

Code of Practice for Revenue Auditors (2002)
Supplement

Finance (No.2) Act 2008
Changes in relation to Penalties and Publication

2 April 2009

1.	INTRODUCTION.....	3
2.	PENALTIES.....	3
3.	CODE OF PRACTICE FOR REVENUE AUDITORS	3
4.	OVERVIEW OF THE FINANCE (NO.2) ACT 2008 CHANGES	3
5.	CONTINUATION OF EXISTING PROCEDURES.....	4
6.	DETERMINATION OF A LIABILITY TO A PENALTY	5
7.	ISSUE OF A NOTICE OF OPINION	5
8.	APPLICATION TO A RELEVANT COURT.....	6
9.	DETERMINATION BY A RELEVANT COURT	6
10.	RECOVERY OF PENALTIES	6
11.	APPEALS.....	6
12.	REVIEW PROCEDURES.....	6
13.	PENALTIES IN DEATH CASES.....	7
14.	OVERVIEW OF 'TAX-GEARED AND DUTY-GEARED CIVIL PENALTIES	8
15.	CATEGORIES OF TAX DEFAULT	9
16.	PENALTY TABLE 1 – penalties on or after 24 December 2008	10
17.	QUALIFYING DISCLOSURES	11
18.	EXCLUSIONS – NOT A QUALIFYING DISCLOSURE.....	13
19.	SECOND OR SUBSEQUENT QUALIFYING DISCLOSURES.....	13
20.	QUALIFYING DISCLOSURES AND PROSECUTION	14
21.	FIXED PENALTIES	14
22.	PUBLICATION – Section 1086 TCA, 1997.....	14
23.	PENALTY TABLE 2 – penalties before 24 December 2008	15

1. INTRODUCTION

Finance (No.2) Act 2008 contains changes to the civil penalty regime and to the criteria for publication of defaulters. The purpose of this document is to outline these changes and to explain the effect of the changes on the *Code of Practice for Revenue Auditors (2002)*.

While these legislative changes may impact on the settlement of some cases, it is envisaged that the vast majority of audits will continue to be settled by negotiation of monetary settlements.

Monetary settlement has an important role in Revenue's compliance programmes. The use of appropriate monetary settlement procedures is consistent with the efficient management of the tax system and the best use of the resources Revenue utilises in fostering a compliance culture. Of course, Revenue also pursues a vigorous prosecution policy for appropriate cases.

In particular, nothing in the new legislation prevents the continued availability of existing procedures under the *Code of Practice for Revenue Auditors (2002)* concerning self-correction, innocent error, no loss of revenue, interest charge, surcharge, materiality, etc.

2. PENALTIES

References to penalties in this document refer to civil (monetary) penalties only.

In the course of audits, Revenue officers are concerned mainly with civil penalties. Not every type of adjustment arising as a result of a Revenue audit will give rise to a liability to a penalty. However, where a Revenue officer is of the opinion that a taxpayer may be liable to a penalty, the procedures to be followed are as outlined herein.

3. CODE OF PRACTICE FOR REVENUE AUDITORS

Both a Revenue Code of Practice Review Group and the TALC Audit sub-committee continue to do extensive work on the revision of the *Code of Practice for Revenue Auditors (2002)* with a new Code of Practice scheduled for publication in 2009.

In the meantime, subject to the changes required by the new penalties legislation, the current code of practice continues to apply.

4. OVERVIEW OF THE FINANCE (NO.2) ACT 2008 CHANGES

The Finance (No.2) Act 2008 passed into law on 24 December 2008. Tax defaults that occurred prior to 24 December 2008 are covered by the old penalty legislation as outlined in the *Code of Practice for Revenue Auditors 2002*. Tax defaults that occur on or after 24 December 2008 are dealt with under this new penalty legislation.

The new procedure, where a 'relevant court' is asked to determine whether a taxpayer is liable to a penalty (in a situation where agreement on a penalty is not reached or where an agreed penalty is not paid), is available to resolve all tax default penalty cases irrespective of when the default occurred.

Changes introduced by the Finance (No.2) Act 2008 fall into the following broad headings:

A) Determination of a liability to a penalty

Where there is no agreement with a taxpayer on the amount of a penalty due or where an agreed penalty is not paid, a taxpayer is given an opportunity to have a court examine whether that taxpayer is liable to a civil penalty for contravention of tax or duty legislation. In other words, a penalty will not be imposed against the wishes of a taxpayer unless a court has determined that such penalty is due. The application to a relevant court is made by Revenue.

B) Recovery of a penalty

Where a taxpayer is found by a court to be liable to pay a penalty, that penalty may be collected and recovered in the same way as tax is collected and recovered. Note: The collection and recovery of penalties in this manner only applies to penalties determined by a court. Where a taxpayer agrees on the amount of a penalty (prior to court proceedings), the taxpayer must pay the amount agreed.

