THE HIGH COURT

[2021] IEHC 118

[Record No. 2019/299 R]

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

BETWEEN

DESMOND O'SULLIVAN

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 22nd day of February 2021.

Introduction

1. This matter concerns a case stated for the opinion of this Court pursuant to s.949AQ of the Taxes Consolidation Act 1997 ('TCA') in relation to a determination by a Tax Commissioner of 11th October, 2019 in an appeal by Mr. Desmond O'Sullivan ('the appellant'). The Revenue Commissioners ('Revenue') are the respondent. The case stated recites that a notice requesting Mr. Conor Kennedy ('the Commissioner') to state and sign a case was received by the Tax Appeals Commission ('TAC') on 31st October, 2019 in accordance with s.949AQ of the TCA. The Commissioner accordingly drafted and signed a comprehensive case stated for the opinion of this Court pursuant to s.949AQ of the TCA on 17th December, 2019.

2. The parties proffered detailed written submissions in advance of the hearing, and the written submissions made on behalf of the appellant at the hearing before the Commissioner were also made available to the court. The appellant also sought, at the commencement of the hearing before the court, to have certain further documentation admitted which had not been made available at the hearing before the Commissioner. This application was opposed by Revenue, and I will refer to the application in this regard in more detail below.

3. The case stated states that the issue in the appeal "*was to determine whether the Appellant could satisfy the burden of proof to support his assertion that he invested €700,000 in the Santa Maria Property Partnership (SMP) and as a consequence seek to avail of loss relief pursuant to Taxes Consolidation Act 1997 (TCA) section 381."* [Paragraph 3].

Background

4. The factual background to the matter is set out comprehensively in both the determination and the case stated. In the following paragraphs, I will summarise the 'material findings of fact' as set out in the latter document.

5. The appellant acquired a 9.86% interest in the Santa Maria Property Partnership ('SMP'), which was in operation as a trading partnership in or around 2007. In or around October 2007, SMP acquired a 1.45-acre site at Cunningham Road, Dalkey, Co. Dublin. This site cost €20 million, and the partners of SMP contributed €5 million, with the remaining €15 million of the development cost to be financed by Zurich Bank. The intention was to

develop the site for the construction of residential units in accordance with its planning permission. The development commenced in 2008, but due to the collapse in the property market in that year, Zurich withdrew funding and the development was abandoned, causing significant losses to all the investors.

6. In his tax returns for 2009 and 2010, the appellant claimed an offset of losses incurred against the appellant's PAYE income in accordance with s.381 of the TCA. The Commissioner records that "*this loss offset triggered a tax refund which was immediately taken by the Bank".*

7. On or about 12th December, 2014, Revenue wrote to the appellant querying his claimed entitlement to offset trading losses for 2009 and 2010. Ultimately, the respondent issued amended notices of assessments for those years disallowing the entitlement to loss relief, which gave rise to tax liabilities of €31,557 and €31,923 for the periods ending 31st December, 2009 and 31st December, 2010 respectively. The assessments accordingly gave rise to a tax liability of €63,480.

Evidence given before the Commissioner

8. In the case stated, the Commissioner summarised the evidence given by the appellant and two witnesses on his behalf. The appellant gave evidence that he began investing in properties in 1990 and had built up a substantial property portfolio of approximately thirty-seven properties while working as a commercial pilot. In 2004 he retired from flying to concentrate on his property business. In 2005 he was introduced to a chartered accountant, Mr. Alan Hynes, who prevailed on the appellant to use his substantial property portfolio as equity for investment into 'big-ticket' investments. This was to be done through an investment vehicle of Mr. Hynes called Tuskar Property Holdings ('Tuskar').

9. The first such investment was for €300,000 in a project called Moongate, a property in Wexford. Due to planning difficulties, this development never took place, and the €300,000 which was to have been invested in the project was transferred to the firm of solicitors acting on behalf of Mr. Hynes, Seamus Maguire & Co. The evidence of the appellant was that €100,000 of that transfer was subsequently paid to Mr. Hynes as property-based commissions, and that the remaining €200,000 from the abortive Moongate investment, together with the sum of €500,000 borrowed from AIB, were invested into SMP. The case stated records that an AIB bank statement of the appellant was produced in evidence, and shows the transfer of €500,000 to Tuskar on 16th July, 2007. It is recorded that "*the Respondent accepted such evidence*". The case stated goes on to say however that "…*the Appellant was unable to clarify the source of the lodgement of €300,000 on 8th July 2008 that appeared on the same statement. Furthermore, he was unable to confirm whether that lodgement represented a return of capital from a project managed by Mr. Hynes…"* [para. 13(e)].

10. The case stated records the appellant as having given evidence that SMP acquired a property on Cunningham Road, Dalkey for €20 million, but goes on to say that "*SMP contributed €7 million and the balance was funded by Zurich…"*, notwithstanding the

statement in the "*material findings of fact*" that €5 million was the sum contributed by the SMP partners. Mr. Hynes produced a schedule that purported to highlight the amount of funds invested in SMP. The case stated states that the schedule *"…noted that the appellant invested €700,000 which when added to the other partners' contributions came to €6,100,000. However, he was unable to reconcile a conflicting entry on that document which showed the total partners' contribution of €7,100,000…"* [para. 13(g)].

11. The case stated goes on to note that, in cross-examination, *"…the Appellant was unable to clarify how one investor had a 7.04% interest while not making any equity contribution…*" [para. 13(h)].

12. The appellant also gave evidence of an investment, through Tuskar, in another project described as 'The Laurels, Dundrum' in 2007 for the sum of €500,000. The case stated goes on to state as follows:

> *"(j) [the appellant] was asked to explain this investment [i.e., in The Laurels, Dundrum] in context of the other projects managed by Tusker [sic]. His attention was brought to his statement of net worth in which he had made an equity investment in Moongate and The Laurels. However, he was unable to reconcile the equity invested in these projects with his assertion that he has contributed €500,000 to SMP and the purporting entries on the client ledger of Seamus Maguire & Company, Solicitors showing an amount of €300,000 credited on that firm's cash ledger on 13th June, 2007, €200,000 of which was also purportedly invested in SMP".*

13. The case stated records that the appellant asserted that, at the time he invested in SMP, the Moongate investment was wound up. It goes on to state as follows:

> *"However, he was unable to provide any evidence to support the assertion that the entire €500,000 borrowed from AIB on 16th July, 2007 was invested entirely in SMP, and…as such, no further evidence could be furnished to confirm that the €500,00[0] was transferred to Tusker [sic] as a capital contribution in SMP or indeed any confirmation that the additional €200,000 was invested in SMP."*

14. Mr. Richard Clinch, a Solicitor working for Seamus Maguire & Co., gave evidence on the appellant's behalf. He was not involved in the transactions of 2007, but had reviewed the firm's financial records and was of the opinion that the sum of €300,000 transferred into the practice client account on 13th June, 2007 related to the appellant. This opinion however was based on a review of limited documentation available in his office, given that Mr. Clinch was not involved in the transactions in 2007.

