specialisation at the level of the Appeal Commissioners, coupled with a generalist approach in the Circuit Court. In addition, there is informality in both venues which ensures that the appeal process is not dominated by lawyers, and remains an accessible forum for taxpayers to challenge tax assessments. Again, the volume of work does not exist at present to justify a separate revenue court. The Commission does not recommend the creation of a specialist revenue court, even on the basis of joint criminal and civil jurisdiction. [Paragraph 4.27]

8.31 Because of the increasing complexity of tax law, the Commission recommends that the assignment of judges should remain within the discretion of the President of the Circuit Court and that, where possible, the President of the Circuit Court should assign judges with some knowledge of tax law to tax appeals by arrangement with judges of each circuit. [Paragraph 4.31]

8.32 **Chapter 5 Offences and Prosecution**

8.33 The Commission recommends, in the interests of fairness, that a pre-prosecution letter be issued in all cases. [Paragraph 5.19]

8.34 **Chapter 6 Public Prosecution System**

8.35 The Commission recommends that the Revenue Commissioners continue to prosecute summarily under a delegation from the DPP, rather than under an independent statutory authorisation. The Revenue Commissioners should issue a pre-prosecution letter in all cases before issuing a summons. [Paragraph 6.22]

8.36 The Commission recommends that the arrangements currently in place for the prosecution of revenue offences be

maintained for a period and then reviewed in a few years. The Commission does not recommend the creation of a DFP. [Paragraph 6.40]

8.37 Accordingly, the Commission does not recommend any change to the current relationship between the Revenue Solicitor and the DPP and would not recommend the transfer of the functions performed by the Revenue Solicitor's Office to a DFP, if such an office was established. [Paragraph 6.46]

8.38 Accordingly the Commission does not recommend the transfer of summary prosecution functions to the DFP, in the event of a DFP being established. [Paragraph 6.48]

8.39 As mentioned at paragraph 6.51, since we have insufficient empirical evidence to answer these questions, the Commission makes no recommendations on the benefits of establishing a body with a joint investigation and prosecution role. Instead, we turn to consider a relevant foreign comparison. [Paragraph 6.58]

8.40 Although a Serious Fraud Office is outside the precise terms of reference of the Paper, it was worthwhile to consider the multi-disciplinary approach to the investigation and prosecution of serious fraud adopted by the SFO in New Zealand. The Commission does not recommend the creation of a Serious Fraud Office in Ireland. [Paragraph 6.68]

8.41 **Chapter 7 Criminal Revenue Court**

8.42 The Commission does not recommend the establishment of a court whose members are qualified in a field other than law, for instance, accounting. [Paragraph 7.06]

8.43 The Commission recommends the retention of jury trial in the case of trials on indictment for revenue offences. [Paragraph 7.18]

8.44 The Commission does not, at the moment, recommend the establishment of a specialised criminal revenue court, at either District or Circuit Court level (or both). [Paragraph 7.23]

8.45 The Commission recommends 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. [Paragraph 7.26]

8.46 The assignment of courtrooms and times is an administrative convenience and therefore the Commission does not have any recommendations to make in this respect. [Paragraph 7.28]

APPENDIX A COMPARATIVE SYSTEMS

A Introduction

1. We have chosen not to describe the UK here (though particular features of it will be found throughout the Paper) partly because information on this is readily accessible elsewhere and partly because the Irish system is largely derived from that of the UK so that its value as a comparator is limited. Instead, we have selected two other jurisdictions - New Zealand from the common law world and the Netherlands from the civil law world- each of which has like, Ireland been a constitutional polity,¹ free of any political extremism, for more than a century.

B The Netherlands

(1) Introduction

2. “In general, the Dutch are public-spirited about paying taxes. The bulk of the tax returns (92%) are paid on time, albeit in some cases after the issue of a reminder.”² The Tax and Customs Administration is responsible for collecting tax and on the whole have numerous ways in which to oblige taxpayers to pay and accordingly the amount that cannot be collected is limited. As will be seen from the following outline of the Dutch system for the administration and enforcement of the tax code, it is quite similar to the Irish system.

