Neutral Citation: [2013] IEHC 651

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 720 J.R.]

BETWEEN

GERARD GAFFNEY

APPLICANT

AND

THE REVENUE COMMISSIONERS

RESPONDENTS

JUDGMENT of Ms. Justice Dunne delivered the 1st day of February 2013

The applicant herein seeks judicial review of a decision of the respondents dated the 8th March, 2011, denying the applicant the option of making a qualifying disclosure in respect of his tax affairs. This application concerns the construction of the provisions of s. 1077E of the Taxes Consolidation Act 1997 ("s. 1077E" and "the Act"). In order to understand the nature of the applicant's claim for judicial review in these proceedings it would be helpful to set out in full the provisions of s. 1077E of the Act:-

> 1. "The Acts" means the Tax Acts, the Capital Gains Tax Acts and Parts 18A and 18B of this Act;
>
> "carelessly" means failure to take reasonable care;
>
> "liability to tax" means a liability to the amount of the difference specified in subsection (11) or (12) arising from any matter referred to in subsection (2), (3), (5) or (6);
>
> "period" means a year of assessment or accounting period [or a return period, as defined in section 530]1, as the context requires;
>
> "prompted qualifying disclosure", in relation to a person, 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;
>
> "qualifying disclosure", in relation to a person, means—
>
> (a) in relation to a penalty referred to in subsection (4), a disclosure that the Revenue Commissioners 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 referred to in subsection (4), and full particulars of all matters occasioning any liability to tax or duty that gives rise to a penalty referred to in section 116(4) of the Value-Added Tax Consolidation Act 2010, section 134A(2) of the Stamp Duties Consolidation Act 1999 and the application of subsection (4) to the Capital Acquisitions Tax Consolidation Act 2003, and
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> (b) in relation to a penalty referred to in subsection (7), a disclosure that the Revenue Commissioners 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 referred to in subsection (7) for the relevant period under whichever of the Acts the disclosure relates to,
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> made in writing to the Revenue Commissioners or to a Revenue officer and signed by or on behalf of that person and that is accompanied by -
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> > (i) a declaration, to the best of that person's knowledge, information and belief, made in writing that all matters contained in the disclosure are correct and complete, and
> >
> > (ii) a payment of either or both of the tax and duty payable in respect of any matter contained in the disclosure and the interest on late payment of that tax and duty.
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> "Revenue officer" means an officer of the Revenue Commissioners;
>
> "tax" means income tax, corporation tax, capital gains tax, income levy or parking levy;
>
> "unprompted qualifying disclosure", in relation to a person, means a qualifying disclosure that the Revenue Commissioners are satisfied has been voluntarily furnished to them -
>
> (a) 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, 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."

2. Where any person -

(a) delivers any incorrect return or statement of a kind mentioned in any of the provisions specified in column 1 of Schedule 29 which contains a deliberate understatement of income, profits or gains or a deliberately false or overstated claim in connection with any allowance, deduction, relief or credit,

(b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction, relief or credit and does so deliberately, or

(c) submits to the Revenue Commissioners, the Appeal Commissioners or a Revenue officer any incorrect accounts which contain a deliberate understatement of income, profits or gains or a deliberate overstatement of any claim in connection with any allowance, deduction, relief or credit,

that person shall be liable to a penalty.

3. Where any person deliberately 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 person shall be liable to a penalty.

4. The penalty referred to -

(a) in subsection (2), shall be the amount specified in subsection (11), and

(b) in subsection (3), shall be the amount specified in subsection (12), reduced, where the person liable to the penalty cooperated fully with any investigation or inquiry started by the Revenue Commissioners or by a Revenue officer into any matter occasioning a liability to tax of that person, to-

(i) 75 per cent of that amount where subparagraph (ii) or (iii) does not apply,

(ii) 50 percent of that amount where a prompted qualifying disclosure is made by that person, or

(iii) 10 per cent of that amount where an unprompted qualifying disclosure is made by that person.

5. Where any person carelessly but not deliberately -

(a) delivers any incorrect return or statement of a kind mentioned in any of the provisions specified in column 1 of Schedule 29,

(b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction, relief or credit, or

(c) submits to the Revenue Commissioners, the Appeal Commissioners or a Revenue officer any incorrect accounts which contain an understatement of income, profits or gains or an overstatement of any claims in connection with any allowance, deduction, relief or credit, that person shall be liable to a penalty.

6. Where any person carelessly but not deliberately 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 person shall be liable to a penalty.

7. (a) The penalty referred to –

(i) in subsection (5) shall be the amount specified in subsection (11), and

(ii) in subsection (6) shall be the amount specified in subsection (12), reduced to 40 per cent in cases where the excess referred to in subparagraph (1) of paragraph (b) applies and to 20 per cent in other cases.

(b) Where a person liable to a penalty cooperated fully with any investigation or inquiry started by the Revenue Commissioners or by a Revenue officer into any matter occasioning a liability to tax of that person, the penalty referred to -

(i) In subsection (5), shall be the amount specified in subsection (11), and

(ii) in subsection (6), shall be the amount specified in subsection (12),

reduced -

(I) where the difference referred to in subsection (11) or subsection (12), as the case may be, exceeds 15 per cent of the amount referred to in paragraph (b) of subsection (11) or paragraph (b) of subsection (12), to –

(A) 30 per cent of the difference referred to in subsection (11) or, as the case may be, subsection (12) (in clauses (B) and (C) referred to as "that amount") where clause (B) or (C) does not apply,

(B) 20 per cent of that amount where a prompted qualifying disclosure is made by that person, or

(C) 5 per cent of that amount where an unprompted qualifying disclosure is made by that person,

or

(II) where the difference referred to in subsection (11) or subsection (12), as the case may be, does not exceed 15 per cent of the amount referred to in paragraph (b) of subsection (11) or paragraph (b) of subsection (12) to –

(A) 15 per cent of the difference referred to in subsection (11) or, as the case may be, subsection (12) (in clauses (B) and (C) referred to as "that amount") where clause (B) or (C) does not apply,

(B) 10 per cent of that amount where a prompted qualifying disclosure is made by that person, or

(C) 3 per cent of that amount where an unprompted qualifying disclosure is made by that person.

8. Where any person deliberately or carelessly furnishes, gives, produces or makes any incorrect return, information, certificate, document, record, statement, particulars, account or declaration of a kind mentioned in any of the provisions specified in column 2 or 3 of Schedule 29, that person shall be liable to –

(a) a penalty of €3,000 where that person has acted carelessly, or

(b) a penalty of €5,000 where that person has acted deliberately.

9. Where any return, statement, declaration or accounts mentioned in subsection (2) or (5) was or were made or submitted by a person, neither deliberately nor carelessly, and it comes to that person's notice that it was or they were incorrect, then, unless the error is remedied without unreasonable delay, the incorrect return, statement, declaration or accounts shall be treated for the purposes of this section as having been deliberately made or submitted by that person.

10. Subject to section 1077D(2), proceedings or applications for the recovery of any penalty under this section shall not be out of time because they are commenced after the time allowed by section 1063.

11. The amount referred to in paragraph (a) of subsection (4) and in paragraph (a)(i) of subsection (7) shall be the difference between -

(a) the amount of tax that would have been payable for the relevant periods by the person concerned (including any amount deducted at source and not repayable) if that tax had been computed in accordance with the incorrect or false return, statement, declaration or accounts as actually made or submitted by or on behalf of that person for those periods, and

(b) the amount of tax that would have been payable for the relevant periods by the person concerned (including any amount deducted at source and not repayable) if that tax had been computed in accordance with the true and correct return, statement, declaration or accounts that should have been made or submitted by or on behalf of that person for those periods,

and for the purposes of this subsection and of subsection (12) references in those subsections to tax payable shall be construed without regard to the definition of "income tax payable" in section 3.

