THE HIGH COURT

[2023] IEHC 15

[Record No. 2020 / 968 SS]

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 949AQ OF THE TAXES CONSOLIDATION ACT, 1997 (AS AMENDED)

BETWEEN:-

THOMAS MCNAMARA

APPELLANT

AND

THE REVENUE COMMISSIONERS

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 19th day of January, 2023.

Introduction.

1. This is an appeal by way of case stated under s. 949AQ of the Taxes Consolidation Act, 1997 (as amended) (hereinafter "TCA") from the determination of an Appeal Commissioner, Ms. Lorna Gallagher (hereinafter "the Commissioner") dated 16th January, 2020.

2. In his income tax return dated 14th November, 2008, in report of the year 2007, the appellant disclosed the sale of a site in Tullamore town. Following an audit, an amended assessment to capital gains tax (hereafter, "CGT") for the year 2007 was made on 7th August, 2014. The appellant appealed that amended assessment to the Taxation Appeals Commission.

3. The essential question that was before the Commissioner for her determination was whether the sale price of €42m, which had been obtained by the appellant in 2007 in respect of a 3.6 acre site in the centre of Tullamore town, was the current use value (hereinafter "CUV") of the site, as maintained by the appellant; or was the price obtained for development land, as maintained by the respondent.

4. Section 648 TCA defines "current use value" as follows:

> "*Current use value – (a) in relation to the land at any particular time, means the amount which would be the market value of the land at that time if the market value were calculated on the assumption that it was at that time and would remain unlawful to carry out any development (within the meaning of s. 3 of the Act of 1963, or, on or after 21st January, 2002, within the meaning of s. 5 of the Act of 2000) in relation to the land other than development of a minor nature…".* What is meant by "development of a minor nature" is set out later in the judgment.

5. The section also defines "development land" as follows:

" *'development land' means land in the State the consideration for the disposal of which, or the market value of which at the time at which the disposal is made, exceeds the current use value of that land at the time at which the disposal is made, and includes shares deriving their value or the greater part of their value directly or indirectly from such land, other than shares quoted on a Stock Exchange*."

6. In essence, to determine whether or not land is "*development land*" for CGT purposes, one compares two figures: the sale proceeds and the current use value. If the first figure exceeds the second, the land is development land.

7. The Commissioner heard evidence from the appellant; his expert valuer, Mr. Kelly; his accountant, Mr. Casey; and she heard evidence from Mr. Quinn, from Savills, who had been retained by the respondent to prepare a report on the CUV of the lands at the time of disposal in 2007. Having heard evidence over a period of four days in June/July 2017, the Commissioner issued her determination on 16th January, 2020, in which she determined that the appellant had not succeeded in proving that the CUV of the property sold, equalled the sales proceeds received, namely €42m, and had not discharged the onus of proof. She therefore determined that the property sold constituted development land in accordance with s. 648 TCA.

8. The appellant submitted a notice seeking a case stated on a point of law on 5th February, 2020. The Commissioner issued a case stated. The appellant was not satisfied that the questions raised by the Commissioner therein, adequately reflected the points that had been raised by him in respect of the determination. That issue was tried before the High Court. In a judgment delivered on 12th July, 2021, Barrett J. held with the appellant. He directed that an amended case stated be prepared by the Commissioner. On 23rd September, 2021, the Commissioner issued an amended case stated, in which she raised three questions for the determination of this court. These questions are set out below.

The Questions raised in the Case Stated.

9. The questions of law on which the opinion of the High Court is sought, are as follows:

a) Whether having regard to the evidence given, and the issues raised thereupon as addressed in the Notice seeking the Case Stated, I was correct in law in my determination that the sale of the property on 4th July, 2007 constituted a sale of development land in accordance with s. 648 TCA 1997.

b) Whether I was correct in determining that the statutory requirements of s. 949I(6) of the Taxes Consolidation Act 1997, were not met and that the appellant was thereby not entitled to rely on the additional ground of appeal and whether I sufficiently addressed the legal issues raised and provided adequate reasons in determining the legal arguments made thereto (the issues thereupon as addressed in the Notice seeking the Case Stated).

c) (i) Whether I was correct in holding that the appellant did not make a true and full disclosure in his tax return.

(ii) Whether I was correct in dismissing the appellant's submission that where a taxpayer has brought all relevant matters to the attention of his professional tax advisor, he should be considered to have taken due care in the preparation of their return.

(iii) Whether I was correct to dismiss the appellant's submission that although an error may have been made in the return, professional advice had been relied upon in filing the return and the error could not amount to a failure of the appellant to make a full and true disclosure of all material facts.

(iv) Whether I was correct in finding that the amended assessment was not statute barred.

(v) Whether I was correct in the sufficiency and adequacy of the reasons given in dismissing the appellant's arguments on the applicability of the time bar and provide adequate reasons for the dismissal of these points.

Background.

10. The lands the subject matter of the relevant disposal herein, constitute a 3.6 acre site in Tullamore town centre. On the lands there were five buildings, which were largely arranged around a central car park. The first property, known as the Corn Store, had formerly operated as the Texas Department Store. The property was originally a bonded warehouse, which comprised a five-storey detached building extending to a gross internal floor area of approximately 37,635 square feet; having approximately 7,527 square feet on each floor. The second property was the warehouse (Texas Household and Garden Goods Store). The building, which had originally been constructed as industrial/warehouse units, comprised three separate single storey buildings, which at the date of valuation were

assumed to have been amalgamated into three interconnected buildings. This building had a gross floor area of approximately 27,754 square feet.

11. The third building was the former Tesco premises (Texas DIY). This property comprised a single storey detached building, with the exception of the northeast corner, which was two storeys in height. The building had a gross internal floor area of approximately 21,613 square feet. The fourth building was a unit which had been used as a former Lifestyle Sports shop. The property comprised a single storey terraced ground floor retail unit, extending to a net internal floor area of approximately 1,063 square feet. The fifth property was a restaurant at No. 16 Colmcille Street, which was trading as "The Paddy Field", a Chinese restaurant. The property comprised a two storey, end of terrace building, extending to a total floor area of approximately 1,695 square feet. The sixth part of the site constituted a surface car park, with spaces for approximately 280 cars.

12. In the years up to the date of disposal in 2007, the appellant had carried on a successful retail business from the buildings under the general trade name "Texas Department Stores"; with the exception of the restaurant premises, which had been leased to his brother.

13. By a contract for sale dated 4th July, 2007 between the appellant and Maureen Kelly (Clothing) Ltd, as vendors; and Davy Property Holdings Ltd, Eamonn Duignan and John McCarthy, as purchasers, it was agreed that the entire site would be sold for the sum of €42m.