3. The policy of the Dutch tax authorities is aimed at achieving voluntarily compliance. The tax authorities have a range of measures at their disposal to encourage taxpayers to comply with their obligations. Sanctions, such as the imposition of fines and criminal charges, are used as a last resort. Cases will be selected for

¹ Leaving aside the occupation of the Netherlands during World War II (1940-45).

² Memorandum from Marian Bette of the Tax and Customs Administration.

investigation with a view to prosecution in accordance with certain criteria, detailed below. If a case involves fraud but is not selected for prosecution, the case will be settled at the administrative level. The Tax and Customs Administration will issue tax assessments for the amount of tax due and may levy fines. These fines can reach a maximum of 100% of the amount of tax due. A settlement may also be reached in certain cases. In such cases, the Tax and Customs Administration will offer the taxpayer a “deal” on behalf of the Public Prosecution Service. If the taxpayer pays a certain amount of money, no prosecution will take place. If the taxpayer does not agree to a “deal”, the case will be prosecuted. The Tax and Customs Administration does not have the power to publish the names, businesses and amounts of settlements or convictions, of taxpayers involved in tax fraud in official gazettes. This naming and shaming tactic is used in Ireland under section 1086 of the *TCA 1997*.

(2) *The General State Taxes Act 1959*

4. In the Netherlands, as in Ireland an Act of Parliament is needed for the imposition of State taxes and other levies.³ *The General State Taxes Act 1959* (“the Act”) regulates the imposition of State taxes and import and export duties. It is the main source of law on the enforcement of the tax code. The Act contains the general procedural rules in relation to tax returns, assessments and enforcement rules, which govern the imposition of administrative and criminal law penalties for contravention of the tax code. The *General Administrative Law Act* also applies to objections and appeals in tax law insofar “as the General State Taxes Act does not provide otherwise.”⁴ Chapter IX of the Act sets out the criminal provisions applicable to tax offences. Article 91 provides that the general Criminal Code applies unless the Act provides otherwise.

(3) *The Tax and Customs Administration*

5. The Taxes and Customs Administration (“TCA”) is responsible for levying and collecting State taxes, including customs duties. It “comes under the authority of the Minister of Finance and

³ Article 104 of the Constitution.

⁴ Vervaele and Klip *European Cooperation between Tax, Customs and Judicial Authorities* (Kluwer Law International 2002) at 53.

under the control of the Director General of Taxes.”⁵ The Minister will typically delegate responsibility for tax legislation and enforcement to the State Secretary, but the Minister will remain politically accountable.

6. The Fiscal Intelligence and Investigation Department (*De Fiscale inlichtingen- en opsporingsdienst* “FIOD”) provides an investigation service to the Tax and Customs Administration. The heads of the central and regional branches of the Fiscal Intelligence and Investigation Department and the investigation co-ordinators are also assistant public prosecutors. The FIOD officials have extensive powers of investigation, for example they may order the detention of suspects in police custody.⁶

7. Investigation and prosecution also come within the tax official’s remit. The Act grants tax inspectors the power to compel taxpayers and others to furnish particular information. If an individual fails to comply with an inspector’s request, the individual may face administrative or criminal sanctions as provided for in the Act. *Una via* provisions ensure that only one of the “two-track system of punitive sanctions” will apply. The sanction system was recently revised in order to comply with the provisions of the European Convention on Human Rights, as the imposition of an administrative penalty is regarded as a “criminal charge” for the purposes of Article 6 of the Convention.

8. The Act sets out maximum fines and leaves the inspector a large margin of discretion in determining the appropriate fine.⁷ The *Administrative Fines (Tax and Customs Administration) Order* contains rules for the imposition of fines. While the rules are not generally binding, they bind the tax inspector under administrative law.⁸ The Director of Taxes and the Procurators General at the Courts of Appeal issued rules, in the form of the Notification, compounding and prosecution guidelines for tax offences and

⁵ Vervaele and Klip *European Cooperation between Tax, Customs and Judicial Authorities* (Kluwer Law International 2002) at 60.