C) Penalties in death cases

The current Revenue practice regarding the recovery of penalties from the estate of a taxpayer after death is now placed on a statutory footing. Penalties will only be recovered from an estate where the taxpayer either agreed in writing to pay the penalties or a court has determined, before the taxpayer's death, that the taxpayer was liable to the penalties. The recovery of penalties from the estate of a deceased taxpayer is subject to the time limits outlined in Section 1048 TCA 1997.

D) New tax and duty geared penalties

The current Revenue practice regarding the level of tax-geared penalties sought in settlements arising out of Revenue audits and investigations, as set out in the *Code of Practice for Revenue Auditors (2002)*, is now put on a statutory basis. In addition, the new provision changes the definition of the behaviour that gives rise to a civil penalty from 'fraudulently' or 'negligently' to 'deliberately' or 'carelessly'.

E) Changes to fixed penalties

A range of fixed penalties is brought up to date and standardised and the amounts of such penalties are increased.

F) Publication of tax defaulters

The terms 'qualifying disclosure', 'unprompted qualifying disclosure' and 'prompted qualifying disclosure' are now defined in the tax Acts.

A taxpayer who makes an unprompted qualifying disclosure or a prompted qualifying disclosure and pays the tax, duty, interest and penalty due does not have their name published.

Where a tax default occurred and there is no qualifying disclosure, the taxpayer is open to the possibility of prosecution and publication. A voluntary disclosure that is not a 'qualifying disclosure' is not sufficient to avoid publication – the taxpayer may be listed for publication and/or prosecution.

Summary Chart

A.	<i>Determination of a liability to a penalty</i>	See Paragraphs 6 to 9
B.	<i>Recovery of a penalty</i>	See Paragraph 10
C.	<i>Penalties in death cases</i>	See Paragraph 13
D.	<i>New tax and duty geared penalties</i>	See Paragraphs 14 to 20
E.	<i>Changes to fixed penalties</i>	See Paragraph 21
F.	<i>Publication of Tax Defaulters</i>	See Paragraph 22

5. CONTINUATION OF EXISTING PROCEDURES

Nothing in the legislative changes introduced by the Finance (No.2) Act 2008 prevents Revenue and taxpayers from agreeing liabilities and penalties without recourse to the courts.

The majority of chapters and sections in the *Code of Practice for Revenue Auditors (2002)* are still relevant in the context of a Revenue audit or inquiry so it is not necessary to repeat all of them here.

In particular, Revenue officers should be aware that:

- Surcharge for Late Submission of Returns is as set out in paragraph 8.1 on page 23
- Innocent Error – Adjustments Without Penalty is as defined in paragraph 9.6 on page 29
- Co-operation is as defined in paragraph 9.7 on page 30
- The period to prepare a qualifying disclosure, the Statement of Disclosure and Examination of Disclosures are as set out in paragraphs 10.1.3, 10.1.4 and 10.2 on pages 32-33
- Self-correction is as defined in paragraph 10.5 on page 35
- VAT: "No Loss of Revenue" is as outlined in paragraph 11.1 on page 36
- Procedures for Discharging Liabilities and Inability to Pay Situations are as per paragraphs 13.1 and 13.2 on pages 40-41
- Paragraph 9.4: The net tax-geared penalty will be treated as including any fixed amount due under Section 1053(1), Section 1054(3)(a), TCA 1997 and Section 27 VAT Act or any similar provision
- Paragraph 10.3 – benefits of a Qualifying Disclosure and Non-Prosecution

References to taxpayers should, except where the context requires otherwise, be read as including references to companies and all other taxpayers. Page references in this paragraph refer to the appropriate page in the *Code of Practice for Revenue Auditors (2002)*.

6. DETERMINATION OF A LIABILITY TO A PENALTY

(SECTION 1077B TCA 1997)

The majority of audit settlements for tax, interest and penalties will be resolved by agreement with the taxpayer in the same manner as previously under the *Code of Practice for Revenue Auditors* (2002).

However, with effect from 24 December 2008, where there is –

- no agreement on the liability to a penalty; or
- where an agreed penalty is not paid,

the following procedure will apply **to all existing 'open' or 'unsettled' audits and to all new audits** (irrespective of which tax year the audit refers or when the tax default occurred)

- Step 1:** Based on the evidence available, a Revenue officer may form an opinion that a taxpayer is liable to a penalty.
- Step 2:** If the penalty is to be pursued, a *Notice of Opinion* must issue to the taxpayer (and a copy should be sent to the taxpayer's agent) – see Notice of Opinion, Paragraph 7 below.
- If the taxpayer agrees with the opinion of the Revenue officer and pays the penalty, then that is the end of the matter.
- Step 3:** If there is no agreement on the amount of the penalty or no payment of an agreed penalty (or no response from the taxpayer) within 30 days, the Revenue officer 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 – see Paragraph 8 below;
- Step 4:** Where a court makes a determination that the taxpayer is liable to a penalty and makes an order for the recovery of that penalty, Revenue may collect and recover the amount in like manner as the collection of tax – see Paragraph 10 below.

