

# Revenue Powers

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## Objective of presentation:

Overview of:

- *Categories of Revenue Powers - audit, investigation and prosecution*
- *Review of recent changes to legislation and Audit Code of Practice*
- *Revenue's requests for information*
- *Different type of Revenue Interventions and resulting implications*
- *Aiding and abetting*
- *Legal issues and safeguards*

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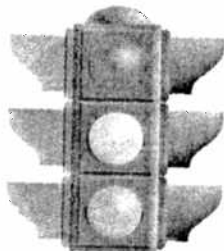
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### Categories of Revenue Powers

1. Audit – usually arranged in advance by appointment for the specific purpose of examining the books and records of the professional – “exercise of routine powers”.
2. Investigation – usually an unannounced visit where information is requested on arrival and no search warrant has been obtained – “exercise of non-routine powers”.
3. Investigation with a view to criminal prosecution: Revenue will present a search warrant on arrival and the visit will be unannounced. Such visits are usually confined to specific cases where evidence of fraud is available to Revenue in advance – “exercise of non-routine powers”.

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### What is a Revenue Audit

- Revenue Audit is a review of tax returns, books & records for accuracy & validity
- Usually for one year for all tax heads or one tax head for a number of periods (e.g. VAT) or transaction (CAT or CGT)
- Where discrepancies arise Revenue may extend audit to cover other years and/or taxes

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### Types of Audit

- **Desk Audit** - conducted from Inspectors Office by letter or phone. CAT, CGT & Stamp Duty audits are normally desk audits
- **Field Audit** - conducted at taxpayer's place of business

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## Notification

- 14 days notice is normally provided
- notice will include
  - date, time and venue of audit
  - details of taxes and years under review
  - Revenue's powers of inspection, removal etc
  - information regarding taxpayers right to appeal

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## Consequences of an Audit

- If Revenue discover an underpayment, underpaid tax must be paid together with interest and penalties
- "Tax-gearred" penalties will be applied – i.e. a percentage of tax due
- Details may be published on tax defaulter list where an underpayment is detected and a qualifying voluntary disclosure has not been made

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## Monetary Settlements with Revenue

- **The Code of Practice for Revenue Auditors 2002:**  
Prior to 24<sup>th</sup> December 2008 the Code of Practice for Revenue Auditors 2002. ("the 2002 Code") governed the agreement of monetary settlement with the Revenue Commissioners. This Code was effectively withdrawn from the passing of the Finance (No. 2) Act 2008 on 24<sup>th</sup> December 2008.
- **The Finance (No. 2) Act 2008** introduced a new penalty regime. The new provisions apply to both new cases and existing unresolved cases as at the 24<sup>th</sup> December 2008, where there has been an underpayment of tax or breach of tax filing requirements.
- **"The Patch"**  
Clearly, some guidance was required from Revenue regarding the conduct of audits under the new regime, pending the publication of the revised Code. This was provided by means of a Supplement Code of Practice for Revenue Auditors 2002 which was published by Revenue on 2 April 2009 ("the Patch").
- **New Code of Practice** is expected in late 2010

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## Finance (No. 2) Act 2008 – Key Changes

- Disclosures – written disclosure only
- Penalties applicable and categories of default
- What happens when a settlement cannot be reached.

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## Disclosures

The primary benefits of making a disclosure under the 2002 Code were as follows:

- mitigation of penalties,
- assurance in respect of non-prosecution, and
- non-publication of the taxpayer's name where a qualifying disclosure was made.