⁶ *Ibid* at 77.

⁷ Chapter VIIIA of the *General State Taxes Act 1959*.

⁸ In accordance with the *General Administrative Law Act*.

customs offences ('Notification Guidelines') in 1993 which are binding on all parties.

9. A taxpayer may appeal a penalty to the inspector⁹ and the inspector's ruling on the objection may in turn be appealed to the Court of Appeal.¹⁰ The taxpayer may appeal on points of law (*in cassation*) to the Supreme Court. The criminal and economic chambers of District Courts, and the tax, economic and criminal chambers of the Court of Appeal¹¹ and the Supreme Court provide jurisprudential guidance on the imposition of administrative and criminal penalties.

(4) The Public Prosecution Service

10. The Public Prosecution Service ("PPS"), the equivalent to the DPP, but subject to the Minister for Justice, is responsible for the investigation and prosecution of crime. Typically the public prosecutor will be an investigator and will control the investigation. However, an exception is made for tax investigations in the General State Taxes Act. The PPS has a prosecution monopoly. The PPS has

⁹ Article 67(g) para. 1 *General State Taxes Act* 1959. The taxpayer may appeal to the tax office where the assessment or other decision was made. If the taxpayer is still dissatisfied, an appeal may be brought to the tax chamber of the court of justice by the taxpayer. Finally an appeal, on a point of law, may be taken by the taxpayer from the Tax and Customs Administration to the High Court.

The Courts of Justice are administrative courts with responsibility for cases arising within their region. Each court of justice has a number of Tax Chambers, which may either sit in chambers of one judge or three judges. The difficulty and seriousness of the case determines whether a single judge or a chamber of three judges takes the case. The Courts of justice deal with all cases pertaining to tax assessments, administrative fines and interest levied by the Tax and Customs Administration. The High Court in The Netherlands has held that administrative fines imposed by the Tax Administration are criminal charges within the meaning of Article 6 of the European Convention for Human Rights. Therefore in cases of undue delay, for example, an administrative fine is mitigated or even abolished. Cases relating to collection and enforcement are dealt with by the Civil Courts. Further information on the Dutch Court system can be found on the following website www.rechtspraak.nl.

¹⁰ Article 26 *General State Taxes Act*.

¹¹ There are five Courts of Appeal. Each Court of Appeal is divided into civil, criminal and tax sections.

a certain margin of discretion in determining whether to bring a prosecution or not. Even where there is *prima facie* evidence of a crime, the PPS may decide that a prosecution is not in the public interest. The PPS operates under the Minister of Justice.¹²

(5) The Judiciary

11. The *Judiciary (Organisation) Act* governs jurisdictional issues in criminal cases. The (19) District Courts have jurisdiction in relation to both summary and serious offences under the tax legislation. This is a departure from the norm in relation to criminal offences since normally the sub-district court deals with summary offences.

12. There is an appeal from decisions in all serious cases and a limited right of appeal in relation to summary offences. The right of appeal in relation to summary cases only arises where a prison sentence has been handed down, or a fine in excess of a certain amount has been imposed or a confiscation order has been made. Appeals go to the Court of Appeal and from there on points of law (*in cassation*) to the Supreme Court.

13. Officials of the TCA and the ordinary police are responsible for the investigation of offences under the tax legislation. Most investigation is carried out by the FIOD, “although primary responsibility rests in principle with the Executive Board of the Tax and Customs Administration.”¹³ A decree from 1995 provides that officials of the FIOD may investigate all criminal offences.¹⁴ The PPS usually has responsibility for the investigation of criminal offences but an exception is made to the general principle in the case of offences punishable under the tax legislation. However, the public prosecutor retains some responsibility for the investigation of tax offences insofar as tax officials are investigating crime.

14. Another exception to the general prosecution system is made in the case of the decision to prosecute or not. Typically the

¹² Article 127 Judiciary (Organisation) Act.

