

**THE HIGH COURT**

[2021] IEHC 780

[Record No. 2020/93R]

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

**BETWEEN**

**NIALL GLYNN, COLM MCDONNELL AND KEVIN SHEEHAN**

**APPELLANTS/RESPONDENTS**

**AND**

**THE REVENUE COMMISSIONERS**

**RESPONDENTS/APPELLANTS**

**JUDGMENT of Ms. Justice Stack delivered on the 14th day of December, 2021.**

**Introduction**

1. This is an application by the Revenue Commissioners ("Revenue") in an appeal by way of case stated pursuant to s. 949AP of the Taxes Consolidation Act, 1997, as amended, ("TCA") against a determination of the Appeal Commissioners dated 21 May 2020. Revenue were respondents to the appeal before the Appeal Commissioners and are appellants to this Court, and they now apply to admit the transcript of the evidence given to the Appeal Commissioners before this Court when hearing the case stated.
2. The three appellants to the Appeal Commissioners are the respondents to the appeal by way of case stated to this Court and are partners in Deloitte. Their appeals to the Appeal Commissioners were designated precedent appeals for 59 other individuals who are partners in Deloitte for some or all of the years of assessment from 2007 to 2015, and I will therefore refer to them as "Deloitte".
3. The case stated concerns voluntary partner retirement payments ("VPR payments") made by Deloitte to certain retired partners, and in particular whether a deduction can be claimed in respect of those payments in computing the Schedule D Case II profits of Deloitte. Deloitte claimed before the Appeal Commissioners that the VPR payments were deductible pursuant to s. 81 (2) TCA as a normal trading expense incurred wholly and exclusively for the purposes of the partnership's business.
4. By contrast, Revenue contend that the VPR payments were not a business expense as the justification for the payments was based on the relationship between the continuing partners and the retiring partner. As such, Revenue says that the payments were, in reality, an allocation or appropriation to the retiring partners out of the profits of the partnership, and as such were not deductible as a business expense.
5. The issue of the admission of the transcript was first raised by Revenue in correspondence in November 2021, many months after submissions had been filed, and then only when the court booklets for the case stated were being prepared. Deloitte objected to the production of the transcript in the booklets for the hearing of the case stated and therefore the admissibility of the transcript now falls for determination before the case stated can be heard.

6. As a preliminary matter, I entirely agree with Deloitte that this issue should have been canvassed by a notice of motion, grounded on affidavit. However, the parties are aware of the issues, and the papers which would otherwise have been exhibited in a grounding affidavit are before me by way of agreed booklet. Furthermore, Deloitte indicated to me at the sitting of the court that they were in a position to deal with the question of whether the transcript was admissible in the case stated.
7. While, therefore, I think the correct practice is to issue a notice of motion, grounded on affidavit, I thought it was appropriate to determine the matter. In the absence of any formal application, I asked counsel for Revenue to set out precisely what was sought and indicated that the orders sought were, in order of preference:
  - a. an order admitting the transcript of the evidence before the Appeal Commissioners for the purposes of the hearing of the case stated;
  - b. alternatively, an order amending the case stated so as to append the transcript to the case stated;
  - c. if necessary, an order remitting the matter to the Appeal Commissioners for the purpose of appending the transcript to the case stated.

It was indicated by counsel that it would not be in anyone's interests to remit the matter to the Appeal Commissioners, I presume because the case stated has been ready for hearing since the filing of submissions earlier this year. In any event, I will deal with the three applications in turn.

**Whether the transcript of the evidence to the Appeal Commissioners should be produced to the High Court on the hearing of the case stated**

8. Counsel for Deloitte submits that a case stated should form a single composite document from which this Court can determine the issues of law set out in the case stated, and I agree with this submission. I think this follows from the seminal decision of Blayney J. in *Mitchelstown Co-Op Society. v. Comr. for Valuation* [1989] I.R. 210, at 212-213, where, after setting out the text of s. 5 of the Valuation Act 1988, pursuant to which certain decisions of the Valuation Tribunal could be appealed to this Court by way of case stated, and after stressing the importance of the Tribunal making the necessary findings of fact, Blayney J. stated:

*"This court should not be required to go outside the case stated to some other document in order to discover [the findings of fact of the Tribunal]. The same principle applies to the contentions of the parties; the inferences to be drawn from the primary facts, and the Tribunal's determination. All these must be found within the case, not in documents annexed. In the same way, the fact that the judgment of the Tribunal is annexed to the case does not dispense the Tribunal from setting out its determination in the case. This is a specific requirement of s. 5 of the Act of 1988."*

