THE HIGH COURT

[Record No. 2023/259R]

[2026] IEHC 379

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 941 OF THE TAXES CONSOLIDATION ACT 1997

Between

THE REVENUE COMMISSIONERS

Appellant/TAC Respondent

and

CHILI BAGAN RESTAURANT LIMITED

Respondent/TAC Appellant

Judgment of Mr. Justice Dignam delivered on the 17th day of June 2026

INTRODUCTION

1. This is a case stated for the opinion of the High Court pursuant to section 949AQ of the Taxes Consolidation Act 1997, as amended, in relation to a determination issued by the Tax Appeals Commissioner ("the TAC") on the 22nd March 2023. The case stated was made at the request of the Revenue Commissioners (who were the respondents before the TAC in an appeal brought by Chili Bagan Restaurant Limited). I will refer to the parties as "the Revenue Commissioners" and "Chili Bagan" respectively.

2. The determination relates to Value Added Tax and to Corporation Tax. The case stated is only concerned with the determination insofar as it relates to Corporation Tax and, in fact, is only concerned with a particular aspect of that part of the determination. It would be helpful to explain the background briefly to put that in context.

BACKGROUND

3. Chili Bagan was selected for an audit by the Revenue Commissioners on the 15th November 2017. The scope of the audit was VAT for the period 1st November 2014 to 31st August 2017 and Corporation Tax for the period 1st November 2014 to 31st October 2016. The audit in respect of Corporation Tax was subsequently extended to include the period 1st November 2016 to 31st October 2017.

4. Following the audit, the Revenue Commissioners issued additional assessments to VAT. The amounts are not relevant to the questions to be determined. The Revenue Commissioners also issued assessments to Corporation Tax in the sum of €8,210 and €21,739 for the financial years ending 31st October 2016 and the 31st October 2017 respectively. These included a 10% surcharge for filing negligent Corporation Tax returns. The Revenue Commissioners also assessed Chili Bagan on additional sales of €59,712 and €158,104 for the financial years ending 31st October 2016 and 31st October 2017 respectively.

5. Chili Bagan appealed against these assessments to the TAC. Essentially the case made by Chili Bagan in that appeal, according to the case stated, was that the underlying figures forming the basis of the assessments could not have been achieved in the business even if it was working at full capacity, and that a number of discrepancies in its accounting system arose from a change in the EPOS system and customers not paying for meals owing to poor service or one customer paying the bill for several tables. The case was made that the Revenue Commissioners' assessments were flawed and exaggerated. It was also submitted that payments had already been made to the Revenue Commissioners and that any further payments required to be made would result in undue hardship and a loss of livelihood. It was also submitted that the onus of proving that the assessments were reasonable and accurate fell on the Revenue Commissioners. Save for the last of these, they are not directly relevant to the issues which have to be determined by this court. The issue which ultimately was determined by the TAC and is the subject of this case stated was not raised by Chili Bagan.

6. The TAC determined that the assessments to VAT should be reduced to a lesser sum because the assessments were not prepared using the "best judgment" or using "reasonable opinion". In relation to the Corporation Tax, the TAC reduced the amount of the liability (paragraphs 54 and 55 of the determination) but, most importantly, also determined that the assessments to Corporation Tax should be reduced to nil on the basis that Chili Bagan had sufficient unutilised Corporation Tax losses available from previous periods which, when applied against the additional income assessed by the Revenue Commissioners, reduced the amount of tax to be paid to nil. The Revenue Commissioners explained in their written submissions that if a company sustains trading losses in an accounting period, they may be offset as a means of relief from tax against other trading income for the same accounting period or the immediately preceding accounting period. Unused trading losses can be carried forward, without time limit, against trading income of the same trade in future accounting periods. In order for a company to have an entitlement to utilise a trading loss, the company must (a) have an allowable loss in a given amount and (b) some or all of that amount must not have already been utilised in reduction of tax liabilities.

