The Importance of Safeguards on Revenue Powers: Another Perspective

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Introduction
The last five years have revealed concerns about the appropriateness of Revenue powers. Broadly speaking, these concerns emphasise either the appropriateness of Revenue powers for securing the revenue of the State, or the lack of safeguards on Revenue powers to protect the rights of the taxpayer. It is the emphasis that is important because disagreement revolves around the appropriate balance between the need to secure the revenue of the State and the rights of the taxpayer.

In what follows, we present some of the implicit and explicit concerns about the current balance between Revenue powers and safeguards for the taxpayer. We then outline the broader legal and economic context. In doing so, we demonstrate that the underlying forces for change are encouraging increases in Revenue powers. Finally, we argue that it is logically inconsistent in both principle and practice to increase Revenue powers without appropriate safeguards.

Recent Concerns
The extent and level of tax evasion uncovered around the turn of the century raised issues about the appropriateness of Revenue powers. In February 2002, the then Attorney-General, Michael McDowell SC, requested that the Law Reform Commission consider the establishment of a Fiscal Prosecutor and a Revenue Court. In March 2003, the then Minister for Finance, Charlie McCreevy, established the Revenue Powers Group to advise Government on issues related to the powers available to the Revenue Commissioners.
In terms of the balance between securing the revenue of the State and the rights of the taxpayer, the main recommendations of both the Law Reform Commission (LRC) and the Revenue Powers Group (RPG) imply a need to rebalance in favour of the taxpayer. The RPG concluded that the powers of it and it accepted the need for such powers, Revenue were similar to other jurisdictions, introduced . Like the provided adequate statutory safeguards were intrusive powers; new safeguards on the circumstances in which directors developed a system of practice under the power also given a new power to facilitate its proposed search for, and removal of, records; legislating and other officers of a company to mitigate; and changes in regard to access to Insurance Tax Fraud Inquiry. for a number of areas in which Revenue has can be criminally prosecuted. And Revenue was preconditions for the use of some of the more third - party information.

The RPG concluded that the powers of Revenue were similar to other jurisdictions, and it accepted the need for such powers, provided adequate statutory safeguards were introduced. Like the LRC, the RPG recommended the inclusion of additional appeals provisions. It also recommended: new objective preconditions for the use of some of the more intrusive powers; new safeguards on the search for, and removal of, records; legislating for a number of areas in which Revenue has developed a system of practice under the power to mitigate; and changes in regard to access to third-party information.

One member of the RPG, Julie Burke, citing supporting judgments from the case in the matter of GO'C and AO'C, has claimed that statutory safeguards are virtually non-existent and that "to the extent that any safeguards exist, they are contained in Revenue Operations Manuals and are of questionable legal standing and offer little comfort to the taxpayer". Based on subsequent legislative action, it would seem that legislators were not convinced by the LRC and the RPG on the substantive issues. A good example is the 2005 Finance Act. Some changes arising from the report of the RPG did make it to the Act. There was an increase in the publication limits for settlement from €12,700 to €30,000. There was a reduction in the interest on overdue tax to 10% APR. There was a reduction in the (rarely used) penalty for fraud from 200% to 100%. However, these represent relaxation in the penalties and do not constitute safeguards on the use of Revenue power. By contrast, in terms of securing the revenue of the State, additional powers were given to Revenue in the Act. There was an extension to the offences that can be criminally prosecuted. In particular, it extends the "aiding and abetting" provisions. It also widens the circumstances in which directors and other officers of a company can be criminally prosecuted. And Revenue was also given a new power to facilitate its proposed Insurance Tax Fraud Inquiry.

The importance of special investigation powers, like that introduced for insurance tax fraud, can be gauged by an examination of the recent use of Revenue powers. The RPG accepted that the use of "normal" Revenue powers in Ireland, like the powers themselves, is similar to international norms (although this raises the issue as to why there are no comparable safeguards).

However, the use of special investigations powers has produced exceptional audit yields for Revenue. In 2005, the Revenue Commissioners collected €11,339m from income taxation. Included in the income tax figures is €537m from Revenue Special Investigations, which means that 4.74% of income tax came from this source. The majority of the yield from special investigations came from an investigation into holders of single premium insurance policies, based on powers introduced in Finance Act 2005.

It seems that special Revenue investigations are an important source of revenue for the State. The importance of these investigations can be seen if the total yield from some of these recent investigations is considered. These are presented in Table 1 on page 54.

The targeting of potentially large levels of tax evasion is to be welcomed. However, doing so by the use of special investigation powers has potential dangers. The cumulative effect of the normalising of "extraordinary" Revenue powers designed for the special investigations tends to tilt the balance towards securing the revenue of the State.