9. Section 5 of the Valuation Act 1988 requires a case stated to set for the "*the facts and the determination of the Tribunal*". Section 949AQ (1)(a) TCA, which sets out what is required to be included in every case stated under that section is more expansive, and provides that a case stated shall contain:
  - (i) the Appeal Commissioners' material findings of fact,
  - (ii) an outline of the arguments made by the parties,
  - (iii) the case law relied on by the parties,
  - (iv) the Appeal Commissioners' determination and the reason for the determination, and
  - (v) the point of law as set out in the notice referred to in s. 949AP (2) on which the opinion of the High Court is sought.
10. It can immediately be seen that the transcript or any other note of the evidence is not required to be included in a case stated, which suggests that it is not generally necessary or appropriate to include those in a case stated, albeit that s. 949AQ (1) (a) does not seem to preclude their inclusion in a particular case, if it is necessary and appropriate to do so.
11. Furthermore s. 949AQ (7A), (inserted by s. 13 of the Finance (Tax Appeals and Prospectus Regulation) Act 2019, which was commenced on 18 December 2019) now provides that the case stated may specify exhibits, which are included with the case stated when it is sent to the High Court.
12. Subsection (7A) is a provision which relieves the Appeal Commissioners of inserting lengthy documents into the case stated and allows them to be exhibited, which no doubt will be more convenient in many cases. However, it does not touch on the appropriateness or necessity of whether any particular document (such as a transcript or a portion of it) should be before the High Court. It seems that the effect of subs. (7A) is merely to provide a convenient mechanism for the Appeal Commissioners in setting out the documents for this Court rather than to affect in any material way the circumstances in which those documents should be before this Court on a case stated in the first place.
13. I pause here to point out that the amendments effected by the 2019 Act, and therefore subs. (7A) were not referred to in argument and the submissions of the parties referred to the provisions of ss. 949AP and 949AQ as they stood prior to those amendments. However, as the amendments are of a kind which do not affect the substantive arguments of the parties, I do not think it is necessary to reconvene the hearing, although my judgment will refer to the law as it now stands.
14. Notwithstanding the insertion of subs. (7A), the absence of any reference in s. 949AQ (1)(a) TCA to the transcript or to any documents which were before the Appeal Commissioners suggests that, in general, it will not always be necessary to include these

in the case stated itself. Section 949AQ (1)(a) sets out what will always be required, but does not provide guidance on when it will be necessary or appropriate to include other documents.

15. The classic statement of what should be included in a case stated appears to be that of Murphy L.J. in the Court of Appeal in Northern Ireland in *Emerson v. Hearty and Morgan* [1946] N.I. 35, at 36:

*"We have thought that this may be a convenient opportunity to call attention to the principles which ought to be observed in drafting cases stated.*

*The case should be stated in consecutively numbered paragraphs, each paragraph being confined, as far as possible, to a separate portion of the subject matter. After the paragraphs setting out the facts of the case there should follow separate paragraphs setting out the contentions of the parties and the findings of the judge.*

*The case should set out clearly the judge's findings of fact, and should also set out any inferences or conclusions of fact which he drew from those findings. The task of finding the facts and of drawing the proper inferences and conclusions of fact from the facts so found is the task of the judge. It does not fall within the province of this court. Accordingly, it is not legitimate by setting out the evidence in the case stated and omitting any findings of fact to attempt to pass the task of finding the facts onto the Court of Appeal. What is required in the case stated is a finding by the judge of the facts, and not a recital of the evidence. Except for the purpose of elucidating the findings of fact it will rarely be necessary to set out any evidence in the case stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the judge which would justify him in deciding as he did."*

16. Blayney J. (sitting as a judge of this Court) in *Mitchelstown Co-Op Society v. Comr. for Valuation* [1989] I.R. 210, at 212, expressed his complete agreement with and adopted that statement of the principles to be observed, before finding that the case stated before him had not been drafted in accordance with those principles. The case stated by the Valuation Tribunal to the High Court had not contained any clear statement of the facts found by the tribunal, and the entire transcript of the evidence was annexed to the case. Blayney J. was careful to distinguish between evidence which had been accepted and findings of fact based on such evidence. It was clear that it was in the case stated itself that the findings of fact should be identified, and this Court should not be required to go outside the case stated to some other document in order to discover them.
17. He went on to state that the same principle applies to the contentions of the parties, the inferences to be drawn from the primary facts, and the Tribunal's determination. All of these must be found within the case, not in documents annexed. As already stated, the recent amendment of s. 949AQ by the insertion of subs. (7A) means that *Emerson* must be qualified, but only very slightly: the *dictum* of Blayney J. in relation to cases stated should now be read as meaning that, in cases stated under s. 949AP of the TCA, the court

should find all that it needs in the case stated and the documents formally exhibited thereto. But the circumstances in which the evidence, as opposed to the findings of fact, should be set out, are explained in Emerson.