7. The determination that Chili Bagan had sufficient unutilised losses to reduce the liability to nil was based on the finding of fact made by the TAC at paragraph 39.18 of the determination that "*At 1st October 2016, the Appellant had the sum of €378,293 in unutilised CT losses*." It is more fully set out at paragraphs 56 – 58 of the determination:

> "56. The Commissioner notes that the Appellant had allowable CT losses of €378,298 as at 1st November 2015. As the Appellant is entitled to offset those losses against any future profits of its business under section 382 TCA 1997, it follows that the additional CT assessments for the accounting period ended 31st October 2018 in the sum of €69,724 may be offset against these losses carried forward thereby reducing the corporation tax liability to nil. This offset is subject to the Appellant's losses being reduced by the amount of such offsets."
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> 57. As section 1084 TCA 1997 permits the Respondents to apply a surcharge to the Appellant's liability, it follows that as the Appellant's CT liability for the period under appeal is nil, the surcharges for those periods should also be reduced to nil.
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> 58. Accordingly the commissioner determines that the appellant has partly succeeded in its appeal and directs that...the Respondent's assessments to CT be

reduced to nil by virtue of the foregoing adjustments and the availability of losses carried forward by the appellant from earlier accounting periods."

8. It is this determination, and particularly the manner in which the underlying finding of fact and the determination were made, which form the basis of the case stated.

9. The manner in which this determination was made by the TAC is not set out in any significant detail in the body of the case stated or the determination (it is referred to in paragraph 6 of the case stated) but it is set out in a letter of the 2nd May 2023 from the Revenue Commissioners to the TAC which is exhibited to the case stated. In any event, save for some differences in emphasis, there is no real disagreement between the parties on this. At the hearing of the appeal, the TAC asked the Revenue Commissioners whether Chili Bagan had unutilised Corporation Tax losses. The question of unutilised taxes had not been raised by Chili Bagan as part of the appeal and an officer of the Revenue Commissioners committed to ascertaining the position and providing the TAC with the necessary information in early course. The TAC told the Revenue Commissioners in an email later that day that it was not necessary to provide that information because the position had been confirmed by Chili Bagan. In particular, the TAC informed the Revenue Commissioners by email of the 29th November 2022 that "*For the avoidance of doubt, the Respondent is no longer required to submit the losses forward or CT1's, as requested this morning at the hearing, as the Appellant has now submitted these.*" It seems (from Chili Bagan's written submissions) that the company's tax agent provided the "*Form CT1 Return Summary*" for the years ending 31st October 2015, 2016 and 2017 and company accounts for the same years. The Form CT1 Return Summary for 2015 stated "*Amount of losses forward not used in this accounting period and available for carry forward to succeeding accounting periods: €378,293*" and the return for 2016 said "*Trading Losses Forward (from earlier accounting period(s)): €378,293*". The documents were not provided to the Revenue Commissioners by either Chili Bagan or the TAC. It was pointed out on behalf of Chili Bagan that as the Form CT1 is a tax return, the Revenue Commissioners would already have had copies of the CT1s. It is worth mentioning at this stage that Chili Bagan refers in a number of places in their written submissions to the Revenue Commissioners having failed to provide the requisite information. It is difficult to understand this allegation in circumstances where it is common case that the information was provided by Chili Bagan the very same day as the hearing.

10. The Revenue Commissioners challenged this determination and the TAC's entitlement to reach it in their letter of the 2nd May 2023, in which they requested that a case be stated for the opinion of the High Court. According to the case stated (paragraphs 5 – 7), following receipt of this letter, the TAC requested the parties to attend a Case Management Conference under the provisions of section 949T(1) the Taxes Consolidation Act 1997 ("the TCA") in order to "*discuss the quantum of available CT losses carried forward which the Commissioner determined was €378,293 (paragraph 39.18 of the determination and which were obtained from the Appellant's CT return provided to the Commissioner by the Appellant after the hearing) and the available CT losses disclosed in the Respondent's Outline of Arguments, €168,084. As either of those CT loss figures materially absorbed the CT charge on the additional income arising from the Commissioner's findings, it was anticipated that the parties might come to an agreement, without incurring additional time and cost and without the need for the matter to be referred to the High Court*." The Revenue Commissioners agreed to attend the Case Management Conference. Chili Bagan declined to do so on the basis, inter alia, that once the TAC made its determination it was final and the only way the matter could be dealt with was by case stated to this court.