There may also be a tendency to use Revenue powers to achieve aims for which they were not specifically designed. For example, it would seem that the Criminal Assets Bureau (CAB) has grown to rely more heavily on the power to tax rather than the powers it was granted to seize the assets of suspected criminals. Up to the end
of 2005, CAB had demanded and collected over €80m in taxes whereas it had achieved Section 3 Orders of approximately €30m. One less than favourable interpretation of the use of Revenue powers by CAB is that it involves the State sharing the ill-gotten gains of criminals.

Legal and Economic Context

When one considers the evolution of Revenue powers over the last two decades, it is obvious that the tide is flowing in favour of securing the revenue of the State. The various increases in Revenue powers have not brought about corresponding increases in the protection afforded to the taxpayer. Rather than increasing safeguards on the increased powers, a standard practice seems to be to grant a period of grace to the taxpayer to get their affairs in order—a popular coercive technique called "amnesty", which is used to collect items as diverse as outstanding taxes and illegally held firearms. These amnesties offer little ongoing protection to the taxpayer.

Putting these changes in context would suggest that the direction of these changes is likely to continue because the reasons driving them remain. The majority of the increased Revenue powers introduced over the last two decades can be attributed to three causes:

1. There were changes driven by changes in economic conditions and the manner in which business is conducted.
2. There were changes in Revenue's power to combat serious crime.
3. There was the introduction of Revenue powers to combat specific types of tax evasion, e.g., interest income tax evasion.

It is informative to consider each of these three reasons in turn. It is less than 20 years since the movement to greater self-assessment in the tax system brought increased powers of audit for Revenue and the associated tax amnesty of 1988. Four years later, there was an even more significant change in the economic environment with the advent of the Single European Market. The associated removal of certain restraints on the movement of goods and capital had numerous implications. Jurisdictional integration resulted in changes to the taxation of interest income and Revenue powers designed to deal with the greater potential for money laundering facilitated by the freer movement of capital. The legislation associated with the commitment to the Single European Market included the Criminal Justice Act 1994.

Within three years of the Criminal Justice Act 1994, Revenue powers had increased substantially as a result of efforts to combat crime. In a flurry of legislative activity following the murders of Veronica Guerin and Garda Jerry McCabe in the summer of 1996, the Proceeds of Crime Act 1996, the Criminal Assets Bureau Act 1996, and the Taxes Consolidation Act 1997 were introduced. We have already seen the implications of the subsequent interpretation and use of this legislation in terms of CAB's use of its Revenue powers.

But there were other ways in which this legislation increased the powers of Revenue relative to the taxpayer. In terms of search and seizure powers alone, Chapter 4 of the TCA 1997 provided:

- No preconditions for information-seeking powers;
- No independent review of Revenue's decision and no right to appeal;
- No requirement to notify the taxpayer of a court application;
- No requirement to first request the information from the taxpayer;

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A Section 3 Order prevents a person from dealing in any way with property that is the subject of the Order. It is termed an "interlocutory order" and remains in place for up to seven years. It is granted by the Court once it is satisfied that, on a civil standard of proof, a person is in possession or control of property that constitutes directly or indirectly the proceeds of crime.

No redress for damage;

No time limit on documents requested.

Two features of this legislation are worth remembering. First, the hollowing out of the rights of the individual is a general trend and not one limited to the taxation arena. For example, the Criminal Justice Act 1994 facilitated a wider interpretation of what exactly constituted the proceeds of crime post-conviction, and it reduced the burden of proof to the balance of probabilities from beyond reasonable doubt. The Proceeds of Crime Act 1996 further reduced the rights of the individual by allowing confiscation of property, believed by the Gardaí to be the proceeds of crime, without a prior criminal conviction.

The second feature of the legislation worth remembering is that such legislation introduced in times of perceived extraordinary need tends to become normalised with the passage of time. There are clear parallels between criminal law and tax law in this regard.7

The third type of change in Revenue powers was driven by the need to combat specific tax evasion schemes such as DIRT, Ansbacher, and the Clerical Medical Insurance Scheme. The success of the resulting special investigations in terms of yield per investigation is presented in Table 1 on page 54. Given this success, it would be fair to assume that Revenue will continue to target areas where the potential for tax evasion remains greatest.

It also seems fair to assume that legislation to facilitate the process will continue to make its way to the Statute Book and remain in place after the specific investigations have come and gone. In the rush to increase powers, alternative, potentially better solutions are overlooked. The case of interest income taxation is an obvious one. If one is to believe the agencies of the State, then the reason for the differential treatment of resident and non-resident interest income taxation (including enforcement) was the threat to the Irish currency and the exchange rate.8 Has the reason for the differential treatment of resident and non-resident accounts disappeared with the Irish pound? Could not the differential treatment at the heart of the tax evasion be removed?

The cumulative effect of all these changes in Revenue powers is to increase the potential to secure the revenue of the State without having corresponding increases in the protection afforded to the taxpayer. Moreover, as this part of the article sought to demonstrate, the underlying reasons for the changes remain and it is therefore unlikely that the direction of change will be reversed.