14. The closing date for the sale was stipulated in the contract as being 2nd August, 2007. The court is not aware to whom, or to what company, the lands were actually transferred. The court notes that in the general conditions attaching to the contract, it was provided at general condition No. 1 that it was the purchaser's intention to incorporate a special purpose company, or other entity to purchase the subject property. It provided that the purchasers would be entitled to nominate such company, or other entity to take the deed or deeds of assurance of the subject property.

15. On 23rd May, 2008, an application for planning permission to carry out development on the site was made by a company called Inverine Plc. The application was for permission to carry out extensive development on the site consisting of the following: demolition of three of the existing "Texas" retail units; demolition of a public house known as "The Wolf Trap", removal of a water tank and oil tank; the erection of a two storey building, with a

gross floor area of 27,978 sq. m., comprising a shopping centre and two levels of underground basement car parking. The development was also going to consist of the provision of a new public car park and civic plaza at Kilbride Park, a new civic space at Offaly Street/Colmcille Street; a change of use of No. 16 Colmcille Street and the widening of Offaly Street at its junction with Colmcille Street. The shopping centre was stated to comprise three anchor stores; 37 retail units; four kiosks; an enclosed mall area; public toilets; a management suite; two levels of underground basement car parking providing a total of 704 car parking spaces; an internal service yard; storage rooms and service corridors and basement.

16. From the documents opened to the court, it appears that the company was granted planning permission for that development. That was appealed by a third party. A decision appears to have been given on the appeal in favour of the company. However, according to the Commissioner, as stated in her determination, the company had put in a revised planning application for the site at the time when the appeal was heard before her in 2017. There had been no development carried out on the site at the time of the inspection of the site by Mr. Quinn and Mr. Madden on behalf of Savills on 23rd October, 2013.

Submissions on behalf of the Appellant.

17. Mr. Tuite SC, on behalf of the appellant, submitted that the valuation report produced by Mr. Quinn was so erroneous and deficient in its content, that the Commissioner ought to have excluded it completely from her consideration.

18. The appellant claimed that the expert's report contained errors and omissions and was generally deficient in the following respects: He had failed to obtain all necessary information about the various properties prior to preparing his report; he failed to condition the findings in the report, despite knowledge of the deficiencies in the report; he failed to obtain all relevant information from the planning defendant of the local authority, or review the planning file prior to the report being prepared, including that he had failed to speak to the planning authorities, or to access the full planning file, which was available in the offices in Tullamore; he had failed to have regard to the limitations on the planning available on the property; in particular, he had failed to have regard to the five rights of way that existed over various portions of the property; he had failed to have regard to the intention of the council to construct an inner ring road over the property and had not had regard to the restrictive covenant over the use of the former Tesco building; he had failed to seek maps

showing the exact boundaries of the various properties within the site; he had failed to seek information on the layout of the buildings prior to the report being prepared; he did not have access to legal maps; he did not have proper maps of the individual parts of the property; he failed to take account of comparators at the time of the sale of the property as the basis of valuation; he had not used his own comparators in compiling the report, which had showed consistently higher figures than were included in the report; he allowed a director or Savills to sign off on the report's methodology and approach, without any visit to the property; he failed to refer to the 5,000 sq. ft. of mezzanine flooring in the warehouse; he incorrectly ascribed a large area in the Tesco building as stores, when that area had been used for retail sales and he had failed to appreciate that the warehouse building was also used for retail and that the retail showroom was also general retail space; he erroneously overestimated the stores area in the Tesco building as 6,329 sq. ft., rather than 2,500 sq. ft; he failed to include any figure in respect of the carpark of over one acre, with 283 carparking spaces, and the income generated therefrom; he had not previously done any valuation in Tullamore; he was unable to access or inspect all parts of the properties on the site, with no effort being made to contact the purchaser, or to contact the appellant, to ask about the interior of the inaccessible areas of the properties; he valued the property as individual units rather than allowing for any premium for the sale of the property as a whole; he erroneously believed that the top floors in the Texas department store had restricted headroom, despite the fact that he had not been on these floors; he did not give any value to the garden centre adjacent to the corn store building; he erroneously described the entrance to the carpark as coming from Water Lane, when in fact it was accessed from Kilbride Plaza; he had misunderstood the concept of current use value; he had failed to have regard to the evidence that the department store was the epicentre of business in Tullamore; he had failed to contact the appellant to obtain information on the property, despite being aware of shortcomings in the information in his possession; he had failed to qualify the report by indicating the deficiencies in access and information on which it was based.

19. It was submitted that having regard to all of these errors and deficiencies in the report, the evidence of Mr. Quinn should have been excluded by the Commissioner, because he had not made adequate inquiries when carrying out his inspection and preparing his report. In relation to the inadequacy of his inquiries, it was pointed out that Mr. Quinn had not sought to obtain further keys to enable him to gain access to those areas of the buildings

to which he could not gain access; he had failed to go to Tullamore to examine the planning files that were available; he had failed to obtain legal maps showing the precise boundaries of the internal properties within the site; he had failed to contact the appellant to obtain information prior to concluding his report. It was submitted that by not making these inquiries, this demonstrated that the expert's evidence was unreliable and that he had lost his impartiality. It was submitted that in these circumstances, the Commissioner ought to have excluded his evidence from her consideration.

20. It was submitted on behalf of the appellant that given the errors, omissions and deficiencies in the expert's report and having regard to his failure to carry out the necessary inquiries prior to concluding his report, Mr. Quinn had not complied with the standards expected of expert witnesses as set down in *National Justice Compania SA v. Prudential Assurance Company ("The Ikarian Reefer")* [1993] 2 Lloyds Rep. 68; *Payne v. Shovlin* [2004] IEHC 430; *Donegal Investment Group plc v. Dambywiske & Ors* [2016] IECA 193; *O'Leary v. Mercy University Hospital* [2019] IESC 48 and *Duffy v. McGee* [2022] IECA 254.

21. It was submitted that in omitting his comparators from the report, and having regard to the fact that that had been done following a discussion between the expert witness and representatives of the respondent prior to finalising the report, this demonstrated that the expert had abandoned the level of independence and impartiality that was expected of him as an expert witness; on which basis, the Commissioner ought to have excluded his evidence.

22. It was further submitted that the Commissioner had acted erroneously in failing to regard the evidence given by Mr. Kelly on behalf of the appellant, as expert evidence, when he was an estate agent practising in the Tullamore area. It was submitted that the Commissioner had acted otherwise than in accordance with the principles of fairness and natural justice in failing to regard his evidence as expert evidence.

23. In relation to the Commissioner's finding that the appellant was out of time to raise the point that the defendant was out of time to make an amended assessment to CGT; it was submitted that the Commissioner had been wrong in law to hold that that ground of appeal could have been included in the appellant's amended notice of appeal dated 22nd October, 2014, when the matter was governed by the decision in *Revenue Commissioners v. Droog* [2016] IESC 55, in which judgment was not handed down by the Supreme Court until 6th October, 2016.

