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Special Report to each House of the Oireachtas - the reasons why

I hereby submit a special report to each House of the Oireachtas under Sections 6(5) and 6(7) of the Ombudsman Act, 1980.

This is the first special report presented to Dáil and Seanad Éireann following a rejection by a public body of a recommendation by the Ombudsman. The Oireachtas appointed me to hold public bodies to account and to ensure fair play in their dealings with the public. Following my investigation in these cases, I regret to say that the Revenue Commissioners have failed to meet the standards required by fair or sound administration in their dealings with the complainants covered by this report and others affected by the issues arising from the investigation. Indeed, I find that the basis on which the Revenue has rejected three of my five recommendations involves such a misrepresentation of the position that I consider it a direct and unprecedented challenge to the authority vested in the Office of the Ombudsman by the Oireachtas.

There are two issues which I wish to draw to the attention of the Houses. The first is the Revenue's refusal to pay complainants interest or compensation for delays on the part of Revenue in making tax rebates properly due to them. The second issue is the Revenue Commissioners' refusal to introduce a scheme to compensate taxpayers generally in the future where tax is incorrectly levied due to maladministration on Revenue's part. I strongly believe that Revenue should introduce such a scheme without further delay. This would be in line with a recommendation of the Joint Oireachtas Committee on the Strategic Management Initiative in a report on Quality Customer Service in the Office of the Revenue Commissioners published in December 2001. It would also show that the

Revenue is serious about its *Charter of Rights*, published as long ago as 1988. The Charter declares as its priority objective the fostering of the highest degree of public confidence in the Revenue's '*integrity, efficiency and fairness*', as well as declaring that the role of Revenue staff is to seek to collect '*only the correct amount of tax or duty no more and no less.*'

The Office of the Ombudsman relies on the authority which comes from its independence, impartiality and competence to gain fair play for people who have been wronged by public bodies. As Ombudsman I do not make binding decisions. The Revenue Commissioners are free in law to reject my recommendations. My only recourse, when I consider that a public body's response to a recommendation is unsatisfactory, is to make a special report to each House of the Oireachtas under the Ombudsman Act, 1980. This is such a report.

I respectfully ask the Houses to consider my report and to take whatever action they deem appropriate in the circumstances.

Kevin Murphy
Ombudsman

November 2002

FOR REDRESS TAXPAYERS

Introduction



... both women claimed refunds of the tax incorrectly deducted from them. In both cases, Revenue refused to allow a full refund of the tax and limited the refund to what Revenue claimed was a statutory limit of five years... Both complainants also claimed compensation for loss in value of refunds denied them and of the amounts actually refunded to them. In addition, six other complainants approached me in relation to this second issue. Each claimed that a tax refund properly owing to them had been wrongly retained by Revenue for a lengthy period. Revenue had refused to pay them interest or compensation for loss in value ...



The names used in this special report have been changed to protect the identities of the complainants.

The report concerns the actions of the Revenue Commissioners (the Revenue) relating to two issues:

- (i) time limits on retrospective refunds of tax wrongly collected and
- (ii) compensation for loss in value where tax refunds are made in cases where the overpayments of tax were the result of maladministration.

I received two complaints in relation to the first issue. Mrs Maria Kelly and Mrs Phyllis Nolan are both in receipt of public service occupational widow's pensions. Following a 1988 High Court decision, which held that the children's portion of a Garda Síochána widows pension should not be taxed as the income of the surviving parent, both women claimed refunds of the tax incorrectly deducted from them. In both cases, Revenue refused to allow a full refund of the tax and limited the refund to what Revenue claimed was a statutory limit of five years. The two widows complained to me that they had been wrongly denied full refunds of tax - four additional years worth of refunds in Mrs Nolan's case and three additional years in the case of Mrs Kelly. Both complainants also claimed compensation for loss in value of the refunds denied them and of the amounts actually refunded to them. In addition, six other complainants approached me in relation to this second issue. Each claimed that a tax refund properly owing to them had been wrongly retained by Revenue for a lengthy period. Revenue had refused to pay them interest or compensation for loss in value because there was no specific statutory provision for the payment of such

interest in their particular circumstances.

There are six chapters in this report:

Chapter 1 examines the role of the Ombudsman and the courts, and discusses the question of administrative accountability of public bodies. I have found it necessary to do this because of an implicit questioning of my role in the Revenue's response to a draft of my investigation report. It also examines the discretionary decision-making powers of the Revenue under the care and management provisions of the Tax Acts.

Chapter 2 deals with the legal background to time limits on retrospective refunds of tax made by Revenue.

Chapter 3 deals with the legal background to the payment of compensation for loss in value of delayed refunds of tax.

Chapter 4 examines the Revenue's refusal to make a full retrospective payment of income tax to two widows.

Chapter 5 examines the Revenue's refusal to compensate the two widows and six other taxpayers for loss in value of tax refunds.

Chapter 6 contains my findings and recommendations, the Revenue's response to my recommendations and my response to Revenue's refusal to accept my recommendations in full.

In accordance with Section 6(6) of the Ombudsman Act, 1980, I gave a copy of the original draft of my investigation report to the Revenue in order to allow it to make representations to me in relation to any finding or criticism adverse to it in the draft report. The then Chairman of the Revenue Commissioners sent me a detailed response, the full text of which is in Appendix 1, which I considered very carefully. While I did not find it necessary to

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alter the substance of the draft investigation report in light of the Revenue response, I restructured the draft report and included my comments on the arguments put to me by the then Chairman in the appropriate sections of the report. Before making any recommendations arising out of the investigation I decided, again in accordance with Section 6(6) of the Ombudsman Act, 1980, to give a copy of the revised draft investigation report to the new Chairman of the Revenue Commissioners. I did not find it necessary to make any significant alteration to the report in the light of the Chairman's response which is at Appendix 2.

I sent my final investigation report with recommendations to the Revenue. Revenue accepted my first recommendation - that the two widows be paid the additional arrears due to them. With regard to my second recommendation, the Revenue also agreed, with certain reservations, to make refunds to others in situations similar to these two women. However, Revenue rejected my third recommendation, viz., that the two widows and six other complainants, whose tax rebates were also wrongly delayed, be compensated by Revenue for this delay. Revenue also rejected my fourth recommendation, viz., the provision of compensation in four other cases where the examination of the complaint had been held over pending the outcome of the investigation. The Revenue told me that it could not accept these recommendations because of their wide-ranging implications. It also said that it lacked the legal authority to make such payments. I accept neither point and I informed the Chairman accordingly.

During my investigation I had repeatedly pointed out to the Revenue that it had conceded interest payments to another group of taxpayers without specific statutory authority. I understand that the Revenue considered that a High Court judgement (*Lawrence O'Rourke v The Revenue Commissioners* [1996] ITR p81) could be extended to this group, and this was done.

The Revenue has also argued that my frequently expressed view - that like cases should be treated in like manner - is the chief reason for rejection of this recommendation because the cases themselves could not be "ring-fenced". This is disingenuous on the Revenue's part. My recommendations are restricted to three specific groups - the eight complainants, other public service widows who were affected by the *O'Carroll* judgement in the same way as Mrs Kelly and Mrs Nolan and four other cases where a complaint had been made to my Office and where the examination had been held over pending the outcome of this investigation. I am heartened, however, to see that this principle of equal treatment for people in similar circumstances is uppermost in the Revenue's mind, despite its continuing refusal to put it into practice.

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Introduction

The fifth recommendation is that the Revenue should introduce a scheme to compensate taxpayers for delays in granting tax refunds because of some fault on the Revenue Commissioners' part. This has also been rejected but with the assurance that the question is under review. The Revenue also make the point that such a scheme should be placed on a statutory basis - a matter which, it points out, is the responsibility of the Minister for Finance in the first instance. I am aware of the Revenue Commissioners' role in this process, but I do not accept that it is the passive role which the Revenue claim it to be.

In view of Revenue's rejection of three of my recommendations I have decided to make a special report to the Oireachtas. I do this, firstly, because I believe that Revenue is not justified in refusing to compensate the complainants who were the subject of my investigation. My reasoning in this regard is outlined in the body of this report. Secondly, I believe that, in order to prevent similar complaints arising in the future, Revenue should introduce a general scheme to compensate taxpayers where it is solely or significantly to blame for delay in refunding tax overpayments.



Chapter 1

CONTEXT - THE OMBUDSMAN'S ROLE



FOR REDRESS TAXPAYERS

Context - The Ombudsman's Role



An Ombudsman operates in the area of administrative accountability, i.e., the process of ensuring that public service activities and, in particular, the exercise of decision-making powers, whether discretionary or otherwise, are carried out not only in a proper legal manner but in a manner consistent with fairness and good administrative practice.



By way of background I would like at this stage in the report to raise a number of issues which are relevant to this investigation. These are the role of the Ombudsman and the Courts, the Ombudsman and administrative accountability and the discretionary powers of the Revenue under the care and management provisions of the Tax Acts.

The Ombudsman and the Courts

The question may legitimately be asked as to whether the issues arising out of these complaints are more appropriate for consideration by the courts rather than the Ombudsman. In this regard I think it is important for me to clarify my role as Ombudsman. My functions, as set out in Section 4 of the Ombudsman Act, 1980, require me to examine the actions or inactions of specified public bodies which have adversely affected complainants and which were or may have been:

- "(i) taken without proper authority,*
- (ii) taken on irrelevant grounds,*
- (iii) the result of negligence or carelessness,*
- (iv) based on erroneous or incomplete information,*
- (v) improperly discriminatory,*
- (vi) based on an undesirable administrative practice, or*
- (vii) otherwise contrary to fair or sound administration."*

It is important to emphasise that, unlike the courts, I do not make binding decisions, only recommendations based on my assessment of the merits of particular cases and the appropriateness or otherwise of the

actions or decisions of public bodies in such cases. Nevertheless, and bearing in mind that my actions are open to judicial review, it is incumbent on me to ensure that, in judging the actions of public bodies against the criteria set out in the Ombudsman Act, I act in a way which would not bring me into conflict with the courts. At the same time, I must make my own decisions about what is "contrary to fair or sound administration" having regard to the general principles developed by the Irish courts as well as by, for example, the Court of Justice of the European Communities and the European Court of Human Rights. I also take into account the various principles of good administration developed by international bodies such as the Council of Europe which the State has accepted, even though they may not be enshrined in domestic statutory law. These principles would, in any event, be most unlikely to conflict with any similar principles developed by the Irish courts. As Ombudsman, I am not, therefore, precluded from developing incrementally, and on a case by case basis, rules of good practice the infringement of which by public bodies would be "contrary to fair or sound administration" subject, of course, to the avoidance of conflict with the courts.

The Ombudsman and administrative accountability

An Ombudsman operates in the area of administrative accountability, i.e., the process of ensuring that public service activities and, in particular, the exercise of decision-making powers, whether discretionary or otherwise, are carried out not only in a proper legal manner but in a manner consistent with fairness and good administrative practice. Just as financial auditors examine the activities of the public

Context - The Ombudsman's Role

service in accordance with certain financial principles and criteria, an Ombudsman examines public service activities against the background of what are commonly referred to as the principles of good administration.

I have used these principles to develop a *Guide to Standards of Best Practice for Public Servants* which I published in conjunction with my Annual Report for 1996. The *Guide* explains to public servants how to deal properly, fairly and impartially with their clients. These "accountability parameters" are derived from the categories of maladministration referred to in Section 4 of the Ombudsman Act, 1980, from the practical experiences of thousands of complainants, and from Ombudsman colleagues throughout the world.

The discretionary powers of the Revenue under the care and management provisions of the Tax Acts

Section 849 of the Taxes Consolidation Act, 1997 (TCA 1997) provides that all duties of tax shall be under the care and management of the Revenue. The Section also enables the Commissioners, by reason of their responsibility for the care and management of the tax, to:

"... do all such acts as may be deemed necessary and expedient for raising, collecting, receiving and accounting for tax in the like and in as full and ample a manner as they are authorised to do in relation to any other duties under their care and management ..."

The terms 'care' and 'management' are not defined.

The *Fifth Report of the Commission on Taxation* (October 1985) considered the broad issue of 'Revenue Practice'. The Commission defined 'Revenue Practice' as the way in which the Revenue Commissioners apply the tax system where:

- (i) the legislation does not cover the case in question or is unclear;
- (ii) the legislation cannot be implemented strictly or in a cost-efficient manner;
- (iii) the legislative detail appears deficient, unjust or in conflict with the general spirit of the legislation in question; or
- (iv) the legislation confers some discretionary powers in its operation on the Revenue Commissioners.

In its report the Commission noted:

"Revenue practice in Ireland is not directed by legislation. It is established by Revenue decision. When requested the Revenue Commissioners may express their view on the interpretation or application of the tax system. There is however, no general clearance or rulings procedure for transactions."

The Commission went on to note, at pages 74 and 75:

"Some legislation confers specific discretionary powers on the Revenue Commissioners ... In addition the Revenue Commissioners are charged with the care and management of all taxes and duties ... The extent of the discretion conferred on the Revenue Commissioners by this general provision has never been clearly defined."

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Context - The Ombudsman's Role



"Under the care provision we mitigate the application of the law if its literal interpretation would not be in accord with the intention of the Oireachtas or if it would result in hardship."



The view of the Revenue Commissioners - quoted in the Fifth Report of the Commission on Taxation (October 1985)

The Commission asked the Revenue Commissioners for their view on the powers conferred on them by the care and management provisions. They replied that:

... the care and management provisions have not as far as we are aware ever been legally interpreted. However, these provisions place on the Revenue Commissioners the responsibility for administering the law in relation to taxes, subject to the general direction of the Minister for Finance and subject to the right of appeal to the Appeal Commissioners and the courts. The management provision enables us to exercise administrative discretion in allocating the resources available to us. We are not required to implement the letter of the law in all cases, regardless of cost.

Under the care provision we mitigate the application of the law if its literal interpretation would not be in accord with the intention of the Oireachtas or if it would result in hardship. (my emphasis).

(Source: *paragraph 3.16 of the Fifth Report of the Commission on Taxation, 1985*)

Commenting on the care and management provisions, the Institute of Taxation has noted that:

"The Revenue Commissioners, by reason of their responsibility for the care and management of the tax, have power to grant concessional treatment that is not in strict accordance with the legislation where circumstances suggest to them that it is proper to do so."

(Source: The Institute of Taxation *The Taxation of Capital Gains* 1998 Tony Appleby & Frank Carr).



Chapter 2

TIME LIMITS ON RETROSPECTIVE REFUNDS OF TAX



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Time Limits on Retrospective Refunds of Tax

Legislation

Part XXXIV of the Income Tax Act, 1967 (ITA 1967) is entitled "Repayment" and comprises Sections 496 to 498. Section 498 provides:

"Save as otherwise expressly provided by any provision of this Act, no claim for repayment of income tax under this Act shall be allowed unless it is made within ten years next after the end of the year of assessment to which it relates."*

*Section 498 of ITA 1967 originally specified a time limit of six years; this was amended to ten years by Section 4(5) of the Finance (Miscellaneous Provisions) Act, 1968.

The 10 year limit specified under Section 498 applies to all claims for repayments which are not expressly provided for by any other provisions of ITA 1967. For example, in Sections 191 and 307 of the Act, alternative time limits to the ten year rule are provided for. There is also a reference to overpayments in Section 1(2) of Schedule 2 which sets out the rules in relation to Schedule E tax.