Another Case for Safeguards

Ironically, there are parallel developments which suggest that logical consistency requires safeguarding the rights of the taxpayer. The plethora of tribunals and investigations into various aspects of Irish life suggests few citizens believe that those in positions of power use that power in the public interest all the time. Yet the implications of such a belief are rarely followed to their logical conclusion. The vast majority of individuals agree that there needs to be limits on the use of power. However, under the surface of this perspective lies the conviction that constraints are only needed on others. Few seem to accept the need for limits on their own power. It seems it is easier to see the potential for the abuse of powers in others.

Consistently Inconsistent Positions

Legislators are no different in this regard. At the beginning of the 21st century, individuals are faced with economic incentives in virtually all aspects of their lives because legislators believe these incentives will influence the behaviour of citizens. Legislators believe that plastic bag levies will aid environmental efforts at recycling. They believe that the individualisation of the tax system will encourage morelabour-force participation. They believe that "sin" taxes on items like cigarettes and alcohol will reduce consumption.

Not only do legislators believe that incentives influence individuals in their roles as private citizens, but they also believe that they will influence individuals in their public role. Legislators believe that doctors will operate a medical-card prescribing scheme more efficiently if they get some of the savings. They believe that in the education sector will devote more time and effort to research if the legislators allocate funds for "fourth-level" education. But the legislators do not believe that they themselves are influenced by political donations.

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7 The non-jury Special Criminal Court is a case in point. Introduced in 1972 at the height of "the Troubles" to combat the threat posed by paramilitary intimidation of jurors, it has become normalised over time despite the fact that the paramilitary threat has abated.

8 According to the Governor of the Central Bank, Mr Maurice O'Connell, in his evidence to the DIRT investigation, the exchange rate was "the plank which kept us floating."
Nor are those legislators who deal with taxation matters any different. One Minister for Finance stated in his Budget speech that: 

"...there is no such entity as 'the Revenue' in the sense of the enemy of the citizen. Every good citizen ought to pay his tax and there must be effective means of dealing with deliberate evasion or refusal to pay. Tax which one person escapes paying is not conveniently wiped out but is shifted on to the shoulders of his fellow-citizens. Refusal to pay amounts to contempt of the Oireachtas."  

Over three decades later, the same individual provided “the Revenue” with millions of pounds in settlement for evaded taxes. The Moriarty Tribunal will soon issue its findings.

In 1999 the same individual successfully defended “the Revenue” with millions of pounds in settlement for evaded taxes. The Moriarty Tribunal will soon issue its findings.

Given the nature of Revenue powers discussed here, one other example is worth noting. In his recent book about CAB, Paul Williams describes the suspicion that exists within An Garda Síochána about the interests and motivation of other agencies of the State and its legislators. For example, he suggests that Customs Officers damaged a Drug Squad investigation because of vested interests, and that senior Gardaí believe that the Garda Síochána Act 2005 is open to abuse by a corrupt Government. It seems that Gardaí recognise the potential for abuse of power by other public servants.

**Logical Consistency Requires Safeguards**

The above examples fit neatly into the body of theory called constitutional political economy. The theory derives from the work of 1986 Nobel Laureate James M. Buchanan, and it advocates the need for constraints on those working in the public sector, e.g., politicians, bureaucrats, Revenue officials, lawyers and professors. It arrives at this conclusion from an application of the exchange principle to the political process. The presumption that ensures logical consistency is that all individuals are moral equivalents – everyone is self-interested and there are no superior moral beings operating in the public sector.

While this is not the place to discuss the details of constitutional political economy, it is useful to note that it provides us with the fundamental question we should ask when examining tax law. In effect, constitutional political economy asks what form of social contract would be agreed among a group of self-interested individuals and, in particular, what agreement would be reached on taxation. The answer is that taxation powers would be delegated to some members of the group, and strict limits would be placed on the use of these powers. This is a close approximation to, and justification for, constitutional democracy.

The reasoning behind this conclusion is pretty straightforward. Delegation is required because it would not be feasible to attempt to get agreement among the group every time revenue is required. Therefore, individuals would delegate the power to tax provided they believed that, on the whole, they would pay their “fair” share. To ensure that the delegated power was not abused, and that everyone paid their fair share, individuals would require constitutional safeguards on the use of tax powers. The safeguards are required because all individuals are moral equivalents in their self-interest. There is a need to “guard the guards”.

Constitutional political economy neither claims that all individuals act in a self-interested fashion nor that individuals behave in a self-interested fashion all the time. It acknowledges that this is an empirical matter. However, once one considers the possibility that individuals might behave in such a fashion, then powers should only be delegated when they are accompanied by appropriate safeguards. Increases in these powers should be accompanied by increases in safeguards.

**Conclusion**

When the Government sought expert opinion on Revenue powers, it was advised on the need for greater safeguards for the taxpayer.

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*Charles L. Haughey, Dáil Debates (11 April 1967) at 1279.*


*Ibid. at 296.*