CASE STATED

11. The questions raised in the case stated are:

> "20.1 Did the Commissioner err in law in finding as a material fact, at paragraph 39.18 of the Determination that: "At 1st October 2016, the Appellant had the sum of €378,293 in unutilised CT losses"?
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> 20.2 Did the Commissioner err in failing to adhere to or have regard to the burden of proof in making the foregoing finding of fact?
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> 20.3 Did the Commissioner err in law in relying, on the said finding of fact, on evidence which was not admissible or admitted on appeal."

12. The principles applying to appeals by way of case stated are well-established and it is not necessary to discuss them in any real detail. It is sufficient to refer to *Mara v Hummingbird [1982] ILRM 421 and Ó Cúlacháin v McMullen Brothers Limited [1995] 2 IR 217*. In *Mara v Hummingbird*, Kenny J stated:

"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 aside unless the inferences which he made from the primary facts were ones that no reasonable Commissioner could draw."

13. In *Ó Cúlacháin v McMullen Brothers*, Blayney J, on behalf of the Supreme Court summarised the position as follows (at page 222-223):

"In the light of these statements of the law it seems to me that when a court has before it a case stated seeking its opinion as to whether a particular decision was correct in law, the following principles apply (I refer in them to a case stated by a judge, as is the position here, but they apply equally where the case is stated by the Appeal Commissioners or by any other party):—

(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."

DISCUSSION

14. It seems to me that the questions posed, while separate, are interconnecting and the discussion of each feeds into the discussion of the others.

15. There are a number of issues with the determination made by the TAC.

16. Firstly, the question of unutilised allowable losses was not raised by Chili Bagan as part of the appeal. There is no reference in either the case stated or the determination to Chili Bagan raising the issue of such losses as one of the bases upon which it was claimed that the assessments by the Revenue Commissioners were incorrect. This point is not referred to in the TAC's discussion in the determination of the submissions made on behalf of Chili Bagan (paragraphs 19 – 29). Furthermore, at paragraph 14 of the written submissions filed in this court on behalf of the Revenue Commissioners, it was stated *"...Notably, the Appellant had not contended, in its grounds of appeal, that the presence of allowable losses formed a basis on which to abate or reduce to nil, the CT Assessments*". At paragraph 11 of those written submissions, it was submitted that "*The Taxpayer did not establish, nor even attempt to establish in evidence at appeal that it had an entitlement to loss relief, or that it had not utilised such loss relief as it might be entitled to.*" At paragraph 25 it was submitted that *"...the proposition that the Taxpayer had allowable losses to set off against any CT liability, if confirmed, was not included in its grounds of appeal against the CT Assessments*." None of these assertions are disputed by Chili Bagan. I am, therefore, satisfied that the question of unutilised losses was not part of Chili Bagan's appeal and was not dealt with in any substantive manner at the appeal.

17. Thus, leaving aside any of the issues which I go on to discuss shortly, it seems to me that the TAC erred in law in relying on information that was not relevant to an issue in the appeal, and in making a finding of fact on an issue that was not an issue in the appeal.

18. I want to emphasise that I am not concluding as a general proposition that the TAC is precluded from dealing with an issue which was not originally raised or that the TAC may not allow the original points raised by a taxpayer to be expanded. That case was not argued before me. What is significant in this case is that the TAC made the determination on the basis of information that was provided to it by Chili Bagan in respect of an issue which had not been raised prior to, or in any substantive way, at the appeal hearing, and in respect of which there appears to have been no application made to raise that issue. Any jurisdiction to consider such additional issues or to allow the expansion of grounds of appeal must provide both sides with an opportunity to fully address the question of whether the party should be permitted to raise the new point and to address the substance of the issue itself. That was not done in this case.