7. ISSUE OF A NOTICE OF OPINION

(SECTION 1077B TCA 1997)

Where,

- in the absence of any agreement that the taxpayer is liable to a penalty; or
- following the failure by a taxpayer to pay an agreed penalty,

a Revenue officer is of the opinion that the taxpayer is liable to a penalty, that officer, shall give notice of that opinion in writing to the taxpayer (and agent). The Notice of Opinion will include details of -

- a) the provisions under which the penalty arises,
- b) the circumstances in which that person is liable to the penalty,
- c) the amount of the penalty to which that person is liable; and
- d) such other details as the Revenue officer considers necessary.

A Revenue officer may at any time amend an opinion and will give notice of the amended opinion to the taxpayer (and agent) in the same manner as the original notice of opinion outlined above.

For consistency and ease of administration, a standard *Notice of Opinion* will be used. The *Notice of Opinion* should issue only **with the express written approval of a Principal Officer**.

The *Notice of Opinion* should be issued to the taxpayer and a copy sent to the agent.

Where a taxpayer does not respond to correspondence relating to a *Notice of Opinion* of a Revenue officer, a Revenue officer cannot assume or decide that the taxpayer is liable to a penalty – that is a matter for a relevant court to determine.

Note 1: For tax-geared penalties, the quantum of the tax due must be finalised before a *Notice of Opinion* is issued.

Note 2: When forming an opinion on the amount of a tax-geared penalty due, the Revenue officer will take into account whether a qualifying disclosure and/or co-operation has already been given by the taxpayer.

8. APPLICATION TO A RELEVANT COURT

(SECTION 1077B TCA 1997)

Where the taxpayer to whom a *Notice of Opinion* issued does not, within 30 days after the date of the notice (or within 30 days after the date of the amended notice), agree in writing with the opinion or the amended opinion contained in the notice and pay the Revenue Commissioners the amount of the penalty specified in the notice, the Revenue officer may apply to a relevant court for that court to determine whether the taxpayer has actually contravened the statute giving rise to a penalty.

Applications to a relevant court **must be approved in writing at Principal Officer level**.

Where a Principal Officer has approved the making of an application to a relevant court, a submission is to be made by the Revenue officer to the Revenue Solicitors Office comprising a synopsis of the case and enclosing all relevant documentation and correspondence including the Notice of Opinion. The Revenue Solicitors Office will make the application on behalf of a Revenue officer to the relevant court.

Note: The fact that a *Notice of Opinion* is issued by Revenue or that an application is made by Revenue to a relevant court does not negate the taxpayers' entitlement to a reduced or mitigated penalty for co-operation or for a qualifying disclosure.

9. DETERMINATION BY A RELEVANT COURT

(SECTION 1077B TCA 1997)

Based on the evidence before it, it will be a matter for the relevant court to determine whether the taxpayer has breached the relevant legislation occasioning the liability to a penalty.

10. RECOVERY OF PENALTIES

(SECTION 1077C TCA 1997)

Where a relevant court has made a determination that a taxpayer is liable to a penalty, the court may also – **where a relevant application is before it** – make an order as to the recovery of that penalty, and without prejudice to any other means of recovery, that penalty may be collected and recovered in like manner as an amount of tax.

11. APPEALS

Appeals against tax and duty assessments, estimates and non-penalty determinations

There are no changes as regards the statutory appeals procedures against assessments, estimates and non-penalty determinations.

Appeals against a Penalty Determination by a Relevant Court

Under the new structure, it is important to understand that it is a court (rather than a Revenue officer) that has determined that a taxpayer has contravened a statute that gives rise to a liability to a penalty and there is, therefore, no right of appeal of such determination to the Appeal Commissioners.

Appeals against a Determination by a relevant court lie, therefore, within the Rules of Court applicable to each relevant court and not within the TCA 1997

12. REVIEW PROCEDURES

The taxpayer's right to request a second opinion in relation to the conduct of the audit as set out in paragraph 6.3 of the *Code of Practice for Revenue Auditors* (2002) remains unchanged.

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.

13. PENALTIES IN DEATH CASES

(SECTION 1077D TCA 1997)

Section 1077D applies as and from the passing of the Finance (No.2) Act 2008 (i.e. as and from 24 December 2008) and, therefore, applies to all current open (i.e. unsettled) death cases. The provision is not backdated to cover settled death cases.