Section 133 of ITA 1967 details the circumstances where the obligation on the part of the Revenue to issue annual assessments in respect of income under Schedule E (i.e., any remuneration, salary, etc., received from all offices and employments together with pensions and annuities) will not apply. The section provides:

- "(1) No assessment under Schedule E for any year of assessment need be made in respect of emoluments to which this Chapter applies except where —*
- (a) the person assessable, by notice in writing given to the inspector within five years from the end of the year of assessment, requires an assessment to be made,*
 - (b) the emoluments paid in the year of assessment are not the same in amount as the emoluments which fall to be treated as the emoluments for that year, or*
 - (c) there is reason to suppose that the emoluments would, if assessed, fall to be taken into account in computing the total income for sur-tax purposes of a person who is liable to sur-tax or would be so liable if an assessment were made in respect of the emoluments.*
- (2) Where an employer pays to the Revenue Commissioners any amount of tax which, pursuant to this Chapter and any regulations thereunder, he has deducted from emoluments, he shall be acquitted and discharged of the sum represented by the payment as if he had actually paid that sum to the employee."*

Under Section 133(1)(a), therefore, the obligation on the Inspector of Taxes to issue an assessment is restricted to instances where notification is given in writing within five years of the end of the year of assessment.

Time Limits on Retrospective Refunds of Tax



There was no reference in *O'Carroll* to limiting such rebates to the plaintiff alone. This was in contrast to *Murphy v Attorney General* [1982] IR 241, a case which dealt with the tax treatment of married couples where the Court expressly limited the application of the judgement in order to avoid excessive disruption to the public finances.



Case Law

In November 1988, the High Court decided in the case of *Ó Coindealbháin (Inspector of Taxes) v Breda O'Carroll* [1988] ITR 221, that the children's portion of a Garda Síochána widow's pension was the beneficial property of the children and should not be assessed as income of the surviving parent. In *O'Carroll*, Lynch J. considered a case stated by an Appeal Commissioner concerning the liability to income tax of a contributory pension granted to Mrs Breda O'Carroll on the death of her husband, a member of the Garda Síochána.

Under the Garda Síochána Pensions Order, 1981 (S.I. No. 199 of 1981), a widow's contributory pension became payable to Mrs O'Carroll on the death of her husband. Under the same order, a children's contributory pension was also granted in respect of each of her three children and, as the children were in her care, the children's contributory pensions were paid to Mrs O'Carroll. The Inspector of Taxes decided that Mrs O'Carroll was liable to income tax on these payments and the tax was calculated by aggregating the amount of the children's contributory pensions paid to her with her other income.

Mrs O'Carroll disputed this decision and appealed to the Appeal Commissioner who decided that the sum representing the children's pensions paid to her should not be assessed as her personal income. Following an appeal against this determination by the Revenue, the High Court ruled that the Appeal Commissioner was correct. The Revenue considered the question of an appeal to the Supreme Court but decided against it.

The High Court ruling had implications not only for all open and all future income tax assessment cases but also for settled cases. In essence, the ruling determined that the sum representing the children's pensions paid to the mother should never have been subject to income tax as the income of the mother and the tax, as a consequence, should be rebated. There was no reference in *O'Carroll* to limiting such rebates to the plaintiff alone. This was in contrast to *Murphy v Attorney General* [1982] IR 241, a case which dealt with the tax treatment of married couples where the Court expressly limited the application of the judgement in order to avoid excessive disruption to the public finances.

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Chapter 3

COMPENSATION FOR LOSS IN VALUE OF DELAYED REFUNDS OF TAX



FOR REDRESS TAXPAYERS

Compensation for Loss in Value of Delayed Refunds of Tax

Legislation

The Revenue claims that, apart from those cases where a statutory provision exists for the payment of compensation in the form of interest, it is unable to compensate for loss in value of tax refunds made.

Provision is made in legislation for the payment of interest on tax overpaid in certain instances, including:

- (i) Under Section 941(9) of TCA 1997, which provides, in relation to income tax or corporation tax:

"if the amount of the assessment is altered by the order or judgement of the Supreme Court or the High Court, then—

 - (a) *if too much tax has been paid, the amount overpaid shall be refunded **with such interest, if any, as the Court may allow**"*
- (ii) Under Section 942(6)(b) of TCA 1997, which provides in relation to the Circuit Court:

*"where the amount of tax is altered by the determination of the judge or by giving effect to an agreement under subsection (8), then, if too much tax has been paid, the amount or amounts overpaid shall be repaid and (except where the interest amounts to less than £10) in so far as the amount to be repaid represents tax paid in accordance with this subsection it **shall be repaid with interest** at the rate of 0.6 per cent, or such other rate (if any) prescribed by the Minister for Finance by regulations, for each month or part of a month from the date or dates of payment of the amount or amounts giving rise to the overpayment to the date on which the repayment is made."*
- (iii) Under Section 30 of the Finance Act, 1976 (FA 1976) which provides, where an assessment has been raised and where there has been an appeal against the assessment:

*"Where an overpayment of tax is to be repaid under subsection (3), **the overpayment shall carry interest** at the rate or rates in force by virtue of section 550 (1) of the Income Tax Act, 1967, for the period from the date or dates of the payment of the amount or amounts giving rise to the overpayment, as the case may require, to the date on which the repayment is made"*
- (iv) Under Section 953(9) of TCA 1997 in relation to an overpayment of preliminary tax which provides:

*"Where the amount of preliminary tax paid by a chargeable person for any chargeable period exceeds that person's tax liability for that period, the excess shall be repaid and the **amount repaid shall carry interest** at the rate of 0.6 per cent, or such other rate (if any) prescribed by the Minister for Finance by regulations, for each month or part of a month for the period from the date or dates of the payment of the amount or amounts giving rise to the overpayment, as the case may require, to the date on which the repayment is made"*

Compensation for Loss in Value of Delayed Refunds of Tax



The Revenue claims that, apart from those cases where a statutory provision exists for the payment of compensation in the form of interest, it is unable to compensate for loss in value of tax refunds made.



Case law

The issue as to whether interest was payable on a tax repayment was considered in a number of court cases:

- (i) - *Mooney v Ó Coindealbháin* [1988] ITR Vol 4

Mr Mooney was a branch manager in an employment exchange. For income tax purposes his employment was treated as coming within Schedule E of ITA, 1967 and tax was deducted under the PAYE system. Mr Mooney claimed that he should be regarded as self-employed and assessed under Schedule D. The Circuit Court agreed but the Inspector of Taxes appealed the decision to the High Court. The High Court held that the working relationship between the then Minister for Social Welfare and Mr Mooney was a contract for services and not a contract of service and that he should have been assessed under Schedule D. As a consequence the PAYE tax overpaid by Mr Mooney in the sum of £58,853 was refunded to him and, in a subsequent decision, the High Court also held that he was entitled to be paid interest on his overpayments in accordance with Section 30 FA 1976.

- (ii) *Lawrence O'Rourke v The Revenue Commissioners* [1996] ITR p81

Mr O'Rourke was also a branch manager in an employment exchange. Following the High Court decision in *Mooney v Ó Coindealbháin*, the same tax consultant who had acted for Mr Mooney, and who was now acting for Mr O'Rourke, met with the Inspector of Taxes. As a result of this meeting it was agreed that Mr O'Rourke and

some 80/90 other branch managers were entitled to be treated as coming within Schedule D. It was also agreed that the formalities of raising assessments for the relevant years could be dispensed with, if abridged income and expenditure accounts were submitted on behalf of Mr O'Rourke for the relevant tax years. On the basis of these accounts, the Inspector certified a repayment of £23,139 to Mr O'Rourke. No interest was paid on this sum. Mr O'Rourke commenced High Court proceedings and contended that he was also entitled to interest under Section 30 FA 1976.

In the High Court, Counsel for Mr O'Rourke accepted that there was no express agreement between his client and the Inspector that interest on the tax repayment would be paid in accordance with Section 30. He claimed, however, that it was implicit in the agreement on dispensing with the formalities of raising assessments in order to avoid over-burdening the revenue system, that Mr O'Rourke would be treated as entitled to interest pursuant to Section 30 as if these formalities had taken place.

Counsel for the Revenue Commissioners submitted that Section 30 only took effect when an assessment had been raised and where there had been an appeal against the assessment. These necessary pre-conditions had not been met in this case.

The High Court judge agreed to state a case for the opinion of the Supreme Court as follows:

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Compensation for Loss in Value of Delayed Refunds of Tax



O'Flaherty J., however, made the point that simple justice would seem to require that the Revenue Commissioners, having mistakenly come into possession of the taxpayer's money, should pay interest at a rate to be decided upon by the trial judge...



The unjust enrichment occurred as a result of the retention by the Revenue of the excess tax. The measure of the taxpayer's loss was the amount of excess tax plus the interest which the money might have earned had it not been withheld.



"Whether having regard to the facts found or admitted before me the Plaintiff is entitled to a payment of interest on foot of the overpayment of tax for the periods in question pursuant to Section 30 of the Finance Act, 1976".

The Supreme Court answered the question in the negative and ordered the matter to be referred back to the High Court for determination. In the course of the Supreme Court judgement, Murphy J. said there was no doubt about the necessity for compliance with the pre-conditions required by Section 30, i.e., that there had been an assessment raised and an appeal against the assessment had been made. There was, therefore, considerable difficulty in asserting a claim for interest under Section 30 in respect of PAYE tax collected otherwise than by assessment on the taxpayer. O'Flaherty J., however, made the point that simple justice would seem to require that the Revenue Commissioners, having mistakenly come into possession of the taxpayer's money, should pay interest at a rate to be decided upon by the trial judge rather than the *de luxe* rate specified in Section 30.

The decision of the High Court was that interest should be paid on the tax refunded based on the doctrine of **unjust enrichment**. The unjust enrichment occurred as a result of the retention by the Revenue of the excess tax. The measure of the taxpayer's loss was the amount of excess tax plus the interest which the money might have earned had it not been withheld. In calculating the rate of interest applicable the court rejected the argument that the punitive interest rate provided for under Section 30 FA 1976, was appropriate. The court also rejected a contention that the

overdraft rate applicable in respect of current accounts at the relevant times would be appropriate and concluded that the appropriate rate of interest was that applicable under Section 21(1) of the Courts Act, 1981.

The application of the O'Rourke ruling

In *O'Rourke*, there was no statutory authority under the Taxes Acts for the payment of interest, but interest was paid to him and to his fellow branch managers by order of the High Court based on the doctrine of unjust enrichment. Following the decision to pay interest in *O'Rourke*, Revenue decided to apply the rationale for the payment of interest used in that case, *notwithstanding the fact that there was no statutory provision for such payment*, in another case. In this instance, a number of former bank officials had been refunded income tax following a High Court decision that marriage gratuities paid to them should be regarded as termination payments. This decision entitled the former bank officials to the statutory relief available on such termination payments and the overpaid tax was refunded. *Interest was paid on the refunds on the same basis as in O'Rourke.*

In his judgement in *O'Rourke*, Keane J. referred to the House of Lords decision in *Woolwich Building Society v Inland Revenue Commissioners* [1993] AC 70. The facts of this case were that the Woolwich Building Society had paid £57m. in tax pursuant to demands under certain tax regulations. Payment was made under protest on the grounds that the regulations were *ultra vires* and void. Proceedings for judicial review to challenge the validity of the regulations were immediately commenced and were successful. The Inland Revenue Commissioners repaid the capital sum with

Compensation for Loss in Value of Delayed Refunds of Tax



Following the decision to pay interest in O'Rourke, Revenue decided to apply the rationale for the payment of interest used in that case, notwithstanding the fact that there was no statutory provision for such payment, in another case.



interest from the date of the Court order finding the regulations *ultra vires* but refused to pay interest from any earlier date. A majority of the House of Lords held that Woolwich was entitled to interest for the earlier period. A majority also expressed the view that the time was appropriate to develop the law of restitution to an extent that permitted the recovery of interest in circumstances such as arose in that case.

In *O'Rourke*, Keane J. quoted a paragraph from Lord Goff's judgement in *Woolwich*:

"I would therefore hold that money paid by a citizen to a public authority in the form of taxes paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right. As at present advised, I incline to the opinion that this principle should extend to embrace cases in which the tax or other levy has been wrongly exacted by the public authority not because the demand was ultra vires but for other reasons, for example, because the authority has misconstrued a relevant statute or regulation"

and Keane J. himself continued:

"... if the law as laid down in those passages is also the law applicable in Ireland, the tax overpaid by the plaintiff was recoverable as a matter of right. It would follow automatically from that conclusion that the plaintiff was entitled to interest so as to compensate him for the unjust enrichment effected at his expense by the defendants."


FOR REDRESS TAXPAYERS





Chapter 4

**THE REVENUE
COMMISSIONERS' REFUSAL
TO MAKE A FULL
RETROSPECTIVE PAYMENT OF
INCOME TAX TO TWO
WIDOWS**



FOR REDRESS TAXPAYERS

The Revenue Commissioners' Refusal to Make a Full Retrospective Payment of Income Tax to Two Widows



The Revenue refused to allow a refund of income tax paid on the children's portion of her widow's pension for the years 1980/81 to 1982/83 on the grounds that the claim for repayment was for a period outside what it described as the statutory limit of five years specified in Section 133 ITA 1967.



This chapter describes my investigation of complaints made by Mrs Maria Kelly and Mrs Phyllis Nolan.

Mrs Maria Kelly's complaint

Mrs Kelly is a widow in receipt of a widow's pension in respect of her late husband's employment in the Civil Service. The pension is paid to her by the Office of the Paymaster General (PMG). She is also in receipt of a contributory widow's pension from the Department of Social & Family Affairs. Incorporated in each pension was a sum payable in respect of Mrs Kelly's children. Initially, pension payments in respect of Mrs Kelly's children under both pension schemes were treated as the income of the surviving parent for income tax purposes. However, in November 1988, the High Court decided in *O'Carroll* (see chapter 2) that the children's portion of a Garda Síochána widow's pension was the beneficial property of the children and should not be assessed as income of the surviving parent.

The decision in *O'Carroll* also applied to the pension payable to Mrs Kelly. On 8 April 1989, in the light of this judgement, Mrs Kelly claimed a refund of the income tax which had been paid on the element of her PMG pension applicable to her children. She received a refund of the excess tax deducted for the tax year 1989/90 in December 1989 through the PMG. She subsequently received, in 1990, a refund of income tax paid on the children's portion of the pension in respect of the years 1983/84 to 1988/89. In all, she received a refund of £15,542.55. The Revenue refused to allow a refund of income tax paid on the children's portion of her widow's pension for the years 1980/81 to 1982/83 on the grounds that the

claim for repayment was for a period outside what it described as the statutory limit of five years specified in Section 133 ITA 1967.

Mrs Phyllis Nolan's complaint

Mrs Nolan is a widow in receipt of a widow's pension payable in respect of her late husband's employment in the Civil Service. As with Mrs Maria Kelly, she also received a limited refund of income tax paid on the children's portion of the civil service pension. The refund amounted to £4,599.17 and was paid to her in September 1990. The Revenue refused to allow a full refund of income tax paid on the children's portion of the widow's pension on the grounds that the claim for repayment was for a period outside the statutory limit of five years. Mrs Nolan was denied a refund of the tax paid on the children's portion of the pension for the tax years 1979/80 to 1982/83.