¹³ See Vervaele and Klip *European Cooperation between Tax, Customs and Judicial Authorities* (Kluwer Law International 2002) at 65.

¹⁴ Extraordinary Investigating Officials (Fiscal Intelligence and Investigation Department) Decree 1995.

decision is made by the PPS but in the case of tax offences all files are first sent to the Executive Board of the Tax and Customs Administration for a decision on whether to forward the case to the public prosecutor. Tax and Customs Administration officials help the Executive Board of the Taxes and Customs Administration to decide whether criminal proceedings should be brought. If the Board decides that it is not in the public interest to prosecute, the Board will deal with the case itself. A public prosecutor cannot prosecute a case unless the Board refers the case to the PPS. The Executive Board has an exclusive compounding power.¹⁵ Thus both the Tax and Customs Administration and the PPS are involved in decisions on the investigation and prosecution of criminal tax and customs offences.¹⁶

(6) Administrative Fines

15. The Tax and Customs Administration may impose fines for minor or serious violations of the tax laws. These administrative fines are known as omission fines and offence fines respectively. There is no need to prove intention or any other form of guilt in order to impose an omission fine. Detection of an act contravening the statute will justify the imposition of a fine. However, an omission fine will not be imposed if there is an absence of all blame on the part of the taxpayer. The maximum omission fine is €4538.

¹⁵ Vervaele and Klip *European Cooperation between Tax, Customs and Judicial Authorities* (Kluwer Law International 2002) at 59

¹⁶ Vervaele and Klip *European Cooperation between Tax, Customs and Judicial Authorities* (Kluwer Law International 2002) at 67.

Table A: Omission Fines¹⁷

Finable act	Determination of amount of fine
Non-submission or late submission of tax return for assessment taxes (taxes imposed by way of an assessment) (art. 67a AWR).	Fixed amount, depending on the omission series, ranging from €113 for the first omission, €340 (second omission), €567 (third omission), €794 (fourth omission) to €1,134 for the fifth and subsequent omissions.
Non-submission or late submission of tax return for taxes that must be paid upon filing the return (self assessment) (art. 67b AWR).	Fixed amount, depending on the omission series, ranging from €57 for the second omission (the first omission is free) and €113 for the third and subsequent omissions.
Failure to pay on time for taxes that must be paid upon filing the return (self-assessment) (art. 67c AWR).	Percentage of the tax not paid on time, ranging from 1% with maximum of €1,134 for the second omission, to a fine of 5% with a maximum of €2,268 for the third and subsequent omissions.
Failure or partial failure to pay taxes that must be paid upon filing the return (self assessment) (art.67c AWR).	Percentage of the tax not paid on time, ranging from 1% with maximum of €1,134 for the first omission to a fine of 5% with a maximum of €2,268 for the second omission and a fine of 10% with a maximum of €4,537 for the third and subsequent omissions.

16. The maximum offence fine is 100% of the tax “that would not have been imposed had the tax inspector failed to detect the error.” Offence fines will only be imposed when the taxpayer has deliberately or as a result of gross negligence supplied the tax inspector with incorrect or incomplete information.

¹⁷ Extract from Bette *Presentation on Dutch Sanction System* (Dutch Tax Administration Oslo 2001).

Table B: Offence Fines¹⁸

Finable acts	Determination of amount of fine
The deliberate failure to submit a tax return, or submit it correctly or fully for tax imposed by way of an assessment (art. 67d AWR)	50% of the amount of the assessment
Through the intention or gross negligence of the taxpayer, insufficient tax is assessed as due (concerning taxes imposed by way of an assessment) (art. 67 ^e AWR)	50% of the amount of the additional tax assessment in the case of intention 25% of the amount of the additional tax assessment in the case of gross negligence
Through the intention or gross negligence of the taxpayer, insufficient tax is paid as due (concerning taxes that must be paid upon filing the return) (art. 67f AWR)	50% of the amount of the additional tax assessment in the case of intention 25% of the amount of the additional tax assessment in the case of gross negligence

