THE HIGH COURT

[2021] IEHC 262

[2020 No. 88 R]

BETWEEN

FERGUS BYRNE

APPLICANT

AND

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 13th day of April, 2021

SUMMARY

1. The applicant ("Mr. Byrne") is the owner of two filling stations in County Offaly. Over a period of three years, he bought fuel for approximately €2.5 million (on which he paid VAT of €451,770) from three different companies, McCarthy Oil, John Kelly Fuels and FQ Services. Evidence was provided to a Tax Appeal Commissioner (the "Commissioner") that no VAT was ever accounted for by these companies to the Revenue Commissioners ("Revenue") in relation to the relevant invoices. Revenue also refused to allow Mr. Byrne to offset the VAT he had paid on the fuel.

2. On appeal, the Commissioner determined that Mr. Byrne was not entitled to set-off the VAT, as she determined that Mr. Byrne should have known that the purchases of fuel which he made from these suppliers were connected to the fraudulent evasion of VAT. Mr. Byrne claims that the Commissioner made an error on a point of law in reaching her determination.

3. The case before this Court concerns an appeal by way of Case Stated by Mr. Byrne concerning Revenue's refusal to allow him, pursuant to s. 59 of the Value-Added Tax Consolidation Act 2010, to set-off against his VAT bill, the VAT of €451,770 paid by him on the purchase of fuel from various suppliers.

4. As a preliminary matter, Revenue asserted what appeared to be a novel point, namely that the High Court should not have regard to the transcript of the hearing before the Commissioner, since it claimed that the High Court should not review evidence which is not set out in the Case Stated signed by the Commissioner, it being the responsibility of the Commissioner to draft the Case Stated pursuant to s. 949AQ(2) of the Taxes Consolidation Act, 1997 (as amended). For the reasons set out below, this Court rejected this claim.

5. As a further preliminary matter, Revenue also asserted that as the parties were in agreement that the Commissioner applied the correct legal test in determining the appeal, there could be no '*error on a point of law'*, which is necessary to engage the jurisdiction of the High Court on a Case Stated. This Court rejected Revenue's analysis on the grounds that conclusions or inferences from findings on primary fact (as made by the Commissioner in this case) amount to conclusions on mixed questions of fact and law and, as such, could amount to an error on a point of law (if those conclusions are ones which no reasonable commissioner could draw).

6. However, on this substantive point, of whether no reasonable commissioner could have drawn the same conclusion as the Commissioner (that Mr. Byrne should have known about the VAT fraud), this Court concluded that this was not the case. This is because of the cumulative effect of all the evidence before the Commissioner, including, but not limited to, the triangular payment arrangement (whereby Mr. Byrne received fuel from McCarthy Oil, yet he discharged the invoice which he received from McCarthy Oil by making payments to John Kelly Fuels) and the fact that Mr. Byrne was sufficiently concerned about the diesel to have it checked for laundering. Accordingly, this Court refuses to set aside the decision of the Commissioner.

BACKGROUND

7. Mr. Byrne commenced his service-station business in 2000. He operated his business for a number of years seemingly without any controversy. In April 2013, Mr. Byrne was subject to a Revenue audit and his business records for the years 2010, 2011 and 2012 were examined. Following this audit, Revenue raised assessments whereby it disallowed VAT input credits on the following invoices on the basis that those invoices were fake (see Revenue's letter of 27th November, 2013 at para. 101 below) and that they represented transactions connected with the fraudulent evasion of VAT:

2010	FQ Services	€12,432
2011	McCarthy Oil	€190,356
2012	John Kelly Fuels (Ireland)	€248,982
		_____
		€451,770

8. Mr. Byrne appealed these assessments on the grounds, *inter alia*, that he was not aware of any evasion of VAT in the supply chain and ought not to have known that he was taking part in a transaction connected with fraudulent evasion of VAT. This appeal was heard by the Commissioner over two days, on 29th June, 2016, and on 17th January, 2017. The Commissioner issued her determination (the "Determination") on 31st December, 2019 in which she upheld the notices of assessment totalling €451,770.

9. By notice dated 21st January, 2020, Mr. Byrne requested the Commissioner to state and sign a case for the opinion of the High Court pursuant to s. 949AQ of the Taxes Consolidation Act, 1997 (as amended). On 17th April, 2020 the Commissioner set out three questions of law for the opinion of the Court as follows:

   I. "Whether there was sufficient objective evidence before me to support my determination that there was a transaction connected with the fraudulent evasion of VAT.