12. The amount referred to in paragraph (b) of subsection (4) and in paragraph (b)(ii) of subsection (7) shall be the difference between -

(a) the amount of tax paid by that person for the relevant periods before the start by the Revenue Commissioners or by any Revenue officer of any inquiry or investigation where the Revenue Commissioners had announced publicly that they had started an inquiry or investigation or where the Revenue Commissioners have, or a Revenue officer has, carried out an inquiry or investigation into any matter that would have been included in the return or statement if the return or statement had been delivered by that person and the return or statement had been correct, and

(b) the amount of tax which would have been payable for the relevant periods if the return or statement had been delivered by that person and the return or statement had been correct.

13. Where a second qualifying disclosure is made by a person within 5 years of such person's first qualifying disclosure, then as regards matters pertaining to that second disclosure -

(a) in relation to subsection (4) -

(i) paragraph (ii) shall apply as if "75 per cent" were substituted for "50 per cent2,

(ii) paragraph (iii) shall apply as if "55 per cent" were substituted for "10 per cent", and

(b) in relation to subparagraph (I) of subsection (7)(b) -

(i) clause (B) shall apply as if "30 per cent" were substituted for "20 per cent", and

(ii) "clause (C) shall apply as if "20 per cent" were substituted for "5 per cent".

14. Where a third or subsequent qualifying disclosure is made by a person within 5 years of such person's second qualifying disclosure, then as regards matters pertaining to that third or subsequent disclosure, as the case may be –

(a) the penalty referred to in paragraphs (a) and (b) of subsection (4) shall not be reduced, and

(b) the reduction referred to in subparagraph (I) of subsection (7)(b) shall not apply.

15. A disclosure in relation to a person shall not be a qualifying disclosure where -

(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, or

(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.

16. The relevant period for the purposes of subsections (11) and (12) shall be, in relation to anything delivered, made or submitted in any period, that period, the next period and any preceding period, and the references in those subsections to the amount of tax payable shall not, in relation to anything done in connection with a partnership, include any tax not chargeable in the partnership name.

17. For the purposes of this section, any returns or accounts submitted on behalf of a person shall be deemed to have been submitted by the person unless that person proves that they were submitted without that person's consent or knowledge."

It will be seen from the above that s. 1077E is a comprehensive and self contained provision of the Act dealing with the calculation of penalties for deliberately or carelessly making incorrect returns in relation to, *inter alia*, income tax, corporation tax and Capital Gains Tax. Of particular relevance in this case will be the parts of the section relating to the definition of "prompted qualifying disclosure", "qualifying disclosure" and the provisions of section 1077E(15).

The applicant in these proceedings has sought the following relief:-

1. An order of *certiorari* quashing the respondent's decision set out initially in their letter dated the 8th day of March 2011, and explained in their further letter dated the 30th day of June, 2011, denying the applicant the option of making a qualifying disclosure in respect of his tax affairs on the ground that the investigation into his tax affairs had commenced.

2. A declaration that the respondent's acted unlawfully and *ultra vires* in respect of s. 1077E of the Taxes Consolidation Act 1997, in refusing the applicant the option of making a prompted qualifying disclosure in respect of his tax liabilities in the instant case.

3. A declaration that the respondents' policy in respect of the making of a qualified disclosure in the case of revenue investigations as set out in para. 1.6 of its Code of Conduct for Revenue Audits is unlawful and *ultra vires* s. 1077E of the Taxes Consolidation Act 1997.

4. A declaration that the respondent's acted unreasonably and irrationally in law in refusing the applicant the option of making a prompted qualifying disclosure in respect of his tax liabilities under s. 1077E of the Taxes Consolidation Act 1997.

5. A declaration that the respondent is entitled to make a prompted qualifying disclosure under s. 1077E of the Taxes Consolidation Act 1997, in respect to his tax affairs and to obtain all the benefits under law therefrom in the calculation of monetary penalties in his case.

6. A declaration that the respondents breached their customer service charter in denying the applicant the option of making a prompted qualifying disclosure.

7. A declaration that the applicant has a legitimate expectation that he had the option of making a prompted qualifying disclosure in the circumstances of his case.

8. A declaration that the respondents policy in respect of the making of prompted qualifying disclosures differentiate as between tax payers subject to revenue audit and taxpayers subject to revenue investigation and, insofar as taxpayers subject to revenue investigation are denied the option of making a prompted qualifying disclosure, is said to differentiate as between different classes of taxpayers is in breach of the guarantee of equality provided for in Article 40.1.1 of Bunreacht na hEireann."

The applicant also sought, if necessary, an order extending the time within which to bring this application.

The reference in para. 3 above to the Code of Conduct for Revenue Audits should be a reference to the Code of Practice for Revenue Audit.

Background

A series of affidavits have been exchanged between the applicant on the one hand and Denis Holligan on behalf of the respondents on the other hand. The applicant described how he entered into a tax scheme which involved his subscribing for 200A ordinary shares at €1 per share in a company called Teamridge Limited; a further company, Venture Construction Limited subscribed €1,275,000 for 100 shares on a premium of €12,749 per share. Teamridge Limited was liquidated and the applicant received €1,233,533 from the liquidation. Mr. Holligan in his affidavit pointed out that an important aspect of the scheme not mentioned by the applicant was the transfer from Venture Construction Limited to the applicant of all of the rights attaching to its shares in Teamridge Limited, paid for by Venture Construction Limited at a premium. By this means the full value of those shares passed to the applicant.

Mr. Holligan in his affidavit also described the Special Projects and Policy Development Branch, Investigations and Prosecutions Division of the Revenue Commissioners. Its role is to carry out project based investigations and examinations with a view to identifying undeclared tax liabilities on income, profits and gains by persons and recovering the tax liabilities, statutory interest and penalties thereon. He described the general nature of such investigations and said that the Special Projects and Policy Development Branch commenced and continued to investigate certain defined aspects of the tax affairs of the applicant, namely, the transactions involving the transfer of share rights to the applicant by Venture Construction Limited, a company of which the applicant was a

member. The Special Projects and Policy Development Branch had identified characteristics in certain cases consisting of decrease in net assets in a company, liquidated of a related company and large round sum distributions on liquation where the liquidated company's assets appeared to be only cash. The existence of the characteristics so described gave rise to concerns of tax risk and payment of tax. The wider analysis, examinations and investigations into the matter revealed the extraction of significant funds from a large number of companies involving the transfer to share rights for the benefit of persons without the payment of tax and this process led to the identification of the related beneficiaries. The case of the applicant and the related transactions was identified as part of the process. The examination and investigation into the matters relating to the transactions involving the transfer of share rights gave rise to serious concerns of non compliance with tax obligations. Ultimately the letter of the 8th March, 2011, was sent by the Revenue Commissioners to the applicant. Mr. Holligan went on to state that the Revenue's investigation and the issue of a notification of a revenue investigation in the letter of the 8th March, 2011 to the applicant were based on information gathered, collated and analysed by Revenue in a considered, organised and focused way. He pointed out that the applicant could have disclosed his participation in the scheme and the related transactions and source prior to, at the time of, or indeed subsequent to the filing of the relevant tax return. This he chose not to do.

> The letter of the 8th March, 2011, stated:-
>
> "I am writing to advise you that this office has commenced an investigation into your tax affairs for the tax years 2009 et seq. The investigation is concerned, *inter alia*, with the tax consequences of transactions involving the transfer of share rights, to you by Venture Construction Limited ("the company")."