Where, before an individual's death –

- a) that individual had agreed in writing (or it had been agreed in writing on his or her behalf) that he or she was liable to a penalty under the Acts;
- b) that individual had agreed in writing with an opinion or amended opinion of a Revenue officer that he or she was liable to a penalty under the Acts (or such opinion or amended opinion had been agreed in writing on his or her behalf);
- c) the Revenue Commissioners had agreed or undertaken to accept a specified sum of money in the circumstances mentioned in paragraph (c) or (d) of Section 1086(2) TCA 1997 from that individual; or
- d) a relevant court has determined that the individual was liable to a penalty under the Acts,

then, the penalty shall be due and payable and any proceedings for the recovery of such penalty under the Acts which have been, or could have been, instituted against that individual may be continued or instituted against his or her executor, administrator or estate, as the case may be, and any penalty awarded in proceedings so continued or instituted shall be a debt due from and payable out of his or her estate.

However, such proceedings may not be brought outside the time limits stated in Section 1048, Taxes Consolidation Act 1997. Those time limits are as follows:

- o if a grant of probate or letters of administration issued in the year the individual died, the time limit is three years after the end of that year in which the individual died;
- o if the grant of probate or letters of administration issued in a year subsequent to the year in which the individual died, the time limit is two years after the end of that year; or
- o if an additional inland revenue affidavit is required, the time limit is two years after the end of the year in which the new affidavit is delivered.

14. OVERVIEW OF 'TAX-GEARED AND DUTY-GEARED CIVIL PENALTIES

The other main changes in the Finance (No.2) Act 2008 as regards the tax and duty civil penalties regime include –

- a) putting the levels of civil penalties to be sought in settlements on a statutory footing; and
- b) replacing the 'fraud' and 'neglect' civil penalties with penalties occasioned by 'deliberate' and 'careless' behaviour.

A summary of the pre and post Finance (No. 2) Act 2008 position is as follows –

	Cases where the tax default occurred before 24 December 2008	Cases where the tax default occurred on or after the 24 December 2008
Quantum of Penalty	The quantum of civil penalty to apply in such cases is the 100% tax-geared penalty as mitigated in accordance with the <i>Code of Practice for Revenue Auditors</i> (2002). (see Penalty Table 2 - Paragraph 23 below)	The quantum of civil penalty to apply in such cases is the new tax-geared penalty as set out in the Finance (No. 2) Act 2008 (see Penalty Table 1 - Paragraph 16 below).
Categories of Default	The categories of default giving rise to a civil penalty are those carried out 'fraudulently' or 'negligently' [Categories as per <i>Code of Practice for Revenue Auditors</i> (2002)]	The categories of default giving rise to a civil penalty have been changed to (a) Deliberate behaviour; (b) Careless behaviour with significant consequences; or Careless behaviour without significant consequences.
Mitigation	The mitigation is as outlined in Paragraph 9.4 of the <i>Code of Practice for Revenue Auditors</i> (2002). (see Penalty Table 2 - Paragraph 23 below)	Whilst the general power of mitigation is retained in statute, the tax and duty-geared penalties contained in the Finance (No.2) Act 2008 include reduced penalties where certain conditions are fulfilled (see Penalty Table 1 - Paragraph 16 below).

The key issue is, therefore, to determine when the tax default giving rise to a penalty occurred and this is explained in the following examples.

Examples

Tax Period	Document Submitted	When Submitted	Contravention	Contravention Occurred	Penalties to Apply
2007	Form 11	1/09/2008	Incorrect Return	1/09/2008	Pre Finance (No. 2) Act 2008 Penalties
2007	Form 11	1/03/2009	Incorrect Return	1/03/2009	Finance (No. 2) Act 2008 Penalties
2007	Form 11	Not filed	Failure to Comply	01/11/2008	Pre Finance (No. 2) Act 2008 Penalties
2008	Form 11	Not filed	Failure to Comply	01/11/2009	Finance (No. 2) Act 2008 Penalties
2008 Jan-Feb	VAT 3	14/03/2008	Incorrect Return	14/03/2008	Pre Finance (No. 2) Act 2008 Penalties
2009 Mar-Apr	VAT 3	10/05/2009	Incorrect Return	10/05/2009	Finance (No. 2) Act 2008 Penalties
2008	Form 11	1/10/2009	Incorrect Return	1/10/2009	Finance (No. 2) Act 2008 Penalties

Where a taxpayer fails to comply with a requirement to deliver a return or statement of a kind mentioned in any of the provisions specified in column 1 of Schedule 29, that taxpayer shall be liable to a penalty.

15. CATEGORIES OF TAX DEFAULT

The categories of tax default giving rise to a civil penalty have been changed but the definition of the types of behaviour is along the lines outlined in the *Code of Practice for Revenue Auditors* (2002).