15. The case stated records at para. 14(b) that Mr. Clinch "…*was also uncertain as to why the reference taken from the extract from the firm's cash ledger on 13th June, 2007 describing the €300,000 lodgement purportedly relating to the appellant as a transfer of loan proceeds [sic]. As such he was not in a position to provide any substantive evidence that the specific monies in his firm's client account related to the appellant…".* Mr. Clinch

confirmed that the firm's client ledger account showed that, although €300,000 was lodged, only €200,000 was transferred to SMP while the remaining €100,000 was paid to Mr. Hynes. In this regard, he was relying on an email between a former colleague and Mr. Hynes of 14th June, 2007, which referred to the colleague's assumption that the funds came from the appellant and the need to confirm with the appellant that this was so. The case stated remarks that "… *however, no evidence was furnished that the monies actually related to the Appellant".*

16. Ms. Bridget Atkinson also gave evidence on behalf of the appellant. Ms. Atkinson had worked with Mr. Hynes until March 2009, and confirmed that Tuskar was a conduit for monies to be invested in various projects and entities managed and controlled by Mr. Hynes. She confirmed that Tuskar had managed the Moongate, SMP and The Laurels projects, but was not able to confirm the amount the appellant had invested in each project.

17. No further evidence was tendered on behalf of the appellant. In particular, and perhaps notably, Mr. Hynes did not give evidence in relation to the extent of the appellant's investment in SMP. Revenue did not tender any evidence before the Commissioner.

Determination and reasons

18. The case stated set out the determination of the Commissioner and his reasons for that determination. They may be summarised as follows: -

- The evidence of the appellant that he invested €700,000 in SMP conflicted with the written submissions made by his agent which asserted that he contributed €500,000 to SMP;

- the written submissions also referred to a total capital contribution by all partners to SMP of €5 million, whereas the appellant produced a document stating that the capital contribution was €6 million. This document however contained a discrepancy, in that it suggested that the partner capital contribution was in fact €7 million;

- the appellant could not explain how one particular investor appeared to have obtained a 7.04% share in SMP notwithstanding that he had not made any equity contribution;

- while it was clear from the AIB statement produced in evidence that the appellant had transferred €500,000 to Tuskar, "…*there was no supporting evidence to show how those funds were allocated across the 3 projects managed by Tusker [sic] on behalf of the Appellant…";*

- the appellant failed to provide documentation supporting his investment in SMP, and there was no evidence from Mr. Hynes or other persons which would make it possible to determine how much the appellant had invested in SMP;

- the appellant was unable to explain the source of the funds of €300,000 lodged into his loan account on 8th July, 2008, and whether such funds were refunds of capital contributions from any of his investment holdings managed through Tuskar;

- the evidence of Mr. Clinch was inconclusive and, given his lack of personal involvement in the transactions, consisted of opinion rather that factual evidence as to how the funds lodged in his firm's account were utilised;

- Ms. Atkinson was unable to confirm how much the appellant had contributed to each of the projects managed by Tuskar.

19. The Commissioner had stated at para. 26 of the case stated that, in light of the evidence, while he was satisfied that the appellant had transferred €500,000 to Tuskar, he was not sufficiently satisfied that the funds constituted the appellant's equity contribution in SMP. He summarised his findings at para. 27 of the case stated as follows: -

"27. I have therefore found that the appellant has not satisfied the burden of proof necessary to reduce the assessment due to:

(a) the inconsistencies of facts between the submissions and evidence;

(b) the absence of any supporting evidence such as a partnership agreement and partnership accounts for SMP;

(c) the failure to provide an explanation as to how one partner in SMP was entitled to a profit share notwithstanding that he did not make an equity contribution;

(d) the failure to furnish any supporting documentation to confirm his investment in SMP;

(e) the uncertainty as [to] how Mr. Hynes, through the investment vehicle Tuskar, managed the Appellant's funds, and

(f) the inability to produce evidence or indeed to provide any reconciliation of the funds invested with Tuskar with regard to his investments in Moongate, the Laurels and SMP."

20. The Commissioner found that, as the appellant did not satisfy the burden of proof necessary to reduce the assessments for the years 2009 and 2010, those amended assessments stand.

The questions of law stated

21. At para. 30 of the case stated, the Commissioner set out of the questions of law for the opinion of the High Court as follows: -

"30. The questions of law for the opinion of the High Court are whether I erred in law:

(a) *in relying on transactions relating to Moongate and the Laurels during the hearing of the appeal when such transactions were not dealt with at the initial hearing [i.e. the case management conference held in preparation for the hearing before the Commissioner] and the Appellant was not prepared to deal with those queries having had no notice that such queries would be raised;*

(b) *in relying on inconsistences of fact and a failure to adduce relevant evidence when the transactions to which the hearing related occurred in 2007 and the requirements to maintain records had expired by 12th of December 2014, and*

(c) *in relying on evidence produced in preparation of the hearing as constituting primary evidence for the purposes of determining credibility."*

Are the questions raised appropriate?

22. There were significant issues between the parties as to whether the questions set out in the case stated accurately expressed the issues of law arising from the hearing. Both parties agreed that this Court has power to amend the questions to reflect more accurately the legal issues which arise from the overarching issue of whether or not the Commissioner applied the correct principles of law in assessing the facts and ultimately allowing Revenue's assessments to stand.