(7) Criminal Charges

17. Article 69 of the Act outlines the following as constituting tax offences:

- (i) “A tax return as provided under the Tax Act is not submitted or submitted on time;
- (ii) A tax return as provided under the Tax Act is inaccurate or incomplete;
- (iii) A person required under the Tax Act to provide information, data or directions fails to do so, or provides incorrect or incomplete information;
- (iv) A person required under the Tax Act to make available data carriers or their content for consultation, fails to do so;
- (v) A person required by law to keep accounts fails to meet the legal obligations for maintaining and keeping accounts, and co-operating with their audit;

¹⁸ Extract from Bette *Presentation on Dutch Sanction System* (Dutch Tax Administration Oslo 2001).

- (vi) A person who under the Tax Act is required to issue an invoice or bill, submits an incorrect or incomplete document.”¹⁹

18. A maximum fine of €45,378 or six years imprisonment may be imposed for tax offences.

(8) *The Decision to Prosecute*

19. The tax authorities will determine whether the case is eligible for criminal charges on the basis of a points system. (See also paragraph 14 for further discussion on the manner in which the Tax and Customs Authority determines whether or not to refer the case for prosecution). If the case has three points ascribed to it, it will be considered eligible for prosecution. The following criteria are used by the tax authority to assign points to a case:

- (i) “Absolute amount of tax that has been evaded (the higher the amount, the higher the number of points);
- (ii) Whether the evaded amount is more than 25% of the total tax owed;
- (iii) First repeated tax offence;
- (iv) Recovery impossible;
- (v) Cooperation/knowledge of consultant;
- (vi) Combination with other than tax offences;
- (vii) Repetition of offence;
- (viii) Status of suspect/example function/cunning;
- (ix) Balanced law enforcement”.²⁰

20. The decision to prosecute is taken by the Public Prosecutions Department, after tripartite consultation between the Public Prosecutions Department, the FIOD and the officials of the tax authorities.

¹⁹ Bette *Presentation on Dutch Sanction System* (Dutch Tax Administration Oslo 2001).

²⁰ *Ibid.*

(9) Statistics

21. The Tax and Customs Administration and the PPS agree on the number of tax fraud cases which will be prosecuted each year. It was agreed that 450 cases would be prosecuted in 2001. This number was exceeded with 479 cases being prosecuted due to an overflow from previous years. 134 of these cases were dismissed, 81 were settled and the criminal courts gave rulings in the remaining 264.

22. The figures below show the seriousness of these cases (this is a general figure based upon the experiences of previous years):

Criminal loss	Percentage of total of cases prosecuted (approximately)
€ 0 - € 11,345	12%
€ 11,345 - € 113,445	48%
€ 113,445 - € 453,870	24%
€ 453,870 - € 22,698,000	15%
€ 22,689,000 - ...	1%

C New Zealand²¹

(1) *The Inland Revenue*

23. The Inland Revenue is the government department responsible for administering New Zealand's tax system. Sections 6 and 6A of the *Tax Administration Act 1994* charge the Commissioners of Inland Revenue and all departmental staff with responsibility for the care and management of the tax system. The Inland Revenue has adopted a strategy aimed at voluntary compliance with tax laws within the self assessment system. Sanctions exist for failure to comply with the tax laws. The Inland Revenue can prosecute taxpayers for criminal offences, impose civil penalties and collect outstanding tax debts through the Courts. The Inland Revenue's use of each of these options will be discussed in turn.

(2) *Criminal and Civil Penalties*

24. Criminal offences are divided into information and knowledge offences, evasion and other offences, such as aiding and abetting offences. Charges may be brought under the *Tax Administration Act 1994*. These offences must be prosecuted by the Inland Revenue as the prosecuting authority. Charges may also be brought under the *Crimes Act 1961*. The most frequently invoked charge concerns the use of a document with intent to defraud. Prosecution under the *Crimes Act 1961* is reserved for the most serious frauds on the revenue. These offences will be prosecuted by the Inland Revenue, the Police or the specialist Serious Fraud Office with the Inland Revenue as complainant.