19. This omission is also directly relevant to the question of procedural fairness, which I return to. The present point is that the TAC erred in law in making a find of fact on the basis of information which was not relevant to an issue raised by the appellant in the appeal before the TAC. In my view, this amounts to an error of law.

20. That in itself determines the first and third questions raised in the case stated, and requires both questions to be answered "Yes". However, in case I am wrong on this and, in order to decide the other questions, I propose to go on to consider a number of other issues. That consideration assumes that the question of unutilised losses was properly an issue in the appeal before the TAC.

21. It is appropriate to place these issues in the context of the statutory provisions governing appeals to the TAC and how they should be conducted.

22. Section 949AC of the TCA provides that the TAC may allow evidence to be given orally or in writing and may admit evidence whether or not the evidence would be admissible in proceedings in a court in the State. Section 949H(1) requires the TAC to manage and conduct proceedings in a way that will meet the reasonable expectations of members of the public (and tax payers in particular) with regard to undue formality being avoided and a flexible approach being adopted by the TAC in relation to procedural matters. Section 6(2) provides, inter alia, that it shall be a function of the TAC to decide on the appropriate procedure to be adopted in relation to an adjudication of an appeal. Section 6(4) provides that the TAC shall perform their functions in a manner that has regard to the need for proceedings to be accessible and fair, and to be conducted as expeditiously as possible.

23. As discussed above, the manner in which the TAC dealt with the "*unutilised losses*" issue was to accept, after the hearing, Corporation Tax returns and company accounts from Chili Bagan as evidence that the company had unutilised losses of €378,293.

24. It was submitted on behalf of the Revenue Commissioners that these documents do not constitute evidence. For example, it was submitted at paragraph 11 of the written submissions that "*There was no evidence to support the finding contained in §39.18*".

25. There are, of course, two limbs to the finding at paragraph 39.18: firstly, that there were allowable losses; and secondly, that those losses had not been utilised. (In fact there are three, the other being the amount of allowable unutilised losses, but I do not need to engage with this).

26. I do not accept that the CT return or the company accounts do not constitute evidence of allowable losses or that those losses have not been utilised, even where the information was submitted after the hearing. Thus, I am satisfied that there was information which is capable of being evidence of allowable unutilised losses of €378,293. The question of whether such evidence is of any weight is a separate question. More importantly, the questions of whether that information is admissible as evidence, whether it was correctly admitted, and whether the manner in which it was admitted as evidence by the TAC, were in accordance with law are also separate matters.

27. In relation to these questions, it bears repeating that the information was prepared solely by Chili Bagan. The TAC simply received the information, admitted it into evidence and made its finding based on the contents of the information without seeking the Revenue Commissioners' position in relation to the information. The omission to obtain the Revenue Commissioners' position before admitting the information as evidence and, more importantly, relying on it to make a finding of fact, is not just a technical or academic point. It is clear from the written submissions made on behalf of the Revenue Commissioners that they would have disputed the claim that there were allowable losses of €378,293 and that there were any unutilised losses.