23. Section 949AR of the TCA, as inserted by s.34 of the Finance (Tax Appeals) Act 2015, sets out the jurisdiction of this Court in relation to a case stated from the TAC as follows: -

"(1) The High Court shall hear and determine any question of law arising in a case stated and –

(a) *shall reverse, affirm or amend the determination of the Appeal Commissioners,*

(b) *shall remit the matter to the Appeal Commissioners with its opinion on the matter, or*

(c) *may make such other order in relation to the matter as it thinks just,and may make such order as to costs as it thinks fit.*

(2) The High Court may send the case stated back to the Appeal Commissioners for amendment, in which case –

(a) *the Appeal Commissioners shall amend the case stated accordingly, and*

(b) *the High Court shall, thereafter, proceed in one of the ways specified in subsection (1)."*

24. While s.949AR (2) expressly permits the court to send the case stated back to the Commissioner for amendment, the parties agree that the court can amend the case stated of its own motion. They each rely in this regard on the decision of O'Malley J in this Court in *Untoy v. GE Capital Winchester Finance Limited* [2015] IEHC 557. In that case, the court had to consider the appropriateness of a very extensive series of questions in a case stated by the District Court pursuant to s.2 of the Summary Jurisdiction (Ireland) Act 1857, as extended by s.51 of the Courts (Supplemental Provisions) Act 1961. The court held that the questions required to be revised; however, O'Malley J stated that she did not believe that it would be helpful to remit the matter to the District Court for amendment as there were "*sufficient findings of fact to enable the court to deal with those aspects of the case that appear to be of most relevance to the transactions in question…"* [para. 120]. The court accordingly recast the questions and answered them without remitting the matter for amendment by the District Court.

25. While it may on occasion be necessary to send a case stated back to the Commissioner, I do not consider that course necessary in the present case. The findings of fact are clearly set out, as are the reasons for the determination. I do not consider that I am constrained by s.949AR (2) to send the case stated back to the Commissioner for amendment if I am of the view that the questions of law for the opinion of this Court should be amended or expressed differently, and that any such amendment may be effected by this Court without the need to send the case stated back to the Commissioner, a course which would only complicate matters, increase costs and delay the resolution of the matter.

26. The parties are each of the view that I should amend the questions asked. However, they do not agree as to what are appropriate amendments.

27. The appellant has no difficulty with the first question. It relates to the appellant's contention that he was 'ambushed' at the hearing before the Commissioner by being expected to answer questions about his investments in Moongate and The Laurels, in circumstances where he was not legally represented and had no advance warning that he would be expected to give evidence in relation to those investments. As the appellant puts it at para. 20 of his written submissions, "*…the question ultimately being posed is whether the Appeals Commissioner erred in law in relying on a failure to adduce evidence in respect of transactions which were not the subject of the assessment made by the Revenue at first instance".*

28. Revenue submits in relation to this question that it is a "*process*" question, i.e. that it relates to the procedural fairness or otherwise of the hearing, and is therefore not a question which is amenable to resolution by this Court on a case stated. Revenue therefore submitted that the question was not appropriate, although it made submissions in relation to the substance of the question, in case it was found by this Court to be appropriate.

29. The parties both accept that the second question could be usefully revised. In his written submissions, the appellant suggested that Revenue had recommended re-phrasing the question as follows: -

"(b) Whether the Appeal Commissioner erred in law in relying on the Appellant's inconsistencies of fact and his failure to adduce relevant documentary evidence in relation to transactions which occurred in 2005 and 2006; …"

30. This reformulation was said to be acceptable to the appellant. However, in Revenue's written submissions, it was stated that this was *"not an accurate portrayal of the position of the Respondent, or of the issue as raised by the Appellant until [the appellant's submissions] were filed…".* As Revenue stated at para. 19 of its submissions:

> *"…the Appellant's stated issue was with the legal duty to preserve evidence of the SMP transaction, which dates from 2007, not 2005 or 2006, not [sic] with the status of evidence of the Moongate or Laurels transactions. The Appellant, when requesting that a case be stated, pointed out that the SMP transactions date from 2007, alleged that the statutory duty to maintain records in relation to those records expired on 12 December 2014 (which the Appellant would say is both untrue and irrelevant), and sought to have a case stated on that point. For that reason, the Revenue Commissioners proposed amending the question to:*
>
> *(b) Whether the Appeal Commissioner erred in law in relying on the Appellant's inconsistencies of fact and his failure to adduce relevant documentary evidence in relation to transactions which occurred in 2007;*
>
> *(c) Whether the Appeal Commissioner erred in law in relying on an inconsistency between the Appellant's written submissions and his evidence, and on his failure to explain the inconsistency.*
>
> *The Appellant should not be permitted by this Honourable Court to now change the second question from an issue over the status of the SMP evidence to an issue over the status of the Moongate or Laurels evidence."*

31. The parties do not therefore agree as to the appropriate wording of the second question. They do however agree that para. (c) in the foregoing paragraph is an appropriate reformulation of the third question.

32. I will address the issue of whether there should be amendments to the questions in the case stated below, after considering the submissions of the parties.

Application to admit new evidence

33. At the outset of the hearing, counsel for the appellant sought to adduce further documentary evidence which had not been adduced before the Commissioner. There was no formal application before the court in this regard. Counsel sought to justify the introduction of the evidence by arguing that the appellant's conduct of the hearing before the Commissioner was fatally undermined by the perceived 'ambush' whereby the appellant maintained that he was required to give evidence in relation to Moongate and The Laurels without notice, and that it was necessary to bring evidence before the court which would have been adduced before the Commissioner if the appellant, who did not have legal representation, had anticipated this issue.

34. With the agreement of the parties, I inspected the documents in question. They comprised a letter of 11th September, 2020 from a retired bank manager offering an interpretation of certain notations on a bank statement relevant to a transfer from, and a lodgement to, an account held by the appellant; certain bank statements from August and December 2008, together with two documents entitled 'particulars of mortgage loan' and 'certificate of interest' in relation to an account held by the appellant and another person, both dated 31st December, 2008; and what appears to be an unsigned undated attendance note of a case management conference, which it would appear was attended by representatives of Revenue, and the Commissioner who ultimately presided over the hearing.

35. In this latter regard, I should say that both parties sought to make reference to what was agreed or understood by the parties as a result of what happened at the case conference, notwithstanding that neither the determination nor the case stated make specific reference to the case conference at all. While counsel for Revenue advanced criticisms of the attempt by the appellant to introduce a purported note of the case conference, the Revenue's own submissions contained a lengthy paragraph outlining what Revenue contended had occurred at that conference, and what the understanding of the parties was as a result in relation to what the appellant required to prove at the hearing of the appeal.