The letter continues by setting out the information available to the Revenue Commissioners in relation to the scheme and states that the information suggests that the value of the rights transferred from the company to the applicant is chargeable to income tax. The letter concluded by stating:-

> "I must point out that if additional tax liabilities arise as a result of this investigation, the option of making a qualifying disclosure is no longer available to you given that the investigation has commenced."

Following receipt of the letter of the 8th March, 2011, the applicant stated that he was advised by his tax advisers to settle his tax affairs and accordingly a payment was made to the Revenue in the sum of €366,705. That sum was made up of the figure of €308,040 in relation to Capital Gains Tax, €27,861 in interest and €30,804 in penalties. That was based on advices furnished in a letter dated the 21st March, 2011, to the applicant from his tax advisers, Dermot Byrne and Associates Limited. I should point out that there is a dispute between the applicant and the Revenue as to whether or not the tax liability at issue between the Revenue and the applicant is a liability in respect of Capital Gains Tax or income tax, but that is not a dispute which requires to be resolved in these proceedings.

As a result of further advices from the applicant's tax advisers he was informed that the effect of the respondent's decision that he could not make a prompted qualifying disclosure was that the penalty imposed upon him was 50% higher than it would have been had he been able to make a qualifying disclosure. Following those advices the applicant queried that decision and correspondence was exchanged between the applicant and the respondents on the 27th June, 2011, and the 30th June, 2011. Again I think I should refer briefly to the contents of the letter of the 30th June, 2011, from the respondents to the applicant's tax advisers, in which it was stated:-

> "The Revenue investigation into your client's tax affairs commenced prior to your original letter dated the 28th March, 2011. (That was the letter in which the bank draft for €366,705 was sent to the Revenue). For further information regarding the making of qualifying disclosures, I refer you to the Code of Practice for Revenue Auditors available on www.revenue.ie ."

For completeness I should refer to the fact that the applicant has stated on affidavit that the letter of the 8th March, 2011, from the Revenue was received by him on the 10th March, 2011, at the same time as he had received a letter from his tax advisers dated the 10th March, 2011. That letter (from his tax advisers) had advised him to "repair my 2009 tax return with an expression of doubt". It is worth quoting from that letter also. It stated:-

> "There is a Revenue investigation into the arrangements, under which the liquidation took place in 2009/2010.
>
> Subject to the outcome of this investigation it is important that matters be dealt with as follows:
>
> > We recommend that you repair your 2009 tax return and pay the Capital Gains Tax immediately, with an expression of doubt."

The letter went on to set out a calculation of the amount due on the basis that the tax involved was Capital Gains Tax.

Having set out the relevant background above, there are just two comments I think I should make at this point in relation to the issues I have to consider. First of all it is clear that an investigation by the Revenue in relation to the applicant's tax affairs had commenced prior to the 8th March, 2011. There was some issue at the hearing before me in relation to the date upon which that letter was received and the fact that at the same time, the applicant had also received the letter from his tax advisers dated the 10th March, 2011. However, it is patently clear that the letter of the 8th March, 2011, from the Revenue Commissioners to the applicant was notifying him of the fact that an investigation into his tax affairs had commenced. The second point to make is that there was some discussion between the parties at the hearing before me in relation to the status of an expression of doubt and the time at which such expression of doubt could be made. It will be recalled that in the letter of the 10th March, 2011, from the tax advisers to the applicant, it was suggested that the 2009 tax return be repaired with an "expression of doubt". Ms. Clohessy S.C. in the course of her submission made the point that when the applicant was furnishing his tax return for the year 2009, the applicant did not give any details of the tax scheme in his tax return. He could have given such details and furnished an "expression of doubt". She made the point that this could only be done at the time of filing a tax return. S. 955(4) of the Act deals with the question of an expression of doubt in the following terms:-

> "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."

Having regard of the provisions of the relevant section, it seems to me that there is force in the argument of Ms. Clohessy as to when an expression of doubt can be furnished and I accept her submissions on this point.

Submissions
I now want to consider the submissions made by the parties in relation to the central issue in dispute between the parties herein.

Statutory Interpretation in General
It will be seen that the provisions of s. 1077E of the Act of most significance in this case are the definitions of "qualifying disclosure", "prompted qualifying disclosure" and "unprompted qualifying disclosure" together with the provisions of s. 1077E, subs. 15 of the Act, all of which have been set out above.

The parties are in agreement as to the approach to be taken by the court in the interpretation of the statutory provisions. In the first instance, it was urged on the court that a literal approach should be adopted in relation to the construction of the statutory provisions. Reference was made to the judgment of Denham J. (as she then was) in *Lawlor v. Flood* [1999] 3 I.R. 107, where she stated:-

> "In applying the ordinary meaning of the words the Court is enforcing the clear intention of the legislature. This aspect of statutory construction is an essential part of the separation of powers. Further, it is an illustration of appropriate respect by one organ of government to another."

Finlay C.J. also considered the literal approach in the case of *McGrath v. McDermott* [1988] I.R. 258 at p. 275, where he observed that the literal approach to the construction of legislation meant that the courts could not deviate from the literal meaning of a statute merely because the court might consider such deviation desirable:-

> "The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, . . . the courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable."

Interpretation of Taxation Statutes
The interpretation of taxation statutes was also addressed. A number of authorities were referred to in that context including the judgment of Kennedy C.J. in *Revenue Commissioners v. Doorley* [1933] I.R. 750 at p. 765, where it was stated:-

> "A taxing Act (including of course any other Act or part of an Act incorporated in it by reference), of its own proper character and purpose, stands alone, and is to be read and construed as it stands upon its own actual language. In my opinion, therefore, the argument from the earlier Stamp Acts propounded by Pigot C.B. and adopted here, is not one which may be admitted by the Court in interpreting the Act before us. The duty of the Court, as it appears to me, is to reject an a *priori* line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e., within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred."

I will also refer to the decision in the case or *Inspector of Taxes v. Kiernan* [1982] I.L.R.M. 13 at pp. 121 to 122, in which Henchy P. made the following observations:-

> "Leaving aside any judicial decision on the point, I would approach the matter by the application of three basic rules of statutory interpretation. First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning. As Lord Esher M.R. put it in *Unwin v. Hanson* at p. 119 of the report:-
>
> > 'If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.'
>
> The statutory provisions we are concerned with here are plainly addressed to the public generally, rather than to a selected section thereof who might be expected to use words in a specialised sense. Accordingly, the word 'cattle' should be given the meaning which an ordinary member of the public would intend it to have when using it ordinarily.
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> Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language: see Lord Esher M.R. in *Tuck & Sons v. Priester (*at p. 638); Lord Reid in *Director of Public Prosecutions v. Ottewell* (at p. 649) and Lord Denning M.R. in *Farrell v. Alexander* (at pp. 650-1). As used in the statutory provisions in question here, the word 'cattle' calls for such a strict construction.
>
> Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed."

As I have indicated, the parties are in agreement that the principles set out above are applicable to the interpretation of the statutory provision at issue in these proceedings. It is on that basis, therefore, that the court will approach the matters at issue herein.

The Construction of s. 1077E.
Mr. Ross Maguire S.C. on behalf of the applicant in the course of his submissions looked at the Code of Practice for Revenue Audit, a

document which was produced by the Revenue in consultation with the Taxes Administration and Liaison Committee as explained by Mr. Holligan in his first affidavit. The Code of Practice gives a definition of a Revenue audit and a definition of a Revenue investigation. At para. 1.7(b) under the heading "Notification of a Revenue Investigation it is stated as follows:-

> "Where a Revenue investigation is being notified, the letter issued will include the wording: "Notification of a Revenue Investigation" As and from the date of a "Notification of a Revenue Investigation" letter (that is the date shown on the letter) to the taxpayer or agent, the opportunity to make any type of 'qualifying disclosure' is no longer available.