25. The defendant may enter a guilty plea, or the offences may be tried summarily or on indictment depending on the seriousness of the offence. Revenue offences are dealt with in the same manner as other criminal offences. However, a District Court judge with experience in the specialist Taxation Review Authority (which deals with disputes over tax liability) may be assigned to the case where tax issues are important.

26. The introduction of a range of civil penalties during the 1990s saw a reduction in the number of minor criminal prosecutions.

²¹ See also Chapter 7 on the New Zealand Serious Frauds Office 6.59-6.66.

Although, the majority of prosecutions continue to be for minor offences, such as failure to file a return, the Inland Revenue is seeking to enlarge its investigation and prosecution of serious fraud. In conjunction with the Serious Fraud Office and the Police, the Inland Revenue will deal with a serious fraud case in a co-ordinated way. Prison sentences of up to four years have been imposed for serious fraud offences. This is a relatively heavy sentence for non-violent offending in New Zealand as the *Criminal Justice Act* establishes a presumption in favour of prison for violent offences, but a presumption against prison for “non-violence offences”. The names of taxpayers who commit criminal tax offences are published in the *New Zealand Gazette*.

27. The Inland Revenue also settles disputes over tax liability, and/or the collection of tax debt. It will have regard to the perceived litigation risk; recovery prospects; and compliance costs in deciding whether the case is suitable for settlement or prosecution. However, the Inland Revenue is aware of the questionable constitutionality of using criminal charges as a bargaining chip when negotiating civil liability. Therefore, where a mix of civil and criminal issues arises, any civil settlement of the civil issues will remain separate from consideration of the criminal issues. Whether the evidence is sufficient will typically be the determining factor in deciding whether to bring a criminal prosecution. The circumstances of the offence and the offender will be taken into account as subsidiary issues.

28. The civil penalties which may be imposed will be an additional charge, calculated as a percentage of the tax shortfall resulting from the breach. The percentage ranges from 20% for failure to take reasonable care to file a correct return to 150% for evasion. The penalty can be reduced for voluntary disclosure or increased when there is obstruction in the course of an investigation.

29. In the majority of cases debt collection is pursued by obtaining judgment against individuals; issuing statutory demands against companies; proceeding to bankruptcy action against individuals; and applying for delinquent companies to be placed in liquidation. The Inland Revenue use these methods rigorously. The

Inland Revenue is the most frequent petitioner in bankruptcy and winding up applications.²²

30. The government enacted the new compliance and penalties legislation in 1996 with application from the 1997-98 income year.

(a) *Late Payment Penalties*

31. The late filing penalty recognises that taxpayers have a fundamental obligation to file their return by the due date. Previously, the only option available to the Commissioner was to prosecute, and this is a time-consuming and expensive procedure. The standard penalty for late filing is \$50. This penalty rises to \$250 if the net income exceeds \$100,000 and to \$500 if the income is higher than \$1,000,000. A penalty of \$250 applies if a PAYE or ACC reconciliation is filed late. The penalty is imposed only after prior warning from the Inland Revenue Department that the return is overdue.

32. The late payment penalties apply from the due date for a tax, or in the case of a reassessment, from the new due date for payment of reassessed tax. A 5 per cent penalty applies if the due date for the payment of the tax is missed. After the due date, however, incremental penalties of 2 per cent of the tax outstanding are charged monthly.

(b) *Shortfall Penalties*

33. The fundamental standard expected from taxpayers in meeting their tax obligations is the standard of reasonable care. This standard is breached by lack of reasonable care, taking an unacceptable position, gross carelessness, abusive avoidance and tax evasion. Sanctions apply according to the seriousness of the offence and the amount of revenue at stake. The penalty rates applying are:

WRONGDOING	PENALTY
LACK OF REASONABLE CARE	20% OF THE TAX SHORTFALL

²² Tax Compliance Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance 1998.