36. Counsel for Revenue submitted that the material should not be ruled admissible, particularly in the absence of a formal motion which referenced the usual criteria which govern the admission of new evidence for the purpose of an appeal. Counsel was particularly critical of an attempt to introduce evidence from a retired bank manager from 11th September, 2020, long after the hearing before the Commissioner. It was submitted that Revenue would have no opportunity to cross-examine in relation to this letter, or any of the other documents sought to be adduced.

37. I suggested to the parties that, rather than cause delay by prolonged submissions in relation to the admissibility of the documents, I should simply accept them *de bene esse*, and rule on their admissibility in my judgment. Counsel for both parties agreed to proceed in this manner.

Submissions generally

38. I propose to summarise briefly the submissions of each of the parties, rather than reproduce them in detail. However, I have considered carefully all of the written submissions and the submissions made to me at the hearing, and I have had the advantage of listening to the digital audio recording of the hearing for this purpose.

Submissions of the appellant

39. In the appellant's written submissions, issue is taken with Revenue's contention that the matter raised in the first question – whether the Commissioner was in all the circumstances entitled to have regard to the Moongate and Laurels transactions in circumstances where the appellant had no notice that these transactions would be in issue

– was one of 'process' and therefore more properly a matter for judicial review rather than the case stated procedure.

40. It was submitted that the decision of Finlay CJ in *Dublin Corporation v. Ashley* [1986] IR 781 was authority for the proposition that the court is entitled to have regard to matters which might not come within the province of a case stated:

> *"The purpose and effect of a consultative case stated by a Circuit Court Judge to the Supreme Court is to enable him to obtain the advice and opinion of the Supreme Court so as to assist him in reaching a correct legal decision. Having regard to that purpose and the relationship which exists between the two courts, it would, in my view, be quite inappropriate for the Supreme Court, for any reason of procedure, to abstain from expressing a view on an issue of law which may determine the result of the case before the learned Circuit Court Judge." [Page 785].*

41. The appellant contended that he was entitled to fair procedures, and that it was improper that he would be queried in relation to the Moongate and Laurels transactions where they did not form part of the Revenue's assessment. This theme was developed in relation to the second question raised by the Commissioner. It was submitted that s.886(4)(a)(i) of the TCA requires a person to keep records to enable the returns to be made for the purposes of income tax "*for a period of 6 years after the completion of the transactions, acts or operations to which they relate*…" It was suggested that the commissioner had erred in law in failing to have regard to the section in considering the significance of the failure of the appellant to produce documentary evidence of the investments in Moongate and The Laurels, which occurred in 2005 and 2006 respectively.

42. In addressing the third question raised by the Commissioner, and in particular the inconsistencies between the submissions on behalf of the appellant and the evidence tendered by him, to which the Commissioner referred to in his findings at para. 27 of the case stated, it was submitted that the appellant could not be expected to be privy to the arrangements regarding the other investors and SMP. The appellant was not a legally-qualified person; he had invested his money on the basis of the 'sales pitch' to him by Mr. Hynes. As Mr. Hynes was subsequently the subject of disciplinary action by the Institute of Chartered Accountants due to professional misconduct in relation to, *inter alia*, a failure to provide adequate information to investors, there was no reality to having Mr. Hynes attend to give evidence of investments in SMP. It was submitted that the appellant had presented the best evidence available to him, and to the extent that there were discrepancies between the evidence presented by the appellant and the written submissions of his agent, the evidence of the appellant was to be preferred, and that too much weight had been attributed by the Commissioner to the alleged inconsistencies.

43. Counsel for the appellant, Andrew Feighery BL, laid heavy emphasis in his submissions on a letter of 16th July, 2018 from Mr. Clinch of Seamus Maguire & Co to the appellant. The text of this letter was as follows: -

"Dear Mr. O'Sullivan,

From our records it is apparent that you lodged an amount in the sum of €300,000 to this firm's client account on the 14th June 2007 for the purposes of an investment in the Santa Maria partnership.

We hope that this may be of some assistance."

44. There was some confusion at the hearing before me as to whether this letter had been adduced in evidence before the Commissioner, as neither Mr. Feighery nor Mr. Kieran Binchy BL, who represented Revenue in the present application, had been involved in the hearing before the Commissioner. Reference was made to the letter in a schedule to the written submissions on behalf of the appellant to the TAC, but there is no reference to it in the determination or in the case stated. However, having taken instructions, Mr. Binchy was able to confirm that it had featured in the hearing before the Commissioner, and that Mr. Clinch had been cross-examined by Revenue in relation to it.

45. Counsel suggests that this letter constitutes sufficient proof that at least €300,000 was invested in SMP specifically, as opposed to Tuskar, and that as the appellant had only claimed a trading loss of €222,996 by way of offset against income from employment for 2009 and 2010, the Commissioner had sufficient evidence to establish that in excess of this sum had been invested in SMP and subsequently lost.

46. It was also submitted that the 2009 assessment, pursuant to s.955(2)(a) of the TCA, as amended by s.17(1)(g) of the Finance Act 2003, required to be raised within four years of the end of the chargeable period in which the return was delivered and that the assessment would therefore have had to be raised by 31st October, 2014, and was not in fact raised until 16th December, 2014. It was suggested therefore that the assessment for 2009 in the sum of €31,557 was invalid and should be disregarded.

Revenue's submissions

47. As regards the first question, Revenue made the point – not contested by the appellant – that it was disclosed to Revenue for the first time, two days before the appeal hearing, from documentary evidence disclosed by the appellant, that he had been an investor in the Moongate and The Laurels projects. It was submitted that this raised the possibility that transfers of monies made to Tuskar may have been for these developments rather than SMP, and that it was reasonable in the circumstances for the Commissioner to have regard to the existence of these developments, given the lack of documentary corroboration of the investment in SMP. It was submitted that the question of an 'ambush', as alleged by the appellant, did not arise.

48. Revenue submits in any event that if there were to be any question as to whether the Commissioner had based his decision on evidence which he should not have considered on the ground that to do so would infringe the appellant's rights to procedural fairness, this would more properly be an issue for judicial review than the case stated procedure.

49. Revenue submitted that the provisions of s.886A were of no relevance, as they did not reverse the burden of proof in the appeal, which both parties accepted was on the taxpayer. Section 886A merely created an offence if records were not kept for defined periods. It was submitted that the appellant never sought to argue before the Commissioner that lapse of time was the reason he did not have documentary evidence. Revenue did not in any event accept that there was any possibility that the time periods in the section had not been respected: the losses had been claimed in November 2011, and the assessments raised in December 2014, so that there was a three-year period during which the appellant would have been aware of the necessity to preserve records in case an assessment was raised.