Mr. Maguire in commenting on the Code of Practice and, in particular, that section, commented that that was the position of the Revenue throughout the proceedings. It was part of his argument that the Code of Practice was not in accordance with the provisions of s. 1077E of the Act. He looked at the description of a qualifying disclosure contained in the Code of Practice at para. 2.6 and the definition of a qualifying disclosure. He noted that it is pointed out in para. 2.7 of the Code of Practice that a taxpayer who makes a qualifying disclosure will not be investigated with a view to prosecution and will not have his or her tax settlement published in the list of tax defaulters. In addition, there is a reduction in the amount of the penalty payable by the taxpayer. He referred to the definition contained in the Code of a "prompted qualifying disclosure" and further referred to para. 2.10 which is headed "Exclusions - disclosure not regarded as a qualifying disclosure" which sets out the following:-

> "A disclosure made by a taxpayer shall not be a qualifying disclosure where any of the following circumstances apply:
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> (a) If before the disclosure is made, a Revenue officer had started an audit 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) If 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 include investigations of a class of cases such as Ansbacher cases, Moriarty Tribunal cases or Mahon Tribunal cases."

It is clear that the relevant part of the Code of Practice from the point of view of Revenue is the part contained at para 2.10(a) above. To reinforce his argument, Mr. Maguire referred to Appendix 2 of the Code of Practice at p. 75 and in particular to a panel headed "Disclosures". He argued on the basis of the information contained in that panel that it was clearly the Revenue view that there was no option permissible for a taxpayer in respect of a prompted qualifying disclosure in the case of investigation. I should say that I disagree with Mr. Maguire's reliance on this particular matter in that it is manifestly clear from the terms of the information provided in the panel that it is the notification of an investigation that deprives the taxpayer of the benefits of a qualifying disclosure and not the mere fact of an investigation.

Exercise of Discretion.
A further argument made on behalf of the applicant was that there was no basis in the provisions of s. 1077E to distinguish between a person who is to be audited and a person who is to be investigated and it was further contended that s. 1077E does not give the Revenue scope to exclude the making of a prompted voluntary disclosure in the case of an investigation. It was contended that the Revenue was adhering to an inflexible policy and thereby fettering its discretion.

The contention of the applicant in this regard is that the refusal of the Revenue to afford him an opportunity to make a prompted qualifying disclosure is the adoption of a fixed policy by the Revenue such that the Revenue are fettering their discretion in circumstances where, under the provisions of s. 1077E, the Revenue have been afforded a discretion under the Act. Reference was made to a series of decisions including the case of *Dunne v. Donohoe* [2002] 2 I.R. 533, a decision of the Supreme Court. That was a case which concerned the granting of a firearm certificate and the role of a Superintendent of An Garda Síochána in that regard. In that case, Keane C.J. stated that:-

> ". . . a superintendent who imposed a precondition in the case of all applications for the grant or renewal of firearm certificates that the applicant should, . . . install a gun safe . . . would be acting *ultra vires* the provisions of the [Firearms Acts]" (At p. 543)

Reference was also made to the decision in the case of *Re. N. a Solicitor* (Unreported, High Court, Finlay P. 30th June 1980,) which was referred to in the passage referred to previously from Hogan and Morgan "*Administrative Law*" at para. 15.209, in which the learned authors commented:-

> "In another example, Re. N, the applicant had fallen into some difficulties in running his practice, and he subsequently failed to apply for a practicing certificate. The Incorporated Law Society had a rule of practice that, in such circumstances, an applicant is bound to spend a year as an assistant solicitor in a solicitor's office before being considered for a full practicing certificate and thus when N. did apply for a certificate, he was refused a full certificate. Finlay P. held that the rule unduly fettered the discretion of the Society, and prevented full consideration of the merits of the applicant's case. While the Society was entitled to have a policy, it could not be applied to all cases in an inflexible manner. Finlay P. accordingly reversed the order made by the Society, saying that the Society may have paid insufficient regard 'to the likely effect on a prospective employer of an applicant of the age of this applicant seeking employment and not varying a full unqualified certificate."

Reference was also made to two further decisions that in *Crofton v. Minister for Environment, Heritage and Local Government* [2009] I.E.H.C. 114 and *Mishra v. Minister for Justice, Equality and Law Reform* [1996] 1 I.R. 189. In the latter case Kelly J. at p. 205 stated:-

> "In my view, there is nothing in law which forbids the Minister upon whom the discretionary power under s. 15 is conferred to guide the implementation of that discretion by means of a policy or set of rules. However, care must be taken to ensure that the application of this policy or rules does not disable the Minister from exercising her discretion in individual cases. In other words, the use of a policy or a set of fixed rules must not fetter the discretion which is conferred by the

> Act. Neither, in my view, must the application of those rules produce a result which is fundamentally at variance with the evidence placed before the Minister by an applicant."

In relying on the passages referred to above, it is the applicant's contention that there is a discretion as to notification under the Act and that the Revenue are fettering their discretion in that they have taken the view that there is to be no disclosure in the case of an investigation. A number of other authorities were referred to in this context including the case of *Breen v. Minister for Defence* [1994] 2 I.R. 34, in which O'Flaherty J. commented at p. 41 to 42:-

> "The respondent having carefully, as he said, considered the representations, nonetheless, has not stated how he reacted to the information that he received about the dire straits in which this unfortunate man found himself.
>
> I am far from saying that every administrative decision must be accompanied by elaborate reasons such as would be appropriate to a judgment but the citizen's sense of resentment and frustration can be readily understood in circumstances where he has presented what he thinks is a viable case and has been met simply by a blanket refusal to change by the administrative decision-maker. Unfortunately, the decision arrived at appears to fly in the face of what the justice of the case required."

Reliance was placed on this authority to make the point that the respondents never addressed their minds to the possibility of notification in the case of an investigation in that there was a "blanket refusal to change" or, to put it another way, a fixed policy.

Two further cases were referred to by counsel on behalf of the applicant in the context of an argument as to the failure of the respondents to acknowledge that there was any discretion to exercise. The first of those cases is the case of *Sherwin v. Minister of the Environment* [2004] 4 I.R. 279 and the second case is the decision in the case of *Whelan v. Kirby* [2005] 2 I.R. Those decisions were considered by the learned authors Hogan and Morgan in the work referred to above and I will refer briefly to a passage from their work at para. 15-234 which refers to the latter of those cases where the comment was made as follows:-

> "A second example is Whelan v. Kirby which arose out of a criminal prosecution for drunken driving. The solicitor for the accused made an application to have the intoximeter inspected by an independent expert. The District Court rejected this application with the words 'I cannot get involved in this. The law is the law'. In so saying, according to the Supreme Court, the judge failed to entertain the application and so failed to exercise his judicial discretion."

It was pointed out that cases such as this and the well known decision in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] I.E.S.C. 3 are relied on by the applicant because this is a case where, in the event that there is no ability to make a prompted qualifying disclosure, the applicant faces the risk of prosecution, the risk of publication and the inability to rely on the mitigation of the penalty measures contained in section 1077E.