UNACCEPTABLE INTERPRETATION	20% OF THE TAX SHORTFALL
GROSS CARELESSNESS	40% OF THE TAX SHORTFALL
ABUSIVE AVOIDANCE²³	100% OF THE TAX SHORTFALL
TAX EVASION	150% OF THE TAX SHORTFALL.

34. The level of penalty may be adjusted up or down to take account of matters such as hindrance or voluntary disclosure.

35. The standard of reasonable care is the basic standard that all taxpayers must exercise in fulfilling any tax obligation. The term ‘reasonable care’ is not defined in the legislation. The government considered that the concept of reasonable care was sufficiently well established in the commercial world and in common law so that it did not require definition. Also, by not defining the term, it remains adaptable to changing perceptions of what constitutes reasonable care. The concept also is sufficiently flexible to reflect a wide range of circumstances as well as changes over time in the tax system.

36. The test of an unacceptable interpretation applies if the tax at stake exceeds the greater of \$10,000 or 1 per cent of the income tax returned in the relevant period. The test applies in all cases if the tax at stake exceeds \$200,000. An ‘unacceptable interpretation’ is defined in the legislation as an interpretation that does not meet the standard of being ‘about as likely as not’ to be correct. Effectively, ‘about as likely or not’ creates an expectation that the interpretation must be one that the courts might regard as worthy of consideration, even if it is not one that they will adopt. The decision as to whether or not an interpretation is unacceptable takes into account all the provisions of the relevant legislation, including the likelihood of the application of a general or specific anti-avoidance provision.

37. If an arrangement fails the unacceptable interpretation test, and its dominant purpose is determined to be tax avoidance, it constitutes ‘abusive avoidance’, the penalty for which is 100 per cent

²³ Abusive avoidance is not a term used in Ireland.

of the tax shortfall. If an arrangement is not abusive, but fails the unacceptable interpretation or reasonable care tests, the lower shortfall penalties will apply.

38. Abusive avoidance occurs if arrangements have as their principal purpose the gaining of a tax advantage, and the taxpayer's interpretation was not "more likely than not" to be correct. Such arrangements are defined by characteristics such as artificiality, contrivance and lack of commerciality. They might also involve concealment of information.

39. The names of those who have taken a position of abusive avoidance are published in the *New Zealand Gazette*.

**APPENDIX B COLUMN 1 OF SCHEDULE 29:
PROVISIONS REFERRED TO IN SECTIONS
1052, 1053 AND 1054 (ANNOTATED)**

Section 121	Benefit of use of car
Section 172K(1) ¹	Company returns to Collector-General (relevant distributions)
Section 172L(2) ²	Non-resident company Returns of distributions under stapled stock arrangements to RC
Section 244A and Regulations under that section ³	Application of section s44 (relief for interest paid on certain home loans)
Section 258(2) ⁴	Deposit taker return to Collector-General
Section 470 and Regulations under that section ⁵	Relief for insurance against expenses of illness
Section 470A and Regulations under that section ⁶	Relief for premiums under qualifying long-term care policies

¹ Inserted by *Finance Act 2002*, section 128(a)(1)(i) with effect from 25 March 2002. See Brennan (ed.) *Tax Acts 2002* (Butterworth Ireland Limited 2002) 2180.

² Inserted by *Finance Act 2002*, section 128(a)(i) with effect from 25 March 2002.

³ Inserted by *Finance Act 2001*, section 23(c) for 2002 and later tax years.

⁴ Inserted by *Finance Act 2002*, section 128(a)(ii) with effect from 25 March 2002.

⁵ Inserted by *Finance Act 2001*, section 19(3) with effect from 6 April 2001.

⁶ Inserted by *Finance Act 2001*, section 20(c) with effect from 6 April 2001.