24. On the third question, the appellant submitted that the Commissioner had been wrong in law to find that the appellant had not made "full and true disclosure" in his tax return for the relevant year and that on that basis, the four-year time limit for raising, or amending, an assessment, did not apply; because, in making his tax return, the appellant had relied on the advice of his accountant/tax adviser, Mr. Casey. It was submitted that case law established that where a person sought advice from a suitably qualified tax expert and relied on that advice when making their tax return, they would not be held negligent for making what turned out to be an erroneous return: See *Carrasco v. Revenue and Customs Commissioners* [2016] UK FTT 731; *AB (A firm) v. Revenue and Customs Commissioners* [2007] STC (SCD) 99 and *Mariner v. Revenue and Customs Commissioners* [2013] UKFTT 657.

25. It was submitted that having regard to these matters, each of the questions raised in the case stated should be answered in the negative.

Submissions on behalf of the Respondent.

26. It was submitted by Ms. Goodman SC, on behalf of the respondent, that the report that had been furnished by Mr. Quinn had been comprehensive and fair. He had set out what areas he and Mr. Madden had inspected and those areas to which he had been unable to gain access. He had clearly stated that he had not inspected the planning file in respect of the site, as he did not think that it was necessary, as his report concerned the CUV of the site, not its development potential or value. He had made assumptions in relation to compliance with planning and other regulatory matters, which had been clearly stated in his report; all of which had been favourable to the appellant.

27. It was accepted that there were errors in the report. It was submitted that these arose mainly due to a lack of information available to Mr. Quinn. Counsel noted that the report had been sent to the appellant in 2014. He replied through his agent, stating that there were errors in the report, but he did not say what they were.

28. It was pointed out that the appellant had not obtained his own valuation of the CUV of the site as of the date of disposal. He had only retained Mr. Kelly shortly before the hearing of the appeal. Mr. Kelly had not produced a valuation report, or any report. He merely gave evidence as to the perceived shortcomings in Mr. Quinn's report.

29. It was submitted that when errors and shortcomings in Mr. Quinn's report came to light in the course of the hearing, these were accepted by Mr. Quinn. The necessary

adjustments were made by the Commissioner on the basis of the valuation evidence which she had heard from Mr. Quinn and Mr. Kelly and based on the factual evidence given by the appellant. This had resulted in the CUV being increased from circa €13m, to €20m. That was still far short of the sale price. It was submitted that the Commissioner's determination that the price obtained represented the price for development land was sound in law.

30. Counsel submitted that Mr. Quinn's report and his evidence, had been entirely consistent with the principles set out in the relevant case law concerning the duties of expert witnesses and with the provisions of O.39 of the Rules of the Superior Courts. It was submitted that there was no basis on which it could be suggested that Mr. Quinn's evidence was tainted by any of the shortcomings identified in the expert's evidence, which had been given in the *Duffy* case. Accordingly, it was submitted that there was no basis on which Mr. Quinn's evidence should have been excluded by the Commissioner.

31. Insofar as Mr. Quinn had had discussions with representatives of the respondent prior to finalising his report, it was submitted that that was perfectly proper, as long as no effort was made by the respondent to influence the content of the report, or its conclusions. There was no evidence that that had taken place. In this regard counsel referred to the evidence given by Mr. Quinn in re-examination before the Commissioner.

32. In relation to the allegation that the Commissioner had not had regard to the expert evidence given by Mr. Kelly, it was submitted that that was not borne out in her determination. The Commissioner had referred to Mr. Kelly's evidence in the determination, so it was clear that she had had regard to his evidence. His evidence was clearly expert evidence that had been considered by the Commissioner.

33. It was submitted that having regard to the principles which this Court should adopt when considering an appeal by way of case stated on a point of law, as set down in *Mara v. Hummingbird Limited* [1982] ILRM 421 and *O'Culachain v. McMullan Brothers Limited* [1995] 2 IR 217, there was no basis on which the court could strike down the determination that had been made by the Commissioner in this case.

34. On the issue of the non-inclusion of the time point in the notice of appeal, counsel submitted that the decision of the Supreme Court in the *Droog* case was not relevant, as it dealt with a different point altogether. Therefore, the Commissioner was correct to hold that there was no reason why the time bar point could not have been raised in the appellant's notice of appeal.

35. In relation to the third question and the points made by the appellant in that regard, counsel submitted that the matter was governed by s.951(5) TCA, which provided that a return would be deemed that of the taxpayer, even though it was submitted by an agent on his or her behalf. It was pointed out that Mr. Casey had accepted in cross-examination that there were errors in the tax return that had been made by the appellant. It was submitted that in these circumstances it was accepted that a "full and true" disclosure had not been made; therefore, the four-year time limit did not apply and the Commissioner had been correct to so determine.

36. It was submitted that the court should answer all questions raised in the affirmative.

Relevant Statutory Provisions.

37. The definitions of "current use value" and "development land" as set out in s.648 TCA, have been set out earlier in the judgment. That section also defines "development of a minor nature" as meaning development "*not being development by a local authority or a statutory undertaker within the meaning of s.2 of the Act of 1963*", which, under or by virtue of s.4 of the Act of 1963, is exempted development for the purposes of the Local Government (Planning and Development) Acts 1963-1993. The Finance Act 2004 substitutes the following definition at s. 83(1)(b)(iii):

> "'*development of a minor nature' means development (not being development by a local authority or a statutory undertaker within the meaning of section 2 of the Act of 1963, or, on or after 11 March 2002, within the meaning of section 2 of the Act of 2000) which, under or by virtue of section 4 of the Act of 1963, or, on or after 11 March 2002, under or by virtue of section 4 of the Act of 2000, is exempted development for the purposes of the Local Government (Planning and Development) Acts 1963 to 1999 or the Act of 2000;'*."

38. Section 949I deals with notices of appeal. It provides *inter alia* that a notice of appeal shall specify the grounds for the appeal in sufficient detail for the Appeal Commissioners to be able to understand those grounds. Subsection 6 of that section provides that a party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal, unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice.

39. Section 955 deals with amendment of and time limit for assessments. Section 955(1) TCA provides that an inspector may "*at any time*" amend an assessment on a chargeable person. However, sub. (2)(a) qualifies that position:

> *"(a) Where a chargeable person has delivered 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, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and—*
>
> *(i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and*
>
> *(ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered, by reason of any matter contained in the return."*

40. Section 957(4) provides that where an appeal is brought against an assessment, or an amended assessment, made on a chargeable person for any chargeable period, the chargeable persons shall specify in the notice of appeal (a) each amount or matter in the assessment or amended assessment with which the chargeable person is aggrieved and (b) the grounds in detail of the chargeable persons appeal as respects each such amount or matter. Subsection 6 goes on to provide that the chargeable person shall not be entitled to rely on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners, or the judge of the Circuit Court, as the case may be, are or is satisfied that the ground could not reasonably have been stated in the notice.