50. Likewise, Revenue rejected the argument pursuant to s.955(2)(a) of the TCA in respect of the 2009 assessment on the basis that it had never been raised before the Commissioner. It was suggested in any event that the subsection's four-year time limit for the making of an assessment ran from the end of the chargeable period in which the return is delivered, and that the timeline would therefore have permitted the raising of an assessment in December 2014.

51. In relation to the Commissioner's third question concerning the reliance by him on submissions produced in preparation for the hearing for the purpose of determining credibility, Revenue submitted that the various changes in the appellant's case as documentation was disclosed were essentially matters which go to the credibility of the appellant and of the case put forward by him. It was submitted that, even if the Commissioner were not entitled to have regard to these inconsistences, there was still ample other evidence before him to justify his findings of fact and to support his conclusions.

52. Revenue submitted that there was no error of law on the part of the Commissioner, nor could it be said that there was no evidence on which the Commissioner could have come to the conclusions which he reached. While heavy emphasis was placed by counsel for the appellant on what he submitted was proof of an investment of €300,000 by the appellant in SMP, it was noted by counsel for Revenue that none of the questions raised by the Commissioner related to this supposed investment, and the six conclusions of the Commissioner – recited at para. 19 above – suggested that the Commissioner was of the view that the receipt by Mr. Hynes's solicitors of €300,000 was not evidence of a €200,000 investment in SMP as suggested by the appellant.

The format of the questions

53. While it is not clear how the questions posed by the Commissioner came to be formulated, it would appear that, by an administrative oversight, Revenue's observations on the questions, which were sought prior to finalisation of the case stated, were not taken into account. This may help to explain the unusual level of debate between the parties as to whether the questions appropriately reflect the issues which arise in this application on foot of the Commissioner's determination. As appears from paras. 21 to 32 above, the parties attempted prior to the hearing to reformulate the questions by agreement, but had limited success in this regard.

54. The first question relates to whether or not the Commissioner was entitled to rely on evidence given by the appellant in relation to the investments regarding Moongate and The Laurels, in circumstances where the appellant claims he was not prepared to deal with queries regarding those investments, having had no notice that they would be raised. No specific objection has been raised by either party to the wording of this question, although the appellant did state at para. 20 of his written submissions that "*…the question ultimately being posed is whether the appeals the Commissioner erred in law in relying on a failure to adduce evidence in respect of transactions which were not the subject of the assessment made by the Revenue at first instance*". I am not entirely satisfied with how this question is phrased, but I consider its meaning to be tolerably clear, and I do not propose any amendments. The objection of Revenue that it is not an appropriate question as the issue is one of "*process*" can be dealt with separately.

55. In relation to the second question, I think that this could usefully be rephrased. The appellant suggested an alternative wording which is set out at para. 29 above. Revenue disagreed that this was appropriate and suggested a wording – at para. 30 above – which referred to the purported *"failure to adduce relevant documentary evidence in relation to transactions which occurred in 2007..."* [emphasis added], rather than 2005 and 2006 as suggested in the appellant's version.

56. I think that the point which the appellant wants to make in relation to the 2005 and 2006 transactions - Moongate and The Laurels – is covered in the first question. The second question deals with whether the Commissioner erred in law in his assessment of the facts surrounding the SMP transaction, and in particular in relying on inconsistencies of fact and failures to adduce relevant documentation in this regard. The appellant's complaints about the Commissioner's assessment, particularly of Mr. Clinch's evidence and the letter of 16th July, 2018, come within the ambit of this question. I therefore propose to adopt Revenue's wording for the second question.

57. The Commissioner's third question appears to relate to whether the Commissioner was entitled to rely on inconsistencies between the appellant's submissions and the evidence given at the hearing. The wording proffered by Revenue is in my view more precise, and is acceptable to both parties. In the circumstances, I will substitute it for the Commissioner's third question.

58. As I stated at para. 25 above, I do not consider that any purpose would be served in the present case by sending the case stated back to the Commissioner for amendment in circumstances where I have had the benefit of submissions from both parties as to the suitability of the questions posed by the Commissioner. I am satisfied that s.949AR(2), which states that the High Court "*…may send the case stated back to [TAC] for amendment…",* is permissive only, and that the High Court can amend the questions to reflect more accurately the issues that arise on the case stated. Accordingly, the questions in the case stated will be as follows: -

> Whether the Commissioner erred in law:

(a) In relying on transactions relating to Moongate and The Laurels during the hearing of the appeal when such transactions were not dealt with at the initial hearing and the Appellant was not prepared to deal with those queries having had no notice that such queries would be raised;

(b) Whether the Appeal Commissioner erred in law in relying on the Appellant's inconsistencies of fact and his failure to adduce relevant documentary evidence in relation to transactions which occurred in 2007;

(c) Whether the Appeal Commissioner erred in law in relying on an inconsistency between the Appellant's written submissions and his evidence, and on his failure to explain the inconsistency.

Analysis of the issues

59. The law in relation to the jurisdiction of the High Court in an appeal by way of case stated is well settled, and not in dispute between the parties. In *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] ILRM 421 at 426, Kenny J described the jurisdiction of the court on a case stated as follows: -

> *"A case stated consists in part of findings on questions of primary fact e.g. with what intention did the taxpayers' purchase the Baggot Street premises. These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The Commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents, as is the Commissioner. If the conclusions from the primary facts are ones which no reasonable Commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however 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 he made from the primary facts were ones that no reasonable Commissioner could draw."*

60. In *DA MacCarthaigh, Inspector of Taxes v. Cablelink Limited* [2003] 4 IR 510, the Supreme Court cited this passage, and also cited with approval the following summary of principles by Blayney J in *Ó Culacháin v. McMullan Brothers Limited* [1995] IR 217 at 223:

> *"(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."

61. In *Deane v. The Revenue Commissioners* [2018] IEHC 519, Costello J cited this summary with approval and, while noting that the TAC had now succeeded the Appeal Commissioners pursuant to the Finance (Tax Appeals) Act 2015, held that the case stated in that case "*should be approached on the basis of the principles set out in Ó Culacháin as there is no reason in principle to vary the principles simply because of the establishment of the Commission*". [Page 3 of judgment].