Having made that general point as to discretion, Mr. Maguire made submissions on a literal construction of section 1077E. He argued that the definition of "prompted qualifying disclosure" envisages that Revenue Officer will notify the taxpayer that an investigation or inquiry will start on a certain date and thereby enable the taxpayer to make a prompted qualifying disclosure in the period after notification and before the investigation or inquiry is to start. Mr. Maguire on behalf of the applicant said that a strict construction of the relevant parts of s. 1077E(1), subs (15) had the effect that a qualifying disclosure, be it prompted or unprompted, shall not be a qualifying disclosure where, before the disclosure is made, a Revenue Officer had started an inquiry or investigation into any matter contained in the disclosure and had contacted the taxpayer or his or representative in that regard. Accordingly, he contended that 1077E(1), subs. 15 is a cutting down or derogation from the definition of a prompted qualifying disclosure provided for in s. 1077E(1). He added that in general terms subs. 15 provides that where (a) before the disclosure had been made, an inquiry or investigation had started and the taxpayer had been notified in that regard or (b) the matters contained in the disclosure are matters known or about to become known to the respondents through their own investigations there cannot be a qualifying disclosure, be it prompted or unprompted. He further submitted that although points (a) and (b) relate to different situations, they have in common an implication that the disclosure which has been ruled out as a qualifying disclosure has already been made by the taxpayer. In both instances, he contended that the respondents or their officers are required to have sight of and to have evaluated the disclosure made by the taxpayer because if they did not have sight of and evaluated, they would be unable to say whether or not they had started an inquiry or investigation into any matter contained in the disclosure and had contacted or notified the taxpayer about this or whether the matters contained in the disclosure were known to about to become known to the respondents through their own investigations. Therefore, he contended that on a literal construction of subs. 15, the taxpayer has first to make disclosure and then be advised by the respondents or their officers that the disclosure had been read and evaluated and been found to be other than a qualifying disclosure for the reasons set out in subsection 15. It was pointed out that it is clear from the affidavits herein that no such process of reading and evaluating the applicant's disclosure was undertaken. The letters commencing with the 8th March, 2011, from the Revenue to the applicant and/or his advisers made it clear that the applicant could not make a qualifying disclosure because the investigation had commenced. This prohibition by the respondents on the applicant making a disclosure was contended to be incorrect and contrary to the true meaning of subs. 15 which it was contended envisaged that its provisions came into operation after the respondents had received a disclosure from the taxpayer. On that basis it was contended that the respondents were not entitled to rely on the provisions of subsection 15(a).

Purposive Interpretation of s. 1077E

It was then argued on behalf of the applicant that the definition of "prompted qualifying disclosure" and the provisions of subs. 15 are contradictory – in the definition of "prompted qualifying disclosure", a time period is given to the taxpayer to make a voluntary disclosure while subs. 15(a) removes that period when an investigation has begun. Given that there is a contradiction between the provisions, it is submitted that a purposive construction of the provision should be undertaken. On that basis it is contended that having regard to the overall purpose of the Oireachtas in providing a measure of relief from tax penalties where prompted qualifying disclosure is made, it is contended that the taxpayer/applicant should be given the benefit of making prompted voluntary disclosure as the permissive definition of "prompted qualifying disclosure" should prevail over the restrictive provisions of subsection 15. It is further argued that in the context of taxation litigation, any ambiguity should favour the taxpayer. (See *Harris v. Quigley* 2006 1 ILRM 401).

Further Points

A number of other points have been made on behalf of the applicant herein. Based on the arguments as to the construction of s. 1077E contended for by the applicant, it was submitted that the decision of the Revenue not to afford the applicant an opportunity to make a prompted qualifying disclosure was unreasonable or irrational, having no basis in law.

It was also submitted that s. 1077E makes no distinction between an investigation or inquiry whereas in the Code of Practice, such a distinction is made. It was submitted therefore that the Revenue in their operation of s. 1077E as evidenced by the Code of Practice have deviated from the provisions of the section and have unlawfully created two categories or classes of taxpayers in a manner not

permitted by the statute, namely, those subject to audit and those subject to investigation. Thus it was contended that in this way the respondents have acted irrationally and unreasonably in law.

Respondents Submissions
Ms. Clohessy S. C., on behalf of the respondents noted that at the heart of the arguments on behalf of the applicant was the contention that s. 1077E must be interpreted as giving the applicant a right to make a voluntary disclosure before commencing an investigation. It was also a significant part of his case that there was a "disconnect" between the provisions of s. 1077E and the Code of Practice in that there was a blanket decision made by the Revenue to refuse to permit a qualifying disclosure to be made in the case of an investigation as opposed to an audit.

She pointed out that this was a case in which the applicant did not furnish any details of the "tax scheme" in his tax returns to the Revenue. He could have given details of the scheme with his annual tax returns together with an "expression of doubt" but chose not to do so. Ms. Clohessy pointed out, as mentioned previously, that the time for raising an expression of doubt was when filing a tax return. However, the applicant told the Revenue nothing about the tax scheme. It was the Special Project unit that identified a situation involving the liquidation of companies and the payment of large sums of money to individuals following the liquidation. The applicant is effectively saying that the Revenue must stop their investigations and give him an opportunity to tell them what they already know. As she explained, the letter of the 8th March, 2011 set out a description of the tax scheme.

Ms. Clohessy then examined the provisions of section 1077E. She noted that the section dealt with penalties for tax defaulters. She referred to the definition in s. 1077E of "liability to tax", that is, "a liability to the amount of the difference specified in subs. (11) or (12) arising from any matter referred to in subs. (2), (3), (5), or (6)". She also referred to the definitions of "qualifying disclosure" and "prompted qualifying disclosure". Having done so, she said that if a taxpayer fell within the scope of s. 1077E, subs. 15, a disclosure is not a qualifying disclosure. She contended that the applicant fell precisely within the provisions of s. 15(a), in that a Revenue Officer had started an investigation into the tax affairs of the applicant. She noted that Mr. Maguire accepted that the applicant fell within subs. 15(a) but had argued that there was discretion to notify the taxpayer so as to enable a prompted qualifying disclosure to be made, but she said that there is no discretion provided for in s. 1077E as contended for by Mr. Maguire. She made the point that if Mr. Maguire was right in that regard, every single person who has ever been the subject of publication in the tax defaulter's list must have had a right to make a prompted qualifying disclosure. That could not be correct and as she emphasised, the underlying premise of the tax code is "self assessment"; accordingly, the Revenue accept a tax return as being correct. To suggest that a compliant taxpayer and a non compliant taxpayer should be treated by the Revenue in exactly the same way was an absurd proposition. She made the point that a disclosure, in order to be a prompted qualifying disclosure or an unprompted qualifying disclosure, must in the first instance be a qualifying disclosure. A disclosure is not a qualifying disclosure where the matters disclosed have already become known to the respondent through its own investigations or where before the disclosure is made, the respondent had started an investigation into the matters contained in that disclosure and notified the tax payer in that regard. She pointed out that the provisions in relation to disclosure related to the liability to tax that is a liability that has arisen or to put it another way where the taxpayer had under paid tax and in that regard she referred to the definition of prompted qualifying disclosure, the definition of liability to tax and the overall purpose and scheme of section 1077E.