The Preliminary Examination

I conducted a detailed preliminary examination of the complaints from Mrs Kelly and Mrs Nolan.

Mrs Kelly

Mrs Kelly was widowed in February 1981. Following the decision in *O'Carroll*, she received a refund of income tax paid on the children's portion of the pension for the years 1983/84 onwards. No repayments were due, according to the Revenue, for the tax years 1980/81 to 1982/83 as these years were outside the limit in which refunds could be made under Section 133 ITA 1967. The Revenue, in accordance with legal opinion received, claimed that Section 498

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ITA 1967 (as amended by Section 4(5) of the Finance (Miscellaneous Provisions) Act, 1968), which provided for the repayment of income tax for up to ten years did not apply in Mrs Kelly's case as that section only applied to repayments which were not covered by any other provisions of the Income Tax Acts governing repayment. In Revenue's view Mrs Kelly's case was expressly covered by Section 133 which provided for the shorter time limit.

Mrs Nolan

Mrs Nolan was widowed in April 1979 and received repayments for the years 1983/84 to 1987/88 as these were within the five year time limit. No repayments were due, according to Revenue, for the tax years 1979/80 to 1982/83.

Having carried out a preliminary examination, I asked the Revenue to review the decision not to refund the additional amounts of income tax paid by Mrs Kelly and Mrs Nolan. In addition, I asked the Revenue to consider making provision for a compensatory payment to restore the loss in purchasing power of any additional refund due to the complainants.

In its response, the Revenue said that there was no statutory provision for the refund of tax in these cases beyond the five year limit nor for the payment of compensation in such cases.

In the light of this response, I decided to commence a formal investigation of the complaints. On 22 July 1999, I notified the Revenue of my intention to carry out an investigation of the complaints under Section 4 of the Ombudsman Act, 1980.

The investigation centred on the issue of retrospective payments of tax and compensation for the loss in value of any additional refund due in the cases of Mrs Kelly and Mrs Nolan. The scope of the investigation of the compensation issue was extended to include six other cases where a tax overpayment had been refunded but where requests for compensation for loss in value had been refused. Details of these additional cases are set out in chapter 5.

The investigation process centred mainly on the examination of the tax files of the complainants and tax policy files supplied to me by the Revenue. The investigation also included research into relevant court decisions, legislation and general practice across the public service on the issue of retrospective payments and the payment of interest or compensation for loss in value.

The Investigation

The Legal Background - The O'Carroll case

In *O'Carroll*, an Appeal Commissioner determined a case in Mrs Breda O'Carroll's favour concerning the liability to income tax of a contributory pension which she was granted on the death of her husband who was a member of the Garda Síochána. The facts of the case are briefly set out in chapter 2.

The decision of the Appeal Commissioner was considered by the Revenue to be likely to have wide-ranging implications. It believed that it would lead to a significant loss of income tax and would trigger potentially large retrospective payments. In a memo prepared by a Revenue official, dated 20 March 1987, the question of appealing to the High Court was considered. In the memo the official noted that there would be:

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"a substantial loss of tax revenue if the Appeal Commissioner's decision were to be accepted as Revenue policy".

Prior to the matter being considered by the High Court, it was the view of the Revenue that the children's contributory pension paid to Mrs O'Carroll under the terms of the Garda Síochána Pension Scheme was in fact the income of the children. In a memo dated 1 December 1988 a Revenue official wrote:

"The Children's Contributory Pension paid to Mrs O'Carroll under the terms of the Garda Síochána Pension Scheme was initially considered by the Revenue Commissioners to be the income of the children. When the Inspector subsequently pointed out that the scheme is almost identical to that of the Civil Service Widows and Childrens Scheme, Defence Forces Scheme, National School Teachers Scheme and presumably other State Pension Schemes and that the decision would have wide implications it was decided to take the opposite view ... The Appeal Commissioner, Mr Ó hUallaigh, held against Revenue ... Counsel opinion was sought which was not optimistic. Nonetheless the case was appealed to the High Court."

The decision to appeal to the High Court was taken, not on the premise that the Revenue case had legal merit but on grounds of expediency in that it would buy the Revenue sufficient time to assess the effects (in terms of loss of tax) of an adverse ruling in the Courts. The period from the date of the Appeal Commissioner's decision (September 1986) to that of the High Court judgement, which upheld that decision, was just over 2 years.

In its comments on a draft of my investigation report the Revenue took issue with this conclusion. It said:

"It is of course accepted that a by-product of taking the appeal was that there would be additional time to consider the full implications. But it would be wrong to imply that this was the only or principal reason for taking the case. The Appeal Commissioner's decision had the effect of turning the existing interpretation and practice on its head and had major implications for all pension schemes. Such an important point of principle could not be accepted without reference to the higher courts. Indeed it would be unusual if Revenue did not appeal such a decision."

My conclusion is based on information contained in the Revenue's files and I could quote six or seven extracts to support it. I will confine myself to just two further quotations, the first of which is taken from a memo written by a Revenue official when the question of pursuing the case further in the Supreme Court was being considered. The memo noted that it was the unanimous view that the appeal should not be pursued and that there was absolutely no prospect of overturning the decision of the High Court on appeal and added:

"It is worth recalling that when the issue first arose the view ... was that the child had a separate pension and that the income from that pension should be assessed on the child and not the mother. When the Inspector questioned the wisdom of this approach because of its widespread applicability, ... (it was) agreed to recommend pursuing the matter to appeal ... Thereafter it seems that

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The decision to appeal to the High Court was taken, not on the premise that the Revenue case had legal merit but was rather on grounds of expediency in that it would buy the Revenue 'sufficient time to assess the effects (in terms of loss of tax) of an adverse ruling in the Courts'. The period from the date of the Appeal Commissioner's decision (September 1986) to that of the High Court decision was just over 2 years.



decisions in this case were driven by implications rather than by consideration of the merits in Revenue's arguments. I think that there is a lesson for us all in the circumstances which led ultimately, to a fairly futile appeal to the High Court".

The Revenue did not appeal to the Supreme Court.

The second quotation is from a note dated 27 July 1989 from a Revenue legal officer to the Attorney General's Office outlining the background to the case:

"The Revenue Commissioners decided in April 1986 that, because of the wide-ranging implications of accepting the arguments in Mrs O'Carroll's case, the case was to be taken to appeal despite the fact that the Revenue case was weak in law ...

A case stated was demanded as a protective measure and counsel's opinion was sought. The Counsel's opinion received dated 17 February 1987, a copy of which is herewith, was not optimistic of success. Despite this it was decided that even if there was a strong probability that the Revenue case would fail, the case should be appealed to the High Court which course would apart from any other consideration allow sufficient time to assess the effects (in terms of loss of tax) of an adverse judicial decision. On 20 March 1987 the Department of Finance were informed that the appeal was unlikely to succeed but that it was being appealed for the reason outlined above."

Section 133 or Section 498?

It was accepted by the Revenue that the O'Carroll High Court judgement would have important consequences. In a note dated 8 March 1989 a Revenue official considered the implications of O'Carroll for the tax treatment of children's pensions. He noted:

"It would seem that all open cases and future cases must be settled on the basis of the recent judgement and that any years already settled should not be re-opened. However the taxpayer has the right under Section 133 ITA 1967 to require an assessment to be made provided the notice in writing is given within the five year limit.

Subsection (a) of Section 133 is at the taxpayer's option, subsection (c) is mandatory. In regard to subsection (c) the assessing procedure for 1987/88 and prior years would be completed.

I take the view that the term "settled" for the purposes of the tax memo means in a PAYE case, where the source has not been assessed,*

- the issue of a P21 Balancing Statement

- the issue of a formal letter to the taxpayer advising him of the balance (if any) of the tax due or overpaid.

Such a case can only be re-opened on receipt of a timely claim under Section 133(a)"

This official's note was included in the papers submitted to a Revenue legal officer and to Counsel for consideration of the question of retrospective claims. In an opinion dated 4 May 1989, Counsel wrote:

*an instruction to tax inspectors as to what should be done.

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"Having regard to the cases to which Section 133 of the Income Tax Act, 1967 is relevant then it is my opinion that the provisions of Section 133(1)(a) enable a person by notice in writing to the Inspector within five years from the particular year of assessment to require an assessment to be made ..."

In a comment on Counsel's opinion a Revenue official noted that it:

"confirms that retrospective claims should be admitted subject to the five year limit."

Following an indication from one of the teaching organisations that it might dispute the time limit for retrospection and look for ten year reviews by relying on another Section of the Act, i.e., Section 498 rather than Section 133, a further Counsel opinion was sought. An internal memo submitted by a Revenue official to a Revenue legal officer on 4 July 1990 said:

"In our view the only avenue by which these years could be re-opened is by a request from the taxpayer under Section 133(a) ... are we correct in assuming that the only avenue by which these settled years may be re-opened is Section 133 or does the taxpayer have the right to claim a repayment subject to the 10 year limit?"

A further opinion on the matter from Counsel, dated 20 October 1990, considered the question of retrospective claims in respect of 'settled cases' which he described as follows:

"The term "Settled" cases refers to:

- (i) *Those where the Inspector has issued a statement showing the balancing position for the year on Form p21; or*

- (ii) *Form p21 has not issued but the Inspector has notified the taxpayer in writing of the balancing position for the year.*

It is my opinion that taxpayers under Schedule E who require a revision of their liability by the issue of an assessment would have to avail of Section 133 and that the five year limit applies to it.

Furthermore, it is my opinion that Section 498 does not amend or modify or increase the rights of a taxpayer who has claimed under Section 133 nor does it give him a greater right.

I think it is also a construction of Section 498 that the words "save as otherwise expressly provided by any provision of this Act" would capture a situation under Section 133 which requires an assessment to be issued."

The Revenue Commissioners' Refusal to Make a Full Retrospective Payment of Income Tax to Two Widows



Good administration in the area of taxation demands that Revenue should not retain taxes which are not due from a taxpayer. This principle is at the heart of the Revenue Charter of Rights, published in 1988, which refers to the role of Revenue staff as seeking to collect 'only the correct amount of tax or duty no more and no less'.



Analysis

Good administration in the area of taxation demands that Revenue should not retain taxes which are not due from a taxpayer. This principle is at the heart of the Revenue *Charter of Rights*, published in 1988, which refers to the role of Revenue staff as seeking to collect '*only the correct amount of tax or duty no more and no less*'.

A logical consequence of the application of this principle is that tax which is not due but is collected by the Revenue should be refunded in full to the taxpayer. In this context, if, following the completion of an investigation of a complaint relating to a refusal to refund tax collected but not due, I were to find that the taxpayer was improperly discriminated against, the appropriate redress would involve a complete refund of the tax paid, i.e., with full retrospective effect. However for pragmatic reasons relating, *inter alia*, to possible implications for public finances (see *Murphy v Attorney General*, etc.), I have confined my analysis to the question of whether these taxpayers were entitled to the refund available under Section 498 of ITA 1967. I have done so on the basis that the High Court decision in *O'Carroll* was confined to Garda pension cases and that the Court's attention was not drawn to the much wider implications for a number of similar public service pension schemes.

In endeavouring to fulfil its role, Revenue has to be guided by the legislative provisions governing the repayment of income tax. Section 133 of ITA 1967 provides that an assessable person can write to the Revenue Commissioners and ask to have an assessment made in respect of any year within five years of that particular year. In the case of the

complainants, any such assessment would have to take into account the *O'Carroll* decision in respect of the children's contributory pension and make the necessary tax refund. Section 498 of the Act limits the period for claiming refunds generally to 10 years '*save as expressly provided for by any provision of this Act*'. The question which arises is whether it can be justifiably argued that Section 133 contains an express provision for an alternative time limit for repayment.

In considering the question of whether the time limits for making a retrospective claim are those which are deemed to apply under Section 133 or those explicitly stated in Section 498 the following points are relevant:

- (i) The word 'expressly' is defined in the Oxford English Dictionary as "*in direct or plain terms; clearly, explicitly, definitely*". Unlike Section 498, refunds are **not** expressly provided for in Section 133. I accept, however, that they may be implicitly provided for on the basis that, by writing to the Revenue Commissioners for an assessment for a particular year, a taxpayer is re-opening consideration for tax liability in that year and, if there is an overpayment, a refund may be made.
- (ii) Given that the words '*expressly provided for by any provision of this Act*' are used in the Act, if it is to be argued that they do not apply to Section 133, then it would seem reasonable to conclude that these words were included to cover other situations provided for in the Act where a repayment could be made but where time limits other than the one contained in Section 498 would

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...given that the tax and legal experts in the area appeared to be unsure about the applicability of Section 133 to requests for retrospection following the O'Carroll judgement, it suggests to me that Section 133 could not be relied upon as a basis for expressly excluding the possibility of retrospective payments over the 10 year period, which is provided for in Section 498.



apply. I have referred in chapter 2 to Sections 191 and 307 of ITA 1967 where alternative time limits to the ten year rule are expressly provided for and where, as a consequence, Section 498 would not apply.

- (iii) For two years following the judgement in *O'Carroll*, the question of retrospection was considered by Revenue. **[I should mention that I would have liked to see what exactly was done in the case of Mrs O'Carroll but the Revenue was unable to provide any clarification on this matter from its records].**

Before deciding that retrospection was to be limited to 5 years under Section 133, Revenue sought and received Counsel's opinion on the issue on two occasions (4 May 1989 and 20 October 1990). Following receipt of the first opinion it was noted by Revenue that Counsel had suggested that *"as the matter is quite complicated it may be that a consultation or further facts might be necessary"*. In this context, given that the tax and legal experts in the area appeared to be unsure about the applicability of Section 133 to requests for retrospection following the O'Carroll judgement, it suggests to me that Section 133 could not be relied upon as a basis for **expressly** excluding the possibility of retrospective payments over the 10 year period, which is provided for in Section 498.

In its comments on a draft of my investigation report, the Revenue argued that it is not clear on what basis I could justify my statement that the tax and legal experts appeared to be unsure about the

application of Section 133. A close reading of Counsel's opinion of 20 October 1990 (the fourth opinion obtained on the issues involved) showed that it related solely to cases where the taxpayer is looking for an assessment. Where such requests are made, this may or may not re-open their liability to income tax for the year in question but the express provision of the Section is to enable an assessment to be made. In *O'Carroll* the Court determined that an overpayment of income tax had been made because the children's contributory pension should not have been assessed as the income of the surviving parent. This ruling in my view should have applied to all similar cases and would not have required each person affected to give a written notice seeking assessment. In the absence of any limitation by the Court similar to that in *Murphy v Attorney General*, failure to apply the ruling generally would have been discriminatory and contrary to fair or sound administration. Indeed, the strict application of Section 133 would involve discrimination as the five year period would vary depending on the date each person asked for an assessment to be made.

- (iv) My Office sought legal advice on the question of whether the claim for retrospection following *O'Carroll* fell to be considered under Section 133 or Section 498. The advice indicated that Section 133 merely provides for a relaxation of the Revenue's obligation to issue annual Schedule E assessments and that the purpose of Section 133 is to outline the circumstances where there is still a requirement on the Revenue to issue assessments rather than make an express provision for limited refunds. My legal advisors said that, having regard to the fact that the courts had

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already determined the main points at issue, there was no statutory prohibition on the Revenue from issuing revised assessments and processing the repayments subject only to the general 10 year time limit contained in Section 498. At no stage have the Revenue pointed to a statutory requirement that, in order to get repayment of overpaid tax as a result of a Court judgement, the taxpayer must invoke Section 133. It is interesting to note that in *Taxes Consolidation Act 1977 - Guidance Notes*, prepared by the Revenue and available on the Revenue website, reference is made to Section 997 TCA 1997 (which replaced Section 133 ITA 1967). The *Guidance Notes* state: "This section provides that assessments need not be made in respect of PAYE emoluments except in a small number of cases."