62. There may be many cases in which, after a debate as to the intricacies of some abstruse section of the TCA, the Commissioner gives her decision, and the case stated procedure is invoked by the unsuccessful party so that the Commissioner may ask the High Court to advise as to the correct interpretation of the arcane provision for the benefit of the parties and the clarification of the true legal position. This is not such a case. The disagreement between the parties in the present case concerns the manner in which the Commissioner conducted the hearing and interpreted the facts which came before him. The issue which was central to the Commissioner's deliberation was identified at para. 3 of the case stated as follows: -

> *"The issue in this appeal was to determine whether the Appellant could satisfy the burden of proof to support his assertion that he invested €700,000 in the Santa Maria Property Partnership (SMP) and as a consequence seek to avail of loss relief pursuant to Taxes Consolidation Act 1997 (TCA) section 381."*

63. The parties were agreed that, as regards the TAC hearing, the burden of proof is on the taxpayer; as Charleton J put it 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".*

64. As the principles identified by Blayney J in *Ó Culacháin* make clear, the Commissioner's findings of fact should not be disturbed "*unless they are such that a reasonable [Commissioner] could not have arrived at them or they are based on a mistaken view of the law".* The core objection of the appellant to the Commissioner's findings is not so much that he made incorrect findings of fact, but that his inference from such findings of

fact that were made to the effect that the appellant had not proved his case was incorrect as a matter of fact and law.

65. In relation to the first question, Revenue considers that the issue raised is one of "*process*", and is not a "*question of law*" as is required by s.949AR(2) of the TCA. Essentially, Revenue argues that it is suggested that the Commissioner exceeded his jurisdiction by taking into account matters which, as a matter of procedural fairness, should not have been considered, and as such what is at issue is not a question of law amenable to resolution by this Court on a case stated, but a procedural and jurisdictional issue which can only be challenged by way of judicial review.

66. An analysis of this issue requires an examination of how the transactions regarding Moongate and The Laurels came before the Commissioners. The written submissions for the TAC hearing compiled by the appellant's agent do not refer to these transactions at all, and both parties are agreed that they were not mentioned or considered at the case management conference prior to the hearing at which the Commissioner was present. Counsel for Revenue informed this Court that the existence of those transactions was only made known to Revenue through documentation furnished by the appellant two days prior to the TAC hearing.

67. It is not disputed that Mr. Hynes channelled the investments made by individuals such as the appellant through Tuskar. However, the appellant required to prove that monies transferred to Tuskar were invested in SMP, and specifically that the €500,000 transferred to Tuskar on 16th July, 2007 were a contribution of capital to SMP. The evidence of the appellant is set out at paras. 12 to 14 of the case stated, and summarised at paras. 8 to 17 above. Revenue in its submissions has this to say about the appellant's evidence: -

> *"28 …no original contemporaneous documentation in relation to the SMP partnership was produced by the Appellant. The secondary documentation, such as unattributed appendices and vague emails, and the statement of net worth of the Appellant of questionable provenance, all produced by the Appellant at the hearing, were self-contradictory and contradicted the Appellant's own account of the investment. The AIB loan statement at best was evidence that a loan of €500,000 to the Appellant was transferred to 'Toskar Prop Holdin'. Under cross-examination the Appellant was unable to explain how alleged liabilities were funded, and was unable to explain the provenance of a €300,000 repayment to the same loan account. He was unable to explain why his alleged investment of €700,000 did not match his alleged holding of 9.86%, which at a pro-rata share would be granted to a €493,000 investment. He was unable to explain the source of funds: There would be an allowable loss only if the funds introduced were the Appellant's own, and were not repaid by Tuskar."*

68. While this is of course Revenue's view on the appellant's evidence, it is clear that the appellant's prospects of successfully appealing the assessment were significantly hampered by an almost complete absence of contemporaneous documentation which would corroborate that the investment had been made. Given that investments had been

made through Tuskar, and that documents disclosed by the appellant suggested that investments in two other projects had been made by the appellant in that company, it seems to me that, in circumstances where there was little or no documentation to corroborate the SMP investment, Revenue was entitled to cross-examine the appellant generally in relation to what exactly he had invested in Tuskar, and for what purpose.

69. It does not seem to me that Revenue could have been precluded from asking questions about Moongate and The Laurels, and raising the possibility that monies paid to Tuskar could have been intended or ultimately used for the purposes of those investments rather than SMP.

70. Paragraph 13(j) of the case stated, quoted at para. 12 above, indicates the line of questioning pursued by Revenue – based on documentation supplied by the appellant – and his response. These inquiries would not have been necessary if the appellant had been able to corroborate his investment in SMP with appropriate documentation. In the absence of such documentation, Revenue was entitled to interrogate the possibility that monies paid to Tuskar were for purposes other than investment in SMP.

71. The appellant argues that he had no notice of this issue. It is often the case, whether in court or in a specialised tribunal such as the TAC, that unexpected and unanticipated issues arise in cross-examination. When this happens, it is open to a party who considers he has been disadvantaged procedurally and deprived of the opportunity to adduce evidence which would be of particular relevance to the issue, to request an adjournment of the matter to enable him to deal with it. No such application appears to have been made to the Commissioner, and even at this stage, there has been no indication of what steps would have been taken by the appellant if he had been given notice that the issues of Moongate and The Laurels would be raised.

72. I note that the appellant was not legally represented at the hearing before the Commissioner. Perhaps a solicitor or barrister instructed by the appellant would have foreseen the possibility that, given the absence of documentary corroboration of the investment in SMP and the fact that all investments with Mr. Hynes appear to have been channelled through Tuskar, some evidence as to the investments in Moongate and The Laurels might be required at the hearing. Such a person might also have been more attuned to the possibility of seeking an adjournment of the hearing if further useful evidence regarding those investments could be adduced.

73. However, none of this occurred. I am satisfied that the Commissioners did not err in law by permitting questions in relation to Moongate and The Laurels, and relying on the evidence which emerged in relation to these issues to inform his conclusions. The Commissioner heard evidence which he was entitled to consider in making his findings of primary fact.

74. I do not consider that the issue raised by the appellant, even if it were correct or justified, indicates the possibility of a procedural failure so fundamental that it is indicative of a lack of jurisdiction. Accordingly, a judicial review is not necessary to decide this issue.