Decision and Policy of the Revenue Ultra Vires s. 1077E
Ms. Clohessy rejected the argument of Mr. Maguire to the effect that the letter of the 8th March, was a decision in the sense of the exercise of a discretion but argued that in fact it was a communication as to the applicant's legal position. She observed that the applicant appeared to contend that the respondents had made what was described as a decision based on an erroneous interpretation of s. 1077E thus rendering the decision void, but she rejected contention on the part of the applicant. The question of the policy apparent from the Code of Practice was also dealt with by Ms. Clohessy. She noted that the reference to the Code relied on by the applicant arose in the respondents letter of the 30th June, 2011, which referred to the applicant to the Code "for further information regarding the making of qualifying disclosures". She said that the letter referring to the Code was not a letter setting out the basis for the respondents' communication regarding the qualifying disclosure. The Code was referred to as a source of further information and is explanatory in nature only. She made reference to the fact that the basis for the applicant's contention appears to be based principally on para. 1.6 of the Code which explains the nature of Revenue investigations and the fact that a disclosure may not be qualifying disclosure where a taxpayer has been notified that an investigation into their tax affairs has started but that no reference was made by the applicant in the course of their arguments to other provisions of the Code which may be of relevance and in that regard she cited para. 2.10 of the Code which sets out exclusions in respect of disclosures not regarded as a qualifying disclosure. Paragraph 2.10 of the Code states, *inter alia*, that a disclosure made by a taxpayer shall not be a qualifying disclosure where any of the following circumstances apply:-

> "If before the disclosure is made, a Revenue officer had started an audit 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."

It was submitted on behalf of the respondents that the applicant had misconstrued the meaning, effect and legal significance of the Code of Practice. On the contrary, the treatment of the applicant by the respondent was based on subs. 15 of section 1077E. When the applicant sought to make a disclosure, the position was that an investigation had already started and the matters were notified to the applicant as being the subject of such investigation. In those circumstances it was contended that the applicant could not meet the definition of qualifying disclosure and was thus unable to make a prompted qualifying disclosure. Ms. Clohessy outlined briefly the circumstances in which the Code came to be provided and I have already referred to that in the context of the information provided by Mr. Holligan in his affidavit. Ms. Clohessy emphasised that the Code was no different in fact from the Act. It was made clear under the Act that if the respondent already had the information to be provided in a disclosure there cannot be a disclosure and in that regard she referred to para. 1.7 of the Code of Practice in relation to the notification of a Revenue audit or investigation. In any event, she noted that it was not being said on behalf of the applicant that the Code gave him a right over and above those contained in the provisions in section 1077E.

Exercise of Discretion
Ms. Clohessy in her examination of the provisions of s. 1077E submitted that there was no provision in the section for the exercise of any discretion. A taxpayer had a right to make a qualifying disclosure in the circumstances provided for in the section. She emphasised that the Revenue had no discretion to exercise a discretion not provided for in the section. In that context she referred to the decision in the case of *Garda Representative Association v. Minister for Justice* [2010] I.E.H.C. 78, in which Charleton J. at para. 18 to 20 made the following comments:-

> "A discretion may be either ample or narrow. In some instances an apparent discretion given to a Minister in legislation will fade away and become an entitlement of those to whom the statute is addressed; as, for example, where a statute sets out a series of qualifying criteria which, once they are fulfilled, gives an apparent discretion to a Minister, or other official, to grant an entitlement. In such a case an apparent empowerment, whereby the Minister or an official may grant a

> benefit, a common statutory wording, becomes instead an entitlement to receive same once the detailed qualifying criteria set out in legislation are met. . . .
>
> Discretion, therefore, is a power which may, on the one hand, be so circumscribed as to be extinguished, but it may also, on the other hand, be a power which is so wide as to put it, for most practical purposes, beyond the scope of judicial review. In between these two extremes, there are situations where the answer to the extent of discretion is to be found in the legislative text interpreted in accordance with its plain wording or, if any ambiguity arises, then in accordance with the purpose behind the enactment. . . ."

She made the point that having regard to the passage cited above, there was no phrase contained in s. 1077E which could give rise to a discretion.

Legitimate Expectations
In the course of their written submissions, the respondents dealt with the issue of legitimate expectation which was a matter relied on by the applicant in the statement grounding the application for judicial review in the following terms, "the applicant had a legitimate expectation based on s. 1077E that he would be entitled to make a prompted voluntary disclosure in the circumstances of his case" and secondly, on the basis that "the applicant had a legitimate expectation based on the relevant provisions of the respondents Customer Service Charter that s. 1077E would be applied, fairly, reasonably and consistently by the respondents in his case". It was pointed out that the applicant had in the statement of grounds simply referred to the respondents Customer Service Charter to the effect that s. 1077E would be applied fairly, reasonably and consistently by the respondents and Ms. Clohessy made the point that if that was relied on as the promise upon which to build the case grounded in legitimate expectation, the applicant had failed to establish breach of such promise even if the statement contained in the Customer Service Charter could be construed in that way. I think Ms. Clohessy is correct in that regard, but in fairness to Mr. Maguire, the issue of legitimate expectation was not addressed either in the oral or written submissions by Mr. Maguire and for that reason I do not propose to consider the issue of legitimate expectation any further.

The final matter dealt with by Ms. Clohessy related to the alleged unconstitutionality of the provisions of s. 1077E on the basis that there was a differentiation between taxpayers' subject and those subject to investigation. This suggestion was rejected by Ms. Clohessy who reiterated that if that was correct, then everybody who had previously appeared on a tax defaulters list should have been given notice permitting them to make a prompted voluntary disclosure. She made the point that the legislation at s. 1077E subs. 15 provides a different treatment applies to someone in the position of the applicant and someone who makes a disclosure at a time when an investigation into their tax affairs has not already started and the disclosure contains matters not already known to the respondent. She rejected the suggestion that there was a Revenue "policy" which allows taxpayers subject to "Revenue audit" to make a prompted qualifying disclosure, but denies such treatment to taxpayers subject to "Revenue investigation". The approach of the Revenue is that directed by the distinctions set out in s. 1077E subs. 15. Accordingly, she argued that the applicant had failed to establish as a matter of fact the necessary distinction in treatment as between the applicant and others in the same position. Accordingly, she argues that the applicant had failed to make out a case based on breach of constitutional rights.

Replying Submissions
In replying submissions Mr. Maguire made the point that the Act envisages that before an investigation commences into any matter occasioning any liability to tax, the Revenue are obliged to decide whether or not to notify the taxpayer. From the Code it would appear that in the event of an investigation, the Code indicates that there never will be any such notification. This flies in the face of the definition of a prompted qualifying disclosure. The Code makes it clear that in the case of an investigation there is no discretion. His essential point is that it cannot be said that there can never be a prompted qualifying disclosure in the event of an investigation. In the circumstances of the policy exercised by the Revenue there it is no opportunity to make a prompted qualifying disclosure in the circumstances of an investigation. That is a fixed policy and cannot be permitted.

Consideration and Decision
There was no disagreement between the parties as to the law applicable to the construction of statutes. The central issue in this case is whether or not the Revenue had an obligation to afford the applicant an opportunity to make a prompted qualifying disclosure in the circumstances of this case. It is clear from the authorities that in the first instance, the court should, in construing the section at issue adopt a literal approach thereby giving effect to the intention of the Oireachtas in enacting the legislation. In that respect, the definition of "qualifying disclosure", "prompted qualifying disclosure" and the terms of subs. 15(a) are of most relevance.

It would be helpful to make some general observations on s. 1077E of the Act. It appears in a chapter of the Act headed "Income Tax, Corporation Tax and Capital Gains Tax: Penalties for false returns etc.". Section 1077E is headed "Penalty for Deliberately or Carelessly Making Incorrect Returns, etc." Broadly speaking, it will be seen that the section is concerned with penalties for making incorrect returns. The returns or statements involved in s. 1077E are those referred to in column 1 of Schedule 29 of the Act as is clear from s. 1077E(2), (3), (5) and (6), which includes, for example, a reference to s. 879 of the Act which deals with returns of income and s. 473 of the Act which deals with allowances that may be claimed by certain taxpayers, in respect of rent paid by them. Put simply, a taxpayer who is entitled to claim an allowance for rent paid in accordance with s. 473 and who over claims the amount due will be liable to a penalty.