The Law.

41. The principles which the court should adopt when deciding an appeal by way of case stated on a point of law, have been long settled. In *O'Culachain v. McMullen Brothers Limited*, Blaney J., in delivering the unanimous judgment of the Supreme Court, adopted the *dicta* of Kenny J. in *Mara v. Hummingbird* as set out at p.426 of that judgment and proceeded to set out the following principles, which have been followed in many subsequent cases:

> *"(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*
>
> *(2) Inferences from primary facts are mixed questions of fact and law.*

(3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.

(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.

(5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the Court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."

42. In *Byrne v. Revenue Commissioners* [2021] IEHC 262, Twomey J. held that there was a high threshold facing an appellant in a case stated under the Taxes Consolidation Act. He stated as follows at paras. 59 et seq.

"*59. In considering this issue, it is important to bear in mind that this is an appeal on a point of law by way of Case Stated under s. 949AQ of the Taxes Consolidation Act, 1997 (as amended). As such the role of this Court is not to determine whether the Commissioner was right or wrong (in her conclusion that the cumulative effect of (a) the purchase of fuel by Mr. Byrne from McCarthy Oil which was invoiced by McCarthy Oil but paid to John Kelly Fuels, (b) Mr. Byrne's testing of the fuel to see if it was laundered and (c) the other facts set out by her in her Determination), and that the only reasonable explanation was that the purchase was connected with VAT fraud.*

60. This is because this is not an appeal and it is not the function of this Court to replace the view of the Commissioner with this Court's view, even if this Court were of the view that a connection with VAT fraud was not the only reasonable explanation for the purchase of the fuel by Mr. Byrne.

61. As is clear from Hummingbird, the Case Stated jurisdiction is much more restrictive. In order for Mr. Byrne to be successful, this Court must conclude that the Commissioner has reached a conclusion on the evidence that no reasonable Commissioner could reach.

62. This high threshold arises because of the well-established and uncontroversial 'curial deference' which the courts grant to specialist statutory bodies which have

been set up by the Oireachtas with expertise, in this case, in tax matters. See, for example, the statement of O'Connor J. in Karshan (Midlands) Ltd v. Revenue Commissioners [2019] IEHC 894 where he states at para. 7 that: "In this appeal the Court is restricted to identifying the law and applies a deference to the Commissioner who has experience in determining facts with an eye to the applicable law." and at para. 9 where he described the Case Stated jurisdiction as one that 'is inherently deferential to the fact finder'.

63. Another reason for this high threshold is because, unlike this Court, the Commissioner was uniquely placed to evaluate all of the evidence – she had the benefit of seeing and hearing Mr. Byrne give his evidence as well as seeing and hearing the evidence of the other witnesses. Accordingly, she is the person who is best positioned to determine the appropriate weight to be given to the evidence.

64. The high threshold facing an applicant in Mr. Byrne's position is also highlighted by the fact that the burden of proof is on a taxpayer to establish that he is entitled to, in this case, the input VAT credits he seeks, and not on Revenue to establish that it is entitled to disallow the credit which Mr. Byrne seeks. This is clear from the judgment of Charleton J. in Menolly Homes Limited v. The Appeal Commissioners & Anor [2010] IEHC 49 at para. 22: "The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable"."

43. The dicta of Twomey J. on curial deference would have to be tempered in light of the dicta of Murray J. when delivering the decision of the Court of Appeal in *Stanberry Investments Ltd v. Commissioner of Valuation* [2020] IECA 33, where he dealt with the issue of courts showing curial deference to decisions of statutory tribunals at paras. 46-52. He stated as follows at para. 49:

"*The Commissioner says in this case, as parties in a similar position frequently do, that the Court should be "slow to interfere with the decisions of expert administrative Tribunals". Without significant qualification, this statement is apt to mislead. Administrative tribunals, expert or otherwise, obtain no deference on pure issues of law (see Millar v. Financial Services Ombudsman [2015] IECA 126 [2015] 2 IR 156 at - in particular - para. 62). The remarks of Kelly J. in Premier Periclase Limited v.*

Commissioner of Valuation [1999] IEHC 8, makes it clear that errors of fact simpliciter do not present any issue of curial deference either; "[w]hen conclusions are based on an identifiable error of law or an unsustainable finding of fact by a Tribunal, such conclusions must be corrected" (at para 25). A similar statement of principle appears in Nangles Nursery v. Commissioner of Valuation [2008] IEHC 73 at para. 25. It follows that in both judicial review proceedings, and appeals on a point of law, the scope for 'deference' is limited."

44. The judge summarised his conclusions at para. 52 as follows:

"*… Deference means that in those areas touching on the Tribunal's expertise, the Court should be slow to interfere with the Tribunal's reasoning. It does not mean that where the Tribunal's reasoning is unclear so that there are differing possible interpretations of its decision the Court must simply assume that it was correct in the conclusion it reached. As Charlton J. said in EMI Records v. Data Protection Commissioner at para. 22, "curial deference cannot possibly arise where by statute reasons for a decision are required but none are given." 'Curial deference' is thus properly understood as depending on the Tribunal having provided a properly reasoned decision, not as affording a mechanism for compensating where the decision is not so reasoned…*"

45. Subject to that caveat in relation to curial deference, the court is satisfied that the dicta of Twomey J. in *Byrne* are a correct statement of the law. The principles set down in the *Byrne* case were reiterated by Stack J in *Glynn v. The Revenue Commissioners* [2021] IEHC 780.

46. In relation to the onus of proof at an appeal hearing before the TAC, case law makes it clear that the onus of proof rests on the taxpayer who is challenging the assessment. As noted above, in *Menolly Homes Limited v. the Appeal Commissioners and the Revenue Commissioners* [2010] IEHC 49, Charleton J. stated at para. 22, that the burden of proof in the appeal process, was, as in all taxation appeals, on the taxpayer. He stated that it was not a plenary civil hearing. It was an inquiry by the Appeal Commissioners as to whether the taxpayer had shown that the relevant tax was not payable. That dictum was adopted with approval by Twomey J. in *Byrne v. The Revenue Commissioners*. In the course of that judgment, he referred to the decision of Sanfey J. in *O'Sullivan v. Revenue Commissioners* [2021] IEHC 118, where the judge had stated as follows at para. 90: -

"…*The burden of proof is on the taxpayer to prove his case, and for good reason. Knowledge of the facts relevant to the assessment, and retention of appropriate documentation to corroborate the taxpayer's position, are solely matters for the taxpayer. The appellant knew, from the moment he submitted his return, that it could be challenged by Revenue and he would have to justify his position*..."