In a note prepared for the Minister for Finance in October 1989, a Department of Finance official noted that implementation of the High Court judgement in *O'Carroll* was estimated by the Revenue, in the case of the Garda Scheme and schemes with similar wording, at about IRE1 million and that the retrospective payments covering a period of five years could involve an additional cost of up to IRE5 million. In this regard, it is not unlikely that Revenue's actions following *O'Carroll* were essentially an exercise in damage limitation. The appeal to the High Court was, as Revenue's papers show, a tactic to give them breathing space to see how it might deal with the issue of retrospection as both its legal advice and the views of its own officials clearly pointed to the fact that the appeal had no hope of success.

Counsel's advice to Revenue was that Section 133 was the appropriate section under which retrospective payments could be made. However, it seems that in seeking Counsel's advice on the scope of retrospective payments in the first instance in April 1989, emphasis was put on Section 133 as the means through which repayments could be sought and there was no mention of Section 498. When a teaching organisation raised the question of the applicability of Section 498 to such cases a further opinion was sought from Counsel. His opinion was that taxpayers who require a revision of their liability would have to avail of Section 133 and that the five year limit applied. However, in *O'Carroll*, it is clear that the Court had already decided the issue of liability. Those taxpayers affected by that judgement should not need to seek a revision of liability but rather a repayment in accordance with the conclusions reached in the judgement.

O'Carroll upheld the determination of the Appeal Commissioner that the children's portion of the Garda Pension was the income of the child. In a note on the Appeal Hearing which was held on 11 September 1986, a Revenue Official recorded that the Appeal Commissioner:

"accordingly reduced the assessment to take account of the child's portion of the pension"

In an opinion dated 20 October 1990, Counsel for Revenue said that:

"...it is a construction of Section 498 that the words 'save as otherwise expressly provided by any provision of this Act' would capture a situation under Section 133 which requires an assessment to be issued."

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Revenue pointed out that it was anxious to give the best possible benefit to the taxpayers within the law but the legal advice available at the time of the decision was clear that Section 133 was the only avenue of approach ... I have examined the papers relating to the giving of legal advice very carefully and I am satisfied that at no stage was Counsel briefed in an open-ended way...I am not calling into question Counsel's competence, objectivity and independence as claimed by Revenue. I am simply recording that there was no evidence whatsoever on the Revenue files to support its claim that it wanted to give the best benefit to the taxpayers.



... as I have made clear in this report, taxpayers who have paid tax which is not due should have it refunded in full, subject only to avoidance of excessive disruption to the public finances



For Section 498 not to apply there must be an express provision for an alternative, as there is in Sections 191 and 307. To my mind, deeming that a construction of Section 498 captured a situation under Section 133 is very far removed from saying that the latter section is an expressly provided alternative to Section 498.

In commenting on a draft of my investigation report, Revenue pointed out that it was anxious to give the best possible benefit to the taxpayers within the law but the legal advice available at the time of the decision was clear that Section 133 was the only avenue of approach. Revenue argued that the issue between it and my Office essentially boiled down to a difference of legal opinion. I do not accept this argument. Cases will arise from time to time which hinge on a particular statutory interpretation and where a statutory provision is open to different interpretations. Only the courts can settle such cases. This is not such a case. I have examined the papers relating to the giving of legal advice very carefully and I am satisfied that at no stage was Counsel briefed in an open-ended way. Responding to my restructured draft investigation report, the Revenue repeated the claim that this conclusion is unfair to both the Revenue officials concerned and to Revenue's Counsel. I am not calling into question Counsel's competence, objectivity and independence as claimed by Revenue. I am simply recording that there was no evidence whatsoever on the Revenue files to support its claim that it wanted to give the best benefit to the taxpayers. Indeed, as I outlined earlier, the emphasis seemed to be on limitation of cost. In any event, as I have made clear in this report, taxpayers who have paid tax which is not due should have it refunded in full subject only to avoidance of excessive disruption to the public finances.

Section 498 was not considered until raised by a teaching organisation. There was no reference to Section 191 which deals with errors and mistakes nor to Section 1(2) of Schedule 2, even with the intention of demonstrating that these provisions were either not applicable or less advantageous than Section 133. In the correspondence my Office had with the Revenue, the argument was made that Section 498 is designed to cover claims for reliefs and allowances (e.g., medical insurance relief) and does not apply to cases of the kind involved here. I can find no basis in the 1967 Act for this distinction. It may be that this assumption in relation to Section 498 coloured the whole approach to retrospection but I remain convinced that there was some element of damage limitation involved especially given the position of the Exchequer in the late 1980's. On the basis of the cost given in relation to five years' retrospection, I do not consider that retrospection for ten years would have involved excessive disruption to the public finances.

My findings on the question of Revenue's refusal to pay full retrospection to these two widows are set out in chapter 6.



Chapter 5

**THE REVENUE
COMMISSIONERS' REFUSAL
TO COMPENSATE THE TWO
WIDOWS AND SIX OTHER
TAXPAYERS FOR LOSS IN
VALUE OF THE TAX
REFUNDS**



FOR REDRESS TAXPAYERS

The Revenue Commissioners' Refusal to Compensate the Two Widows and Six Other Taxpayers for Loss in Value of the Tax Refunds

In this chapter, I deal with the question of compensation for loss in value of tax refunds. In this connection, I should point out that an important factor in this element of the investigation is the High Court Judgement of 18 December 1996 in the *O'Rourke* case which is detailed in chapter 3. What I say there about the application of the *O'Rourke* judgement to the payment of compensation for loss of purchasing power to Mrs Kelly and Mrs Nolan applies *a fortiori* to the repayment of tax wrongly exacted from them as a result of the Revenue misconstruing the relevant pension regulations (see Chapter 4 of this report).

The Complainants

This chapter describes my investigation of complaints made by Mrs Kelly, Mrs Nolan and six other complainants:

Mr T. J. Lynch

In Mr Lynch's case, income tax was deducted by the Land Commission at source on interest paid in July 1979 on an investment in Land Bonds held by him. As a resident of Cyprus in that year, Mr Lynch was not liable to the tax deduction by virtue of Section 361 ITA 1967 and the Double Taxation Relief (Taxes on Income) (Cyprus) Order, S.I. 79 of 1970.

In September 1988, the complainant's accountants sought repayment of the income tax amounting to £20,198.59 deducted on the interest paid. Before repayment could be made, numerous internal checks had to be made by the Revenue to verify that the tax had actually been paid by Mr Lynch. This process took some time as it involved referring the case to various tax areas. In November 1989,

having established that the tax had been deducted, the Inspector proceeded to deal with the payment of the claim. There were further delays in processing the claim. In December 1990, a query was sent to the Residence Section within the Revenue regarding the residential status of the claimant. In October 1991, Mr Lynch was deemed to be resident in Ireland rather than abroad by Residence Section. This was appealed and the decision reversed in February 1992. Before making a repayment, the Revenue made further checks to ensure that Mr Lynch had no additional outstanding tax liabilities. In March 1994, appeals in respect of outstanding tax assessments for 1977/78, 1978/79 and 1979/80 were settled by the Revenue on the basis of a repayment to Mr Lynch of £6,151.14 for these years. At this stage, the Revenue repaid to Mr Lynch the tax on the Land Bonds originally paid in July 1979, nearly fifteen years previously. The repayment was made to him on 8 April 1994. The complainant sought interest or compensation for loss in value on the refund for the period during which the tax had been held by the Revenue. He claimed that the repayment had been due since 7 July 1979. The Revenue refused the request on the grounds that there was no statutory provision for the payment of interest or compensation for loss in value on tax incorrectly deducted in Mr Lynch's circumstances.

The Revenue Commissioners' Refusal to Compensate the Two Widows and Six Other Taxpayers for Loss in Value of the Tax Refunds

Mr Larry Hayes

In Mr Hayes's case, a tax refund of £25,260 was made in respect of Professional Services Withholding Tax (PSWT), following a decision of the High Court in *Michael Daly v. The Revenue Commissioners* [1995] ITR 185, under which the provisions of Section 26(1) of the Finance Act, 1990, relating to the payment of such tax, were struck down. He claimed that he had been denied the use of the amount of the refund for a period of two years and sought compensation. On 26 October 1995, the Revenue refused his request saying that there was no provision in legislation for the payment of interest or compensation for loss in value of refunds of withholding tax.

Mr Tom Sullivan

Mr Sullivan's complaint also concerns an overpayment of PSWT in the sum of £22,558.50 and the refusal by the Revenue to pay interest or compensation for loss in value on the overpayment on the basis that there was no provision in legislation for the payment of interest or compensation for loss in value of refunds of withholding tax.

Mr Fintan Dunne

Mr Dunne was made redundant in the 1985/86 income tax year. He received a lump sum redundancy payment and paid tax on the amount of the payment which exceeded the statutory limits. He subsequently claimed that he had been made redundant as a result of a disability (epilepsy) and claimed he was entitled to the exemption in respect of tax paid on his redundancy payment in accordance with Section 115 of ITA 1967. His claim was supported by his former employer in a letter

dated 22 April 1987 which stated that Mr Dunne had been selected for redundancy on the basis that he was unsuited for future job requirements '*because of his continuing difficulty with epilepsy*'. The claim was refused and he was advised that there was no appeal mechanism. The reasons for the refusal are unknown because the Revenue papers dealing with the decision have been destroyed.

In 1987 Mr Dunne became unemployed. By 1996 he was in receipt of an invalidity pension. In that year a public representative resubmitted a claim for tax relief on his behalf in which he included medical evidence which stated that his epilepsy prevented him from continuing in employment. Revenue sought from Mr Dunne a medical certificate confirming:

- the nature of his infirmity;
- that the infirmity prevented him from continuing his employment;
- the date from which the infirmity had prevented him from continuing his employment.

Following receipt of this information the Revenue concluded that the relief available under Section 115 should apply. Mr Dunne received a refund of tax of £2,343.79 as a result. He then sought interest, or compensation for loss in value, on the repayment made to him. In September 1997 this request was refused by the Revenue on the grounds that there was no statutory basis for making such payment.

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The Revenue Commissioners' Refusal to Compensate the Two Widows and Six Other Taxpayers for Loss in Value of the Tax Refunds

Mr Sean O'Reilly

Mr O'Reilly is a writer of school text books and had books published which attracted an income in the period covered by the tax years 1978/79 to 1994/95. He paid full income tax on all the income received in respect of the royalties on these books. He made a claim for exemption, under the Writers and Artists Provisions, Section 2 Finance Act 1969, on 5 August 1978, and this was refused in October 1981. According to the Revenue it had been unable to deal with the claim until then as the matter had been overlooked originally.

Appeal provisions against decisions under Section 2 were introduced in 1989. These allowed claimants who had been refused determinations prior to 1989 to appeal provided they did so within 6 months. Mr O'Reilly appealed in June 1989 and was finally given a determination on 5 January 1996. The delay in finalising the case was due to the fact that a claim for similar exemption was being dealt with in the Courts in *The Revenue Commissioners v Colm Ó Loinsigh*, [1994] ITR 1994.

In the event the High Court, in *Ó Loinsigh*, upheld a decision of the Appeal Commissioners in favour of Ó Loinsigh. Mr Ó Loinsigh had written a series of books known as "Pathways to History" and applied for relief against taxation in respect of income received by him from the sale of the books in the tax years 1988/89 and 1989/90. To qualify for relief the work had to be regarded as "original and creative". The Appeal Commissioners considered the works to be original and creative.

Following this determination the Revenue advised Mr O'Reilly in January 1996 that he was now entitled to claim exemption from income tax, applicable from 6 April 1981 on the works published. This was subsequently

backdated to 1978, the date he had first applied. He subsequently received a rebate of the tax paid in the sum of £11,887.80 covering all years from 1978/79 to 1994/95.

Under Section 30 of FA 1976 interest could have been paid if the refund to Mr O'Reilly had been the result of an appeal against an assessment to tax. However his appeal was not against an assessment but against a decision to refuse his claim for exemption under Section 2, Finance Act 1969. Commenting on this issue in September 1996, a Revenue official noted:

"It could be argued that the only reason Mr O'Reilly did not appeal the assessments was that he was told by us that there was no means of appealing our refusal to issue a determination under Section 2. As such we could be said to have deprived him of his right of appeal and in equity he should be allowed interest. While the amount involved in this particular instance is not large any such decision would obviously have implications for other cases.

In this respect therefore Mr O'Reilly's case is similar to the Laurence O'Rourke case presently in the High Court and it seems to me that we should await the outcome of the case before making any decision in this instance."

Following the decision in *O'Rourke*, the Revenue decided that Mr O'Reilly was not affected. Interest was paid on the repayments for the years 1988/89 to 1994/95 as payments of preliminary tax were involved. However, his request for interest for the other years was refused on the grounds that there was no statutory basis for making such payment.

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... compensation in respect of repayments of income tax had been the subject of a High Court judgement on 18 December 1996 in the O'Rourke case ... Following this case, interest was paid to Mr O'Rourke and his colleagues, at the interest rate applicable at the time, under Section 21 of the Courts Act, 1981.



Mr Seamus Doyle

Mr Doyle appealed against an assessment to income tax for 1985/86 to the Appeal Commissioners. This assessment determined that interest paid on a rental property was not allowable under Section 496 of ITA 1967. Under this section, where interest was paid on an advance from a bank, the person by whom the interest was paid was entitled, subject to fulfilling certain conditions, to repayment of tax on the amount of the interest. The Appeal Commissioner upheld the assessment. Accordingly tax was, and continued to be, deducted from Mr Doyle from his salary under the PAYE system in respect of these years up to 1990/91, inclusive. Mr Doyle appealed to the Circuit Court which ruled in his favour. On 23 February 1995, Mr Doyle received a refund of PAYE income tax of £9,306.44 for the years 1985/86 to 1990/91.

Mr Doyle submitted a claim for interest under the provisions of Section 30 of FA 1976 and/or Section 429 of ITA 1967. This was refused by the Revenue as it concluded that an interest payment under Section 30 only applied to a final and conclusive determination of the Appeal Commissioners. It argued that the payment of interest under Section 429 required a direct payment of the disputed tax to have been made. In Mr Doyle's case no direct payment had been made as tax had been deducted from him under the PAYE system. His request for interest was refused on 30 December 1997 on the grounds that there was no provision in legislation for such payment in the circumstances applicable in his case. He was advised however that the matter would be looked at further when a decision had been delivered in the *O'Rourke* case.

After the decision in *O'Rourke*, Revenue wrote to Mr Doyle and advised him that his case could be distinguished from *O'Rourke* in that the court decided that, as the statutory machinery under Section 30 was not employed in the *O'Rourke* case, other avenues should be explored as the basis for making a payment to him. Referring to his case the Revenue concluded that:

"In your case therefore, the statutory machinery is Section 429(4) Income Tax Act, 1967 and as has been pointed out above, there is reason to believe that there is no basis for making the payment of interest."