Section 1077E sets out the circumstances in which the penalty applicable may be reduced, for instance, where the taxpayer has cooperated fully with the Revenue Commissioners, where the incorrect return was made carelessly, but not deliberately and so on. Section 1077E, subs.(4) and (7) show how a prompted qualifying disclosure and an unprompted qualifying disclosure will reduce the penalty payable, to 50% of the amount of the penalty in the case of an unprompted qualifying disclosure and 10% of the penalty where an unprompted qualifying disclosure has been made.

Other provisions of s. 1077E provide for lesser reductions in the penalties applicable in the case of subsequent qualifying disclosures.

Broadly speaking, therefore, it can be seen that the section provides for the rate of penalty applicable to understatements of income and over claims of allowances and the effect of a qualifying disclosure in mitigating the amount of penalty.

It would be of assistance to examine more closely the relevant provisions of s. 1077E of the Act.

> A "qualifying disclosure" means:
>
> ". . . a disclosure that the Revenue Commissioners 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 referred to in subsection (4), . . . [or subsection (7)]"

Thus, the basic requirement of a qualifying disclosure is the disclosure of complete information of all matters occasioning a liability to tax to the Revenue Commissioners.

> 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."

Thus, it is clear that a prompted qualifying disclosure can only be made between the date of notification by a Revenue Officer of the date on which an investigation or inquiry will start and the date on which that inquiry or investigation will start. I think there can be no misunderstanding as to the period within which prompted qualifying disclosure can be made. There are two matters within that definition which require some further consideration.

The first point to note is that there is no definition contained in s. 1077E of the phrase "investigation or inquiry". Equally, there is no reference to an audit in section 1077E. As has been described at length in the submissions made to the court, the Code of Practice makes a distinction between Revenue audits and Revenue investigations. That distinction is not reflected in section 1077E. Obviously, the Code of Practice does not prevail over the provisions of the section and it is to the section itself one must look to find the intention of the Oireachtas. In looking at the definition of "prompted qualifying discretion" it is important to bear in mind that the investigation or inquiry at issue is an investigation or inquiry into any matter occasioning a liability to tax of that person. Thus, I think, it is clear that the investigation or inquiry referred is not a general investigation or inquiry being carried out by the Revenue Commissioners or its officers. It follows that at the outset of a general investigation into an area of concern as to the underpayment of tax, the identity of those involved will, in all probability, be unknown.

It would be helpful to look more closely at the Code of Practice and its treatment in relation to a Revenue audit. At para. 1.1 the objective of a Revenue audit is set out in the following terms:-

> "The primary objective of the customer service, compliance, audit and prosecution programmes is to promote voluntary compliance with tax and duty obligations.
>
> The audit programme is mainly concerned with detecting and deterring non compliance.
>
> Its range of functions includes:
>
> • Determining the accuracy of a return, declaration of tax liability or claim to repayment
>
> • Identifying additional liabilities or other matters requiring adjustments, if any
>
> • Collecting the tax, interest, and penalties, where appropriate
>
> • Identifying cases meeting criteria for publication in the tax defaulter's list under the provisions of Section 1086 Taxes Consolidation Act, 1997
>
> • Specifying remedial action required to put taxpayers on a compliant footing where errors or irregularities are discovered during the course of an audit
>
> • Considering what procedural or other changes are necessary to eradicate evasion activities
>
> • Where strong indications of serious tax evasion emerge in cases, referring them to Investigations & Prosecutions Division (IPD) to evaluate suitability for prosecution
>
> • Verifying compliance with both Customs legislation and Excise legislation, checking the accuracy and completeness of data entered in customs declarations, including those made under simplified procedures."

Having thus set out the objective of a Revenue audit, a definition is then set out at para. 1.2 as follows:-

> "A Revenue audit is an examination of:
>
> • A tax return
>
> • A declaration of liability or a repayment claim
>
> • A statement of liability to Stamp Duty
>
> • The compliance of a business with tax and duty legislation.
>
> An examination may involve looking at all the risks in a particular case or may focus on a single issue.
>
> It also includes, where appropriate in any particular case, and also in cases where returns have not been submitted, an examination of an individual's or a company's books, records and compliance with tax obligations so as to establish the correct level of liability. It may also involve collection of arrears of tax with a view to putting the taxpayer on a correct tax compliance footing.
>
> Apart from randomly selected cases . . . audits are generally based on informed selections from the risk profiling of cases, including computer assisted profiling as well as local knowledge. Audit cases may also be selected for examination of a particular sector or scheme. . . ."

Further on, in the Code of Practice at para. 1.6 a description of Revenue investigations is given:

> "An investigation is an examination of a customer's affairs where Revenue has strong concerns of serious tax offences having occurred.
>
> Where strong indications of serious tax evasion are known in relation to a customer, the case will not normally be the subject of a Revenue audit but rather the subject of a Revenue investigation. A number of investigation cases may lead to criminal prosecution. Where, in the course of an audit, an auditor encounters strong indicators suggesting a serious tax offence, he or she will advise the taxpayer that an investigation may be undertaken. Continuation and completion of the audit/investigation will be managed in conjunction with Investigations and Prosecutions Division."

Although it appears that a distinction is made in the Code of Practice between a Revenue audit and Revenue investigation, I do not think that it could be said that a Revenue audit does not involve an "investigation or inquiry". In the case of both a Revenue audit and a Revenue investigation as described in the Code of Practice, it is clear that there will be an examination of the person's tax affairs. It seems to me that such an examination, be it in the form of a Revenue audit or Revenue investigation comes within the definition of investigation or inquiry as provided for in the definition of a prompted qualifying disclosure. The important point is that the definition of "prompted qualifying disclosure" as appears in s. 1077E sets out precisely the period within which such a qualifying disclosure may be made. It can be made only when a Revenue Officer notifies the taxpayer that an investigation or inquiry into any matter occasioning a liability to tax of that person will start. It is significant that it is a notification in respect of the individual's tax affairs and further that such investigation or inquiry is to start on a specified date. Therefore, in the case of an audit, it follows as a matter of practicality that a taxpayer who is about to be subject to an audit will have notice of that fact and therefore will have the opportunity to make a prompted qualifying disclosure. The situation in relation to an investigation is different. If one thinks of the type of issues that can give rise to an investigation in the general sense of the word, an investigation may take place not into an individual and their liability but, as in this case, into a tax scheme that has come to the attention of the Revenue. As appears from the affidavit of Mr. Holligan, there is a branch of the Revenue, namely, the Special Projects and Policy Development Branch, Investigations and Prosecutions Division, whose role it is to carry out investigations and examinations with a view to identifying undeclared tax liabilities on income, profits and gains by persons and recovering the tax liabilities, statutory interest and penalties. Mr. Holligan went on to describe the nature of the work carried out by the Special Projects and Policy Development Branch in general terms and then in relation to the specific tax scheme at issue in this case. It is inevitable that there will be circumstances in which an investigation will take place into various tax schemes with a view to examining the general issue as to whether there is an undeclared tax liability and such investigation will then, if necessary, pursue individual taxpayers. Thus, in the case of an individual taxpayer who is involved in such a tax scheme, the argument of the applicant throughout has been that he should be notified before such investigation commences. I see nothing in the definition of prompted qualifying disclosure that requires the respondents to notify in advance potential taxpayers of any possible liability to tax in advance of commencing such an investigation with a view to enabling the taxpayer to make a prompted qualifying disclosure. Indeed, it is difficult to see how individual taxpayers could be so notified before a general investigation commences, as the individuals involved may not have been identified in advance of such investigation.