18. Emerson was also approved by the Supreme Court in *McGinley v. Criminal Assets Bureau* [2001] IESC 49 by Denham J., who agreed with the judgment of the court as given by Fennelly J., but nevertheless wrote a separate judgment to offer her observation that it was not, in general, appropriate to append the transcript to a case stated made pursuant to s. 16 of the Courts of Justice Act 1947 (see p. 2 of her judgment). Fennelly J. expressly agreed with Denham J. on that point (see p. 8 of his judgment).
19. Similarly, in *Dublin City Council v. Williams* [2010] 1 I.R. 801, Geoghegan J. referred to the fact that the transcript of the proceedings before the Circuit Court had been sent forward but "*in accordance with correct practice, I take the view that I should confine myself to the findings made by Deery J.*" (at para. 4). This also suggests that the transcript should not in general be put before the court on a case stated.
20. However, as counsel for Revenue points out, the questions of law in that case (set out in full at pp. 803-4) do not seek to challenge primary findings of fact. Similarly, in *McGinley*, the questions stated by the Circuit judge were quite clearly pure issues of law relating to his jurisdiction, and which did not seek in any way to challenge primary findings of fact on the basis that there was no evidence to support them.
21. In both of those cases, therefore, the Supreme Court was setting out the general position which will apply when a case is stated for the opinion of this Court.
22. In *McNamara v. Revenue Commissioners* [2021] IEHC 485, Barrett J. recently listed in a very comprehensive way the principles which he derived from the legislation and relevant caselaw. At para. 37 he stated that the documents which are to support the case stated must be exhibited to the case stated and form part of the case stated, and that case stated in its totality, including those documents/exhibits is what goes before the court. I am in agreement with Barrett J. on this point as this is what s. 949AQ appears to envisage would happen.
23. By contrast, although counsel for Revenue relied heavily on *Byrne v. Revenue Commissioners* [2021] IEHC 262 as effecting a sea change in relation to the admission of transcripts, I do not read that judgment in that way. In *Byrne*, the parties simply agreed that the transcript could be produced to the High Court *de bene esse* and it consequently does not constitute an authority on the appropriate way to introduce the transcript into the case stated. It does, however, contain some comments on when it is appropriate or necessary for this Court to have regard to the transcript and I refer to this further below, when considering the second application of Revenue.
24. It follows from the foregoing that the transcript should not simply be produced to the High Court when it has not been exhibited to the case stated unless there is agreement to

that effect. There being no such agreement in this case, the correct course was to apply by notice of motion to amend a case stated to exhibit the transcript.

25. I now turn to consider whether the case stated should be amended to exhibit the transcript or a portion of it.

**Whether this case stated should be amended to exhibit the transcript or a portion of it**

26. Although the question of whether an amendment is appropriate differs from that at issue in *Express Motor Assessors v. Revenue Commissioners* [2021] IEHC 420, there are some similarities. In that case, the question was whether the proposed legal issue was within the jurisdiction of the Appeal Commissioners, as, if it was not, it could not be relevant to the appeal to this Court on a case stated. The question which arises here is not a question of the jurisdiction of the Appeal Commissioners but turns on the nature of the appellate jurisdiction of this Court, which it is well established is less extensive than that of the Commissioners, as they alone can make findings of fact.
27. Because this Court can only consider whether the determination of the Commissioners was erroneous on points of law, the evidence before the Commissioners, and therefore the transcript of that evidence, is generally not material to a consideration of the questions on which the opinion of the High Court is sought.
28. However, as is clear from long-standing caselaw in this area, this does not mean that the evidence before the Appeal Commissioners is entirely irrelevant. The types of legal issues which may be addressed in a case stated are comprehensively set out in judgments of the Supreme Court. In *Mara v. Hummingbird* [1982] I.L.R.M. 421, at 426, that Court (*per* 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 set aside unless the inferences which he made from the primary facts were ones that no reasonable Commissioner could draw. The ways of conducting business have become very complex and the answer to the question whether a transaction was an adventure in the nature of trade nearly always depends on the importance which the Judge or Commissioner attaches to some facts. He will have*

*evidence some of which supports the conclusion that the transaction under investigation was an adventure in the nature of trade and he will have some which points to the opposite conclusion. These are essentially matters of degree and his 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 Commissioner could not draw them or they are based on a mistaken view of the law."*