The Preliminary Examination

I conducted a detailed preliminary examination of the complaints received from Mrs Kelly, Mr Lynch and Mr Hayes. The outcome of these cases would determine the approach which I would take to the remaining five complaints which were made to me.

In the course of the examination of these complaints, it emerged that the issue of compensation in respect of repayments of income tax had been the subject of a High Court judgement on 18 December 1996 in the *O'Rourke* case. One of the issues considered in that case was whether the Revenue were obliged to pay interest on repayments of income tax collected but not actually due from 80 to 90 Branch Managers of Employment Exchanges of the Department of Social Welfare. Following this case, interest was paid to Mr O'Rourke and his colleagues, at the interest rate applicable at the time, under Section 21 of the Courts Act, 1981.

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... the Revenue, in its *Charter of Rights*, which was first published in 1988, lists the fostering of the highest degree of public confidence in the Revenue's 'integrity, efficiency and fairness' as a priority objective.



In January 1994, the High Court decided that a marriage gratuity paid to a female bank official on retirement should be taxed as a termination payment and that the taxpayer should receive the statutory relief on such repayments - *Sean Ó Síocháin (Inspector of Taxes) v. Thomas Morrissey* [4 ITR 407]. The Revenue accepted the decision and repaid the tax previously levied. The benefit of the decision was extended to a small group of bank officials who had similarly appealed or protested. In the light of the *O'Rourke* judgement, the Revenue decided to pay interest on the tax refunded in the bank officials' cases.

As I mentioned in Chapter 1, I published a *Guide to Standards of Best Practice for Public Servants* in 1996. These standards were subsequently incorporated into the Revenue's *Customer Service Standards Statement*, published in January 1998. One of the standards concerned the issue of 'fairness'. In this context I had stated that, with a view to achieving the highest standards of administration, public servants should ensure that citizens are dealt with fairly. I stressed that one of the underlying principles in dealing fairly with people is that, while accepting that rules and regulations are important in ensuring fairness, they should not be applied so rigidly or inflexibly as to create inequity. In addition, the Revenue, in its *Charter of Rights*, which was first published in 1988, lists the fostering of the highest degree of public confidence in the Revenue's 'integrity, efficiency and fairness' as a priority objective.

In the light of Revenue's decision -

- to pay interest in the cases involving the Branch Managers of Employment Exchanges and the bank officials,
- its discretionary authority under the care and management provisions of the Income Tax Acts (see chapter 3), and
- the contents of its *Charter of Rights* and its *Customer Service Standards Statement*,

I asked the Revenue to review its decision not to pay interest or compensation for loss in value on the tax refunded in the cases of Mrs Kelly, Mr Lynch and Mr Hayes.

The Revenue response

In its response, the Revenue indicated that it was its view that there were no grounds for extending the *O'Rourke* judgement to other cases where there is no statutory authority for paying such interest or compensation for loss in value. It said that the *O'Rourke* judgement was implemented only in cases that were linked to it - i.e., the other Social Welfare Branch Managers and the bank officials' cases.

The Revenue referred to the fact that in the *O'Rourke* judgement, Mr Justice Keane, before making his final decision, referred to *Murphy v Attorney General*, and the basis on which the Supreme Court decision in that case might apply in *O'Rourke*. It said that after detailed consideration Mr Justice Keane distinguished the two cases, *inter alia*, on the basis that the *Murphy* case involved tens of thousands of married couples and the *O'Rourke* case was concerned with 80 to 90 social welfare branch managers. It added that in the immediate aftermath of *O'Rourke* it discussed with Counsel the significance of the distinction which Mr Justice Keane had made between the two cases and came to the conclusion that the decision was undoubtedly affected by the fact that the number of *O'Rourke*-type cases were so relatively few and restricted.

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The Revenue pointed out that the payment of interest or compensation for loss in value in these particular complaints would give rise to a further inequity in respect of all other cases, past and present, where similar circumstances applied and would have serious knock-on effects for the Exchequer.



The Revenue pointed out that the payment of interest or compensation for loss in value in these particular complaints would give rise to a further inequity in respect of all other cases, past and present, where similar circumstances applied and would have serious knock-on effects for the Exchequer. On the issue of the care and management provisions of the Income Tax Acts, the Revenue said that the payment of interest or compensation for loss in value in the absence of statutory authority could be deemed to be an unlawful act not in keeping with the authority provided for in the care and management provisions.

In conclusion, it said that in the light of the Ombudsman's concerns, it proposed to initiate a review of the entire question of interest or compensation for loss in value to see if there was a basis for proposing statutory change.

In light of the response received from the Revenue, I decided to commence a formal investigation of the complaints from the three original complainants and from five others who had subsequently made similar complaints to my Office. I did not consider that the Revenue's offer to carry out a review was a satisfactory response. I had referred to the issue in my Annual Report for 1996 when I had indicated that the legislation dealing with the payment of interest on tax refunded to taxpayers needed to be re-examined and in the meantime no significant change had taken place. A review, while implicitly acknowledging that there was merit in the arguments advanced by my Office, might not result in redress for the taxpayers who had complained to me.

The Investigation

On 22 July 1999, I notified the Revenue of my intention to carry out an investigation of the complaints under Section 4 of the Ombudsman Act, 1980. The Statement of Complaint which issued to the Revenue at that time recited the facts established in the preliminary examination and included details of the other five cases being joined in the investigation.

The Revenue, in response to the Statement of Complaint, maintained that in each of the cases there was no statutory provision which would enable it to pay interest or compensation for loss in value and that the *O'Rourke* case had no general application. The investigation process centred mainly on the examination of the tax files of the complainants and tax policy files supplied to me by the Revenue. The investigation also included research into relevant court decisions, legislation and general practice across the public service on the issue of the payment of interest or compensation for loss in value in the case of delayed payments or refunds.

Provisions have been made in legislation for the payment of interest for tax overpaid in certain instances. Details of these provisions are set out in chapter 3.

There has also been a number of court cases where the question of whether interest was payable on a tax repayment was considered. These are summarised in chapter 3. The application of the judgement in one of these cases, *O'Rourke*, is also considered in chapter 3.

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Revenue ... has laid stress on the fact that that it is not its view that interest is not warranted in these cases but rather that it considers that it is precluded through a lack of statutory authority from making such payments



Analysis

The case for payment of compensation

The Revenue describes its mission in terms of a desire to serve the community by fairly and efficiently collecting taxes and duties and implementing import and export controls. It suggests that quality customer service involves meeting the tax payer's needs through fair and efficient administration. This objective is to be achieved, according to the Revenue's *Charter of Rights*, in a manner which fosters the highest degree of public confidence in the Commissioners' integrity, efficiency and fairness.

With regard to repayments of overpaid tax, there is an acknowledgement on the part of the Revenue Commissioners of an obligation to pay interest to taxpayers in certain circumstances. Legislative provisions governing the payment of interest referred to earlier reflect this. It is reasonable to assume that these provisions came about at the instigation of the Revenue given its input to policy formulation by:

- providing advice to the Minister for Finance;
- advising the Tax Strategy Group on the likely consequences of policy changes;
- bringing forward its own proposals for change; and
- the drafting of the annual Finance Bill and briefing the Minister at all stages during the legislative process.

In this context, it is also reasonable to assume that the legislative provisions which provide for the payment of interest on tax repaid to the taxpayer are clear indicators that compensation in the form of interest is seen by the Revenue as an integral and

necessary element in the fair administration of the tax system. This view is supported by the fact that the Revenue, in response to the Statement of Complaint, has laid stress on the fact that that it is not its view that interest is not warranted in these cases but rather that it considers that it is precluded through a lack of statutory authority from making such payments. The Revenue has also signalled the need for a change in approach and has indicated that it is undertaking a review of the whole question of interest or compensation for loss in value in the case of delayed tax refunds.

In its comments on a draft of my investigation report, the Revenue disputed the view that compensation for loss in value is a necessary element in fair administration of the tax system. It referred to the legislative history of the various provisions for payment of interest:

"In our view this historical context is important in that it indicates that equality of treatment between the State and the taxpayer (as regards compensation for loss of value) was not the guiding force in the development of tax law relating to interest; rather it was the improvement of tax compliance. The limited circumstances in which interest is allowed to be paid - and which mainly relate to situations where taxpayers have to make a payment on account, such as preliminary tax, in advance of knowing the correct liability - are not, as seems to be suggested in ... the [draft] report, a pointer that, in general, taxpayers are entitled to compensation for tax overpaid"

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The O'Rourke decision established a right to compensation in the form of an interest payment to the taxpayer based on the doctrine of unjust enrichment in a case where no specific statutory authority under the Tax Acts exists. The view of the Revenue is that that decision was limited and could not be extended to other cases ... However the decision was extended by the Revenue to cover the bank officials' cases where equally there was no statutory authority for paying such interest or compensation for loss in value.



However it went on to concede:

"It is clear from the historical background set out above that, for policy reasons at the time, statute law as regards payment of interest is not entirely consistent as between the various taxes and within taxes (for example, self-assessment vs. PAYE cases). It is clear also that there is inconsistency between the rapidly developing common law of restitution and statute law in relation to overpayments of tax (and the question of paying interest.)"

The lack of equality between the State and taxpayer which the Revenue accept exists is underlined by the provision in Section 550 of ITA 1967 which provides:

"any tax charged by any assessment to income tax or to sur-tax shall carry interest at the rate of one half per cent for each month or part of a month from the date when the tax becomes due and payable until payment."

The O'Rourke decision established a right to compensation in the form of an interest payment to the taxpayer based on the doctrine of unjust enrichment in a case where no specific statutory authority under the Tax Acts exists. The view of the Revenue is that that decision was limited and could not be extended to other cases. It quoted Mr Justice Keane from his judgement in O'Rourke in support of this view when he said "... in the circumstances of this case, the defendants were unjustly enriched ...". However the decision was extended by the Revenue to cover the bank officials' cases where equally there was no statutory authority for paying such interest or compensation for loss in value.

The Revenue in its comments on the first draft of my investigation report pointed out that:

"The O'Rourke decision was based on a combination of the power of Courts to order payment of interest in accordance with section 22 of the Courts Act, 1981 and the common law principle of restitution. This latter is an area of the law which has been evolving incrementally over the past 25 years or so. The judicial rationale for this body of common law is to reverse 'unjust enrichment'. However, there is still - notwithstanding the radical development of this law in the 1993 Woolwich case and its subsequent adoption into Irish law in O'Rourke - no general right of restitution based simply on proof of an unjust enrichment. This is an important point as the [draft] report appears to conclude from an analysis of O'Rourke that: (a) there is such a general right, and (b) Revenue should put in place administrative procedures to vindicate such rights where persons have overpaid tax and there is no statutory right of redress.

*As Judge Keane acknowledged in O'Rourke, the law of restitution "has been developed incrementally on a case by case basis, so as to ensure that a vague and uncharted area of the law in which 'palm-tree' justice flourishes is not judicially encouraged". It is necessary for a person claiming rights under this common law principle to come within one of the recognised grounds for restitution, **whether it be mistake, duress, lack of consideration or some aspect of the newly-developed***

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Woolwich doctrine (my emphasis). And it is important to recognise that the common law allows a number of defences to a claim for restitution of overpaid taxes (or consequential interest), such as estoppel, change of position or restrictions on locus standi.

*There is also the question of a defence based on the economic necessity of preventing excessive disruption of the public finances. This particular defence was successful in the case of *Murphy v Attorney General*, but unsuccessful in the case of *O'Rourke*, because only 80 or 90 persons were involved. But it is not clear from *O'Rourke* where the boundaries of that defence may lie.*

Furthermore, there may be a legitimate defence based on the extinction of restitutionary actions beyond limitation periods. These limitation periods will presumably depend on whether an action could be taken by judicial review or founded on simple contract or through some other civil law process."

The Revenue conclusion was as follows:

"While we would like to see a review of the tax statute law in relation to interest and 'restitution' completed as soon as possible, any decision to change the statute law in this area is of course a matter for the Minister for Finance, the Government and the Oireachtas.

In the meantime, pending any legislative change in this area, we feel it is unreasonable to criticise Revenue for failing to apply a general principle of 'unjust enrichment' across the board in its administration of the tax system. To adopt such an approach could give

*rise to the type of 'palm tree' justice referred to by Judge Keane in *O'Rourke*."*

The reference to 'palm tree' justice in the Revenue response will be familiar to most Ombudsmen and, indeed, it often arises in discussion at Ombudsman conferences when the question of equity is being considered. 'Palm tree' justice is usually seen as justice summarily administered with little regard for legal principle or precedent. In his book *"Equity and the Law of Trusts in the Republic of Ireland"*, the then Judge Keane sounded an appropriate warning note:

"Justice is the ideal to which all legal systems aspire, but in cases which come before our courts it must be justice according to law, whether it be the law declared by the Constitution itself, or to be found in legislation or the body of common law and equity which also forms part of that law. Individual judges are not free to depart from the law to meet what may seem to be a just result in a particular case. The very nature of the equitable jurisdiction gives a certain allure to the belief that there is some standard of 'fairness', of 'equity' indeed, which renders precedent superfluous. But it is the application of settled principles largely contained in precedent which gives the law of equity the virtues of certainty and consistency. It is as true today as in centuries past that hard cases make bad law and that the arbitrary abandonment of principle and precedent to meet what may seem to be the demands of justice in a particular context leads only to uncertainty, inconsistency and, in the end, injustice at a more profound level."

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Indeed, given the Revenue's stated commitment to fairness, and its acknowledgement of the inequality which exists between State and taxpayer, it is open to criticism for its failure to do anything despite the O'Rourke judgement and the Revenue's extension of the benefits of that judgement to bank officials, the very selective introduction of statutory provisions for payment of interest and my specific reference to the unsatisfactory situation six years ago in my Annual Report for 1996.



Against this background, the first point I would make is that payment of interest or compensation for loss in value in these cases would not conflict with existing law. The Revenue argument in all cases is that it has no statutory basis for making such payments. I deal with this question later in the context of the "care and management" responsibilities of the Revenue. The second point I would make is that I note the concern of the Revenue that my draft report would effectively apply a general principle of "unjust enrichment" across the board in the administration of the tax system. It said:

"The circumstances of the eight complainants in this instance vary widely involving, for example, the treatment of pension income, professional services withholding tax, the treatment of redundancy payment, artist's exemption, Land Bonds and double taxation relief. There is no common thread except that it could be argued in each case that the State has been 'unjustly enriched' by having the use, for a period of time, of tax revenues to which they were not entitled, notwithstanding that there is no statutory basis in these instances for the payment of compensation for the time value of the money withheld.

But if that argument holds good in these widely disparate cases, it must, in all logic, apply across the board in the whole sphere of tax administration. This appears to be the conclusion of the [draft] report since it criticises Revenue for not making provision for a 'general scheme'."

In reply, I pointed out that my recommendations, (which, in accordance with normal practice, are not included in my draft investigation reports) are primarily concerned with the eight cases which were

all income tax cases and were all cases where mistakes were made by the Revenue. However, I added that to the extent that I recommend compensation in those cases, it clearly would also have to apply to other cases which are on "all fours" with these cases. I already have a number of such cases on hands. It seemed to me that in those circumstances (and to avoid a situation where only persons making complaints to my Office would benefit) it would be wrong for the Revenue not to consider a general scheme. Indeed, given the Revenue's stated commitment to fairness, and its acknowledgement of the inequality which exists between State and taxpayer, it is open to criticism for its failure to do anything despite the *O'Rourke* judgement and the Revenue's extension of the benefits of that judgement to bank officials, the very selective introduction of statutory provisions for payment of interest and my specific reference to the unsatisfactory situation six years ago in my Annual Report for 1996.