   II. Whether there was sufficient objective evidence before me to support my determination that [Mr. Byrne] should have known that he was participating in a

transaction connected with the fraudulent evasion of VAT and that the only reasonable explanation for the purchases was that the purchases were connected to the fraudulent evasion of VAT.

III. Whether, upon the facts proved or admitted, I was correct in law in my determination that based on the evidence and the objective factors (as set out in the determination) [Mr. Byrne] should have known that he was participating in a transaction connected with the fraudulent evasion of VAT and that the only reasonable explanation for the purchases was that the purchases were connected to the fraudulent evasion of VAT."

Evidence before the Commissioner

10. In the Determination, the Commissioner summarised the evidence given by and on behalf of Mr. Byrne. A summary is also provided in the Determination of the evidence given by two officers within Revenue.

11. Mr. Byrne gave evidence that he commenced his business in 2000 and expanded it in 2005, opening a second service station. He gave evidence that he used a number of suppliers for his business and was not tied to any one agreement.

12. In 2010 a Mr. Aidan Kelly called to one of Mr. Byrne's premises and represented himself as an agent of McCarthy Oil. He informed Mr. Byrne that McCarthy Oil had an agreement with John Kelly Fuels so as to obtain lower prices for fuel. Mr. Byrne was told that the arrangement would operate in the following way. Invoices would be issued to Mr. Byrne from McCarthy Oil, however Mr. Byrne would make payments for the fuel directly to John Kelly Fuels. Mr. Byrne gave evidence that he knew of John Kelly Fuels, as it was part of a larger fuel company, Tedcastle Limited, but had not previously heard of McCarthy Oil.

13. The Determination quotes an exchange, cited as having taken place during the cross-examination of Mr. Byrne, in which Mr. Byrne accepts that the triangular payment arrangement entered into by him was '*unusual*'. However, while accepting that the payment arrangement was unusual, Mr. Byrne gave evidence that he accepted it without question as it was '*just an arrangement between two companies that that's the way they want their business done*'.

14. Mr. Byrne confirmed in his evidence that he received VAT invoices from McCarthy Oil and made payments by way of bank draft to John Kelly Fuels.

15. Mr. Byrne continued with the unusual payment arrangement until 2012. He gave evidence that in 2012, he became sufficiently concerned about the arrangement that he wanted his bank transactions, i.e. the payments made to John Kelly Fuels, to match the invoices coming from that company, and not invoices from McCarthy Oil. Accordingly, he contacted Mr. Aidan Kelly and requested that the invoices come from John Kelly Fuels from that point forward. This request was accepted and invoices were then received from John Kelly Fuels from that point onwards. When Mr. Byrne began receiving invoices from John Kelly Fuels instead of McCarthy Oil, evidence was provided on his behalf that he

stopped making payments by bank draft to John Kelly Fuels and started making them by bank transfer.

16. It is common case that Mr. Byrne never made any attempt to contact either McCarthy Oil or John Kelly Fuels to seek clarity as to why the triangular payment arrangement was in place, nor indeed was contact made by him with any of the other suppliers who were sometimes interposed in the chain of supply. Rather, he would direct any queries he had about invoices or delivery of fuel to Mr. Aidan Kelly, or to other unnamed or partially named representatives. He was of the view that the unusual payment arrangement was simply the way in which the companies wanted business done. Mr. Byrne's reason for not ordering fuel directly from John Kelly Fuels related to his belief that if he were to do so, he would be required to make upfront payments and would not be able to avail of the same pricing arrangement.

17. Evidence was also given by Mr. Byrne that he sent a sample of diesel from McCarthy Oil for scientific testing. His motivation for doing this related to the media coverage at the time surrounding fuel laundering and he gave evidence that he wanted to have his '*own mind at ease that the product was correct*'. The result of that testing was that the sample contained no marker. However, Mr. Byrne confirmed in his evidence that he did not test samples of fuel purchased from the other suppliers.

18. The Determination also summarises the evidence given by Mr. Byrne in relation to the procedures adopted by him for checking new suppliers. Mr. Byrne stated that it was made clear to him that McCarthy Oil was acting as agent for John Kelly Fuels, that he (Mr. Byrne) was familiar with John Kelly Fuels and that for him, '*that was the only issue'*. Mr. Byrne was questioned as to whether he checked who McCarthy Oil were, as he did not previously know of McCarthy Oil, and Mr. Byrne stated that he had not done so.

19. Mr. Byrne gave evidence that he dealt with representatives at all times and that if he had queries regarding invoices or deliveries, he would raise these with the representative, and that he never felt he had reason to contact McCarthy Oil or John Kelly Fuels directly.