47. Turning to the duties of expert witnesses, the statement of such duties as set out by Cresswell J. in the High Court decision in the *Ikarian Reefer* case, has been adopted with approval in many cases in this jurisdiction, most recently in *Duffy v. McGee*, where Noonan J. delivering the majority judgment in the Court of Appeal, described the statement of principles set out in that case as being the "*classic statement of the duties of experts*" when he stated as follows at para. 89:

"*The classic statement of the duties of experts, widely recognised in the common law world, is to be found in the judgment of Cresswell J. in* National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd (The Ikarian Reefer) *[1993] 2 Lloyds Rep. 68 at 81- 82:*

> *"The duties and responsibilities of expert witnesses in civil cases include the following:*
>
> *1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (per Lord Wilberforce,* Whitehouse v. Jordans *[1981] 1 WLR 246 at p.256).*
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> *2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. (See* Polivitte Limited v. Commercial Union Assurance Company *[1987] 1 Lloyds Rep. 379 at 386 per Mr. Justice Garland and Re J, [1990] FCR193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.*
>
> *3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J Sup.).*
>
> *4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*

*5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J Sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co. Ltd. & Ors. v. Weldon & Ors*., The Times, November 9, 1990 per Lord Justice Staughton).*

6. If after exchange of reports, an expert witness changes his view on a material matter having read the other side's experts report or for any other reason, such a change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be proved to the opposite parties at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice).""

48. Order 39, r.57(1) of the RSC, provides that it is the duty of an expert to assist the court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert. The decision in the *Duffy* case establishes that where it can be shown that the expert witness has departed from the standard of independence and impartiality that is expected of the expert, his or her evidence can be excluded in its entirety: see, in particular, the concurring judgment of Collins J. The general duties of expert witnesses were also considered by the Irish courts in *Payne v. Shovlin* [2004] IEHC 430; *Donegal Investment Group PLC v. Danbywiske & Anor* [2016] IECA 193 and in *O'Leary v. Mercy University Hospital* [2019] IESC 48.

Conclusions.

The First Question.

49. In approaching the issues that arise for determination on this case stated, this Court is bound by the principles set down in *Mara v. Hummingbird* and *O'Culachain v. McMullan Brothers Limited*.

50. In essence, the primary issue for determination by the Commissioner when hearing the appeal in this matter was as follows: whether or not the land was "*development land*" for CGT purposes. In order to do that, she had to compare the sale price and the current use value of the land at the date of disposal. If the sale price exceeded the CUV, she could determine that the land was development land. In determining that question, I am satisfied that the Commissioner was determining a primary question of fact. That being the case, her determination can only be set aside by this Court, if there was no evidence to support it.

51. Having had the benefit of reading the transcript of the hearing before the Commissioner, the court is satisfied that there was ample evidence before the Commissioner to make the determination that she did.

52. The only basis on which her finding of primary fact could be set aside, would be if the court was to accept the appellant's submission that having regard to the errors, omissions and deficiencies in Mr. Quinn's report; or having regard to the fact that he had contact with representatives of the respondent before furnishing his report; the Commissioner ought to have found, either that his report and evidence was so deficient as to be unreliable and therefore ought to be excluded; or that his independence and impartiality had been so compromised, that his evidence ought to have been excluded.

53. I do not think that the submission that Mr. Quinn's report and evidence ought to have been excluded, is well founded. In relation to the errors in his report, it is accepted that there were errors in his report, such as the fact that he was not aware of the existence of the mezzanine floor area, due to the fact that he had not obtained access to that portion of the building; that he had allocated an incorrect amount for the storage area in one building, because he was not aware that the appellant had off-site storage; that he wrongly thought that the carpark was not an earning asset at the date of disposal.

54. In this regard, a number of things have to be noted: First, Mr. Quinn clearly set out the limitations in his investigations. He stated that he had not been able to view portions of the buildings, because he did not have the appropriate keys to open various doors. On the planning aspect, he stated that he had not gone to Tullamore to inspect the planning file in respect of the property. He had stated that he had assumed that the carpark was not an earning asset at the date of disposal in 2007. All these things were clearly stated in the report. The report had been sent to the appellant in 2014, some three years before the appeal hearing. The appellant was invited to comment on it. He responded through his agent,

pointing out that there were errors in the report, yet he did not take the opportunity of stating what these errors were. Instead, he chose to keep his cards close to his chest in that regard.

55. The appellant retained his own valuer. He did not ask him to do a valuation of the CUV of the site at the date of disposal. He used the evidence of Mr. Kelly at the appeal hearing, to point out the deficiencies in the report that had been prepared by Mr. Quinn. In his evidence, Mr. Quinn explained why he had not been able to obtain access to some parts of some of the buildings. He accepted the evidence that was put to him in cross-examination about the use of the relevant areas. He conceded that adjustments would have to be made to his valuation figures.

56. The Commissioner was faced with a situation where the person who knew most about the site at the date of disposal, had chosen to stay silent when he had been made aware of the shortcomings in Mr. Quinn's report. He had given evidence himself and through his valuer, on the errors and omissions in the Savills' report. The Commissioner made the necessary adjustments to the valuation figure for CUV. The appellant cannot complain that this was not a reasonable and fair way for the Commissioner to proceed to determine the issue.

57. The court is satisfied that the Commissioner dealt fairly and reasonably with the various omissions and errors that had been pointed out in Mr. Quinn's report in the course of the evidence that was given before her. To deal with some of the complaints that had been made by the appellant: in relation to the incorrect designation of the storage area, that was corrected by making the necessary adjustment between the storage and retail areas in the building and increasing the ERV accordingly. The incorrect treatment of the carpark, as not being an earning asset, was adjusted by reference to the evidence that had been given by the appellant in that regard, notwithstanding that he had not produced any documentary evidence to corroborate his evidence in relation to the level of occupancy of the carpark, or the level of income derived therefrom. A reasonable and generous assumption was made in relation to the level of usage of the carpark on an annual basis and of the income that that would be likely to generate. A generous adjustment of €4m was made to the CUV in this regard. The evidence of the appellant in relation to the existence of the mezzanine floor area, was accepted by both Mr. Quinn and the Commissioner, and the necessary adjustment was made to account for this additional retail space.

58. The court is satisfied that any errors in Mr. Quinn's analysis, were more than corrected by the adjustments that were made by the Commissioner to the CUV. The fact that these adjustments had to be made "on the hoof", as it were, during the course of the hearing before the TAC, was solely due to the fact that the appellant chose to stay silent, when he was aware of the inaccuracies in the report for years prior to the appeal hearing. It had been open to the appellant to raise these issues well in advance of the appeal hearing, as early as 2014, when he received the report.