For tax defaults that occurred on or after 24/12/2008, the new categories of default are:

a) Deliberate behaviour penalties

Deliberate behaviour is not defined in the Acts and is, therefore, given its normal meaning.

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.

Further examples of the behaviour are as outlined in paragraph 9.5 (i) on pages 26-27 of the *Code of Practice for Revenue Auditors* (2002).

b) Careless behaviour penalties

Carelessly is defined in the Acts as meaning the *“failure to take reasonable care”*

Where there is careless behaviour, the penalty to apply depends on whether that careless behaviour gave rise to significant consequences.

Significant consequences is not defined in the Acts but is the phrase used to describe the statutory penalty applicable where the tax underpaid exceeds 15% of the tax correctly payable.

Careless behaviour with significant consequences

Taxpayers must exercise care in fulfilling their tax obligations. *Careless behaviour with significant consequences* is a lack of due care rendering tax liabilities returned by the taxpayer, or repayment claims made, substantially incorrect.

Careless behaviour with significant consequences is distinguished from *Deliberate behaviour* by the absence of indicators, in the facts and circumstances of the default, which are consistent with intent.

Further examples of the behaviour are as outlined in paragraph 9.5 (ii) on pages 27-28 of the *Code of Practice for Revenue Auditors* (2002)

Careless behaviour without significant consequences

Careless behaviour without significant consequences is intended to cater for defaults of a minor nature that are discovered during many Revenue audits, for example, computational errors and inadequate adjustments for personal expenditure in the profit and loss account.

Careless behaviour without significant consequences is distinguished from *Careless behaviour with significant consequences* by the application of the “15 per cent rule” – that is, for the behaviour to be *Careless behaviour without significant consequences*, the tax underpaid must not exceed 15% of the overall liability ultimately due for that tax-head.

Further examples of the behaviour are as outlined in paragraph 9.5 (iii) on page 28 of the *Code of Practice for Revenue Auditors* (2002)

Examples

Careless Behaviour	Example A	Example B
Tax payable as per an incorrect tax return, say	€10,000	€60,000
Tax ultimately due	€30,000	€65,000
Tax underpaid	€20,000	€5,000
Penalty	The ‘careless behaviour with significant consequences’ penalty applies as the tax underpaid exceeds 15% of the €30,000 ultimately due	The ‘careless behaviour without significant consequences’ penalty applies, as the tax underpaid does not exceed 15% of the €65,000 ultimately due.

16. PENALTY TABLE 1 – penalties on or after 24 December 2008

Applies in respect of all tax defaults that occur on or after the passing of the Finance (No.2) Act 2008 on 24 December 2008

PENALTY TABLE 1		NO QUALIFYING DISCLOSURE		QUALIFYING DISCLOSURE Finance (No.2) Act 2008	
	Category of Tax Default [For tax defaults that occurred on or after 24/12/2008]	NO CO-OPERATION	CO-OPERATION ONLY	Prompted Qualifying Disclosure and co-operation	Unprompted Qualifying Disclosure and co-operation
The tax-gearred penalty is a percentage of the underpaid tax					
FIRST DEFAULT	<i>Deliberate behaviour</i>	100%	75%	50%	10%
	<i>Careless behaviour with significant consequences</i>	40%	30%	20%	5%
ALL DEFAULTS	<i>Careless behaviour without significant consequences</i>	20%	15%	10%	3%
SECOND DEFAULT	<i>Deliberate behaviour</i>	100%	75%	75%	55%
	<i>Careless behaviour with significant consequences</i>	40%	30%	30%	20%
THIRD OR SUBSEQUENT DEFAULT	<i>Deliberate behaviour</i>	100%	75%	100%	100%
	<i>Careless behaviour with significant consequences</i>	40%	30%	40%	40%
A penalty will not be imposed in the 'Careless behaviour without significant consequences' category where the tax default does not exceed €3,000					

Notes: Penalties for negotiated settlements for tax defaults that occurred on or after 24/12/2008

