Bogus Foreign Deposit Accounts Time Limits on Revenue Claims against the Estates of Deceased Persons

Joseph Hogan SC

Part II.

Since my earlier article in the Bar Review on this topic (Volume 9, Issue 1), some commentators have argued that notwithstanding section 1048 of the Taxes Consolidation Act, 1997, which imposes a time limit of 3 to 4 years from the death on raising assessments against the personal representatives of deceased persons, any fraud or neglect on the part of the deceased during his life will re-open the time without limitation. In my view, this is not correct. The only matter that will open the time limits is a misstatement of the assets of the deceased on the inland revenue affidavit, as provided by section 1048. If there is no misstatement, the time limits remain closed, notwithstanding any fraud or neglect on the part of the deceased.

The alternative argument is based upon a misunderstanding of section 924(2)(c) of the act, which provides that where any form of fraud or neglect has been committed by or on behalf of *any person* in connection with income tax, an assessment or an additional first assessment may be made at any time for any year for which, by reason of the fraud or neglect, income tax would otherwise be lost to the exchequer.

Firstly, this section is not of general application. It is limited to assessment cases. Self-assessment cases are excluded[1], because they have their own very different regime set out in section 955. Secondly, this argument depends on the meaning of the words "*any person*" in section 924(2)(c). The argument will work only if these words include a deceased person, and they plainly do not. Section 924(2)(c) applies only to living persons. This is obvious to a lawyer, so for the benefit of non-lawyers it may be useful to point out that when a person dies, the only part of his legal *persona* that survives is his assets and liabilities; that is to say, his estate. On death, the estate vests immediately in the President of the High Court, who then conveys it to the personal representative by way of a grant of probate or letters of administration, on condition that it is distributed in accordance with the will and the law of succession. Nothing else survives death. The only target that a creditor, including the Revenue, can aim for is the estate, via the personal representative. However, the personal representative is protected by section 1048. There is no other target. Therefore section 924(2)(c) of the Taxes Consolidation Act, 1997 will not operate to open any time limits in the case of a deceased person. The time limits in the Taxes Consolidation Act, 1997 are set by section 1048 only.

Thirdly, even in the case of a living person, section 924(2)(c) is of limited value to the Revenue. Fraud or neglect will not be presumed[2]; the Revenue must prove them before the extension of time will operate. Proof will always be more difficult in old cases, and all of these are old cases, where papers may be destroyed, mislaid or difficult to follow. A loss to the exchequer must also be proved before the time limit will open[3]. This involves a complete re-assessment of the income, expenses, reliefs and allowances for every suspect year. It is not limited merely to adding on any amounts discovered in foreign accounts. Even if the materials upon which to ground several years' complete new assessments are available, there is no certainty, even if fraud or neglect is proved, that the result will be a loss to the exchequer. Not every re-assessment produces a difference owed to the Revenue. The Revenue will have to take the risk of a long backdated repayment, softened only by the fact that the interest they pay is only one third of the rate they charge to the taxpayer.

The commentators have sought to back up their argument by pointing out that the Statute of Limitations does not apply to Revenue cases. This is correct[4]. But the implication in raising this point is that the time limit set by section 1048 can be opened up in some way. This is not correct. There has also been some deplorable scare mongering. Some commentators have suggested that the Revenue might not, as a concession, pursue personal representatives personally if they behave properly, the implication from this being an unlawful favouring by the Revenue. There are very few circumstances, theft of the assets being the main one, where a personal representative will be personally liable. But he is personally liable, if at all, only for his own defaults. He is never personally liable for the defaults of the deceased. To suggest otherwise is scare mongering.

1. By section 955(5)(b).
2. *Hurley v Taylor* [1999] STC 1.
3. Is there a circular argument here? Must one (unlawfully) open the time limit and prove two things before the time limit will open?
4. Sections 3(2)(a) and (b), Statute of Limitations, 1957.

