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Provisions on Time Limits for Revenue Assessments: *O'Sullivan v Revenue*

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Introduction

The time-limit provisions contained in the Taxes Consolidation Act 1997 (TCA 1997) serve an important role in providing certainty and safeguarding taxpayers against the reopening of their tax affairs outside a four-year period. The exact construction of these provisions has, however, been the source of many disputes between taxpayers and the Revenue Commissioners (Revenue), that ultimately have been resolved by the Superior Courts. *O'Sullivan v The Revenue Commissioners* [2024] IEHC 611 is the most recent judgment in the area and provides some welcome insights into the proper construction of the provisions, particularly in light of the judgment of Mulcahy J in *Tobin v The Revenue Commissioners* [2024] IEHC 196 earlier this year.

This article examines the decision in *O'Sullivan* and outlines some of the key insights and implications of the case in interpreting the time-limit provisions more generally.

Background

Relevant legislation

For periods before 2013, the relevant rules governing assessments and time limits were broadly contained in Part 41 TCA 1997. These provisions were revised in Finance Act 2012, although many of the concepts from Part 41 have been retained in these new rules, now contained in Part 41A TCA 1997.

Part 41 (i.e. the pre-2013 regime) established administrative rules in relation to the filing of tax returns and the issuing of assessments. Under s951 TCA 1997 a chargeable person was required to file an annual tax return, and under s954(2) TCA 1997 the inspector was required to make an assessment based on the particulars included in the person's return.

The time-limit provision was included at s955(2) TCA 1997 and provided that where a person has made a return for a chargeable period "and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period", Revenue would be precluded from

issuing an assessment for that chargeable period more than four years after the end of the year in which the return is filed.

Section 956 TCA 1997 provided that, for the purpose of making an assessment, the inspector "may accept either in whole or in part any statement or other particular contained in a return" and further provided that in cases where an assessment had been made, the inspector was not precluded "from making such enquiries or taking such actions...as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular". Section 956(1)(c) imposed a time limit on the inspector's right to make enquiries or take actions to satisfy themselves of the accuracy of a statement or particular, precluding the inspector from exercising those powers more than four years after the end of the chargeable period during which the return was filed. However, that time limit did not apply if "the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner".

Background facts

O'Sullivan involved a transaction to which the taxpayer was party in 2005. Under the transaction, rights attaching to shares in a company, Tramult, were transferred to a group of individual shareholders (including the taxpayer). The shares that originally comprised the rights that were transferred were held by another company in which the taxpayer was a shareholder (MMP). Tramult was subsequently liquidated, and on liquidation the taxpayer received a capital distribution of €394,697. The taxpayer considered that the transaction was capital in nature. The application of s547 TCA 1997 resulted in the acquisition cost of the Tramult shares being equal to the liquidation proceeds. Accordingly, the taxpayer considered that there was no capital gain to report and did not include the transaction in his return.

Revenue disagreed with the taxpayer's approach and considered that the transfer of rights in the Tramult shares from MMP to the taxpayer and the other individual shareholders was a distribution chargeable to income tax under s130 TCA 1997. In February 2011 (more than four years after the taxpayer filed his return), Revenue opened an investigation into the transaction. In December 2011 Revenue issued an assessment to income tax to the taxpayer in respect of the transaction.

The taxpayer appealed the assessment. The hearing at the Tax Appeals Commission (TAC) was stayed while *Hughes v The Revenue Commissioners* [2019] IEHC 807 made its way through the appeals process. That case involved a similar transaction, and Revenue was successful in arguing in the High Court that the transfer of rights between share classes was a transfer of assets for the purposes of s130(3)(a). The High Court held that the transaction should therefore be regarded as a distribution chargeable to income tax. The technical merits of that finding are beyond the scope of this article; suffice to say that once *O'Sullivan* was heard at the TAC and the High Court, it was accepted that as a matter of law, based on the decision of the High Court in *Hughes*, the transaction gave rise to a charge to income tax. The only matter left to be determined was whether Revenue was precluded from issuing the assessment outside the statutory time limit in s955(2) TCA 1997.

Section 955(2) TCA 1997: Subjectivity is not the yardstick

Impact of *Tobin* on taxpayer's arguments

In *O'Sullivan* one of the main arguments made by the taxpayer in written submissions was that the four-year rule in s955(2) should be interpreted in light of s956, such that Revenue would be precluded from issuing an assessment outside the four-year period unless there was evidence of fraud or negligence.