The merits of the eight complainants' cases

I now turn to the eight cases before me. In the cases of Mrs Kelly and Mrs Nolan, the position seems to me to be clear cut. The Revenue had clearly misconstrued the relevant pension regulations as a result of which extra tax had been wrongly exacted by it. I see no reason why the *O'Rourke* decision should not apply in these two cases and other similar pension cases and *fortiori* to the question of their being refunded all the tax wrongly exacted subject to the restriction in Section 498 of ITA 1967. I do not see this as involving any excessive disruption of the public finances.

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... it appears to me that the legislative provisions encompassing the care and management role of the Revenue provide them with the administrative discretion to accede to concessional treatment, where it is considered that circumstances suggest that it is proper to do so, notwithstanding the fact that such treatment may not be explicitly provided for in legislation.



In the case of Mr Hayes and Mr Sullivan, the tax refunds made to them in respect of Professional Services Withholding Tax (PSWT) followed a decision of the High Court which struck down a provision in the Finance Act, 1990. There can be little doubt that the principles laid down in the *O'Rourke* judgement cover these two cases.

Furthermore, the lack of a provision for payment of interest in the case of PSWT contrasts with the provision for such payments in the case of Preliminary Tax.

In the case of Mr O'Reilly, repayments of tax were made for all years from 1978/79 to 1994/95. Interest was paid on repayments for the years 1988/89 to 1994/95 as these were repayments of Preliminary Tax but not on the repayments made for the previous years. Revenue acknowledge that Mr O'Reilly could have appealed the assessments for these years and, if he had done so, the assessments would have been affected by the subsequent decision in respect of the determination under Section 2. This would have resulted in an entitlement to an interest payment under Section 30 Finance Act, 1976.

In the case of Mr Lynch, it is clear that he was never liable for the tax deducted from him at source because of the Double Taxation Agreement. While it is also evident that a claim for a refund of income tax was not made until 1988 in respect of a payment made in July 1979, it took a further six years to refund the overpayment to Mr Lynch. The primary cause of this delay can be attributed to failures in internal communications within the Revenue and, on this basis, interest is due to him in respect of the period 1988 - 1994.

In Mr Dunne's case - although the papers are missing - it is evident that the decision to refuse his original claim under Section

115 ITA 1967 was wrong. In 1996 the Revenue decided to allow his claim on receipt of evidence which could easily have been provided at the time of his redundancy had he been requested to do so by the Revenue. This is acknowledged by a Revenue official in a note dated 4 June 1997 which said that:

"the fact that we have now conceded the point, suggests (whether accurately or not) that his case had merit. For this reason I would be inclined to give him the benefit of the doubt and pay interest."

In Mr Doyle's case, the Circuit Court decision indicated that the original interpretation of the Inspector of Taxes was wrong and as a consequence resulted in a refund of PAYE income tax. While it can be argued there are good grounds to conclude that the Circuit Court decision should have automatically triggered a statutory interest payment on the tax refunded, the case would also merit an interest payment on the same basis as *O'Rourke* by virtue of a mistaken application of the law.

The care and management provisions of the Tax Act

In Chapter 1, I referred to the discretionary powers of the Revenue under the care and management provisions of the Tax Acts and the observations of the Revenue Commissioners and the Institute of Taxation on these provisions. In light of these observations, it appears to me that the legislative provisions encompassing the care and management role of the Revenue provide them with the administrative discretion to accede to concessional treatment, where it is considered that circumstances suggest it is proper to do so,

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notwithstanding the fact that such treatment may not be explicitly provided for in legislation. The argument that the Commissioners are prohibited from paying interest on the grounds that there is no statutory provision enabling them to do so is, therefore, not sustainable. It is clear to me that the validity and reasonableness of the case in favour of a compensatory payment in the cases covered by my investigation have been established. Furthermore, I am satisfied that the discretionary authority to make such a payment is provided for in the care and management provisions.

In its comments on a draft of my investigation report, the Revenue said:

"Given the potential significance of what would be involved in such a general non-statutory scheme, and the public finance and public policy implications of any such scheme, we feel it a matter which is far beyond the scope of care and management and any such scheme should have a clear legislative basis."

It is interesting that the Revenue confined its argument to the suggestion that a general scheme of compensation be introduced. It has not said that the discretion it has under the care and management provisions could not be exercised in each particular case under investigation by me by reference to the merits of each case. It is clear from a reading of the final report of the Committee of Public Accounts Sub-Committee on certain Revenue Matters (Parliamentary Enquiry into DIRT) that even the Revenue officials considered their care and management provisions a somewhat grey area. There was general agreement, for example, that the provisions gave discretion in choosing between the prosecution route

and the collection route and in relation to write-offs and mitigation in individual cases. On the other hand, there were differing views on the correctness of using the provisions to issue a general instruction (SIM 263) ordering that no inspections should take place of declarations in the case of non-resident accounts. The Sub-Committee expressed its strong view that there should never be a question of using the care and management provisions in a broad brush policy manner. On 2 May 2001, the Revenue, purporting to act in accordance with the care and management provisions, issued a statement of practice in relation to owners of bogus non-resident accounts. Without in any way expressing an opinion on the merits of this decision, it demonstrates that the care and management provisions have been and can be used in a very pragmatic way by the Revenue with a view to collecting the maximum amount of money in the shortest possible time. [As an aside, could I express a serious concern that the amount of discretion enjoyed by the Revenue in this area leaves it vulnerable to pressure to apply its discretion in an arbitrary and discriminatory manner without reference to objective criteria or principles]. Given the stated commitment of the Revenue to treating taxpayers fairly, I can see no reason at all why the same provisions cannot be used to the benefit of the cases where I find that individual taxpayers have been treated unfairly by reference to the criteria in the Ombudsman Act, 1980. After all, to the extent that taxpayers perceive the tax system as fair, it assists the Revenue in raising, collecting and receiving tax due. Furthermore, the payment of interest in the case of the bank officials demonstrates that it is possible to use these provisions for that purpose.

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A general scheme of compensation

Whether or not a general scheme is possible under the care and management provisions is clearly open to argument. My general approach as Ombudsman has been to favour statutory underpinning of areas where Ministers or Departments exercise discretion (e.g., the school transport system) so that the objective criteria for decision making is known. However, I am conscious that sometimes the making of a statutory provision can be used as a delaying tactic and that justice delayed is justice denied. Responding to my restructured draft investigation report, the Revenue suggested that my comment that whether or not a more general scheme is possible under the care and management provisions is open to argument, indicated a change of position on my part. This is not the case. The Revenue attitude has always been that it did not have the authority under the care and management provisions to pay compensation for tax refunded. As I mentioned earlier I can see no reason why individual taxpayers who have been unfairly treated by reference to the criteria in the Ombudsman Act, 1980, should not receive appropriate redress under the care and management provisions. My view is that the Revenue has such authority and that furthermore the Revenue has been able to undertake other actions which were not specifically authorised in legislation using the care and management provisions as the basis for doing so. It was in this context I suggested that the strongly held view of the Revenue that it did not have authority to introduce an appropriate general scheme was open to argument. Clearly, it would be better to have a scheme of which the public would be aware of rather than leaving it to individuals to make complaints to my Office.

In other areas of the public service steps have been taken, often at the instigation of my Office, to provide for payments to compensate for loss of purchasing power where payments made to individuals are delayed. Some examples of where such payments have been made include the following:

- (i) For the last 16 years, the Department of Social and Family Affairs has operated a scheme to pay compensation to clients who are at a disadvantage because the Department itself was solely or significantly responsible for delays in making payments to them. This can happen where, for example, a person was given wrong information by the Department when enquiring about entitlements. The Department has made regulations giving this scheme legislative status (S.I. 160 of 2000) but it had operated previously under delegated sanction from the Department of Finance. The background to the introduction of the scheme (and the Department of Finance's agreement to it) is set out in my predecessor's Annual Report for 1986.
- (ii) The Department of Education and Science pays compensation in respect of loss of purchasing power in cases where payment of higher education grants has been delayed.
- (iii) The health boards have also agreed to the introduction of a national compensation scheme covering loss of purchasing power. The scheme is currently being examined by the Department of Health and Children.

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... I also drew the Joint Oireachtas Committee's attention to the fact that I had initiated an investigation of Revenue's refusal to pay interest or compensation for loss in value to certain taxpayers. I welcome the Committee's recommendation that the Revenue should bring forward proposals to compensate individuals and companies where Revenue make mistakes that cost taxpayers money.



- (iv) Following an investigation carried out by my Office into the level of unrefunded overpayments on borrowers' loan accounts, local authorities accepted my recommendation that they pay the borrowers compensation for loss of purchasing power on the amounts in question.

I am not saying that these schemes would be on "all fours" with a Revenue scheme but the principle involved would be the same, viz. compensation for loss of purchasing power in the case of payments which were delayed because of an error or mistake on the part of a public body. What these other schemes also demonstrate is that where there is a will there is a way.

I have noted with interest the *First Report of the Joint Oireachtas Committee on the Strategic Management Initiative on Quality Customer Service in the Office of the Revenue Commissioners*, published in December 2001. When my officials appeared before the Committee on 23 May 2000, and in a subsequent written submission, the point was made that one area where improvement was desirable from the Office of the Revenue Commissioners was in the area of the provision of redress. The Revenue's information leaflet on "*How to Complain to Revenue*" was silent on what action might be taken to remedy any adverse effect arising out of an incorrect decision or action by the Revenue Commissioners. I remain strongly of the view that the parameters for redress should be made explicit in the Revenue's customer service standards document. I also drew the Joint Oireachtas Committee's attention to the fact that I had initiated an investigation of Revenue's refusal to pay interest or compensation for

loss in value to certain taxpayers. I welcome the Committee's recommendation that the Revenue should bring forward proposals to compensate individuals and companies where Revenue make mistakes that cost taxpayers money.

I should also make it clear that I would not wish to be prescriptive about the details of such a scheme; for example, whether it should provide for interest payments at the rates prevailing over the relevant period or for compensation for loss of purchasing power by reference to the Consumer Price Index. Furthermore, it would follow that compensation payments would be for whatever period of retrospection was proper or appropriate in respect of the refunds. Accordingly, any limitation on such refunds - either statutory or on grounds of excessive disruption of the public finances - would automatically apply to the compensation payments.

FOR REDRESS TAXPAYERS





Chapter 6

FINDINGS AND RECOMMENDATIONS



FOR REDRESS TAXPAYERS

Findings and Recommendations

Findings

I was satisfied that each of the complainants was adversely affected as a result of the Revenue Commissioners' actions. All suffered monetary loss and in the cases of Mrs Kelly and Mrs Nolan, both suffered obvious hardship.

My findings in relation to the two questions central to this investigation were:

Were further retrospective payments of overpaid income tax due in the cases of Mrs Kelly and Mrs Nolan?

I found that both Mrs Kelly and Mrs Nolan were entitled to repayment of the tax overpaid by them. Revenue was mistaken in applying Section 133 rather than Section 498 ITA 1967 and in limiting the period for which retrospection was payable. Revenue acted contrary to its own *Charter of Rights* and I found that its actions were based on erroneous or incomplete information and were contrary to fair or sound administration.

Should compensation in the form of interest for loss in value in the case of delayed tax refunds have been paid to the complainants?

- (i) I found that in refusing to pay the eight complainants compensation for loss in value, the Revenue Commissioners were acting in an improperly discriminatory manner. I did not accept the argument that the lack of specific statutory authority prohibits Revenue from making such payments nor has it prevented it from doing so in certain cases. Payment of compensation for loss in value in individual cases is possible under the care and management provisions. Failure to exercise this discretion in these cases, where fairness

demanding that they did so, is contrary to fair and sound administration.

- (ii) I found that the failure to provide for the same treatment in similar cases was improperly discriminatory and, therefore, failure to make provision for an appropriate general scheme which allows for such payments is in itself an undesirable administrative practice and is otherwise contrary to fair or sound administration.

Recommendations

I recommended that:

1. Revenue should undertake to make retrospective payments to cover the ten year period prior to the date of the *O'Carroll* judgement (9 November 1988) in respect of any income tax levied on Mrs Kelly and Mrs Nolan, and not already refunded, in respect of the pension payments made to their children during that period.
2. Revenue should put in place as soon as possible arrangements whereby refunds, in accordance with Section 498 ITA 1967, of any income tax levied, and not already refunded, can be made to all individuals who were similarly affected by the *O'Carroll* judgement. Revenue should report to me within twelve months on progress in regard to implementing this recommendation.
3. Revenue should make a compensation payment for loss of purchasing power or loss of interest on the refunds of income tax made in the individual cases listed in the investigation report and in all cases to

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which recommendation 2 applies. In calculating the compensation payable, the Revenue Commissioners should have regard to movements in the Consumer Price Index applicable for the relevant period or to the loss of interest suffered by those involved.

4. Revenue should similarly make compensation payments for loss of purchasing power or loss of interest in other cases where a complaint has been made to the Ombudsman (I supplied details of four such cases to the Revenue) and where the examination of the complaint has been held over pending the outcome of this investigation.
5. Revenue should without delay make provision for a general scheme for payment of compensation for loss of purchasing power in respect of tax refunds made to taxpayers of income tax levied and paid. This general scheme should be designed to cover cases where, as a result of an error, misinterpretation, oversight or other similar action on the part of the Revenue Commissioners, the taxpayer has been adversely affected. In this connection, Revenue should have regard to the compensation scheme operated by the Department of Social and Family Affairs referred to in chapter 5 of this report. Revenue should report to me within six months on progress in regard to implementing this recommendation.

The Revenue response to my recommendations

The Revenue response to my recommendations was as follows:

"Recommendation 1 - Mrs. Kelly and Mrs. Nolan

We will implement recommendation 1 of your report. We will do this on a without prejudice basis as the legal opinion 'stalemate' - i.e. as to whether section 498 or 133 applies - has not, in our view, been satisfactorily resolved. We regret that you neither provided us with a copy of your legal opinion nor agreed to the referral of the matter to the Attorney General.

Recommendation 2 - Cases similarly affected by the O'Carroll judgement

We will, as best we can, implement recommendation 2 of your report - also on a without prejudice basis. I should point out however that we may encounter practical difficulties in doing this. Preliminary contacts with two of the largest payers of widows pensions, and also with the main tax offices involved, indicate that records may not extend beyond the late 1980s.

Notwithstanding these difficulties, I want to assure you that we will explore all options available to us to identify the cases concerned and quantify the further repayments due. We will come back to you within twelve months with a progress report.

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Recommendations 3, 4 and 5 - Compensation for loss of purchasing power

We are not able to implement recommendations 3, 4 and 5 because of the far-reaching implications these would have. As we have explained previously, the circumstances of the cases covered by the recommendations are so disparate that it would be unfair - and virtually impossible - to ring-fence them. This is acknowledged in the finding of the investigation which states "that failure to provide for the same treatment in similar cases is improperly discriminatory". Any exercise of care and management as recommended in 3 and 4 would have to be extended widely. In effect, the entire population of income tax payers are potentially "on all fours" with the eight cases. And indeed it would be impossible to stop at income tax. The inevitable outcome would be - as recommended in 5 - a general non-statutory scheme for the payment of compensation

We are clear that we do not have authority to pay out compensation for loss of purchasing power under our general care and management powers. Nor, given the budgetary and public finance implications, would it be appropriate to do so without clear statutory authority.