59. Litigation and disputes such as this before the TAC, are two-way streets. Parties cannot complain about an issue, which could have been resolved had they chosen to engage proactively with the process. The fact that the decision maker has to deal with issues "on the hoof" during the course of the hearing, was largely due to the appellant's inaction. The court is satisfied that the Commissioner acted in a fair and rational way in making the adjustments that she did.

60. The appellant made complaint that Mr. Quinn had not gone to Tullamore to view the planning file in respect of the site. He stated that he had not done so, because he did not consider it relevant, as he was not considering the development potential of the land; but rather, its CUV at the date of disposal. The Commissioner was entitled to regard that as a reasonable explanation. The appellant did not point to any relevant matter that would have been disclosed had the planning file been inspected by Mr. Quinn in advance of preparing his report.

61. The court is of the view that the Commissioner was quite right in finding that the tenor of the appellant's evidence was not that the local authority would not allow development of the site in the years leading up to 2007, but, on the contrary, in their informal meetings with the appellant, the local authority had expressed the view that it was not keen on the scale of development being suggested by the appellant, but would favour a much more ambitious scale of development for the site.

62. It is important to note that the appellant did not apply for planning permission for the site. He merely had a number of informal meetings with people in the planning department of the local authority, to discuss in general terms what type of development might be given a favourable response, should an application for planning permission be made.

63. The essential point, as noted by the Commissioner, was not that there was any impediment to development of the site, which would have meant that the site could not be sold as development land, but that the local authority favoured an extensive scheme of development at the site. Accordingly, the fact that Mr. Quinn had not travelled to Tullamore to view the planning file for the site, was not relevant. Therefore, it was not a shortcoming in the methodology utilised by him in his report.

64. The appellant also made complaint that Mr. Quinn had used an incorrect methodology, wherein he had valued the individual buildings on the site, but had not added any premium for the fact that the site was being offered for sale as one whole unit. Mr. Quinn had given evidence that in his opinion, it was more favourable to the appellant to have the site valued in its separate constituent elements, because, if the site was sold as a whole, the number of interested purchasers would be substantially less and in addition, they might seek a reduction in the price, due to the fact that they were taking the whole site. The Commissioner was entitled to act on that evidence.

65. The appellant also complained that Mr. Quinn did not have the necessary expertise to give opinion evidence in relation to land values in Tullamore in 2007, due to the fact that he had never carried out a valuation of land in that town before. However, he had given evidence that he had qualifications as a valuer and estate agent; he had over twenty years of experience in that business; he had carried out valuations of properties in other provincial towns around the country; and he had had access to the national database maintained by Savills. The court is satisfied that the Commissioner was entitled to act on that evidence and on that basis, to hold that Mr. Quinn was a suitably qualified and experienced person to give expert evidence on the CUV of the site.

66. The appellant also complained that the report had been countersigned by Mr. Hanley, who was a director in Savills, but who had not visited the site. The court is satisfied that there is no substance in this point. It was quite appropriate for a senior member of the staff in Savills to countersign the report, as an indication that he had overseen the methodology adopted in the report and concurred in the conclusions that had been reached by the primary author. The Commissioner had been entitled to reach the same conclusion.

67. The appellant also complained that Mr. Quinn's report was deficient, due to the fact that he had made no effort to contact the appellant prior to finalising his report in 2014. The Commissioner was entitled to accept the evidence of Mr. Quinn that the usual practice when

doing a valuation many years after a disposal, was for the valuer to contact the current owner and to inspect the property, rather than make contact with the previous owner. The court is satisfied that that was entirely appropriate, where the property was substantially in the same general condition at the date of inspection, as at the date of disposal, as it was in this case.

68. Furthermore, given that there was a dispute between the respondent and the appellant in relation to his liability to CGT arising out of the sale of the lands and more particularly, in relation to his ability to offset those gains against certain other losses, and in view of the fact that Mr. Quinn had been retained by the respondent to provide a valuation of the CUV of the site and to give evidence on behalf of the respondent at the appeal hearing, it would probably have been inappropriate for Mr. Quinn to have made direct contact with the appellant in these circumstances.

69. The appellant complained that Mr. Quinn had not included comparators in his report and that that decision had been reached after he had discussed the issue of their inclusion, or omission, with representatives of the respondent. The issue of the appropriateness of contact between a retaining party and his expert witness in advance of the preparation of a report by the expert, was examined in *Donegal Investment Group plc v. Dambywiske & Ors* [2016] IECA 193. In the course of her judgment, Finlay Geoghegan J. stated as follows at paras. 54 and 55:

> "*54. … It is inevitable that an expert who is required to give expert evidence may have to have contact with the party by whom he is retained to obtain certain relevant facts for the purpose of giving evidence. The dividing line between being informed of relevant facts to take into account when forming one's independent expert views, which is permissible, and being, as it were, lobbied with a point of view to be taken into account when forming an allegedly independent view is a difficult dividing line to draw both as a matter of principle and practice.*
>
> *55. The Court does not consider that it would be appropriate to prescribe precise ex ante rules in relation to this matter. We rather consider that it should remain primarily a matter for a trial judge, by application of the above principles and commonsense, to make a decision on the particular evidence before him or her in relation to the nature of the allegedly inappropriate contact between an expert and the party by whom he was retained, either to reject the expert evidence in its*

entirety as inadmissible or to admit the evidence, but to attach lesser weight to it than to that of an expert who has formed his views without being influenced by such contact."

70. The court is satisfied that the Commissioner was entitled to come to the conclusion that there was nothing inappropriate in the interaction between Mr. Quinn and the respondent prior delivering his report. She was entitled to have regard to the evidence given by Mr. Quinn in re-examination, to the effect that, while it was usual in 2017 to provide comparators in a report, it had not been universal practice to do so, at the time when he had carried out his inspection and produced his report in 2014. The relevant guidelines, being the RICS Guidelines, did not provide that it was mandatory to provide such comparators in a valuation report. She had been entitled to accept Mr. Quinn's evidence that he had regarded the comparators that he had obtained as not being particularly relevant.

71. In any event, comparators were introduced into evidence by both sides. The Commissioner had the benefit of seeing them and of hearing evidence from experts as to what extent, if any, they might be relevant. The Commissioner reached her conclusion having had the benefit of that evidence. Thus, their omission from the report prepared by Mr. Quinn, was not in fact material to the evidence given at the appeal hearing. The court is satisfied that the Commissioner was entitled not to regard their omission from the report prepared by Mr. Quinn, as being indicative of any lack of candour or impartiality on his part.