75. In relation to the second question, the standard which I have to apply is that set out *in Ó Culacháin* at para. 60 above. I cannot find that the Commissioner erred in law in making his findings of primary fact unless there is no evidence to support them. His conclusions in relation to those facts should not be set aside "*unless the inferences which he drew were ones which no reasonable [commissioner] could draw".*

76. Effectively, this means that, in order to hold for the appellant, I would have to be satisfied that the case he made to establish his entitlement to set off trading losses was so compelling that no reasonable Commissioner could have refused the reliefs sought. In this regard, counsel for the appellant submitted that Mr. Clinch's letter of 16th July, 2018 referred to at para. 43 above was such that it proved an investment in SMP of €300,000, and this alone was sufficient to establish an entitlement to the reliefs sought.

77. Mr. Clinch was at a disadvantage in giving evidence in that he was not personally involved in the transactions, and was relying on the firm's records rather than his own recollection. The case stated records that he "…*was relying on an email between his former colleague a Mr. Fergal Dowling and Mr. Hynes dated 14th June 2007 in which Mr. Hynes stated 'I assume these funds came from [the Appellant] of which €100,000 will need to be transferred to our account for value today to reimburse us for [the Appellant's] share of costs in relation to [architect's fees and interest to Anglo etc] I will confirm that with [the Appellant] is the remitter of the funds @ 11.30am (he is attending the office)'. However, no evidence was furnished that the monies actually related to the Appellant".*

78. It is clear from the case stated that there was considerable confusion regarding this €300,000. Mr. Clinch records it as being lodged to his firm's client account on 14th June, 2007. The case stated refers to a lodgement to an account of Mr. Hynes and his wife on 8th July, 2008 in the sum of €300,000 in respect of which "…*the Appellant was unable to clarify the source…he was unable to confirm whether that lodgement represented a return of capital from a project managed by Mr. Hynes…"* [para. 12(e) case stated].

79. The case stated also refers to a difference in the explanation of the €100,000 which the appellant stated was paid to Mr. Hynes as "*commission for the property-based investments".* Mr. Clinch's evidence was that this sum "*went to discharge architect's fees and interest obligations relating to the Moongate property*".

80. Counsel for the appellant attributed the failure to adduce corroborative documentation to the fact that the appellant was "*not a legal person*" who simply invested the monies and trusted Mr. Hynes to administer the investments appropriately. He said that there was no reality to requesting Mr. Hynes to give evidence on the appellant's behalf. While that may be so, the written submissions made on behalf of the appellant to the TAC suggests that the appellant was not a "hands-off" investor by any means: -

> "*12. The appellant had carried out significant work in putting together the opportunity in identifying the site, establishing the planning credentials, preparing cashflows, arranging valuations, negotiating the site purchase and arranging Bank finance...*

20. The activity of the partnership and the development of the site absorbed all of Captain O'Sullivan's time and energy from 2008 until 2012."

81. In hearing the case stated, this Court must be careful not to substitute itself for the Commissioner and fall into the error of re-evaluating the evidence. Even if I were of the opinion that I would have come to a different conclusion, it would be improper to substitute that conclusion for the one reached by the Commissioner unless I were of the view that a reasonable Commissioner could not have arrived at that conclusion on the known facts. The Commissioner had the benefit of hearing the evidence of the appellant, Mr. Clinch and Ms. Atkinson, and of forming a view as to the weight to be given to that evidence. He was uniquely placed to evaluate this evidence, and did so while being presented with virtually no contemporaneous corroborating documentation which would have definitively demonstrated the appellant's involvement in SMP and exactly what he invested in that partnership.

82. A significant factor in the determination was that, while the Commissioner accepted that the appellant had transferred €500,000 to Tuskar, "*…there was no supporting evidence to show how those funds were allocated across the 3 projects managed by Tusker [sic] on behalf of the appellant…*" [para. 17 determination].

83. The Commissioner was also not satisfied with Mr. Clinch's evidence regarding the purported investment of €300,000 in SMP, describing his evidence as "*…opinion rather than factual evidence as to how those funds were utilised*" [para. 20 determination].

84. In coming to his conclusions, the Commissioner took into account inconsistencies of fact, particularly as regards documentation which suggested differing levels of capital contribution by the partners. These inconsistencies, together with the absence of evidence which indicated how the €500,000 paid to Tuskar was allocated across the three investments, and the inability of the appellant to explain the provenance of the lodgement of €300,000 to his account in July 2008 meant that, in the view of the Commissioner, it was "*not possible to determine how much the Appellant invested in SMP".*

85. Taking the determination as a whole, I am not satisfied that the Commissioner erred in law in relying on the appellant's inconsistencies of fact and his failure to adduce documentary evidence in relation to the transactions which occurred in 2007. Applying – as I must – the standard in *Ó Culacháin*, I do not consider that it can be said that the conclusions to which the Commissioner came in this regard were such that a reasonable Commissioner could not have arrived at them.

86. The third question relates to whether the Commissioner erred in law "*in relying on an inconsistency between the Appellant's written submissions and his evidence, and on his failure to explain the inconsistency".*

87. This is a reference to the first two paragraphs of the determination, which are as follows: -

"15. The Appellant was emphatic in his evidence that he invested €700,000 in SMP. However, this evidence conflicts with the written submissions made by his agent in which it was asserted that he contributed €500,000 to SMP.

16. The written submissions also refer to a total capital contribution made by all partners to SMP was [sic] €5 million whereas the Appellant produced a document stating that the capital contribution was €6 million. There was also an unexplained discrepancy in that document reflecting a conflicting partner capital contribution of €7 million. Furthermore, the Appellant was also unable to reconcile or provide any explanation as to how one particular investor had obtained a 7.04% share in SMP notwithstanding that he had not made any equity contribution."

88. The written submissions on behalf of the appellant also referred to the appellant having invested €800,000 in the partnership – see paras. 33 and 40 of those submissions in this regard. While the case stated refers to the submissions as having asserted that the appellant "*contributed €500,000 to SMP*", it is in fact suggested, at para. 10 of those submissions, that the appellant "*personally invested €500,000 in the project*". The author may have been drawing a distinction between the €500,000 paid to Tuskar in July 2007 and the sum of €300,000 purportedly lodged to the account of Seamus Maguire & Co. in June 2007, although this is still inconsistent with the "*emphatic*" assertion of the appellant that he invested €700,000 with Tuskar.