20. The focus of the evidence given at the appeal, as summarised in the Determination, relates to the triangular payment arrangement between McCarthy Oil and John Kelly Fuels. However, evidence was also given by Mr. Byrne during the appeal that he purchased fuel on several occasions from other suppliers, namely DMG, Sure Fuels, North Road Fuels and FQ Services. Mr. Byrne stated that he dealt with a representative whose name he could only partially remember when purchasing fuel from DMG, Sure Fuels and FQ Services. In relation to North Road Fuels, Mr. Byrne stated that he was made aware of this supplier through DMG, as it was represented as an associate of DMG. Payments were made to these suppliers using online banking.

21. Mr. Byrne denied in his evidence that he was aware that some of the suppliers he dealt with were involved in VAT evasion fraud. When questioned about the irregularity of the triangular payment Mr. Byrne repeated his belief that the arrangement was in existence because '*that was the agreement between the two parties'*.

22. Certain propositions were put to Mr. Byrne in the course of his cross-examination during the appeal. It was put to Mr. Byrne that the fact of the triangular payment arrangement, as well as the lower prices offered, along with the fact that the delivery trucks were regularly unmarked (i.e. they did not have the livery of any company) and the fact that he never checked the arrangement directly with John Kelly Fuels or McCarthy Oil and dealt almost exclusively with the representative of McCarthy Oil, ought to have alerted him to the fraud taking place. Mr. Byrne did not agree with this proposition.

23. There was evidence before the Commissioner from a Revenue official, to the effect that the invoices from John Kelly Fuels, McCarthy Oil and FQ Services for which input credits were sought by Mr. Byrne, were not accounted for by any person or body. This Revenue Official stated that fraud occurred as invoices were provided, by a person unknown to Revenue, to a retailer (Mr. Byrne) who then deducted input VAT on foot of those invoices, in circumstances where that VAT had not been accounted for to Revenue by the issuers of those invoices (John Kelly Fuels, McCarthy Oil and FQ Services).

24. It should be noted that although the payment arrangement itself was of serious concern to Revenue, there is no dispute but that the invoices from McCarthy Oil and John Kelly Fuels complied with the technical requirements regarding VAT numbers etc contained in s. 66 of the Value-Added Tax Consolidation Act 2010 and regulation 20 of the Value-Added Tax Regulations 2010.

Determination of the Commissioner

25. In her Determination, the Commissioner states at p. 12 that, in determining whether Mr. Byrne should have known that the only reasonable explanation for the purchases was that they were connected to VAT fraud, she attaches *'weight to the following objective factors and the following evidence',* which she then sets out as follows:

- "The triangular payment arrangement between McCarthy Oil and John Kelly Fuels was accepted by [Mr. Byrne] without question even though it was not a conventional business arrangement. During cross-examination [Mr. Byrne] accepted that it was an unusual arrangement but suggested that in this view, that was how the companies wanted their business done.

- In evidence, [Mr. Byrne] admitted that he did not question Aidan Kelly (the McCarthy Oil representative) about the payment arrangement and yet [Mr. Byrne] accepted also that it was unusual to be paying the principal rather than the distributor. Further, [Mr. Byrne] requested a change of arrangement in 2012 and insisted on receiving invoices from John Kelly Fuels.

- [Mr. Byrne] in his dealings with McCarthy Oil and Aidan Kelly demonstrated a lack of curiosity about the unconventional triangular arrangement. At the time of entry into the transactions, [Mr. Byrne] did not carry out any checks on McCarthy Oil or John Kelly Fuels. In fact, [Mr. Byrne] never contacted the supplier of either company directly. [Mr. Byrne] placed absolute trust and reliance in unnamed or partially named representatives who regularly delivered from unliveried trucks. [Mr.

Byrne] stated that he never had reason to contact John Kelly Fuels or McCarthy Oil and that if there was any query on an invoice or delivery, he would contact Aidan Kelly. In response to the question of why he never contacted suppliers directly but dealt with unnamed or partially named representatives, [Mr. Byrne] stated;

> *'No, because I would deal with reps. Personally, I would just deal with the rep at the road*.'
>
> And further:
>
> *'Well I was comfortable once I was making the payments to John Kelly Fuels I didn't raise any issues.'*

- [Mr. Byrne's] rational (sic) for not contacting the supplier directly and ordering product from the supplier was that he would not get the same deal and that he would be required by John Kelly Fuels to make a payment upfront for a container of €(sic) 40,000-45,000 litres . However, other than stating that he dealt with the representative, Aidan Kelly, in relation to queries that arose, he did not adequately explain why there was no contact whatsoever between himself and his suppliers over the course of these contractual arrangements.