- The penalties for making incorrect returns, etc are as outlined in Sections 1077E etc Finance (No.2) Act 2008. The penalties outlined in Penalty Table 1 above are the ACTUAL penalties to apply in the scenarios given (i.e. they are not mitigated penalties). A Revenue officer shall use this table as a basis for forming an opinion regarding the amount of tax-gearred penalty due by the taxpayer. Where a 'Notice of Opinion' is issued to the taxpayer, the notice must show the actual penalty due.
- The new procedure, where a 'relevant court' is asked to determine whether a taxpayer is liable to a penalty (in a situation where agreement on a penalty is not reached or where an agreed penalty is not paid), is available to resolve all tax default penalty cases irrespective of when the default occurred.
- Where there is a tax default but no qualifying disclosure, the taxpayer's name will be published – subject to the exceptions outlined in paragraph 22. The taxpayer may also be open to criminal prosecution whether or not that taxpayer has co-operated with Revenue.
- A penalty will not be pursued 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 'Careless behaviour without significant consequences' category of tax default.
- Qualifying disclosures in the 'Careless behaviour without significant consequences' category of tax default are not counted when calculating the number of qualifying disclosures made by a taxpayer, for the purposes of deciding on the level of penalties to be applied.
- A qualifying disclosure covering a particular tax-head can only be a second qualifying disclosure if there was a liability to the specific tax-head in the first qualifying disclosure.
- If there are no additional qualifying disclosures within 5 years of a previous qualifying disclosure, any future qualifying disclosure is treated as a first disclosure.
- Defaults where no qualifying disclosure is made (in the 'No co-operation' or 'Co-operation only' categories of tax default) are, of course, not counted when calculating the number of qualifying disclosures made by a taxpayer, for the purposes of deciding the level of penalties to be applied.

17. QUALIFYING DISCLOSURES

To date, the concepts of 'qualifying disclosure' 'prompted qualifying disclosure' and 'unprompted qualifying disclosure' have been key features in determining the ultimate quantum of a civil penalty payable in settlements between taxpayers and Revenue.

Making a qualifying disclosure entitles the taxpayer to a significant reduction in the base penalty that would apply to any tax default settlement if a qualifying disclosure was not made. Qualifying disclosures are also taken into account in Revenue's decisions whether to investigate a case with a view to prosecution.

For 'deliberate' and 'careless' behaviour penalties in respect of tax defaults occurring on or after the 24 December 2008, the Acts define –

- a qualifying disclosure;
- a prompted qualifying disclosure; and
- an unprompted qualifying disclosure.

Qualifying Disclosure

A 'qualifying disclosure' 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 **made in writing** and accompanied by-

- a) a declaration, to the best of that person's knowledge, information and belief, that all matters contained in the disclosure are correct and complete; and
- b) a payment of the tax and duty and interest on late payment of that tax and duty

In addition –

- all qualifying disclosures (prompted and unprompted) in the 'deliberate behaviour' category of tax default must state the amounts of **all liabilities to tax and interest, in respect of all tax-heads and periods**, where liabilities arise, as a result of deliberate behaviour, that were previously undisclosed; and
- in the case of a prompted qualifying disclosure in the 'careless behaviour' category of tax default, the disclosure must state the amounts of **all liabilities to tax and interest in respect of the relevant tax-head and periods** within the scope of the proposed audit; and
- in the case of an unprompted qualifying disclosure in the 'careless behaviour' category of tax default, the disclosure must state the amounts of **all liabilities to tax and interest in respect of the tax-head and periods** that are the subject of the unprompted qualifying disclosure

The Revenue officer may also pursue related liabilities for tax-heads or periods that are not within the initial scope of the audit and the taxpayer will have the opportunity to make a prompted qualifying disclosure in relation to these liabilities.

A qualifying disclosure does not need to make any reference to penalties or state the amount of the penalties due. On receipt of a qualifying disclosure, the penalties will then be agreed with the taxpayer and payment obtained for the full amount of the settlement for tax, duty, interest and penalties.

A real, genuine and accepted proposal to pay the agreed liability (involving payment or an agreed phased payment arrangement) will satisfy the payment criteria for a qualifying disclosure. However, one of the conditions of a qualifying disclosure is that the liability due **MUST** be paid.

For all tax defaults, a 'qualifying disclosure' as defined in this paragraph will qualify for the benefits of non-publication and reduced or mitigated penalties.

Prompted Qualifying Disclosure

A “prompted qualifying disclosure” means a qualifying disclosure that has been made to the Revenue Commissioners or to a Revenue officer in the period between-

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

In practice this means that a prompted qualifying disclosure is a disclosure made after an audit notice has issued but before an examination of the books and records or other documentation has begun.

This definition follows along the lines of the definition of a prompted qualifying disclosure contained in paragraph 10.1 of the *Code of Practice for Revenue Auditors* (2002).

Unprompted Qualifying Disclosure

An “unprompted qualifying disclosure” means a qualifying disclosure that the Revenue Commissioners are satisfied has been voluntarily furnished to them

- a) before any investigation or inquiry had been started by them or by a Revenue officer into any matter occasioning a liability to tax, or
- b) where the person is notified by a Revenue officer of the date on which an investigation or inquiry into any matter occasioning a liability to tax of that person will start, before that notification

An unprompted qualifying disclosure is a disclosure that is made before the taxpayer is notified of an audit or contacted by Revenue regarding an inquiry or investigation relating to their tax affairs.

This definition follows along the lines of the definition of an unprompted qualifying disclosure contained in paragraph 10.1 of the *Code of Practice for Revenue Auditors* (2002).