29. In *Ó Culacháin v. McMullan* [1995] 2 I.R. 217 Blayney J., giving the judgment of the Supreme Court, quoted from that judgment of Kenny J. and, after pointing out that the Court of Appeal in England and Wales had reached a similar view, then stated (at pp. 222-3) 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:
- (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 might point to one conclusion, other evidence to the opposite: these were essentially matters of degree and the judge's conclusions should not be disturbed (even if the court did not agree with them, for it was not retrying the case) unless they were such that a reasonable judge could not have arrived at them or they were based on a mistaken view of the law.
30. Those passages from *Mara* and *Ó Culacháin* were both cited and applied by the Supreme Court in *MacCárthaigh v. Cablelink Ltd.* [2003] 4 I.R. 510. In *MacCárthaigh*, the findings of fact of the Appeal Commissioners were not questioned by either side, even though the question of law was drafted in the following way:
- "[W]hether, on the foregoing facts and evidence, we are correct in finding that there are two separate services with two separate value-added tax rates?"*
31. There is, however, no doubt but that this Court has in an appropriate case a jurisdiction to consider whether a primary finding of fact was made with no evidence to support it, and a transcript could obviously be relevant to that issue.
32. That will only be the case, however, where primary findings of fact are challenged as being erroneous in law because there is no evidence to support them. It is worth repeating the clear statement to that effect in *Emerson*, which was approved by Blayney J. in *Mitchelstown Co-Op Society v. Comr. for Valuation*:

*"Except for the purpose of elucidating the findings of fact it will rarely be necessary to set out any evidence in the Case Stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the judge which would justify him in deciding as he did."*

33. Therefore, if a case is stated on the issue of whether there is an error of law in making any particular primary finding of fact in the absence of any evidence for that finding, then that portion of the transcript setting out the relevant evidence will be required by the High Court in order to determine the issue of law, and that portion of the transcript should then be included in the case stated. Alternatively, it may be necessary to include the entire transcript of the evidence of a witness or of all witnesses for the purpose of showing that there was no evidence to support a primary finding of fact. If the portion of transcript thereby required to be put before this Court is lengthy, it will in all likelihood not be feasible to put it in the main body of the case stated, and it may be better to include it by way of exhibit pursuant to s. 949AQ (7A).
34. In general, therefore, where it is proposed to appeal on the basis that the Appeal Commissioners erred in law in making a primary finding of fact without any evidential basis, it will be appropriate to include the relevant portion of the evidence (such as the evidence of the relevant witness) in the document comprising the case stated, whether in the body of the case stated itself or, if more convenient, in a formal appendix to it as now provided for in s. 949AQ (7A). However, that will not be appropriate in appeals which do not seek to challenge primary findings of fact.
35. In making that very clear distinction between primary findings of fact and inferences or conclusions drawn from them, I am conscious that this distinction is not always clearly maintained in the caselaw. However, at the hearing of this application, it was accepted by counsel for Revenue that there was such a distinction and that the transcript would only be material to an appeal against primary findings of fact as being made without any evidence to support them.
36. The question for consideration in this application is whether this particular case stated includes a question of law for the opinion of this Court as to whether one or more findings of primary fact made by the Appeal Commissioners are erroneous in law as having been made without any evidence to support them. It is therefore necessary to look at the points of law in the case stated, which are set out at para. 121 of the case.
37. Counsel for Revenue relied on subparagraph (f) for his contention that the transcript should be before the judge hearing the case stated. Subparagraph (f) asks whether the Commissioner erred in law in:

*"(f) finding that the VPR payments had a sole business objective I erred in my application of the law to the evidence before me and/or made findings of fact that no reasonable Appeal Commissioner could have made."*



38. I think it is fair to say that this question contains some ambiguity as to what type of legal error is being asserted. Using the terminology in *Mara*, it is not clear whether this Court is being asked:

- whether the Appeal Commissioners erred in his application of the law; or
- whether the Appeal Commissioners erred in making inferences that no reasonable Appeal Commissioners could have made, or
- whether the Appeal Commissioners erred in making primary findings of fact which it was unreasonable for him to make because there was no evidence to support them.

As already seen, Blayney J. was very clear in *Mitchelstown Co-op v. Comr. for Valuation* that the court would not consider how the law should be applied to the evidence as disclosed in the transcript. If there were insufficient findings of fact, then rather than go through the evidence itself, the High Court should remit it to the Commissioner so that the necessary findings of fact could be made.

39. Therefore, insofar as the question of law at para. 122 (f) raises a question about the “*application of law to the evidence*”, it is somewhat difficult to interpret and may indeed be an inappropriate question as being something this Court has no jurisdiction to answer on a case stated.

40. The process by which the case stated came to be drafted is important in understanding why this ambiguity found its way into paragraph (f). Before setting out what I know about how the case stated came to be drafted in this case, it should first be noted that s. 949AP TCA makes provision for how the determination of an Appeal Commissioners, which is otherwise final and conclusive, may be appealed to this Court by way of case stated.

41. Section 949AP (2) provides:

*“A party who is dissatisfied with a determination as being erroneous on a point of law may by notice in writing require the Appeal Commissioners to state and sign a case (in this Chapter referred to as a ‘case stated’) for the opinion of the High Court.*

Section 949AP (3), as amended by the 2019 Act, provides:

*“The notice referred to in subsection (2) shall –*

- (a) state in what particular respect the party concerned is dissatisfied with the determination,*
- (b) state in what particular respect the determination is alleged to be erroneous on a point of law ....” [Emphasis added.]*

Paragraph (a) is new, having been introduced by the 2019 Act, but counsel for Deloitte, in his submissions relied on s. 949AP (3)(a) as it was prior to amendment in 2019, and s. 949AP (3)(b) is simply a re-enactment of that provision.