72. The appellant complained that Mr. Quinn had contradicted himself in cross-examination in relation to his understanding of the concept of CUV and on that basis, his evidence ought to have been excluded. While it is correct that Mr. Quinn did contradict himself somewhat in relation to his understanding of CUV in the course of cross-examination, the court is satisfied that when the Commissioner took all his evidence that was before her, including his report, and concluded that "taken in the round" he had understood the legal concept of CUV when preparing his report and giving his evidence, that was a conclusion that was open to her on the totality of the evidence that was before her.

73. Having regard to these findings, the court is satisfied that there is no basis on which the Commissioner could lawfully have excluded the evidence of Mr. Quinn. That being the case, it cannot be plausibly argued that there was no evidence before the Commissioner on which she could have reached the primary finding of fact that she did.

74. Even if the court is wrong in holding that the determination made by the Commissioner was a finding of primary fact, but was in fact a mixed finding of fact and law, that does not aid the appellant in this appeal. Inferences from primary facts are mixed questions of fact and law. If the conclusions from the primary facts are ones which no reasonable Commissioner could draw, the court can set aside the findings on the ground that she must be assumed to have misdirected herself as to the law, or made a mistake in reasoning. If her conclusions show that she has adopted a wrong view of the law, they can be set aside. If they are not based on a mistaken view of the law, or a wrong interpretation of documents, they should not be set aside unless the inferences which she made from the primary facts were ones that no reasonable Commissioner could draw.

75. The court is satisfied that having regard to the totality of the evidence that was before her, the Commissioner was entitled to reach the conclusions that she did. The court is satisfied that the inferences and findings which the Commissioner made from the primary facts, were findings that any reasonable Commissioner could reach on the evidence that had been presented at the appeal.

76. In reaching those conclusions, the Commissioner was not confined to the evidence of Mr. Quinn. She also had regard to documentary evidence in the form of the Bannon's brochure, which, on any reasonable reading, was clearly advertising the site for sale as a development opportunity. The title of the document made that clear when it stated: "Outstanding Town Centre Development Opportunities". That was further supported by the fact that in the brochure there was almost no description of the current uses of the buildings that were on the site. The Commissioner was also entitled to have regard to the fact that when the appellant's accountant/tax adviser was written to, inquiring as to whether there was any brochure, or other sales material generated at the time of the sale of the site, he had replied in the negative. The Commissioner was entitled to have regard to the fact that his explanation for that incorrect answer, which he had given in evidence before her, had not been particularly convincing.

77. The Commissioner was also entitled to have regard to the subsequent planning history, which supported the conclusion that the land had been sold as a development opportunity. The planning file showed that some ten months after the sale of the site, a planning application was lodged to carry out extensive development on the site, which was granted at first instance.

78. Taking all of these matters into consideration, one cannot say that the finding made by the Commissioner that the site was sold as development land, was not open to her on the totality of the evidence that was before her.

79. The appellant also argued that the determination was flawed because the Commissioner had not regarded the evidence of Mr. Kelly as being expert evidence. While it is true that at section 8 of the determination, which dealt with the issue as to whether in relation to the site, the whole was greater than the sum of its parts, she had stated as follows:

> "*The appellant did not furnish a valuation report in evidence and as a result there is no competing expert testimony and therefore I accept the evidence of Mr. Quinn on behalf of the respondent*."

80. The court is satisfied that when one looks at the totality of the evidence that was before the Commissioner, including the oral evidence given by Mr. Kelly on behalf of the appellant, and when one reads her determination in its entirety, it is clear that she had accepted Mr. Kelly as an expert witness and had had regard to his evidence as being expert evidence.

81. The court is satisfied that the sentence to which exception is taken by the appellant refers to the fact that there was no contrary expert valuation of CUV put forward by the appellant in opposition to the report prepared by Mr. Quinn. The court is satisfied that she was merely referring to the absence of a contrary valuation report on the aspect that she was dealing with in that part of her determination. When viewed in the context of the entire determination, the court is satisfied that the Commissioner had regard to the testimony of Mr. Kelly as being expert evidence. Accordingly, there is no breach of fair procedures in this regard.

82. Having regard to the findings made above, the court is satisfied that the answer to the first question raised in the case stated is "yes".

The Second Question.

83. The essence of this question is whether the Commissioner was right to hold that the appellant was out of time to raise the time limitation point in his appeal, same not having been raised in his amended notice of appeal, when it could have been so included.

84. The submission made by the appellant was that he could not have included that ground in his notice of appeal dated 22nd October, 2014, because the decision of the

Supreme Court was not handed down in the *Droog* case until 2016, which was determinative of the time limitation issue.

85. The court is satisfied that there is no substance in this submission. The *Droog* case dealt with a totally separate point: namely, whether the four-year time limit for raising or amending an assessment, applied to opinions given under s.811 TCA. That issue had been clearly identified by Laffoy J. when delivering the judgment at first instance in the High Court on 31st March, 2011, at para. 3 of her judgment. There, she stated that the question for determination by the court had been whether the Appeal Commissioner was correct in law in holding that the four-year time limit in ss. 955 and 956 applied to the forming of an opinion under s. 811.

86. The decision of the Supreme Court in the *Droog* case was handed down by Clarke J. (as he then was) on 6th October, 2016. He identified the issue which the court had to determine in the following way at para. 1.2:

> "*1.2 The net issue which arises on this appeal is as to whether time limits which apply generally in respect of certain types of action by the appellant ("Revenue") have application to the relatively specific process which is provided for in section 811 which is designed to seek to deprive a tax payer of the benefits of what is defined in that section as a tax avoidance transaction*."

87. Both decisions make it abundantly clear that the court was only dealing with the question of whether the four-year time limit applied to opinions given under s. 811, in the same way as it applied to assessments generally.

88. The court is satisfied that the Commissioner was correct to hold that the time limitation ground of appeal, which concerned the time within which an amendment could be made to an assessment, was not at issue in the *Droog* case. Accordingly, she was correct to hold that that ground of appeal could have been raised in the appellant's notice of appeal. Therefore, she was entitled to find that the appellant was out of time to raise that as a ground of appeal at the hearing before her in 2017.

89. While not pursued with any vigour at the hearing before this court, it was submitted that the Commissioner had not given adequate reasons for her decision on this aspect of her determination. The Commissioner dealt with this issue at pages 27 and 28 of her determination. She set out with clarity and precision why the appellant would not be

permitted to pursue the time bar issue at that late stage in the appeal; it not having been raised in his notice of appeal.

90. She dealt with the *Droog* case, which was the primary authority relied upon by the appellant. She stated clearly why she was ruling against him on this point.

91. In broad terms, the duty to give reasons is so satisfy three goals. First, that the party affected by the decision should know why the decision maker reached the decision that they did. Secondly, to enable the party affected to decide whether they have grounds to appeal or challenge the decision. Thirdly, to enable an appellate, or reviewing court, to ascertain if the decision was lawfully made by the decision maker.