We feel very strongly that the findings which led to recommendations 3, 4 and 5 cannot and should not be classified as maladministration under any of the headings set out in section 4 of the Ombudsman Act. To the extent that there is any unfairness or discrimination involved in failing to compensate taxpayers for loss of purchasing power when they receive a tax rebate, that unfairness arises from the statutory tax code; it does not arise from the manner in which the code is administered on the ground by Revenue.

We have stated before that the whole area of paying interest on tax rebates is in need of review, but we must again stress that any decision to change the law in this area is a matter for the Minister for Finance, the Government and the Oireachtas. We brought your concerns to the attention of the Department of Finance in the context of last year's Finance Bill and, as indicated in my letter of 13 September last, work is currently underway in that Department to consider the matter with a view to bringing forward options or recommendations for consideration by the Minister and the Government in the context of a future Budget and Finance Bill."

Ombudsman's response to Revenue

I replied to the Chairman on 7 October:

"Thank you for your letter of 4 October in response to my investigation report on the complaints of Mrs Maria Kelly and seven other complainants. I note that you intend to implement my first recommendation and that you also intend to implement, as best you can, the second recommendation.

I must express my grave disappointment at your response to my other three recommendations in relation to compensation for loss in value in the case of tax wrongly withheld by you. You claim inability to implement these recommendations because of the far-reaching implications these would have. It appears to me, pursuant to Section 6(5) of the Ombudsman Act, 1980, that this is not a satisfactory response. I consider your response incomprehensible and I believe it is at best disingenuous and possibly mischievous.

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As my investigation report makes clear, the eight complainants each suffered adverse effect as a result of maladministration by the Revenue Commissioners. Your claim that the entire population of income tax payers is potentially on "all fours" with the eight cases would be true only if you accept the possibility that the entire population could be the subject of maladministration by the Revenue. If you have evidence that this is likely, then may I suggest that you take appropriate steps to prevent it.

You claim that you lack authority to pay compensation in these eight cases under your care and management powers. You have already paid such compensation in other similar cases. Your refusal to do so in these cases, following an investigation by me as Ombudsman, I regard as a direct challenge to the authority of the Office of Ombudsman. It is unfair to the eight complainants and the other cases mentioned in the report and this unfairness arises directly from the manner in which the Revenue Commissioners have operated the tax code.

It is clear to me that the Revenue Commissioners are out of step with other Departments and Offices in refusing to accept the basic principle that members of the public are entitled as of right to compensation for loss in value of payments due to them which are wrongly withheld for lengthy periods due to error or some other form of maladministration on the part of the public body. It is not sufficient in my view to state that the whole area of paying interest on tax rebates is in need of review. "

Revenue's further response

"I refer to your letter of 7 October.

In relation to the "compensation for loss of value" recommendations, at this stage I can only reiterate our basic position which is that it is not possible for us to do what you are asking here. We have no authority to pay such compensation, either under the tax code or out of voted funds. Neither have we implicit authority under our care and management functions - our advice on this is very clear.

Whether you agree with us or not, I want to assure you of our bona fides in responding to your recommendations. There is absolutely no question of our being mischievous or disingenuous in any way - we are quite taken aback that you should think that this was the case. We did not take the decision in this case lightly. We explored in great detail the options for implementing your recommendations on compensation in this case but were left each time with the core difficulty - we do not have the authority to do so.

Our response therefore should not in any way be interpreted as a challenge to the authority of the Office of the Ombudsman. Neither indeed should it be seen as a refusal to accept a basic principle that members of the public may, in certain circumstances, be entitled as of right to compensation for the loss in value of payments due to them which are wrongly withheld for lengthy periods by a public body. However the widespread implications of making compensation payments in the cases involved in your investigation make it imperative, in our view, that there be a clear statutory basis for taking such action.

To the extent that there is any unfairness in our failure to compensate the eight complainants for loss of value, that unfairness arises from the statutory position; it should not be laid at Revenue's door."

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Special Report to each House of the Oireachtas

As will be clear from my letter of 7 October 2002 to the Chairman of the Revenue Commissioners, I do not consider that Revenue has given a satisfactory reason for rejecting my recommendation that the eight complainants named in my report be compensated for the delay in making tax refunds to them. Neither do I consider that Revenue has given a satisfactory reason for refusing to introduce a general scheme to compensate taxpayers for delays in making refunds when Revenue itself has been solely or significantly at fault. In the circumstances, I have decided to make a special report to each House of the Oireachtas, in accordance with Sections 6(5) and 6(7) of the Ombudsman Act, 1980.



Appendices

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The Revenue's response to my first draft investigation report, 12 April 2001

I refer to your letter of 13 March, 2001 enclosing a draft investigation report on complaints by Mrs. Maria Kelly and seven others. I want to thank you for allowing us some additional time for the making of representations on this draft report. The report raises important issues and we were anxious to make as full and comprehensive a response as possible. This letter will deal in turn with the analysis and findings in relation to each of the two specific questions raised in the report.

Question 1 : Are retrospective payments of overpaid income tax due in the cases of Mrs. Kelly and Mrs Nolan?

Draft findings

- 1 The draft finding in answer to the first question about Mrs. Kelly and Mrs. Nolan is that both women are entitled to a repayment of the tax overpaid by them outside of the statutory five year time limit specified in section 133 of the Income Tax Act 1967. This finding is apparently grounded on the belief that Revenue were mistaken in applying section 133 (instead of section 498 of the Income Tax Act) and that they acted contrary to Revenue's Charter of Rights. The report indicates that Revenue's failure to repay outside of the five year statutory limit fell within section 4(2)(b) of the Ombudsman's Act on two counts: it was based on erroneous or incomplete information; and it was otherwise contrary to fair or sound administrative practice.
- 2 We feel that the draft report in relation to this issue contains some important inaccuracies and possible misunderstandings. Our particular concerns as regards the text of the

report are set out in paragraphs 13 to 15 below. But before going into the detail of the report we would like to address the two basic findings, namely the "erroneous information" finding, and the "contrary to fair administrative practice" finding. We feel strongly that neither finding is reasonably justified on the strength of the facts of the two cases and the analysis set out in the report.

The "erroneous information" finding

- 3 As already indicated, the "erroneous information" finding appears to be primarily based on the view that Revenue were mistaken in applying section 133 rather than section 498 of the Income Tax Act 1967 and in limiting the period for which retrospection was payable. Unless we misunderstand the report, the issue between us essentially boils down to a difference of legal opinion.
- 4 Revenue received legal advice at the relevant time from Senior Counsel, on two separate occasions, that section 133 was the correct legal mechanism for processing the retrospection claims for Mrs. Kelly, Mrs. Nolan and others in this situation. On the second of those occasions Revenue's Senior Counsel was specifically asked if section 498 applied. All these papers have been made available to you. (There was also an oral consultation with Counsel to ensure the issue was fully understood). The outcome of the process was clear advice that section 133 was the correct legal basis for the processing of refund claims in these cases and Revenue acted on that basis at the time.
- 5 The draft report states that your Office has now sought separate legal advice "on the question of whether the claim

* (In the interests of clarity I have omitted references to paragraph numbers in Revenue's responses to my draft investigation reports)

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for retrospection following *O'Carroll* fell to be considered under section 133 or section 498". Later on it is stated, presumably on the basis of the separate legal advice your Office has now received, that the appropriate provision in the legislation for requesting a refund in these cases was section 498.

- 6 We have difficulty in accepting the reasonableness of a report which contains an adverse finding based solely (or largely) on a new legal opinion, particularly when we have not had an opportunity to see and consider that opinion. Indeed we are not at all clear as to why the specific question put by your Office to Counsel was framed in the way it was since section 498 does not, in itself, provide a legal basis for any refund of tax. However, we would be happy to consider the matter further if your Office is prepared to forward a copy of the separate legal advice obtained in this matter. If necessary the obtaining of the advice of the Attorney General might be a reasonable approach in these circumstances.

The "contrary to fair administrative practice" finding

- 7 The second finding in the report is that Revenue acted contrary to its Charter of Rights and this, presumably, was the basis for the finding that Revenue's actions, in the case of Mrs. Kelly and Mrs. Nolan, were "contrary to fair and sound administration".
- 8 It is difficult to respond to this charge since the analysis of this issue in the report is confined to just one paragraph and two sentences. The first of these simply states in general terms that "it should be obvious that good administration in the area of taxation demands that Revenue should not retain taxes which are not due from a taxpayer. The second quotes extracts from

Revenue's *Charter of Rights*, which states that taxpayers are entitled to have their affairs dealt with in an impartial manner by Revenue staff "who seek to collect only the correct amount of tax or duty, no more and no less".

- 9 From our standpoint the problem with this analysis is that it takes no account of the legal constraints and the highly regulated context within which Revenue must operate. As a matter of principle it is of course difficult to disagree with the broad statement in the report that "Revenue should not retain taxes which are not due from a taxpayer". Yet the law does not provide unqualified support for such a principle. Neither does it provide unqualified support for the principle that "a taxpayer should not retain taxes which are due to Revenue."
- 10 For good administrative and policy reasons, mainly to do with achieving finality and closure, tax law sets down time limits - and other conditions - for the making of repayments to taxpayers where excessive tax has been paid: there is no unlimited or unfettered right to restitution. By the same token our tax law lays down time limits and other conditions in relation to Revenue's power to collect underpayments of tax. There are many examples of this in the tax code, for example, there is a general three-year time limit (running from the date of death) on the recovery of unassessed tax from a deceased person's estate.
- 11 Whether there is scope for achieving greater fairness or symmetry in these statutory rules is a matter for debate, but we feel that Revenue should not be criticised for applying the clear rules in the case of Mrs. Kelly and Mrs. Nolan. If our interpretation of this legislation is correct - and we have already indicated that we are prepared to look again at this when and if we receive your Office's separate legal advice - then our actions

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in this regard could not, in our view, reasonably be regarded as contrary to fair or sound administration.

- 12** Revenue did not, as is indicated in the report, seek to retain tax in the Kelly and Nolan cases following the *O'Carroll* decision. On the contrary Revenue actively sought a means of repaying this tax within the law and suggested section 133 as a possible avenue, which was endorsed by Counsel. In doing so, Revenue was complying fully with the *Charter of Rights* commitment to collect only the correct amount of tax due under the law. We were fully mindful of the need to be fair to the taxpayer while at the same time ensuring that there was a proper legal basis for any retrospection. It is clear from the Revenue papers that there was an anxiety to give the best possible benefit to the taxpayers within the law but the legal advice available at the time of the decision was clear that section 133 was the only avenue of approach.

Concerns about specific aspects of the draft report in relation to Question 1

- 13** We have concerns about some of the text of the report relating to Mrs. Kelly and Mrs. Nolan. First of all there is an implication that the decision to appeal the *O'Carroll* decision to the High Court was taken purely on the grounds of expediency in that it would buy Revenue some time. It is of course accepted that a by-product of taking the appeal was that there would be additional time to consider the full implications. But it would be wrong to imply that was the only or principal reason for taking the case. The Appeal Commissioner's decision had the effect of turning the existing interpretation and practice on its head and had major implications for all pension schemes. Such an important point of principle could not be accepted

without reference to the higher courts. Indeed it would be unusual if Revenue did not appeal such a decision.

- 14** We feel that there may be a misunderstanding of the Revenue position with regard to the backdating of retrospective payments. First of all it is important to recall that Revenue took great care in the *O'Carroll* case to ensure that the approach adopted was correct in legal terms. Two formal opinions were sought from Senior Counsel and a meeting was held between Revenue officials and Counsel to discuss fully the issues involved. Following this, Revenue were satisfied that section 133 was the correct legal basis for processing retrospection claims and that section 498 did not provide any right to repayment of tax for previous years. Our view was and is, based on Counsel's advice, that section 498 has no relevance to these cases.
- 15** The report suggests that tax and legal experts are unsure about the application of Section 133. It is not clear on what basis such a broad statement could be justified.

Question 2: Should compensation for loss in value in the form of interest be paid on tax refunded to the complainants?

The draft findings

- 16** The main draft finding in answer to the second question about paying interest to all eight complainants is that, in refusing to pay interest in these cases, Revenue's action was "improperly discriminatory". This finding appears to be largely grounded on Revenue's failure to extend to these eight cases the benefits of the *O'Rourke* decision (i.e., the December 1996 decision of the High Court to order payment of interest on PAYE tax overpayments to Social Welfare Branch Managers who had been incorrectly classified as Schedule E

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taxpayers). There is a second finding that Revenue's failure to exercise its care and management discretion to pay interest in these eight cases was "contrary to fair and sound administration". And there is a further finding that failure to provide for a general scheme which allows for such interest payments is itself an undesirable practice and is otherwise contrary to fair and sound administration.

- 17 It appears from the report that the second and third findings may be dependent on the first. In other words, the exercise of care and management, in place of statutory provisions governing the payment of "O'Rourke-type" interest, and the putting in place of a general scheme for such payment only arise if the *O'Rourke* decision should be applied on a wide basis - or at least wide enough to encompass the eight complainants.

Some context: background to the paying and charging of interest on tax over/underpaid.

- 18 Before going on to address the report's findings we feel it would be useful to give some background to the legislation governing the payment of interest on tax overpaid and the charging of interest on tax underpaid. As was pointed out in the report, the Tax Acts provide for interest to be paid on tax overpayments in limited circumstances, for example, overpayments of preliminary tax under the self assessment system. There is no general statutory right to interest on overpaid tax. Indeed the Ombudsman specifically acknowledged this on page 19 of his Annual Report for 1996 and on page 20 he indicated that he had written to the Department of Finance in this regard.

- 19 Looking at the legislative history in this regard it seems clear that interest has, over the years, primarily been seen as a tool to improve tax compliance. It is fair to say that it was never seen by our legislators purely in terms of equalising compensation to the State and to the taxpayer for loss of value where tax was underpaid or overpaid as the case may be.
- 20 Prior to 1963 no interest was charged on unpaid income tax. A 6% p.a. interest charge was introduced that year, but was confined to Schedule D taxpayers. It was not matched with a provision to pay interest where tax was overpaid.
- 21 In 1971 the 6% interest charged was increased to 9% but in the same year significant changes were made to the "payment on account" and appeal rules for Schedule D cases: such cases could avoid an interest charge if they made a satisfactory payment on account before their tax bills were finalised and paid the balance within 2 months of finalisation. Because of these changes, which required a degree of estimation on the part of the taxpayer when making the payment on account, the law provided, for the first time, that interest - also at 9% - would be paid on any tax overpaid.
- 22 The introduction, in 1971, of a provision to pay interest on overpaid income tax was in the specific context of incentivising Schedule D taxpayers to make prompt payment of tax in circumstances where a degree of estimation was involved and where underpayment of tax would attract an interest charge. These provisions were subsequently amended in section 30 of the Finance Act 1976 and were carried forward into the preliminary tax system (which is an estimated payment on account procedure) for self-assessment. It should be noted also that, since 1986, the rate of interest payable on

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overpayments - in the limited circumstances where interest is payable - has been significantly less than the rate chargeable on tax underpaid.