Somewhat unhelpfully for the taxpayer, the decision in *Tobin* (which also considered the application of s955(2)) issued just seven days after written submissions were made in *O'Sullivan.* A full examination of *Tobin* is beyond the scope of this article, and we have limited our comments to the aspects of the decision that informed Nolan J's decision in *O'Sullivan*.[1]

In *Tobin* the High Court was asked to consider the application of the four-year time limit in s955(2) in circumstances where the taxpayer had received a Single Payment Scheme (SPS) payment but had not included it in his income tax return. The taxpayer believed that a company that he had established, DTFL, was properly entitled to the SPS payment. That company had included the payment in its corporation tax return.

The High Court in *Tobin* held that the test in s955(2) (whether a full and true disclosure of all material facts had been made) is an objective one. The fact that the taxpayer believed he had correctly completed his return was not a relevant consideration in applying the test.

Approach to statutory interpretation

The High Court's analysis in *Tobin* was based on the application of the plain and ordinary meaning of the language in s955(2) and the meaning of that language in its broader statutory context (in line with the general approach of the Irish courts to statutory interpretation).[2]

In assessing the broader statutory context of s955(2), Mulcahy J considered both s955(4); which permits taxpayers to make expressions of doubt), and s956(2)(c); which permits Revenue to raise enquiries outside the four-year limitation period in cases of fraud or negligence. Both of those provisions incorporate subjective elements. In comparing those provisions to s955(2), which does not expressly incorporate a subjective element, Mulcahy J was satisfied that: "there was no intention to incorporate any subjective element into that section".

Nolan J's decision in *O'Sullivan* emphatically endorses the reasoning of Mulcahy J and confirms that the test in s955(2) is an objective one. Nolan J accepted that the taxpayer's subjective belief in respect of his returns (i.e. that he was not required to include the transaction) was not a relevant consideration in ascertaining whether the return could be said to include a full and true disclosure of all material facts in the application of the test in s955. In the words of Nolan J, "subjectivity is not the yardstick".

Broader interaction between s955 and s956

As a result of the decision in *Tobin*, the taxpayer's arguments in *O'Sullivan* evolved by the time of the oral hearing. Given the High Court decision, it would have been difficult for the taxpayer to sustain the argument that s955 should be interpreted in light of s956, as originally argued in written submissions. Indeed, Nolan J expressly accepted "not only the logic of Mulcahy J's reasoning, but also out of the comity of judgments, that s955 and s956 are not to be read together but in fact apply to different circumstances".

The taxpayer argued, instead, that the provision relevant to the facts of *O'Sullivan* was s956, as the assessment was made on foot of an enquiry or investigation. The taxpayer argued that s955 operated only in cases where there was no such enquiry. Nolan J considered that there was no evidence that the assessment arose out of "enquiries or investigations" as required under s956 and so could not accept that argument.

It was further noted that the proper course of action in respect of enquiries under s956 would have been for the appellant to invoke the relevant safeguards that prohibit out-of-time enquiries, either by way of judicial review or by availing of the specific 30-day appeal procedure in s956(2), but neither remedy was availed of (see paragraphs 57 and 60 of the judgment).

Thus, the question of whether the assessment was issued outside the four-year time limit was one to be considered under s955 only. The key question for consideration was whether the taxpayer had made a full and true disclosure of all material facts necessary for making an assessment, and as noted above, Nolan J was satisfied that the test was an objective one.

Guidance on Materiality

The "full and true disclosure" required under s955 is of "all material facts necessary for the making of an assessment". As a result, the starting point in the application of the test is to ascertain whether the fact at issue is "material" for the purposes of making an "assessment".

In *O'Sullivan* the issue of materiality was addressed by the judgment in *Hughes*. That case confirmed that, as a matter of law, the impugned transaction was a distribution giving rise to a charge to income tax and therefore the existence of the transaction was a material fact that ought to have been disclosed by the taxpayer to enable Revenue to make an assessment.

Nolan J provided more colour on the materiality issue and clarified a distinction between matters of fact (in that case the existence of a particular transaction) and matters of law. He appeared to accept that, provided the taxpayer included the fact of the transaction in his return, the legal treatment of the transaction as income or capital was "immaterial" (paragraph 114):

> "As counsel for the Respondent said, all the information in relation to this transaction was in the hands of the Appellant. If the Appellant simply says nothing about it, then how can the Respondent form a view as to the accuracy of the tax return...The obligation placed on the Appellant by the legislation is to make a true and full disclosure of all material facts. It is immaterial as to whether it was a capital gain or receipt of income."

The taxpayer's obligation is to make a full and true disclosure of all material facts necessary for the making of an assessment, i.e. to give to Revenue the facts that it requires to correctly make an assessment. It appears from Nolan J's decision that the taxpayer may be mistaken in where they include particular facts in the return (i.e. on the application of the law) but that should not necessarily preclude the taxpayer from making a full and true disclosure of all material facts necessary for making an assessment.