So far, the discussion has centred mainly on revenue law and the traditional sources of succession law. But there is another great source of closure. This is section 9 of the Civil Liability Act, 1961, which provides that no proceedings shall be maintainable in respect of any cause of action whatsoever that has survived[5] against the estate of a deceased person, unless either proceedings were commenced within the normal limitation period and were pending at the date of his death, or are commenced within the normal limitation period, or within two years after his death, whichever period first expires. The normal limitation period is defined as the period prescribed by the Statute of Limitations or any other limitation enactment. Since the Taxes Acts are specifically excluded from the Statute of Limitations, the "limitation enactments" would perhaps be the Taxes Acts themselves. The Taxes Acts do not provide a special time bar on commencing actions against the estates of deceased persons. Section 1048 is not a bar on actions, but on raising assessments, which is a stage preliminary to actions. There may therefore be no interpretational conflict between the two statutes. This two-year time limit is not amenable[6] to extension for the usual reasons, such as minority, fraud, mistake etc. In any event, the words "*any cause of action whatsoever*" are sufficiently strong to bar an action for fraud or negligence, and an action for tracing[7]. Therefore, an action, that is to say, a court proceeding for the recovery of any Revenue debt, penalty, interest or other liability may not be commenced more than two years after the death of a deceased person, notwithstanding fraud or negligence, or whether or not an assessment may or not have been raised before, during or after that period.

O'Higgins CJ, discussing stale claims in delivering the judgment of the court in *Moynihan v Greensmyth*[8], stated:-

> "When it was decided to provide generally for the survival of causes of action, a general limitation period of two years was provided in s. 9, sub-s. 2(b), of the Civil Liability Act, 1961 ......Bearing in mind the State's duty to others, in particular those who represent the estate of the deceased, and the beneficiaries, some reasonable limitation on actions against the estate was obviously required. . The danger of stale claims [is] very real and could constitute a serious threat to the rights of beneficiaries of the estate of the deceased."

If the object of the legislation is to strike a balance in those terms, it is very difficult to see preferential treatment for the Revenue being fair, or being excluded from the operation of section 9 of the Civil Liability Act, 1961.

The textbooks, however, are notably silent on section 9. The case law is conducted on the basis that section 9 is restricted to cases of civil liability only[9], whatever that is. In any event the words of the section refer not to "*civil liability*" but to "*any cause of action whatsoever*". It is difficult to argue that these strong words exclude Revenue cases. It is true that the act is entitled the "Civil Liability Act"; but there are few circumstances where one may draw upon the title of an act to deny the meaning of its plain words. And the heading of the part of the act that contains this section refers not to civil liability, but to the *survival of certain causes of action against the estates of deceased persons*, which is an entirely different matter. The precursor of this provision, section 1(3) of the (UK) Law Reform (Miscellaneous Provisions) Act, 1934[10] reads "*No proceedings shall be maintainable in respect of a cause of action in tort*[11]". Note that O'Higgins, CJ., in the context of the judgment, a portion of which is quoted above, was discussing the survival of actions in tort[12]. This may give rise to the silent presumption in the Irish texts. It is not, however, supported by the words of section 9 of the Civil Liability Act, 1961, which follow the UK precursor only so far, reading: "*No proceedings shall be maintainable in respect of any cause of action whatsoever*[13]".

It therefore seems that all Revenue proceedings against the estates of deceased persons are absolutely barred against the executor, the administrator and the beneficiaries two years from the death, and may be barred earlier, within months, against the executor or administrator by *plene administravit* and the statutory advertisement for creditors. In these circumstances, section 1048 of the Taxes Consolidation Act, 1997 may be all but redundant.•

5. "It has been held that the right of the Crown to sue for a penalty in default of making a return of income for the purposes of taxation is a cause of action which will survive against the estate of the tax payer, *Attorney General v Canter* [1939] 1 Kings Bench 318.
6. [1997] IR 55.
7. *Bank of Ireland v O'Keefe* , [1987] IR 47.
8. *Moynihan v Greensmyth* [1997] IR 55 at 72, SC.
9. There is no easy definition of "civil liability."
10. Now repealed.
11. Bold emphasis added.
12. *Moynihan v Greensmyth* [1977] IR 55, at 67.
13. Bold emphasis added.