There was a second point in relation to the definition of "prompted qualifiying disclosure" that I would consider. To some extent I have already addressed the issue. It is clear that a prompted qualifying disclosure can only be made in the period between the date on which the person concerned is notified of the date on which an investigation or inquiry into any matter occasioning a liability to tax of that person will start. In other words, the notification is given before the investigation commences. I have explained that in circumstances where an investigation is a broad based investigation in relation to a scheme in general terms such as the one at issue here, clearly it is not possible to notify an individual of that fact.

It was suggested in the course of the arguments on behalf of the applicant that subs. 15 and in particular subs. 15(a) was taking away the right to make a prompted qualifying disclosure which was conferred in the definition of "prompted qualifying disclosure". I cannot agree with that interpretation. As I have been at pains to point out there are circumstances in which the Revenue will notify an individual that it is about to commence an investigation or inquiry into that specific individual's tax affairs. Equally, it must be the case that in certain instances, the Revenue Commissioners will commence inquiries, not into an individual taxpayer's affairs, but into a particular tax scheme which has come to their attention. In the course of such investigation it may turn out to be the case that an individual taxpayer's affairs are identified as being a matter for concern giving rise to a letter such as that which was written by the Revenue Commissioners to the applicant in this case on the 8th March, 2011. The words used in s. 15(a) to the effect that a "disclosure" in relation to a person shall not be a qualifying disclosure where:-

> "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."

I think the words used in s. 15(a) could not be clearer. There is no doubt that a taxpayer may make a disclosure following correspondence from the Revenue but as was urged on the court by Ms. Clohessy it is difficult to regard a matter as a qualifying disclosure if it is already the subject of an investigation and has become known to the Revenue in the course of that investigation. By contrast, Mr. Maguire pressed the court to accept that it was implicit in the provisions of s. 1077E(15)(a) that there had to be an evaluation of the disclosure before the opportunity to make such a qualifying disclosure could be rejected. Mr. Maguire referred to the use of the words "contained in that disclosure" in subsection 15(a) and laid particular emphasis on that phrase. I think this point can be considered by looking at the facts of this particular case. The Special Projects and Policy Development Branch had identified characteristics in certain cases consisting of a decrease in net assets in a company, liquidation of a related company and large round sum distributions on liquidation, where the liquidated company's assets appear to be only cash. The case of the applicant was identified as part of that process. Thus, in the course of the investigation, an issue arose as to non compliance with tax obligations and the applicant was identified as one of the person's concerned. It is clear, therefore, that the investigation had already commenced by the time the letter of the 8th March, 2011, was written to the applicant. It is not a case in which an investigation was to commence. There is nothing implicit in subs. 15(a) that I can see which indicates that a disclosure had be evaluated by the Revenue prior to writing any letter notifying the individual taxpayer of the fact that an investigation had begun. The reference "contained in that disclosure" in subs. 15 (a) does not mean, in my view, that the Revenue must have evaluated any disclosure before stating that it is not a qualifying disclosure.

Looking at the words of s. 1077E overall and having regard to the definition of prompted qualifying disclosure and the provisions of subs. 15(a) it seems to me that the distinction being drawn in the two parts of the section is a straightforward one. It is simply this, in the event that the Revenue write to an individual informing that individual that an investigation is about to commence, then the individual concerned has an opportunity to furnish a prompted qualifying disclosure. Such prompted qualifying disclosure will have the effect of reducing the penalties that the taxpayer may be liable to pay. In the event that an investigation commences and subsequent to the commencement of that investigation, the Revenue identifies an issue in relation to the liability to tax of an individual, it is then open to the Revenue to write to that individual notifying him of the existence of the investigation. In the

circumstances having regard to the provisions of subs. 15(a) a disclosure made by the taxpayer subsequent to such notification shall not be a qualifying disclosure. There is nothing inherently contradictory or illogical in the provisions of s. 1077E in relation to the definition of prompted qualifying disclosure when contrasted with the provisions of subsection 15(a). Looking at the scheme of the section overall, it is clear that disclosures may be made at different stages and in different ways and that some disclosures will have more value in mitigating penalties than other disclosures. An unprompted qualifying disclosure, where there is no investigation or inquiry taking place by the Revenue, but nevertheless the individual taxpayer informs the Revenue of the fact that there has been either an underpayment of tax or an over claiming of an allowance accompanied by the payment of the tax due, together with the appropriate interest will result in a much reduced penalty. That is provided for in the terms of section 1077E. A prompted qualifying disclosure also allows a taxpayer a reduction in the amount of penalty payable, but to a lesser extent given that in those circumstances the disclosure is made in the context of the Revenue having informed the individual that an investigation or inquiry is about to take place and the final position is where a disclosure is made after an investigation has commenced. I think it can be seen from the nature of the mitigation of penalty having regard to the nature of the disclosures that the overall purpose of the section is to reflect the nature of self assessment in respect of the tax code and the encouragement of tax compliance by the individual taxpayer.

It has been said that there is a "disconnect" between the Code of Practice and the provisions of the section. To some extent, it could be said that the terms used in the Code of the Practice whereby a distinction is made between an audit and an investigation are somewhat confusing. Having said that, I have already indicated that it seems to me that an audit is a form of investigation or inquiry and that by its nature an audit is a form of investigation or inquiry which can only take place once prior notification has been given that such an investigation or inquiry is about to begin. I cannot see how an audit could take place without such prior notification. The fact that there is prior notification that investigation or inquiry in the form of an audit is about to take place, gives the taxpayer the opportunity to make a prompted qualifying disclosure. This is not a case where the taxpayer was notified that an audit was about to take place. Thus, while on one view the Code of Practice as contrasted with the provisions of s. 1077E may create a distinction between an audit and an investigation, I do not think that there is a "disconnect" as contended for by the applicant. It is important to remember that the task I have to consider is the interpretation of the provisions of s. 1077E and to that extent the Code of Practice cannot amend, alter, vary or prevail over the terms of the section.

At its simplest, I am satisfied that on the facts of this case given that an investigation had already commenced into the liability to tax of the applicant prior to any disclosure being made by the applicant that having regard to the terms of subs. 15(a), the applicant is not someone to whom the opportunity of making a prompted qualifying disclosure was open. The terms of s1077E are clear and I cannot see any basis on which it could be said that there is a discretion conferred on the Revenue as to when a prompted qualifying disclosure can be made. This is not a case in which the Revenue is fettering a discretion conferred by the section.

Having regard to my view that the respondents were not obliged to afford the applicant an opportunity to make a prompted qualifying disclosure in the circumstances of this case, it follows that there was no unreasonableness or irrationality on the part of the respondents in not affording the applicant such opportunity.

The final point I want to address briefly is the relief sought by the applicant to the effect that the respondents' policy in respect of the making of prompted qualifying disclosures differentiates as between taxpayers subject to Revenue audit and taxpayers subject to Revenue investigation. For the reasons already outlined above, I do not think that such a policy can be identified. The section provides for the making of prompted qualifying disclosure in the circumstances outlined in s. 1077E under the definition of prompted qualifying disclosure. Equally, the position is made clear in subs. 15(a) that a disclosure is not a qualifying disclosure in circumstances where an investigation has already commenced. That is provided for in the terms of s. 1077E and is not therefore simply "the respondents' policy in respect of the making of prompted qualifying disclosure". Accordingly, it is not necessary for me to consider this matter further. In any event, the distinction discernible in the section is surely that between the compliant and the non-compliant tax payer. I do not see how that could be the subject of any legitimate criticism.

In the circumstances of this case, I am satisfied that the applicant is not entitled to the relief claimed.