- The evidence of [Mr. Byrne] was uncorroborated by any of the representatives or the suppliers he dealt with.

- [Mr. Byrne] never contacted John Kelly Fuels to ask why the triangular arrangement was in place or to simply ask whether it was all okay. He never called to the premises of FQ Services, McCarthy Oil or John Kelly Fuels. [Mr. Byrne] could have taken some basic steps to safeguard his own position and that of his business, but he opted not to do so.

- [Mr. Byrne] stated that when he first started dealing with McCarthy Oil he sent a sample of their diesel for testing. He stated that the sample was validated and there was no marker present. A report was furnished in support thereof. He stated that he took this step because at the time there was a lot of media coverage in relation to laundered fuel being sold. However, sending the fuel for scientific testing is not a means of ascertaining whether [Mr. Byrne] was participating in a transaction connected with the fraudulent evasion of VAT.

- [Mr. Byrne] in his written submissions stated; '*All of the pertinent transactions were properly recorded by [Mr. Byrne] and [Mr. Byrne] had very clear procedures in place to check suppliers with whom he did business at all relevant times*.' However, in evidence, [Mr. Byrne] suggested that this statement meant that he checked the quantities of fuel that were being delivered to him but clearly, that is not the import of the statement. The statement plainly provides that there were procedures in place *'to check suppliers with whom he did business at all relevant times'*. However, that is not the evidence which [Mr. Byrne] provided at hearing. The evidence given by [Mr. Byrne] was of unusually structured transactions driven by margins with a

below-standard approach to checking out the suppliers with whom [Mr. Byrne] did business.

- During cross-examination, [Mr. Byrne] was asked what procedures he had for checking new suppliers. [Mr. Byrne] stated that in respect of McCarthy Oil;

  'the procedure was, in our discussion he made it clear to me that they were acting as agents for John Kelly Fuels. I was familiar with John Kelly fuels and that was the only issue.'

- When asked whether he checked with Aidan Kelly who McCarthy Oil was he stated "*No, I did not, no*."

- Thus, on the evidence of [Mr. Byrne], the procedure was to accept what he was told by the representative without carrying out any checking or verification in relation to same. This approach was taken notwithstanding the evidence [Mr. Byrne] gave in direct examination of his awareness in relation to the problem of fuel laundering. He stated that he knew that fuel laundering was an issue '*in a general sense from the media'* and that he could see [Revenue's] officers testing outside his and other forecourts in his area.

- [Mr. Byrne] provided evidence that other suppliers interposed themselves into the supply chain. It was not clear whether these other suppliers were acting as agents for McCarthy Oil, agents for John Kelly Fuels or whether they were acting in some other capacity. [Mr. Byrne] was unclear in his evidence in relation to these suppliers and he struggled to recollect data in respect of these transactions."

26. In the Determination, the Commissioner then goes on to conclude that the '*cumulative effect'* of these factors and evidence quoted above is such that '*the only reasonable explanation for the purchases was that the purchases were connected to the fraudulent evasion of VAT'*. The Commissioner determined that Mr. Byrne should have known that he was participating in a transaction connected to the fraudulent evasion of VAT. On this basis, the Commissioner determined that the notices of assessment for the years 2010, 2011 and 2012 totalling €451,770 should stand.

APPLICABLE LAW

27. This case is an appeal by Mr. Byrne, as provided for by s. 949AP of the Taxes Consolidation Act, 1997 (as amended), in which he claims that the Commissioner made an error on a point of law. The seminal decision regarding the approach to be taken by the High Court where such a claim is made is the Supreme Court case of *Mara v. Hummingbird Ltd* [1982] I.L.R.M. 421. At page 426 Kenny J. states:

> "The line between questions of law and those of fact can rarely be drawn firmly so as to separate one from the other.
>
> 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 fact 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." [Emphasis added]

28. Thus, to summarise the position regarding the approach of the High Court to claims such as those made by Mr. Byrne, it is:

- the High Court cannot disturb the findings on primary fact of the Commissioner unless there is no evidence whatever to support them, and,

- in relation to conclusions from primary facts which therefore involve mixed questions of fact and law, the High Court can only set aside the Commissioner's conclusion if they are ones which no reasonable commissioner could draw.

ANALYSIS

29. A number of preliminary issues were raised by Revenue regarding the jurisdiction of this Court to hear this Case Stated and also concerning the evidence to which this Court could have regard. These will be considered first.