28. The position of the Revenue Commissioners was set out in their written submissions to this court. For example, at paragraph 12 of the written submissions, the Revenue Commissioners stated, inter alia, that "*While the information received from the Taxpayer was not passed on to Revenue by TAC, based on the Determination and particular, §39.18, it appears that the Appellant purported to confirm that it had unutilised CT losses of €378,298 by reference to a CT return. This assertion was wrong. In fact, the claimed losses of €378,298 had not been accepted by Revenue, which had issued an assessment to CT (on 11 December 2018) reducing allowable losses for the CT period 01 November 2014 – 31 October 2015 from €378,298 to €168,084. That assessment was not appealed.*" In relation to the question of whether the losses were unutilised, paragraph 12 goes on to say "*Moreover, the entire of the Appellant's available losses of €168,084 had been utilised in the CT period 01 November 2015 – 31 October 2016 prior to the appeal and were taken into account in the Assessments. No further sums were available to be offset in reduction of liabilities*." At paragraph 19, the submissions state "*Moreover, the question logically arose as to whether the losses accepted as arising had, by the time of the appeal hearing, <u>been utilised</u>. This matter was not addressed in evidence, or by way of information to the Commission at all. The position is that the losses which were accepted as allowable <u>were</u> taken into account in the computation of the CT Assessments and <u>were not</u> available to the Appellant at the time of the appeal. However, <u>no evidence or information</u> was tendered on this point at all.*" [emphasis in original]

29. I emphasise that I do not make any findings in relation to the substance of these matters. Their significance is that they would have been raised by the Revenue Commissioners.

30. It seems to me that the TAC erred in law in admitting the information provided by Chili Bagan into evidence and relying on it to make the finding of fact without affording the Revenue Commissioners an opportunity to address or respond to that information. Even if the TAC is entitled to accept evidence in the manner in which it was done in this case, that evidence may only be admitted and relied upon where an opportunity is given to the other party to address, respond to, or challenge the evidence. That was not done in this case. As I have just discussed, the Revenue Commissioners are likely to have put a number of matters before the TAC if such an opportunity had been provided. The point was made on behalf of Chili Bagan that it was clear from the email of the 29th November 2022 that Chili Bagan were relying on the Corporation Tax return and that the Revenue Commissioners already had the return. Presumably, the point is that they could have raised these points with the TAC. In my view, that does not remove the obligation on the part of the TAC to expressly provide the Revenue Commissioners with an opportunity to address the information, particularly where it had not been originally raised by Chili Bagan.

31. While section 949AC allows for the relaxation of the rules of evidence and requires regard to be had to reasonable expectations with regard to the avoidance of undue formality and with regard to the adoption of a flexible approach by the TAC, these do not permit a departure from the fundamental requirements that any evidence would be relevant to an issue in the appeal and that evidence would only be admitted if the other party's position is sought and/or obtained.

32. In all of those circumstances, I am entirely satisfied that the TAC erred in law in finding as a material fact, in the manner in which he did so, that Chili Bagan had €378,293 in unutilised losses. I am also satisfied that the TAC erred in admitting and relying on the evidence.

33. It was submitted on behalf of Chili Bagan that the burden of proof in this case was in fact on the Revenue Commissioners. The first point about this is that the TAC clearly stated that the burden was on Chili Bagan and no question has been stated for the opinion of this court on that point. In any event, I am satisfied that the TAC was correct in stating that the burden rested on Chili Bagan. That the burden rests on the taxpayer is clear from *Menolly Homes Limited v The Appeal Commissioners and the Revenue Commissioners [2010] IEHC 49*. This was recently referred to by Barr J in *McNamara v Revenue Commissioners [2023] IEHC 15*. Barr J stated:

> "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…""

34. It was accepted on behalf of Chili Bagan that the burden of proof is normally on the taxpayer. However, they relied on *Hanrahan v Merck Sharp & Dohme (Ireland) Limited [1988] IESC 1* and *Rothwell v The Motor Insurers Bureau of Ireland [2003] IESC 16* to argue that the burden of proof should be reversed in this case.

35. In my view, these cases are of very little assistance in the case of a tax appeal. Both cases were concerned with tort claims brought in civil litigation. In *Hanrahan*, it is clear that the principles being discussed were those applying in such litigation. Henchy J said "*The ordinary rule is that a person who alleges a particular tort must, in order to succeed, prove (save where there are admissions) all the necessary ingredients of that tort and it is not for the defendant to disprove anything. Such exceptions as have been allowed to that general rule seem to be confined to cases where a particular element of the tort lies or is deemed to lie, pre-eminently within the defendants' knowledge, in which case the onus of proof as to that matter passes to the defendant.*" In *Rothwell*, Hardiman J said that *Hanrahan* "*appears accurately to state circumstances in which, and the basis on which, the onus of proof may shift in civil litigation*."