This is a welcome clarification, as in *Tobin* Mulcahy J, having assumed from the outset of his judgment that the SPS payment was a material fact for the purposes of making Mr Tobin's assessment[3] (i.e. having assumed that the payment was income of Mr Tobin and not of the company, DTFL), did not provide any further clarity on the application of the test of materiality. It is interesting to note that this assumption on the part of Mulcahy J ran the risk that, when remitted to the TAC to determine the substantive issue, the assumption may have been proven false (i.e. if the TAC determined that it was DTFL that was properly entitled to the SPS payment). This is in contrast to the approach adopted in *O'Sullivan*, where the time-limit proceedings were paused pending the judgment in *Hughes*, which in effect addressed the substantive matter in *O'Sullivan*.

Construction of "Full and True"

Once it is established that a fact is material to the making of the assessment, the legislation requires that the disclosure of that information is "full and true". After it was concluded that the fact of the transactions having taken place should have been disclosed, it logically followed in *O'Sullivan* that, because there was absolutely no disclosure of the transaction, the analysis of whether it could be considered "full and true" became irrelevant.

At this point, it is worth considering Mulcahy J's approach to testing the meaning of "full and true" in *Tobin*, as it was echoed in *O'Sullivan*. Having assumed that the SPS payment should have been treated as income in the hands of Mr Tobin, Mulcahy J concluded that, *prima facie*, the non-disclosure of such a fact would result in the returns not being "true" (paragraph 46):

> "On the assumption that the payment was income in the hands of the respondent, 'full' disclosure would have required that income to be disclosed. 'True' disclosure is a little more difficult as a concept, but not unduly so. In its plain and ordinary meaning, the requirement is that it be true that *all* relevant facts have been disclosed. *Prima facie*, if a relevant fact is not disclosed, for whatever reason, *the return* is not true." [emphasis in original]

Mulcahy J proceeded to give further consideration to the construction of "true" and considered again the broader context of the self-assessment provisions, which require the taxpayer to provide Revenue with the "necessary information" (being the material facts) so that Revenue can accurately make an assessment: "[f]or Revenue to accurately assess the tax for which a self-assessed taxpayer is liable, Revenue must be provided with full and *accurate* information". [emphasis in original]

Given the non-disclosure of the transaction in *O'Sullivan*, Nolan J did not spend much time considering the meaning of "full and true", save for briefly endorsing the reasoning of Mulcahy J in *Tobin*: "There was no doubt from the decision, that the words 'full and true' equates with 'accurate' and 'correct' which is appropriate in circumstances where the system is one of self-assessment".

It should be acknowledged that the test of accuracy referred to by both Nolan J and Mulcahy J is in reference to a test of the "material facts necessary for the making of an assessment" (i.e. the "information" that must be provided). Whether the disclosure is described as "accurate" or "full and true" is therefore of little impact to the requirement that "material" facts must disclosed.

Implications

The facts of the case operate as a salient reminder that time is of the essence in dealing with Revenue enquiries outside the four-year time limit – waiting until an assessment is issued can deny access to remedies that might otherwise apply.

More broadly, the decision emphatically confirms that s955(2) TCA 1997 should be read as an objective test. Nonetheless, it is important to remember that the analysis in *O'Sullivan*, and indeed in *Tobin*, was very much based on a construction of s955(2) in the context of the wider Part 41, which has since been significantly revised. A question therefore arises of whether the same interpretation of the current time-limit provision in s959AA could be arrived at given the new statutory context of Part 41A (i.e. the new self-assessment regime for periods after 2012). In this regard it is notable that the overall mechanics of the post-2012 regime are somewhat different and Part 41A contains a number of updated definitions, including an updated definition of "assessment" and new carve-outs from the four-year rule, including for occurrences of fraud or negligence.

O'Sullivan has also endorsed a reading of s955(2) that equates "full and true" with "accurate". It is the authors' view, however, that, one of the more significant aspects of the decision in *O'Sullivan* is the commentary on what can be considered "material" for the purposes of making an "assessment". The question of materiality continues to operate as an important guardrail for identifying the information that must be disclosed in a return in order for the time limit to apply. The decision in *O'Sullivan* supports the position that if a transaction gives rise to a liability, it will be material and should be disclosed. More generally, whether a fact is material for the purposes of making an assessment should be considered on a case-by-case basis. Further, although the existence of a transaction may well be material, the exact legal treatment (e.g. whether it is included as income or capital) may be "immaterial".

Footnotes:

[1] More specific details on the decision in *Tobin* can be found in Dearbhla Cunningham, "High Court Considers Limited Reopening of Old Cases in *The Revenue Commissioners v Tobin*", *Irish Tax Review*, Issue 2 of 2024.

[2] See, for example, as cited in *Tobin*, *Perrigo Pharma International DAC v McNamara and Ors* [2020] IEHC 552 and *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43.

[3] See paragraph 37 of *Tobin*, for example.

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