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## Qualifying Disclosure – Eligibility

- A disclosure shall not be a qualifying disclosure where any of the following circumstances apply:
  - a) before the disclosure is made, a Revenue officer has started an inquiry or investigation into any matter contained in that disclosure and had contacted or notified that person, or a person representing that person, in this regard;
  - b) matters contained in the disclosure are matters-
    - that have become known, or are about to become known, to the Revenue Commissioners through their own investigations or through an investigation conducted by a statutory body or agency (i.e., investigations of a class of cases such as Ansbacher cases, Mortuary Tribunal cases or Mahon Tribunal cases), or
    - that are within the scope of an inquiry being carried out wholly or partly in public or
    - to which the person who made the disclosure is linked, or about to be linked, publicly

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### Types of Disclosures - 2002 Code

- Under 2002 Code there were two types of Disclosures
  - (1) Qualifying Disclosures
    - These were sub-divided into:
      - Prompted Qualifying Disclosures
      - Unprompted Qualifying Disclosures
  - (2) Voluntary Disclosures
- Level of penalty applicable was determined by the type of disclosure and category of default as defined in the 2002 Code
- Section 1086(4)(a)TCA1997 – permitted voluntary disclosure to be made orally prior to the commencement of any investigation or enquiry (repealed as of passing of Finance (No.2) Act 2008)

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### Disclosures - Finance Act (No. 2) 2008

- The main features of the new disclosure regime are:
  - The terms “qualifying”, “prompted qualifying” & “unprompted qualifying” are defined in the legislation
  - New categories of default for mitigation of penalties purposes apply for tax defaults occurring after 24 December 2008. Tax defaults which occurred prior to 24 December 2008 are covered by the old penalty regime as outlined in the Code of Practice for Revenue Auditors 2002.
  - An oral voluntary disclosure is no longer an option
  - The new provisions whereby Revenue may request a court to determine that a taxpayer is liable to a penalty where there is failure to agree applies irrespective of when the tax default occurred.
  - All disclosures must be in writing and contain a declaration that the disclosure is made to the best of taxpayer’s knowledge, information and belief
  - Qualifying disclosures do not now have to include penalties J M B
  - New Code of Practice anticipated in late 2010

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### Definitions - Finance Act (No. 2) 2008

#### Qualifying Disclosure

- This is a disclosure that Revenue are satisfied is a disclosure of complete information in relation to, and full particulars of, all matters occasioning a liability to tax that gives rise to a penalty.
- A qualifying disclosure may be unprompted or prompted.

#### Unprompted Qualifying Disclosure

This means a qualifying disclosure that Revenue are satisfied has been voluntarily furnished to them –

- before an investigation or inquiry had been started by them or by a Revenue officer into any matter occasioning a liability to tax of that person.

#### Prompted Qualifying Disclosure

This is a disclosure which is made to Revenue in the period between:

- the date on which a person is notified by Revenue of the date on which an investigation or inquiry into any matter occasioning a liability to tax of that person will start, and the date that the investigation or inquiry starts.

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### Mitigation of Penalties

Cases where tax default occurs before 24 December 2008 (Code of Practice for Revenue Auditors 2002)	Cases where tax default occurs on or after 24 December 2008 (Finance (No.2) Act 2008)
Deliberate Default	Deliberate Behaviour
Gross Carelessness	Careless Behaviour with "significant consequences"
Insufficient care	Other careless behaviour

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### Finance (No. 2) Act 2008- Categories of Default

**"Deliberate Behaviour"**

- This term is not defined in the legislation. "The Patch" provides the the term should be given its "normal meaning". It goes on to say that "in general, deliberate behaviour involves either a breach of a tax obligation with indicators consistent with intent on the part of the taxpayer or a breach that cannot be explained solely by carelessness".

**"Careless Behaviour"**

- Careless is defined in the Act as meaning "failure to take reasonable care".

**"Significant Consequences"**

- The phrase "significant consequences" is used to describe the situation where the difference between the tax or duty underpaid is greater than 15% of the correct tax or duty payable for the relevant period.

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### Finance (No. 2) Act 2008

- issues regarding categories of default

- The definition of behaviour giving rise to a tax-related civil penalty has been changed from 'fraudulently' and 'negligently' to 'deliberately' or 'carelessly' thereby significantly reducing the level of proof.
- In particular, section 1077E(9) of Finance (No.2) Act 2008 should be noted, which provides that failure to remedy a breach made innocently could result in an increased level of penalty if it is not remedied and could impact on the extent of the disclosure required.
- A new category of "careless behaviour with significant consequences" replaces the category of "gross carelessness". "Significant consequences" means that the difference between the tax or duty underpaid is greater than 15% of the correct tax or duty payable for the relevant period.
- Lack of guidance regarding definition of deliberate behaviour, carelessness?
- Burden of proof - civil standard - balance of probabilities -> beyond reasonable doubt, no intent required
- No scope for pre-audit verbal agreement - self assessment of default category in the absence of judicial or other guidance to interpret the definitions.