Section 473 or Regulations under that section	Allowance for rent paid by certain tenants
Section 477	Relief for service charges
Section 531 and Regulations under that section	Payments to subcontractors in certain industries
Section 730FA(2) ⁷	Provision of information by an assurance company to an inspector where tax not deducted under 730F
Section 730G(2) ⁸	Returns of appropriate tax by life assurance companies
Section 739F(2) ⁹	Returns of appropriate tax by investment undertakings
Section 877	Returns by persons chargeable
Section 878	Persons acting for incapacitated persons and non-residents
Section 879(2)	Returns of income
Section 880	Partnership returns
Section 951 (1) & (2)	Self-assessment: obligation to make return
Section 986 and Regulations under that section ¹⁰	PAYE/PRSI regulations
Section 1002(2)(a)(iii)(I) and 1002(2)(c) and (4)(a)(i) and (4)b(i)	Deduction from payments due to defaulters of amounts due in relation to tax
Section 1023	Application for separate assessments by husband and

⁷ Inserted by *Finance Act 2002*, section 40(4) with effect from 5 December 2001.

⁸ Inserted by the *Finance Act 2000*, section 72 with effect from 6 April 2000.

⁹ Inserted by the *Finance Act 2000*, section 72 with effect from 6 April 2000.

¹⁰ Inserted by the *Finance Act 1999*, section 41(a) with effect from 6 April 1999.

	wife
<i>Waiver of Certain Tax, Interest and Penalties Act 1993</i> sections 2(3)(a) and 3(6)(b) 1993	Tax declarations to Chief Special Collector

APPENDIX C BRITISH TAX PROSECUTION STATISTICS

Table A:¹Inland Revenue Prosecutions

Year	1999-00	2000-01	2001-02
Guilty	37	56	58
Acquitted	10	7	5
No evidence Offered	5	0	4
Stayed	3	7	1
Total	55	70	68

¹ For comparative purposes, the populations of both Ireland and the UK should be taken into account. The Irish population is almost 4 million, and the UK population is almost 59 million.

Table B: Prosecution Sentences

Year	1999-00	2000-01	2001-02
Community Service	-	8	12
Suspended Sentence	7	10	6
Fines/Confiscation only	3	3	7
Curfew and Conditional discharge	-	3	7
Sentence under 12 months	8	16	6
12 months to 2 years	12	6	7
2 to 3 years	6	6	7
3 to 4 years	1	2	3
4 years plus	-	2	3

APPENDIX D 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
Working Paper No 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	€2.22
Fourth (Annual) Report (1981) (Pl 742)	€0.95

Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	€1.27
Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
Report on Illegitimacy (LRC 4-1982) (September 1982)	€4.44
Fifth (Annual) Report (1982) (PI 1795)	€0.95
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	€1.90
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	€1.27
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	€1.90
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	€3.81
Sixth (Annual) Report (1983) (PI 2622)	€1.27
Report on Nullity of Marriage (LRC 9-1984) (October 1984)	€4.44
Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54

Seventh (Annual) Report (1984) (PI 3313)	€1.27
Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	€1.27
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	€3.81
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	€2.54
Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	€3.17
Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	€3.17
Report on Minors' Contracts (LRC 15-1985) (August 1985)	€4.44
Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985) (August 1985)	€2.54
Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17- 1985) (September 1985)	€3.81
Report on the Liability in Tort of Mentally Disabled Persons (LRC 18- 1985) (September 1985)	€2.54

Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (October 1985)	€4.44
Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (October 1985)	€2.54
Eighth (Annual) Report (1985) (PI 4281)	€1.27
Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21-1987) (September 1987)	€5.71
Consultation Paper on Rape (December 1987)	€7.62
Report on the Service of Documents Abroad re Civil Proceedings -the Hague Convention (LRC 22-1987) (December 1987)	€2.54
Report on Receiving Stolen Property (LRC 23-1987) (December 1987)	€8.89
Ninth (Annual) Report (1986-1987) (PI 5625)	€1.90
Report on Rape and Allied Offences (LRC 24-1988) (May 1988)	€3.81

Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (September 1988)	€3.81
Report on Malicious Damage (LRC 26-1988) (September 1988)	€5.08
Report on Debt Collection: (1) The Law Relating to Sheriffs (LRC 27-1988) (October 1988)	€6.35
Tenth (Annual) Report (1988) (PI 6542)	€1.90
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