92. The court is satisfied that the reasons given here by the Commissioner were more than adequate to achieve these goals.

93. The court answers the second question raised in the case stated, "yes".

The Third Question.

94. Although it was not strictly necessary for her to do so, for completeness, the Commissioner had gone on to hold that the four-year time limit did not apply in any event, because the appellant had not made "full and true disclosure" in his tax return. In cross-examination, the appellant's accountant, Mr. Casey accepted that there were a number of errors in the tax return that had been filed on behalf of the appellant. It was accepted that the sale of the site had not been identified as a sale of development land. Other errors were acknowledged by Mr. Casey, including entering an incorrect figure in the return for the disposal proceeds in respect of commercial premises, including the property; the inclusion under disposals of residential premises of properties which had in fact been disposed of in 2006; and the omission from the return, of the acquisition of the Paddy Field Restaurant and its disposal later in the year.

95. The appellant appears to accept that errors had been made in his return, such that full and true disclosure had not been made. However, he submits that he should be relieved of the consequences of that, because he had relied on his accountant/tax adviser to make the return on his behalf.

96. In support of this submission, the appellant referred to a number of English and Scottish decisions, which recognised that tax statutes can be extremely complex in their provisions and can be somewhat impenetrable to the ordinary taxpayer. In these circumstances, when looking at the issue of whether there was negligence on the part of the

taxpayer in making an erroneous return, it has been held that where the taxpayer retained a suitably qualified tax adviser and where he acted on the advice of such adviser on a complex matter pertaining to his return, he will not be held to have been negligent when acting on that advice.

97. In particular, the appellant relied on the following dicta at para. 25 in the judgment in the case of *Carrasco v. Revenue and Customs Commissioner*:

> "*In our judgement when a person seeks appropriate professional advice from somebody who is a professed expert in the applicable discipline, it will almost always be reasonable for the person who has sought out such advice to rely upon that advice provided only that that person has selected a seemingly competent professional adviser, unless there are factors to the knowledge of the recipient of the advice which indicate to him/her that it ought not to be relied upon. In our judgement such factors would have to be reasonably obvious rather than subtle or such as might only be picked up by a fellow professional. It was not argued by the respondents that on the facts of this case the situation falls into that latter category*."

98. Similar views were expressed by the Special Commissioners in *AB (A firm) v. Revenue and Customs Commissioners* at para. 105.

99. However, the situation is a little more nuanced than providing protection whenever a taxpayer relies on the advice of his accountant/tax adviser. In the decisions referred to by the appellant, the decision makers were careful to draw a distinction between circumstances where the accountant is merely a functionary, who makes a return on behalf of his client; and a situation, where there is a complex question of tax law involved and upon which the taxpayer takes the advice of an accountant/tax adviser. In the former case, the taxpayer remains liable for the erroneous return. In the latter case, he may be able to avoid a finding of negligence, where he has relied on the advice given by the tax adviser.

100. This was clearly stated by the first Tier Tax Tribunal in *Mariner v. Revenue and Customs Commissioners* [2013] UKFTT 657, where it stated as follows at para. 25:

> "*In our judgement, where an accountant acts as a mere agent, administrator or functionary, he is acting as the taxpayer's agent and his default (whether negligent or not) will usually provide a taxpayer with little opportunity to claim that he is not in default of a particular obligation. However, when a professional person acts in a truly professional advisory capacity, the situation is otherwise and reliance upon*

properly provided professional advice, absent reason to believe that it is wrong, unreliable or hedged about with substantial caveats, will usually lead to the conclusion that a taxpayer has not been negligent if she has taken and acted upon that advice."

101. The court does not regard the submissions made by the appellant under this heading, as being well founded. The case law referred to by the appellant dealt with a separate question altogether. They primarily dealt with the issue of whether the taxpayer had been negligent in making his return, when he did so based on advice as given by his tax advisers. These cases did not deal with the issue of whether the taxpayer could be held not to have made "full and true disclosure", when making an erroneous return.

102. In the present case, the taxpayer remains liable for the accuracy of his tax return, even though it was submitted by his accountant on his behalf. In this case one is dealing with a tax return that was made by the appellant. There were a number of errors, which did not involve complex issues of interpretation of tax statutes, or complex issues of law. In these circumstances, the appellant cannot avoid the consequences of his erroneous return, by pointing to the fact that the return was submitted on his behalf by Mr. Casey.

103. It is noteworthy that neither the appellant, nor Mr. Casey, contended that the content of the return had been made as a result of detailed advice given by Mr. Casey to the appellant. On the crucial question as to whether the sale of the land had been identified in the return, as being a sale of development land; in cross-examination, Mr. Casey accepted that he had not discussed with the appellant whether it was the sale of development land. He could not say whether his colleague in the office had discussed the matter with the appellant. He stated that the return was completed on the basis that it was not a sale of development land. The court is satisfied that in these circumstances, the Commissioner had been entitled to hold that full and true disclosure had not been made by the appellant in his tax return.

104. In addition, s.951(5) provides that a return may be prepared and delivered by the chargeable person, or by another person acting under his authority, and that, where a return is prepared and delivered by such other person, the Tax Act shall apply as if it had been prepared and delivered by the chargeable person.

105. In *Hanrahan v. Revenue Commissioners* [2022] IEHC 43, Stack J. held that the ticking of boxes in a tax return was "critical information". Therefore, the absence of such information would mean that "full and true disclosure" had not been made in the return.

106. Finally, the appellant also submitted that the Commissioner had not given adequate reasons for her finding that "a full and true disclosure of the facts" had not been made by him in his tax return. This issue was dealt with at pages 28 and 29 of her determination. She outlined the relevant statutory provisions. She noted that Mr. Casey had accepted that there were errors in the tax return. She set out clearly why she reached the conclusion that the appellant had not made a full and true disclosure of the facts in his tax return.

107. The court is satisfied that the Commissioner set out adequately the reasons why she had made the finding that she did. There is no substance to the submission that the appellant did not know the reasons on which she had made her findings.

108. In the circumstances, the court is satisfied that the Commissioner was entitled to make the finding that the appellant had not made full and true disclosure in his return. Accordingly, the court would answer all of the constituent parts of question three in the affirmative.

Proposed Final Order.

109. Subject to receiving submissions from the parties, the court would propose to make its final order in the following terms:

> The questions raised in the case stated will be answered as follows:
>
> Question 1 – Yes.
>
> Question 2 – Yes.
>
> Question 3 – (i) yes; (ii) yes; (iii) yes; (iv) yes; (v) yes.

110. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish written submissions on the terms of the final order and on costs and on any other matter that may arise.

111. The matter will be listed before the court for the purpose of making its final order and ruling on costs at 10.30 hours on 9th February, 2023.