Note – It is important that correspondence to taxpayers indicates whether an inquiry or investigation –

- a) **is about to start; or**
- b) **has started**

Summary Chart – Prompted and Unprompted Qualifying Disclosures		
Category of Default	Type of Qualifying Disclosure	Requirement for a Qualifying Disclosure (accompanied by payment of tax, duty and interest)
Deliberate behaviour	<i>Prompted and Unprompted</i>	State the amounts of all liabilities to tax and interest, in respect of all tax-heads and periods where liabilities arise, as a result of deliberate behaviour
Careless behaviour	<i>Prompted</i>	State the amounts of all liabilities to tax and interest in respect of the relevant tax-head and periods , within the scope of the proposed audit
Careless behaviour	<i>Unprompted</i>	State the amounts of all liabilities to tax and interest, in respect of the tax-head and periods that are the subject of the qualifying disclosure
A Qualifying Disclosure does not need to state the amount of the penalties due		

Co-operation only

Where no qualifying disclosure is made, a reduction in the penalties charged is still granted where a taxpayer co-operates fully during the course of the audit or investigation.

Co-operation during the course of an audit is as defined in paragraph 9.7 of the *Code of Practice for Revenue Auditors (2002)*.

The penalties charged are as outlined in Penalty Table 1 (paragraph 16) and Penalty Table 2 (paragraph 23).

18. EXCLUSIONS – NOT A QUALIFYING DISCLOSURE

Following along the lines of Paragraph 10.1.1 of the *Code of Practice for Revenue Auditors (2002)* the Acts now indicate that a disclosure shall not be a qualifying disclosure where any of the following circumstances apply:

- a) before the disclosure is made, a Revenue officer had 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-
 - (i) 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
 - (ii) that are within the scope of an inquiry being carried out wholly or partly in public, or
 - (iii) to which the person who made the disclosure is linked, or about to be linked, publicly

The matters referred to in (b) (i) above are investigations of a class of cases such as Ansbacher cases, Moriarty Tribunal cases or Mahon Tribunal cases.

19. SECOND OR SUBSEQUENT QUALIFYING DISCLOSURES

It is inappropriate that penalties should be similarly reduced on foot of qualifying disclosures of recurring tax defaults in the categories of 'Deliberate behaviour' and 'Careless behaviour with significant consequences'.

Paragraph 10.4 of the *Code of Practice for Revenue Auditors (2002)* outlines that the 100% penalty for fraud or neglect contraventions attracts less mitigation where a taxpayer makes a second or subsequent qualifying disclosure. This continues to apply for tax defaults occurring before 24 December 2008 - see Penalty Table 2 in Paragraph 23.

The Finance (No.2) Act 2008 outlines the position to apply as regards the new 'Deliberate behaviour' and 'Careless behaviour' penalties where a taxpayer makes a second qualifying disclosure within five years of that taxpayer's first qualifying disclosure – see Penalty Table 1 in Paragraph 16.

The Finance (No.2) Act 2008 also outlines the position to apply as regards the new 'Deliberate behaviour' and 'Careless behaviour' penalties where a taxpayer makes a third or subsequent qualifying disclosure within five years of that taxpayer's second qualifying disclosure – see Penalty Table 1 in Paragraph 16.

Note – A new feature is that if a taxpayer makes no additional qualifying disclosures within five years of a previous qualifying disclosure, the count starts again. If there are no additional qualifying disclosures within 5 years of a previous qualifying disclosure, any future qualifying disclosure is treated as a first disclosure.

In this context, it should be noted that:

- A qualifying disclosure can only be a second qualifying disclosure if there was a liability to the specific tax-head in the first qualifying disclosure
- Qualifying disclosures in the '*Careless Behaviour without significant consequences*' category are never counted when calculating the number of qualifying disclosures made by a taxpayer.

20. QUALIFYING DISCLOSURES AND PROSECUTION

Where the taxpayer makes a prompted qualifying disclosure or an unprompted qualifying disclosure, Revenue will not initiate an investigation with a view to prosecution of the taxpayer. A taxpayer may be investigated with a view to prosecution where a disclosure of tax defaults is not a qualifying disclosure.

21. FIXED PENALTIES

A range of fixed penalties has been brought up to date and the amounts of such penalties have been increased.