42. Section 949AP (3)(c) requires such a notice to be sent to the Appeal Commissioners within 21 days after the date of the notification of their determination, and subparagraph (d) requires that it be copied to the other party. Interestingly, s. 949AQ (1)(b) provides that a party who has set out in the notice, by the means provided for by section 949AP (2), a point of law may not set out an additional or an alternative point of law after the period referred to in section 949AP (3)(b) has elapsed.
43. Section 949AQ (2) provides that the Appeal Commissioners shall be responsible for the drafting of a case stated and shall not delegate this task to a party, but also provides that this is without prejudice to the entitlement of the parties to make representations in relation to a draft of the case stated. Section 949AQ (3) then provides that the Appeal Commissioners shall send a draft of the case stated to the parties before signing it, invite representations within 21 days of the date on which the draft is sent to the parties, and s. 949AQ (4) then obliges the Appeal Commissioners to have regard to those representations and, if they consider it appropriate to do so, to modify the draft of the case stated before completing and signing it.
44. It should be recalled that section 949AQ (1)(a) stipulates the matters which a case stated must always include, including material findings of fact, outline of the arguments, the cases relied upon by the parties, the Appeal Commissioners' determination and the reasons for it, and, perhaps most significantly in the context of the issue which I have to determine, at subparagraph (v), "*the point of law as set out in the notice referred to in section 949AP(2) on which the opinion of the High Court is sought*"
45. It seems to be reasonably clear from the foregoing that, while the primary responsibility for drafting the case stated as a whole, including the necessary findings of fact and the reasons for the determination of the Appeal Commissioners, remains with the Commissioners themselves, the point of law in which an appeal by way of case stated is sought must be identified by the appellant.
46. In this case, the appellant to this Court is Revenue. By Notice dated 10 June 2020 Revenue indicated to the Appeal Commissioners that they sought an appeal by way of case stated. The points of law identified by Revenue in this notice, insofar as they are material to this application, were stated as follows at para. 5 of this notice:

*"In particular, [Revenue] is of the view that the Commissioner erred in law in:*

...

- ix. in applying the law to the evidence before him in making the finding of fact and in his inference that the VPR payments had a sole business objective which is a finding no reasonable Appeal Commissioner could make. In particular, in the*

*manner in which this disregards the objective of not adding to profits and the actual benefits of the scheme namely to the retiring partners and the current partners (as so found by the Appeal Commissioner)."*

47. Unfortunately, this draft point of law seems to equivocate between the types of error identified by the Supreme Court in *Ó Culacháin v. McMullan* at paras. (1), (2), and (4), as set out above. It is simply not clear whether Revenue is seeking to appeal:
- the application of the law to the findings;
  - the making of primary findings of fact, which could only be done on the basis that there was no evidence to support them, or
  - the manner in which the Appeal Commissioners drew inferences from the primary findings of fact and whether they were ones which a reasonable Appeal Commissioners should make.
48. In response to the Notice of 10 June 2020 the Appeal Commissioners drafted a case stated and, as envisaged by s. 949AQ, sent it to the parties so that they could make representations in relation to it. I have not seen the draft case stated as only the email sending it to the parties was put in the agreed book of documents for the purpose of this application, but Revenue made representations in relation to it by letter dated 15 July 2020. This letter requested:
- that the draft case stated include all the points of law as set out in the original notice dated 10 June 2020, and in the same terms as drafted by Revenue in that notice;
  - as regards the findings of fact, it requested that the heading "witness evidence" would be deleted in its entirety and replaced with the phrase: "*the following facts were either proved or admitted.*" Revenue also requested that paras. 24 and 25 of the determination would be included, and explained that this request was made so that all the findings in the determination would be included in the case stated;
  - finally, the Appeal Commissioners was requested to include an authority referred to by Revenue in submissions to the Appeal Commissioners.
49. It should be noted that para. 24 of the determination contains 33 separate paragraphs setting out the evidence of Mr. Kenny, a retiring partner, and para. 25 contains nine paragraphs setting out the evidence of the first respondent, Mr. Glynn, a continuing partner. The Appeal Commissioners did not accede to the request of Revenue to replicate all of these in the case stated as findings of fact, but he did set out at para. 11 the material findings of fact made on the basis of their evidence, paras. (a) to (f) being his findings on the basis of Mr. Kenny's evidence and paras. (g) to (j) being his findings on the basis of Mr. Glynn's evidence. Revenue also requested that these would be identified as findings of fact rather than a recitation of the evidence, which is how they had been identified in the determination, and this was done.