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**Penalty Table: Mitigation of tax geared penalties under the new legislation for a 1<sup>st</sup> qualifying disclosure:**

Category of Default	Penalty before Mitigation	Co-operation Only	Co-operation Only and Prompted Qualifying Disclosure	Co-operation Only and Unprompted Qualifying Disclosure
Deliberate Behaviour	100%	75%	50%	10%
Careless Behaviour with "significant consequences"	10%	5%	2%	0%
Careless Behaviour	20%	15%	10%	5%

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**Legal Risks associated with written disclosure**

- Increased legal risks associated with written disclosure
- Requirement to have disclosure in writing by way of declaration – self-incrimination?
- Position of advisor as a witness in the taxpayer's prosecution?
- Risks associated with signature of disclosure by agent if incorrect/incomplete?
- Status of assurance re non-prosecution?
- Position of taxpayer/advisor if disclosure is incomplete or inaccurate?

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**Finance (No. 2) Act 2008 – Notice of Opinion**

- Where there has been a written disclosure together with payment of tax and interest and
  - no agreement on the liability to a penalty;
  - or where an agreed penalty is not paid
 Revenue will issue an opinion (provided approval of Principal Officer obtained) setting out the amount of penalty which they believe the person is liable to pay.
- Such an opinion must identify:
  - the provisions under which the penalty arises;
  - the circumstances in which that person is liable to the penalty;
  - the amount of the penalty to which that person is liable; and
  - such other details as the Revenue officer considers necessary.
- If there is a technical dispute an application can be made to have it referred to the Appeal Commissioners at any time up before the Notice of Opinion issues.

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*letter to Revenue - notify of intention to  
 s. 48(10) distribute - in the case of  
 need a non-resident's  
 Revenue approval.*

### Finance (No. 2) Act 2008 – Notice of Opinion

- The taxpayer may, within 30 days after the date of issue of a *Notice of Opinion*, request a review by an internal or external reviewer provided a review of the conduct of the audit has not already been undertaken.
- If the taxpayer agrees with the *Notice of Opinion* and pays the penalty within 30 days, then the matter is concluded.
- If, within 30 days of the issue of the *Notice of Opinion*, there is:
  - no agreement on the amount of the penalty; or
  - no payment of an agreed penalty, or
  - no response from the taxpayerRevenue may make an application to a relevant court for that court to determine that the taxpayer has contravened a relevant statute giving rise to a penalty (Section 1077B TCA 1997).
- The choice of court is dependant on the amount of penalty involved and must be within the jurisdictional limits of the particular court. These limits are as follows:

➤ District Court	Up to €6,349	J M B
➤ Circuit Court	Up to €38,092	
➤ High Court	Amounts in excess of €38,092	

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### Issues for practitioners – legal process

- Value of assurances in Code of Practice (such as non-prosecution) since primary legislation for voluntary disclosure/penalty regime? Absence of statutory safeguard?
- Revenue have indicated that the new provisions regarding the issue of an opinion and consequent High Court proceedings for the recovery of penalties will only be used in exceptional cases. However, the existence of the power in itself will be a perceived threat for taxpayers when making settlements with Revenue
- Publicity - value of non-publication on list of tax defaulters? Disclosure to regulatory and other bodies despite making a QVD - implications?
- Costs associated with court proceedings?
- Lack of consistency between court rulings?
- Lack of speedy, independent, and non-costly resolution of disputes in respect of underpayment which give rise to the penalty in the first place

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### Revenue interventions/ Requests for information

- Audit & investigation of tax liabilities by:
  - Power of entry and search;
  - Seizure & retention of books and records;
  - Requirement for tax payer or agent to give the authorised officer reasonable assistance including providing information and explanations.