22. PUBLICATION – Section 1086 TCA, 1997

Exclusions from Publication

Section 1086 Taxes Consolidation Act 1997 provides for the following statutory exclusions from publication:

- Cases where a 'qualifying disclosure' is accepted;
- Cases where the specified sum referred to in paragraph (c) of subsection (2) does not exceed €30,000 (figure for the tax, interest and penalty);
- Cases where the tax-geared penalty (agreed or determined by the court) does not exceed 15% of the amount of the tax ultimately due;
- Cases where Section 72 Finance Act 1988, or Section 3 of the Waiver of Certain Tax, Interest and Penalties Act, 1993 applied (Amnesty Legislation);

The Finance (No.2) Act 2008 made some amendments to Section 1086 –

- Details of the settlement of a tax defaulter may be published where a fine or penalty is imposed by a court;
- Details of the settlement of a tax defaulter where a fine or penalty is imposed by a court will not be published where –
 - a) the specified sum in settlement of the tax, interest and penalties due does not exceed €30,000;
 - b) the penalty determined by the court does not exceed 15% of the amount of the tax underpaid; or
 - c) there has been a qualifying disclosure
- Where Revenue accept or undertake to accept a specified sum in settlement of a tax default, the acceptance of this sum in settlement is deemed to have been made pursuant to an agreement between Revenue and the taxpayer;
- For disclosures that occurred on or after 24 December 2008, the disclosure is excluded from publication only where it is a 'qualifying disclosure' as defined in the Acts. The definition of a qualifying disclosure now includes the requirement that the disclosure must be "**made in writing**" to the Revenue Commissioners or to a Revenue officer and include payment of the tax, duty and interest due.

Exclusions from publication - Code of Practice for Revenue Auditors–

- Where a 'qualifying disclosure' as defined in paragraph 17 is accepted, the taxpayer's name will not be published.

23. PENALTY TABLE 2 – penalties before 24 December 2008

Applies in respect of all defaults that occurred before the passing of the Finance Act (No.2) 2008 on 24 December 2008

Note: Information regarding matters such as Deliberate Default, Gross Carelessness, Insufficient Care and qualifying disclosures is contained in the *Code of Practice for Revenue Auditors* (2002).

PENALTY TABLE 2		NO QUALIFYING DISCLOSURE		QUALIFYING DISCLOSURE Code of Practice for Revenue Auditors	
	Category of Tax Default [For tax defaults that occurred prior to 24/12/2008]	No co-operation	Co-operation only	Prompted Qualifying Disclosure and co-operation	Unprompted Qualifying Disclosure and co-operation
		The tax-gearred penalty is a percentage of the underpaid tax			
		No mitigation	Net penalty where mitigation applies		
FIRST DEFAULT	<i>Deliberate Default</i>	100%	75%	50%	10%
	<i>Gross Carelessness</i>	40%	30%	20%	5%
All DEFAULTS in 'Insufficient Care' category	<i>Insufficient Care</i>	20%	15%	10%	3%
SECOND DEFAULT	<i>Deliberate Default</i>	100%	75%	75%	55%
	<i>Gross Carelessness</i>	40%	30%	30%	20%
THIRD OR SUBSEQUENT DEFAULT	<i>Deliberate Default</i>	100%	75%	100%	100%
	<i>Gross Carelessness</i>	40%	30%	40%	40%
A penalty will not be imposed in the 'Insufficient Care' category where the tax default does not exceed €3,000					

Notes: Penalties for negotiated settlements for tax defaults that occurred prior to 24/12/2008

- The penalties for making incorrect returns, etc are as outlined in Sections 1053, 1054 TCA, 1997 and other relevant sections of the Acts [see paragraph 9.1 of the *Code of Practice for Revenue Auditors* (2002)]. The net penalty percentages as shown in Penalty Table 2 above are where mitigation as described in the *Code of Practice for Revenue Auditors* (2002) applies. In a situation where agreement and payment on a penalty cannot be reached with the taxpayer, a Revenue officer shall use this table as a basis for forming an opinion regarding the amount of tax-gearred penalty due by the taxpayer. Where a 'Notice of Opinion' is issued to the taxpayer, the notice must show the mitigated penalty due.
- The new procedure, where a 'relevant court' is asked to determine whether a taxpayer is liable to a penalty (in a situation where agreement on a penalty is not reached or where an agreed penalty is not paid), is available to resolve all tax default penalty cases irrespective of when the default occurred.
- Where there is a tax default but no 'qualifying disclosure', the taxpayer's name will be published – subject to the exceptions outlined in paragraph 22. The taxpayer may also be open to criminal prosecution whether or not that taxpayer has co-operated with Revenue.
- A penalty will not be pursued 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 of tax default.
- Qualifying disclosures in the 'Insufficient Care' category of tax default are not counted when calculating the number of qualifying disclosures made by a taxpayer, for the purposes of deciding on the level of penalties to be applied.
- Non-publication and significant mitigation of penalties are benefits of making a qualifying disclosure. A taxpayer may make a 'qualifying disclosure' as defined in paragraph 17 and the taxpayer's name will not be published.
- Defaults where no qualifying disclosure is made (in the 'No co-operation' or 'Co-operation only' categories of tax default) are, of course, not counted when calculating the number of qualifying disclosures made by a taxpayer, for the purposes of deciding on the level of penalties to be applied.