50. At the hearing of the application to admit the transcript, I asked counsel for Revenue which of the findings in para. 11 it was intended to challenge on the basis that there was no basis in the evidence for them, but none was identified. Instead, a more global submission was made that Revenue intended to challenge the finding that the VPR payments were made "*wholly and exclusively*" for the purposes of the business of the partnership. It is apparently the contention of Revenue that the evidence was to the effect that there was more than one purpose for the VPR payments and therefore it could not be said to satisfy the "*wholly and exclusively*" test.
51. Revenue submitted at hearing that its contention is that the error lies in the Commissioner's inferences from the findings of fact made, but envisages that, because it can be difficult to identify whether a finding is a primary finding of fact rather than an inference from those findings, Deloitte will argue at hearing that the finding that the sole purpose of the VPR payments was for the business of the partnership was a primary finding of fact. Revenue therefore submits that it needs to be able to argue at hearing that there was no evidence for such a finding. It was also suggested by Revenue that the Case Stated does not in fact contain any finding that the payments were made "*wholly and exclusively*" for the purposes of the business of the partnership. It was not explained how Revenue could seek to introduce the transcript for the purpose of challenging a finding of fact which was not made.
52. The problem with all of this is that the points of law for the opinion of this Court, as set out in the case stated, and in particular para. 121 (f) which is singled out by Revenue as dealing with this issue, does not state that the findings of fact were made without evidence to support them. There is reference to the findings of fact being ones no reasonable Appeal Commissioners could have made, but this appears to be a reference to the inferences made by the Commissioner from the primary findings of fact, rather than an attack on the primary findings of fact themselves.
53. I say this because, in *Mara*, the test of what a reasonable Appeal Commissioners would do was formulated by reference to the conclusions or inferences from the primary facts, and not the primary facts themselves, albeit that *Mara* cited with approval the judgment of the House of Lords in *Edwards v. Bairstow* [1956] A.C. 14, in which these tests seem to have been referred to interchangeably. However, *Mara* seems to draw that distinction quite clearly and that of course represents the law in this jurisdiction.
54. In my view it was for Revenue, in drafting its notice pursuant to s. 949AP (2) to identify with sufficient precision the basis of the appeal, and in particular to identify whether it is said that any error in assessing the evidence is said to be an error of law by reason of the fact that a finding of primary fact was made without any evidential basis or whether it is said to be an inference drawn which was either based on a misinterpretation of documents or was one which no reasonable Commissioner could draw. Insofar as it can be difficult to draw that distinction, an appellant can set out the alleged errors of law in the alternative, but this does not relieve an appellant from stating clearly how the error of

law is said to arise, and whether the party seeking the case stated wants to rely on these alternative points.

55. In this respect, I completely agree with Barrett J. in *McNamara v. Revenue Commissioners* at para. 19 where he states that the manner in which the error is identified by an appellant in a notice pursuant to s. 949AP (2) should place the Appeal Commissioners in a position whereby he or she can “package” a case stated in the form contemplated both by s. 949AQ (1)(a) and also by the applicable caselaw, notably the principles in *Emerson* as approved by the Supreme Court in *McGinley*. I further agree with the statement of Barrett J. at para. 23 in *McNamara* that it is for the appellant to submit in the s. 949AP (2) notice that is capable of yielding a case stated that complies with s. 949AQ (1)(a) and the *Emerson* principles.
56. In this case, the s. 949AP (2) Notice was itself drafted ambiguously, and that has resulted in an ambiguity in para. 121 (f) of the case stated. However, the absence of any request from Revenue either at the time of the Notice or at the time of the making of representations on the draft case stated for the inclusion of some or all of the transcript of the evidence of the relevant witnesses in the case stated seems to suggest quite clearly that it was not intended to appeal on the basis that there was no evidential basis for the findings of the Commissioner. Furthermore, there is no application to this Court to amend the case stated to include this as a point of law, or indeed to amend para. 121 (f) to include a challenge to any of the Commissioner’s findings of fact (which are set out in para. 11 of the case stated) on the basis that there was no evidence to support them.
57. Finally, as pointed out by Deloitte, there is no mention of these issues in the written submissions filed by Revenue on 3 February 2021 in support of its appeal to this Court. These submissions, in the section dealing with the “*wholly and exclusively*” issue, refer to the findings of fact at para. 11 (e) and (f) of the case stated but do not seek to challenge them as being without evidential foundation. On the contrary, they appear to be the basis for the appeal against the Commissioner’s determination on this issue, as it is submitted that they amount to findings that there were different purposes behind the VPR payments, and that therefore they could not be said to have the sole purpose required by s. 81(2) (a) TCA in order to be deductible.
58. Indeed, counsel for Revenue stated that it is Revenue’s case that the finding (if indeed such a finding was made, which they do not concede) that the VPR payments were made “*wholly and exclusively*” for the purposes of the partnership’s business was one of inference from the primary facts. This application is made on the basis that Deloitte may say at hearing that the finding (if in fact it was made) was one of primary fact in respect of which the higher onus of showing there was no basis for it at all in the evidence applies.
59. That submission is significant for two reasons. First, it tends to reinforce the view that Revenue only sought to appeal on the basis that inferences were erroneously drawn, not on the basis that there was no evidence for primary findings of fact. Secondly, the fact that Deloitte may contend for a different classification of the nature of the findings is a