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Exercise of non-routine powers

- Entry without search warrant (usually an investigation).
- Section 905 TCA 1997: Revenue entitled to enter a business premises (not private residence)
  - at all reasonable times;
  - without warrant or notice;
  - to inspect documents or records;
  - to remove business records;
  - to require reasonable assistance

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Section 908C TCA 1997–  
Search warrant

- Search power which entitles Revenue to obtain search warrant from the District Court which will be specifically used in cases where a criminal prosecution is intended.

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Section 908C TCA 1997– Search  
warrant

- Under the new search power, provided a search warrant is obtained Revenue will be entitled to:
  - search both the premises and
  - search any persons who are at the premises.
  - search "anything" on the premises;
  - require any persons found on the premises to give their name, address, occupation;
  - produce material in the possession of that person when requested.

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Section 908C TCA 1997--  
Search warrant

- to have the person explain the value and relevance of material (such as books, records or other things including a computer) found on the premises;
- To examine, seize and retain any material found on the premises and to take any necessary steps to preserve such material and to prevent interference with it.
- Where records are held on computer, the Revenue official will be entitled to request any person to direct and find such information.
- Any material which is seized which is required for the purposes of any legal proceedings by an officer of the Revenue Commissioners or for the purpose of any criminal proceedings, may be retained for so long as it is reasonably required for the purposes aforesaid.

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Penalty under Section 908C

- A person who obstructs or attempts to obstruct or fails to comply with a Revenue request will be guilty of an offence and liable on summary conviction and to a fine not exceeding €3,000 and/or a term of imprisonment in excess of 6 months or both.

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District Court Production Order - Section  
908D

- Revenue may obtain an order from a District Justice to produce "evidential material" (including computerised records) by production of an oath in circumstances where the District Justice is satisfied that there are reasonable grounds for suspecting:

*"that a (tax) offence is being, has been or is about to be committed, and that material of value to the investigation of the offence...is in the possession of a person specified in the application".*

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District Court Production Order –  
Section 908D

- Legally privileged documents are excluded.
- No exclusion for documents which are subject to any other obligation as to secrecy or other restriction on disclosure of information imposed by statute or otherwise
  - for example, professional advice of a confidential nature given by accountants.

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District Court Production Order –  
Section 908D

- An order under this section may empower Revenue to:
  - take away books, documents or records;
  - make copies on the premises;
  - any material taken away may be retained as evidence in any criminal proceedings.
- New rules regarding admissibility in evidence of documents/records provided under an order.

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District Court Production Order –  
Section 908D

- Penalty for breach:
  - A person who without reasonable excuse fails or refuses to comply with an order under this section is liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or to both the fine and the imprisonment.

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District Court Production Order –  
Section 908D

- Impact on advisers:
  - Who bears the costs of compliance with such an order?
  - No safeguards.
  - Possibility of unreasonable time limits – no scope for extension.
  - Penalty for breach of section – no definition of “reasonable excuse”.
  - Possibility of being called as a witness against your client.

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Finance Act 2005 –  
Aiding and Abetting by advisors/others

- Section 1078(1A)(c) makes it an offence if a person:  
*“is knowingly concerned in the fraudulent evasion of tax or is knowingly concerned in, or is reckless as to whether or not the person is concerned in, facilitating the fraudulent evasion of tax”.*
- No definition provided in the legislation of the key terms used in the offence.

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Finance Act 2005 –  
Aiding and Abetting

- For example, the concept of “knowingly concerned” in the new section is undefined. For criminal law purposes, the concept of knowledge is well known. However, the concept of “knowingly concerned” is not.
- The key will be whether or not an Irish court defines such a term so as to require some sort of active participation by the advisor in the fraudulent evasion or whether mere knowledge will be sufficient.

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## Penalties for breach

- On summary conviction fine not exceeding €3,000 and/or a term of imprisonment not exceeding 12 months.
- On conviction on indictment, fine not exceeding €126,970 and/or a term of imprisonment not exceeding 5 years.

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