89. In any event, I cannot see any error in law where the Commissioner takes into account inconsistencies between the written submissions of the appellant – which are presumably drafted on his instructions and approved prior to issue – and his evidence to the Commissioner. The Commissioner is entitled to take such matters, and any failure on the part of the appellant to explain any such inconsistency, into account when assessing the appellant's credibility and the strength of his evidence, particularly in circumstances where there is an absence of documentation corroborating the appellant's case.

90. In relation to the appellant's argument that the Commissioner failed to have regard to s.886(4)(a)(i) of the TCA in considering the appellant's failure to produce documentary evidence of the investments, this argument appears to me to be misconceived. 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. The section, which creates an offence for failure to retain records for certain periods, does not relieve the taxpayer from the burden of proof in a tax appeal, and in my view, the Commissioner is entitled and indeed obliged to consider the implications of any lack of documentation relevant to the taxpayer's affairs.

91. The point raised by the appellant in relation to s.955(2)(a) of the TCA in relation to the 2009 return – see para. 46 above – seems to me to be likewise devoid of merit. The point was not raised before the Commissioner, nor was it raised by the appellant in the notice required by s.949AP(2), which pursuant to s.949AP(3)(c) requires to be sent to the

TAC within 21 days after the TAC's notification of its determination. Section 949AQ(1)(b) provides that "*…a party who has set out in a notice, by the means provided for by s.949AP(2), a point of law may not set out an additional or alternative point of law after the period referred to in s.949AP(3)(b) has elapsed*".

92. It does not seem to me therefore that I can consider the point. In any event, it is not apparent to me how it could apply to the present circumstances, given that s.955(2)(a) prohibits an assessment being 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…*". As the return was made in November 2011, and the amended assessments issued in December 2014, it is difficult to see how it could be contended that the assessment was not issued within time.

New evidence

93. While there are provisions of the Rules of the Superior Courts governing applications for leave to admit additional evidence, those orders relate to appeals to the Court of Appeal and the Supreme Court. There is no provision of the Rules of the Superior Courts, or of the TCA, which governs or even envisages the admission of new evidence on a case stated from the TAC.

94. It has been held that a court hearing a judicial review application cannot receive and consider new evidence. As Hogan J stated in *Efe v. Minister for Justice, Equality and Law Reform* [2011] 2 IR 798, "*…if the Court acted upon new evidence, then it would no longer be simply reviewing the decision already taken, but it would be acting on foot of new information of which the decision-maker never stood possessed".*

95. A quick survey of the jurisprudence relating to appellate courts hearing new evidence makes clear that courts are very reluctant to admit additional evidence on appeal. As O'Donnell J remarked in *Emerald Meats Limited v. Minister for Agriculture* [2012] IESC 48 at para. 36: -

> *"The rules on the admission of fresh evidence on an appeal are quite strict. This is as it should be. There are very few cases in which the losing side does not regret that different witnesses were called, evidence given or points made either in cross-examination or in submission. But a trial is not a laboratory experiment where one element can be substituted and all other elements maintained and a different outcome obtained. It is important that parties are aware of the finality of litigation, and bring forward their best case for adjudication. Cases develop organically and unpredictably. One of the benefits which litigation brings at some cost is certainty. A party may reasonably dispute the merits of a conclusion, but cannot doubt that it is a conclusion. The court must make its decision on the evidence and case advanced on the day, or in this case, over the 17 days. It is partly for this reason that the rules and practice of the courts go to such elaborate lengths to attempt to ensure that both sides are fairly apprised of what is in dispute and have an adequate opportunity to prepare for the litigation. It is also why appellate courts have developed rigorous tests on applications to admit fresh evidence. There are*

few cases which in hindsight could not be rerun with different witnesses, evidence, arguments, or advocates, but to consider that such a course is in the interests of justice is to engage in the delusion that endless litigation is a desirable rather than a tormented state."

96. However, it has long been recognised that an appellate court has a discretion to admit additional evidence where the exclusion of that evidence could lead to injustice, and the Rules of the Superior Courts recognise the full discretionary power of the Court of Appeal and the Supreme Court – at O.86A, r. 4 and O.58, r.30 respectively – to receive further evidence on questions of fact.

97. As we have seen, s.949AR requires that the High Court *"hear and determine any question of law arising in a case stated…*". Section 949AR(1)(c), in addition to giving the court power to "*reverse, affirm or amend*" the court's determination, permits it to "*make such other order in relation to the matter as it thinks just".*

98. Notwithstanding the very general way in which s.949AR(1)(c) is expressed, it seems to me that this power must be seen in the context of the court's jurisdiction under the TCA. While the term "*appeal*" is used in the sections governing the case stated procedure, it seems to me that the court's statutory function is limited to hearing and determining "*any question of law arising in a case stated…".* It does not extend to receiving and considering further evidence.

99. If I am incorrect in this conclusion, and the High Court does have an inherent residual power to admit new evidence on a case stated from the TAC, I am satisfied that the present case is not an appropriate one in which to do so. I do not consider any of the material to be of such probative value that to refuse to consider it would amount to a denial of justice. No application has been made to the court in advance of the hearing for their admission. There is no suggestion that the bank statements and the two documents entitled "*particulars of mortgage loan*" and *"certificate of interest*" would not have been available to the appellant prior to the hearing before the Commissioner. The letter of 11th September, 2020 from the retired bank manager is advanced with a view to explaining some of the notations on the statements. Revenue has had no opportunity to consider this material in advance of the hearing, much less a chance to cross-examine the author of the letter. As both parties accept that the investments in Moongate and The Laurels were not acknowledged as an issue at the case management conference, the unsigned note of that conference does not advance the appellant's case at all.

100. In all the circumstances, I was not prepared to accede to the appellant's application to have these documents admitted, and have not taken them into account in the conclusions which I have reached.

Conclusion

101. It follows from the foregoing that

- I consider that the appropriate questions of law arising from the matters set out in the case stated are those set out at para. 58 above, and accordingly there will be an order pursuant to s.949AR(1)(c) amending questions (b) and (c) set out at para. 30 of the case stated in accordance with the reformulated questions at para. 58 above;

- I do not consider that the Commissioner erred in law in his determination in relation to the issues as set out in those questions;

- There will be an order of this Court affirming the determination of the Commissioner pursuant to s.949AR(1)(a).

102. As this judgment is being delivered electronically, I will give the parties 14 days from the date of the judgment to make brief submissions as to the form of the orders to be made, and in particular the question of costs, after receipt of which submissions the court will make formal orders without further reference to the parties.