matter for Revenue to take into account in drafting its request for a case stated and in making representations on the draft case stated as to what the points of law should be. But that is a matter for Revenue to anticipate in formulating its grounds of appeal and in ensuring that the case stated is adequately drafted in the first instance.

60. Revenue relied heavily on *Byrne v. Revenue Commissioners* [2021] IEHC 262 in support of its application. However, two of the questions in that case stated expressly asked if there was sufficient evidence before the Appeal Commissioners to support his findings. It was therefore no surprise that Twomey J. held that the transcript was relevant to the questions in the case stated. Having upheld the various primary findings of fact on the basis of evidence in the transcript which supported them, Twomey J. then considered whether the inferences drawn from those findings were ones which no reasonable Commissioner could have drawn.
61. I entirely agree with the analysis at para. 52-58 of *Byrne* that those inferences are drawn from primary facts (which he had accepted were made on the evidence), but where I respectfully disagree with the approach in *Byrne* is that it does not seem to me that the question of whether an inference is properly drawn from the primary facts should be tested against the transcript. It seems to me that the Appeal Commissioners should put in the case stated all of the findings of primary facts from which he draws the necessary inferences and that the exercise of considering whether the inferences were ones which no reasonable Commissioner can draw is conducted by an analysis of the primary findings of fact as set out in the case stated and whether they support the inferences drawn from them.
62. It is true that in the fifth principle identified by Blayney J. in *Ó Culacháin*, there is reference to the fact that some of the evidence before the arbiter of fact (in that case the Circuit judge) would point to one conclusion, other evidence to the opposite, and this might suggest that the court should look at the evidence even in the case of inferences drawn by the arbiter of fact. However, that fifth principle was derived from the judgment of Kenny J. in *Mara* which appears to distinguish between primary findings of fact and conclusions or inferences drawn from those facts, and in which Kenny J. explicitly approves a passage from Lord Radcliffe in *Edwards v. Bairstow* (at p. 36) to the effect that “*there is value in the distinction between primary facts and inferences drawn from them*”
63. Furthermore, when one looks at how Blayney J. subsequently applied those principles in *Ó Culacháin* itself, it is clear that, after noting that the appellant did not take issue with the findings of fact in the case stated (see p. 223) or of law (see p. 226), the learned judge then turned to consider whether the conclusions of the Circuit judge were ones which no reasonable judge could have arrived at. The consideration of this issue (at pp. 227 to 229) demonstrates that, while there is reference to whether there was evidence to support the conclusions, there is no suggestion that the Supreme Court did more in that case than consider whether the primary findings of fact were capable of supporting the

conclusions or inferences reached. It certainly does not appear that the Supreme Court looked directly at the evidence before the Circuit judge.

64. It may be that any confusion deriving from *Ó Culacháin* was itself caused by the manner in which the error of law was identified in the case stated there under consideration, as that simply asked whether the Circuit judge was "*correct upon the evidence before me and the findings which [he] made*" in holding that the forecourt canopies owned by the respondent qualified as "*plant*" for the purposes of the then provisions of the Income Tax Act 1967.
65. I do not think that there is anything in *Ó Culacháin v. McMullan* which is intended to depart from the clear statement in Emerson to the effect that the case stated should not include any evidence save in the one type of case where the error of law is said to be that there was no evidence before the judge which would justify him in deciding as he did.

I think the better view, therefore, is that it is only where a notice pursuant to 949AP (2) questions the correctness of a primary finding of fact on the basis that there was no evidence to support it that the transcript will be material to the case stated.

66. As stated by the Supreme Court in McGinley and reiterated by Barrett J. very recently in McNamara, this will not be the norm. The notice pursuant to s. 949AP (2) is required to identify with particularity the error of law for the opinion of the High Court, and it is only where such a notice leads to the drafting of a case stated to include a question as to whether any primary finding of fact had evidence to support it that the evidence will need to be before the High Court. In those circumstances, the relevant evidence should be set out in the case stated itself or in an exhibit to the case stated.
67. Even where a primary finding of fact is appealed as being erroneous in law as having no evidence to support it, it would, in my view, be wrong to assume that because the test is that the primary fact is unsupported by the evidence, it logically follows in all cases that the entire transcript of the evidence or even of a single witness needs to be included in order for the High Court to consider the point of law. In at least some cases, particular exchanges may be pivotal, and it will be sufficient to include only those in the case stated.
68. In conclusion, it is my view that the case stated does not identify any alleged error of law to the effect that material findings of fact were made without any evidence to support them. There is no application to amend the questions of law in the case stated and, if there were, I would reserve to the consideration of that application the issue of whether such an application can be made where the point of law sought to be introduced was not identified, at least in substance, in the notice of the appellant pursuant to s. 949AP (2).
69. Counsel for Deloitte says that Revenue has only one "*bite of the cherry*" and suggests that Revenue cannot return to court to seek an amendment. However, I do not need to determine that issue as Revenue were explicit that they were not making an application to amend the questions of law contained in the case stated. If and when such an application is made, it can then be determined if Revenue are precluded from making