36. As is clear from Charleton J's decision in *Menolly Homes*, referred to in the passage from *McNamara*, an appeal to the TAC is not equivalent to a civil claim in tort.

37. Even if I am wrong that *Hanrahan* and *Rothwell* are of little assistance, it seems to me that there is no basis upon which the burden of proof should be reversed if the principles in those cases are applied. In *Hanrahan*, Henchy J said the "*rationale behind the shifting of the onus of proof to the defendant in such cases would appear to lie in* *the fact that it would be palpably unfair to require a plaintiff to prove something which is beyond his reach and which is peculiarly within the range of the defendant's capacity of proof."* He went on to say *"...The onus of disproof rests on the defendant only when the act or default complained of is such that it would be fundamentally unjust to require the plaintiff to prove a positive averment when the particular circumstances show that fairness and justice call for disproof by the defendant*." Hardiman J in *Rothwell* said "*It appears to me that the judgment in Hanrahan, requires not merely that a matter in respect of which the onus is to shift is within the exclusive knowledge of the defendant, but also that it is "peculiarly within the range of the defendant's capacity of proof."*

38. I see no basis upon which it could be concluded that the information upon which a proper assessment of Chili Bagan's tax liability may be conducted is within the exclusive knowledge of the Revenue Commissioner or peculiarly within the range of their capacity of proof. The company is under obligations to maintain proper books and records (see, for example, section 886 of the TCA 1997 and section 84 of the Value-Added Tax Consolidation Act 2010). Thus, the information is within their control and possession. The argument was made on behalf of Chili Bagan that the burden should be reversed because the Revenue Commissioners' workings were unclear and fundamentally flawed. In my view, that does not give rise to a reversal of the normal burden of proof in tax appeals, because the information needed to show that the relevant assessments are incorrect is information which the company itself must maintain.

39. I am therefore satisfied that the TAC correctly stated that the burden of proof rested on Chili Bagan.

40. However, I am equally satisfied that the TAC did not adhere to or apply that burden. By simply accepting the CT Returns and the company accounts as evidence of the amount of allowable and unutilised losses without question, the TAC did not enforce that burden.

41. Chili Bagan placed some emphasis on the requirement to afford curial deference to the TAC in respect of findings of fact. This is based on the well-known statements of principle in *Mara v Hummingbird* and *Ó Cúlacháin v McMullen Brothers Limited* (quoted above). More recently, in *McNamara v Revenue Commissioners*, Barr J said at paragraphs 42 – 45:

"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.*
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> *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.*
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> *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."

42. The deference which the court should afford to findings of fact made by the TAC does not extend to where the process by which those findings of fact were made itself amounts to an error of law. Furthermore, a finding of fact which is arrived at through such a process is not one that a reasonable decision-making body could make.

CONCLUSION

43. In all of those circumstances, I am satisfied that the questions posed by the TAC must be answered as follows:

Did the Commissioner err in law in finding as a material fact, at paragraph 39.18 of the Determination that: "At 1st October 2016, the Appellant had the sum of €378,293 in unutilised CT losses"? - **Yes**

Did the Commissioner err in failing to adhere to or have regard to the burden of proof in making the foregoing finding of fact? - **Yes**

Did the Commissioner err in law in relying, on the said finding of fact, on evidence which was not admissible or admitted on appeal." – **Yes**

44. It seems to me that the appropriate way for the matter to be dealt with in circumstances where the TAC has not considered either the Revenue Commissioners' position in relation to whether the TAC is entitled to consider the issue of unauthorised losses or their position on the substance of that issue, is for it to be remitted to the TAC.