- 23 In our view this historical context is important in that it indicates that equality of treatment between the State and the taxpayer (as regards compensation for loss of value) was not the guiding force in the development of tax law relating to interest; rather it was the improvement of tax compliance. The limited circumstances in which interest is allowed to be paid - and which mainly relate to situations where taxpayers have to make a payment on account, such as preliminary tax, in advance of knowing the correct liability - are not, as seems to be suggested in the report, a pointer that, in general, taxpayers are entitled to compensation for tax overpaid.
- 24 Indeed, apart from Income Tax, it is rare to find examples in the tax code where interest is paid on repayments due to the taxpayer. In the VAT area, for instance, Revenue repay enormous sums to taxpayers each year - £1.681 billion in 1999 - but no interest is payable on those repayments.

The 'improper discrimination finding': non-application of the O'Rourke decision

- 25 A large part of the report is taken up with an analysis of the 1996 decision of the High Court in the case of Laurence O'Rourke. The investigator's conclusion is that as each of the eight complainants received refunds of tax which were not due for payment by them in the first place, and that as these overpayments extended over a period of time, it follows that the doctrine of "unjust

enrichment' applies in these cases. The report goes on to say that "I believe the Revenue Commissioners are free to invoke the *O'Rourke* principles in the present cases".

- 26 We cannot accept this conclusion. The O'Rourke decision was based on a combination of the power of Courts to order payment of interest in accordance with section 22 of the Courts Act, 1981 and the common law principle of restitution. This latter is an area of the law which has been evolving incrementally over the past 25 years or so. The judicial rationale for this body of common law is to reverse "unjust enrichment". However, there is still - notwithstanding the radical development of this law in the 1993 *Woolwich* case and its subsequent adoption into Irish law in *O'Rourke* - no general right of restitution based simply on proof of an unjust enrichment¹. This is an important point as the report appears to conclude from an analysis of *O'Rourke* that: (a) there is such a general right, and (b) Revenue should put in place administrative procedures to vindicate such rights where persons have overpaid tax and there is no statutory right of redress.
- 27 As Judge Keane acknowledged in *O'Rourke*, the law of restitution "has been developed incrementally on a case by case basis, so as to ensure that a vague and uncharted area of the law in which 'palm-tree' justice flourishes is not judicially encouraged". It is necessary for a person claiming rights under this common law principle to come within one of the recognised grounds for restitution, whether it be mistake, duress, lack of consideration or some

¹ For example, Lord Browne-Wilkinson in *Woolwich [1993] A.C. 70* said (at p. 196): "though as yet there is in English law no general rule giving the plaintiff a right of recovery from a defendant who has been unjustly enriched at the plaintiff's expense, the concept of unjust enrichment lies at the heart of all individual instances in which the law does give a right of recovery".

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aspect of the newly-developed Woolwich doctrine. And it is important to recognise that the common law allows a number of defences to a claim for restitution of overpaid taxes (or consequential interest), such as estoppel, change of position or restrictions on *locus standi*.

- 28 There is also the question of a defence based on the economic necessity of preventing excessive disruption of the public finances. This particular defence was successful in the case of *Murphy v Attorney General*, but unsuccessful in the case of *O'Rourke*, because only 80 or 90 persons were involved. But it is not clear from *O'Rourke* where the boundaries of that defence may lie.
- 29 Furthermore, there may be a legitimate defence based on the extinction of restitutionary actions beyond limitation periods. These limitation periods will presumably depend on whether an action could be taken by judicial review or founded on simple contract or through some other civil law process.
- 30 We have stated before that in our opinion the whole question of interest or compensation for loss of value in relation to tax overpayments is in need of review. It is clear from the historical background set out above that, for policy reasons at the time, statute law as regards payment of interest is not entirely consistent as between the various taxes and within taxes (for example, self-assessment vs. PAYE cases). It is clear also that there is inconsistency between the rapidly developing common law of restitution and statute law in relation to overpayments of tax (and the question of paying interest).
- 31 An option, which was also considered by the UK Law Commission following *Woolwich* (Consultation Paper No. 120), is to find a synthesis of the common

law and statutory approaches in the form of one statutory provision. However, the question of protecting the public finances, for example, by way of a short limitation period, would of course also need to be considered. You will appreciate that these are highly complex issues with major policy implications that need to be considered carefully.

- 32 While we would like to see a review of the tax statute law in relation to interest and "restitution" completed as soon as possible, any decision to change the statute law in this area is of course a matter for the Minister for Finance, the Government and the Oireachtas.
- 33 In the meantime, pending any legislative change in this area, we feel it is unreasonable to criticise Revenue for failing to apply a general principle of "unjust enrichment" across the board in its administration of the tax system. To adopt such an approach could give rise to the type of 'palm tree' justice referred to by Judge Keane in *O'Rourke*.

Care and Management

- 34 A section of the report looks at the whole question of Revenue's "care and management" function, using material from the Commission on Taxation's Fifth Report in 1985 and from an Institute of Taxation publication on Capital Gains Tax. On the basis of this material the report concludes that care and management provisions allow Revenue administrative discretion to accede to concessional treatment "where it is proper to do so". The report goes on to say "it is clear to me that the validity and reasonableness of the case in favour of a compensatory payment in these instances has been established."

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- 35 Clearly no tax administration can function properly without some degree of managerial discretion in its day-to-day operations, especially on matters which have significant implications for its use of resources. While the boundaries of what is possible under our own care and management authority are not always clear, Revenue do try to exercise it fairly and consistently within the guidance provided by decided case law on this issue and legal advice we have received over the years.²
- 36 The circumstances of the eight complainants in this instance vary widely involving, for example, the treatment of pension income, professional services withholding tax, the treatment of a redundancy payment, artist's exemption, Land Bonds and double taxation relief. There is no common thread except that it could be argued in each case that the State has been "unjustly enriched" by having the use, for a period of time, of tax revenues to which they were not entitled, notwithstanding that there is no statutory basis in these instances for the payment of compensation for the time value of the money withheld.
- 37 But if that argument holds good in these widely disparate cases, it must, in all logic, apply across the board in the whole sphere of tax administration. This appears to be the conclusion of the report since it criticises Revenue for not making provision for a "general scheme".
- 38 Given the potential significance of what would be involved in such a general non-statutory scheme, and the public finance and public policy implications of any such scheme, we feel it a matter which is far beyond the scope of care and management and any such scheme should have a clear legislative basis.
- 39 Finally, reference is made in the report to other areas of the public service that have compensation schemes. While we are not totally *au fait* with all of these schemes, they appear to be concerned primarily with administrative delay in circumstances where the Department or agency involved has been responsible for the delay and, at least in some of the more significant instances, for example, the Department of Social, Community and Family Affairs, have legislative status. That would appear to be very different from what is involved in these cases.
- 40 As we said at the start of this letter, the matters covered by the draft investigation report raise difficult and complex issues and we were anxious to respond to them as comprehensively as possible. If you think it would be useful, we would be more than happy to meet with the Ombudsman or any members of his staff to discuss these issues further.

2 The Irish Courts have not considered the issue of care and management but our advice is that they would be likely to adopt a similar approach to the UK House of Lords in the 1981 case of IRC v National Federation of Self Employed [1981] STC 260 (the so-called "Fleet Street Casuals case"). Revenue received a legal opinion on the scope of care and management from the Attorney General in 1984 and have also received legal advice on some specific issues touching on care and management over the years.

Appendix 2

The Revenue response to my restructured draft investigation report, 13 September 2002

- 1 I refer to your letter of 2 August enclosing a further draft of the Investigation Report in relation to the above-mentioned complaints. I note that the Ombudsman has not altered the substance of his original draft Report in light of the detailed submission by the then Chairman on 12 April 2001.
- 2 I appreciate the opportunity now afforded to me as the new Revenue Chairman to comment on this latest draft - notwithstanding that the section 6(6) requirement has already been complied with - before the Ombudsman makes any recommendations arising from the investigation.
- 3 I have read the latest draft Report very carefully. It seems to me that Revenue's views and concerns have already been very well articulated in our 12 April 2001 submission. I endorse the views expressed in that submission and I am pleased to see it is intended to include it as an annex to the final Report.
- 4 At this stage I do not intend to go over the same ground again in any detail; rather I propose to confine my comments to what I consider to be the main issues of contention between us and also to inform your Office of some relevant policy developments in the meantime in relation to the interest or "loss of value" question.

Mrs Maria Kelly and Mrs Phyllis Nolan:

section 133 vs section 498

- 5 In the case of Mrs. Kelly and Mrs. Nolan I find it difficult to conclude that the net issue between us is anything other than a difference of legal opinion. I do not want to rehash here the technical arguments about the interpretation of sections 133 and 498, but the fact is

that the Senior Counsel employed by Revenue took one view (which has not been contested in the Courts) and separate legal advice sought by your Office presented another view.

- 6 The Ombudsman does not accept that the issue between us boils down to a difference of legal opinion. If I read the draft Report correctly, he holds this view because he is "satisfied that at no stage was (Revenue) Counsel briefed in an open-ended way. The clear implication is that the issue between us is not a "true" difference of legal opinion because the Revenue opinion is biased or tainted (because of a closed-ended briefing of Counsel by Revenue officials), whereas the Ombudsman's legal opinion is not. This is not grounded on fact and it seems to me that this is a very wrong conclusion which is unfair to both the Revenue officials concerned and to Revenue's Counsel.
- 7 My understanding of the facts is that, while section 498 was not mentioned in the first request for Counsel's opinion, it was specifically included in subsequent requests for his opinion and an oral consultation took place to ensure he fully understood the section 498/133 issues. Indeed the opinion given on 20 October 1990 is concerned exclusively with the relevance of section 498 in these cases.
- 8 I don't wish to overstate the implications of the draft Report for Revenue's Counsel, but the clear suggestion in the Report is that his opinion was not a reliable statement of the law - because Revenue officials were essentially putting words in his mouth. This implicitly calls into question the Counsel's competence, objectivity and independence.

FOR REDRESS TAXPAYERS

Appendix 2

9 You will recall that, in our 12 April 2001 submission, we offered to consider the matter further if your Office was prepared to send us a copy of your separate legal advice. We also indicated our willingness to seek the advice of the Attorney General, if that would help resolve the legal opinion stalemate". This seemed to us to be a reasonable approach at the time. Before the Ombudsman makes any recommendations in these two cases may wish to consider again whether this is not the best way forward.

Compensation for Loss of Value in Tax

Refunds

10 In relation to the "compensation for loss of value" issues, I will comment:

- first, on whether Revenue can be faulted for not putting in place a general non-statutory scheme to compensate tax refund cases for the time value of money; and
- second, on whether Revenue should, without specific legislative authority, compensate the eight named complainants for loss of purchasing power.

General (Non-Statutory) Compensation

Scheme

11 I am pleased to note that the Ombudsman now acknowledges that the question of whether or not a ... general [compensation] scheme is possible under the care and management provisions is "clearly open to argument". This appears to be a welcome change of position from the first draft Report.

12 However, it remains our very strong view that it is neither legally possible nor appropriate, having regard to the public finance and public policy implications involved, for Revenue to put in place a general non-statutory interest repayment scheme. Any such scheme would have to have a clear legislative basis. It must be borne in mind that Revenue repays in the region of €4 billion across all taxes each year.

13 I would add that in the UK, which has a very similar care and management framework to us, they operate a general scheme of paying interest on tax refunds, but this is grounded in legislation, not on care and management.

14 If the Ombudsman considers that the failure to make provision for a appropriate general scheme is contrary to fair and sound administration, then the responsibility for such failure does not rest with the Revenue Commissioners - save to the limited extent that Revenue can influence legislative change in this area.

15 In this connection I can tell you that arising out of the Ombudsman's examination of these eight cases - and because there was no basis for Revenue to accept the assertion that we could provide for a non-statutory scheme of compensation under care and management - we brought the Ombudsman's concerns to the attention of the Department of Finance in the context of last year's Finance Bill. Given that a general scheme would have budgetary and other implications, the Department felt it would be necessary to consider the matter in detail, having regard to best practice in other jurisdictions, with a view to bringing forward options or recommendations for consideration by the Minister and the Government in the context of a future Budget and Finance Bill. The work is currently underway.

Appendix 2

Compensating the Eight Complainants

- 16** While acknowledging that the question of whether a general scheme is possible under care and management is "clearly open to argument", the Ombudsman considers that the question of compensating the eight named complainants does fall within care and management, and that Revenue should have exercised its care and management discretion in these eight cases to compensate them for loss of purchasing power.
- 17** I'm not sure if your Office is aware of the fact that, where the exercise of care and management creates a precedent, Revenue publish the details of the precedent on the Revenue website. This ensures that everybody is aware of the precedent and that everybody who falls within the criteria published will be able to benefit from the precedent - although not strictly falling within the letter of the law.
- 18** The Ombudsman, in his 1996 *Best Practice Guide*, says that dealing fairly with people means treating people in similar circumstances in like manner. But this is qualified by saying that rules should not be applied so inflexibly as to create inequity. It seems to me that these two principles are sometimes difficult to reconcile; the extract from Judge Keane's book on the law of Equity (paragraph 5.4.6) makes this point very well. In the same way that "hard cases make bad law", hard cases can make bad administrative practice if they lead to uncertainty and inconsistency.
- 19** Turning to the eight cases in question, the only common denominator is that they all involve Income Tax - they cover a very wide range of circumstances:
- Two of the refunds arose from the High Court decision in the Breda O'Carroll case;
 - One arose from the High Court decision in the Michael Daly case;
 - One was a straightforward refund of Professional Services Withholding Tax;
 - One related to a redundancy payment tax exemption claim;
 - One related to non-residence for a particular year and the Ireland/Cyprus Double Taxation Treaty;
 - One related to a claim for Artist's exemption in respect of a school text book; and
 - One related to the deductibility of interest on a rental property, which was determined by the Circuit Court.
- 20** The circumstances of these cases are so disparate that it would be impossible - and unfair - to ring-fence them in the context of the draft finding that failure to provide for the same treatment in similar cases is improperly discriminatory. Any such exercise of care and management would have to be extended widely: in effect the entire population of Income Tax payers are potentially "on all fours" with the eight cases. And indeed it would be impossible to stop at Income Tax.
- 21** This of course brings us back full circle to the question of a general non-statutory scheme which, for the reasons already stated above, is not possible under care and management . If anything is to be done here it must be a statutory scheme. While Revenue recognises the merits of providing for a statutory scheme, this is a matter for Government and would, as indicated in paragraph 16 above, have to take budgetary and other implications into account. Hopefully the work now underway will come up with appropriate recommendations in due course.

FOR REDRESS TAXPAYERS

Appendix 2

Meeting

- 22** Given the importance of the issues raised in this Investigation, we would be more than happy to meet with the Ombudsman or any members of his staff before the final Report and any recommendations are made.



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Office of the Ombudsman
18 Lr. Leeson St., Dublin 2.
Tel. 01-6785222
Fax 01-6610570
Email: ombudsman@ombudsman.gov.ie
Internet: <http://www.gov.ie/ombudsman>



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Special Report by the Ombudsman

REDRESS FOR TAXPAYERS

**An investigation by
the Ombudsman of
complaints about the Revenue
Commissioners' refusal:**

To make full refunds of income
tax to two widows
and
To compensate taxpayers when
refunds are wrongly delayed

A special Report to the Dáil and
Seanad in accordance with
Sections 6(5) and 6(7) of the
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November 2002