such an application or whether justice would require that the application to amend would be heard and determined, notwithstanding that it was made late in the day. It is clear from *O'Sullivan v. Revenue Commissioners* [2021] IEHC 118, following *Untoy v. GE Capital Woodchester Finance Limited* [2015] IEHC 557, that there is a power to amend which is exercisable even on the hearing of a case stated. *Untoy* in turn applied *Revenue Commissioners v. Bradley* [1943] I.R. 16 where the Supreme Court determined a case stated on a point of law which the district justice had refused to include in the case stated pursuant to the Summary Jurisdiction Act 1857. In both *Untoy* and *O'Sullivan*, the case stated was amended, not because there had been a refusal to state a case on the particular legal point, but because the questions did not reflect the issues between the parties, and in both of those cases there were sufficient findings of fact to determine those issues of law. As a power to amend a case stated under s. 949AQ so as to include additional questions of law has therefore been established, I am therefore not convinced that Revenue is now precluded from making an application to amend the questions (as opposed to simply including the transcript as an exhibit). However, as that application has not been made, I am not deciding it, nor am I deciding the effect (if any) of the making and determination of this application on any application which might be brought to amend the questions themselves.

70. In the absence of that application, however, there is no question of law in this case stated which would require the transcript or any portion of it to be before the High Court and I therefore refuse the application to amend the case stated to include it.

**Whether the case stated should be remitted to the Appeal Commissioners for amendment so as to include the transcript**

71. Because the transcript is not material to the issues of law before this Court, it follows that the case stated should not be remitted to the Appeal Commissioner to amend it so as to include the transcript.
72. However, had I found that it was appropriate to include the transcript in the case stated, it may well have been necessary to remit it in order to identify those portions of the transcript which would be required in order to deal with a legal issue which addressed squarely the alleged absence of any evidence to support primary findings of fact. This is because it would appear to me that the identification of the relevant portions of the transcript would seem to be a more appropriate task for the arbiter of fact (in the absence of agreement between the parties as to which portions of the evidence should be included or exhibited).
73. Finally, while it is clear from *O'Sullivan v. Revenue Commissioners* that this Court has a power derived from s. 949AR (1)(c) TCA to amend a case stated, I do not think applications should be the norm as s. 949AP seems to envisage that the process of formulating the questions is primarily a matter for the appellant who expresses dissatisfaction with the determination of the Appeal Commissioner and s. 949AQ (1) (b) provides that no additional or alternative points of law may be set out after the period set out in s. 949AP (3) (b) (which I think must now be read as a reference to s. 949AP (3)(c), as that is a re-enactment of s. 949AP (3) (b) within the meaning of s. 26 of the



Interpretation Act 2005). The precise effect of that time limit and its interaction with the power of this Court under s. 949AR (1)(c) do not, however, fall for determination in this application. However, given the existence of the power of this Court as identified in O'Sullivan, presumably it will be appropriate to exercise it from time to time. In particular, where there has been a refusal to include a question of law which properly arises from the Appeal Commissioner's determination, the appropriate course would appear to be to apply to amend.

74. This would seem particularly to follow from the requirement in s. 949AQ (1)(v) which provides that the questions of law set out in the s. 949AP (2) notice should be included. In general therefore, the party seeking the case stated should set out the questions of law and the procedures relating to the draft case stated and the representations of both parties as to what should be contained in it would appear to be directed at drafting the remainder of the case stated, albeit that questions of law relating to matters which are outside the jurisdiction of the Appeal Commissioner or which are doomed to fail could properly be refused (*Express Motors Assessors v. Revenue Commissioners*) and that the Appeal Commissioner can distil or recast the questions set out in the s. 949AP (2) notice (*McNamara v. Revenue Commissioners* at paras. 25-29). The criteria by which such an application is to be determined where no such application was made in the s. 949AP (2) notice or in subsequent representations to the Appeal Commissioner remain to be decided.

**Conclusion**

75. I therefore refuse the application of Revenue to admit the transcript before this Court either informally or by way of amendment of the case stated, or to remit to the Appeal Commissioners for the purpose of amending the case stated so as to include it.