Is the High Court entitled to have regard to the transcript on a Case Stated?

30. Revenue objected to the inclusion in the Case Stated of transcripts of the hearing before the Commissioner, on the basis of its claim that the High Court does not review evidence outside that which is set out in the Case Stated. On this basis, Revenue claims that there is no need for the transcripts to be before the Court. Mr. Byrne responded by indicating that he was at a loss to understand how the Case Stated hearing could proceed absent the transcripts of the hearing before the Commissioner being available to the Court.

31. In view of this disagreement, the parties proposed that the hearing proceed before this Court by reference to the transcript *de bene esse*, with this Court determining, after the hearing, whether it could be relied upon.

32. This Court will now make that determination.

33. It is important to note that it is not suggested by either party that the transcript does not accurately record what occurred at the hearing before the Commissioner. Against this background, Revenue's position appears to be that this Court should be limited, in its

review of whether there was an error on a point of law by the Commissioner, to the description of the Determination as set out by the Commissioner and any documentary evidence attached thereto, but not the transcript of the hearing, if one is available.

34. However, as is clear from *Hummingbird*, the role of this Court in a Case Stated involves considering, in the context of findings on primary fact made by a commissioner, whether there is, or is not, *evidence to support* that finding on primary fact.

35. Similarly, it is also clear from *Hummingbird* that the role of this Court on a Case Stated, in the context of conclusions on mixed questions of fact and law made by a commissioner, is whether no reasonable commissioner could have drawn the conclusion reached. In this regard*, if there is no evidence,* or the evidence is insufficient, for the conclusion on a mixed question of fact and law reached by a commissioner, then it can be said that no reasonable commissioner could have reached that conclusion.

36. It is clear therefore that, whether dealing with findings on primary fact or conclusions on mixed questions of fact and law, the role of this Court is to consider *the evidence* before a commissioner. In this regard, an official transcript of the hearing is the most accurate summary of the evidence which was before a commissioner and so as a matter of general principle, this Court cannot agree that in a Case Stated, the High Court is not entitled to have regard to the transcript, and thereby be deprived of what is, in effect, the evidence before a commissioner.

37. To take an example, if a taxpayer claimed in a Case Stated that findings on primary facts should be set aside, he would have to establish (as noted hereunder) that '*there was no evidence whatever to support*' the findings on primary facts made by the commissioner. However, if at the same time as making this claim, the taxpayer was to claim, as Revenue are now claiming, that this Court is not entitled to have regard to the transcript, then this would, in this Court's view, defy logic. This is because the Court would be asked to make a finding that there was *no evidence whatever* to support the commissioner's conclusion, without having access to the best record of what *evidence was actually before* the commissioner.

38. Indeed, the circumstances of this case support this conclusion, since the Case Stated signed by the Commissioner in this case relies on the terms of the transcript, since at p. 9 of the Case Stated she uses a quotation from Mr. Byrne that:

> "the procedure was, in our discussion he made it clear to me that they were acting as agents for John Kelly Fuels. I was familiar with John Kelly fuels and that was the only issue."

which quotation is clearly taken from line 20, p. 29 of Day 2 of the Transcript.

39. Yet at the same time, Revenue seek to deny Mr. Byrne the opportunity to rely on the rest of the transcript. This Court cannot see how it would be fair to a taxpayer such as Mr. Byrne that this Court could be entitled to rely on an *extract from the transcript* chosen by

the Commissioner which she believes sets out sufficient evidence for her Determination (and thus supports Revenue's case), yet at the same time Revenue seeks to deny Mr. Byrne the right to rely on the rest of the evidence (or lack thereof) contained in the *entire transcript*.

40. For all these reasons, this Court rejects Revenue's claim that this Court is not entitled to have regard to the transcript in reaching its decision on a Case Stated.

No dispute that the Commissioner applied the correct legal test

41. The second preliminary issue concerns the legal test which was applied by the Commissioner at the appeal before her. It is common case that the Commissioner applied the correct legal test, which is derived from the decision in *Kittel v. État belge* and *État belge v. Recolta Recycling SPRL* (Joined Cases C-439/04 and C-440/04), namely she asked whether the taxable person, in this case Mr. Byrne, should have known that he was participating in a transaction connected with the fraudulent evasion of VAT and that the only reasonable explanation for the purchases of the fuel was that they were connected to the fraudulent evasion of VAT.

So no point of law at issue and so no error on a point of law?

42. However, the parties disagree as to whether there was an error by the Commissioner on a point of law, which is the requirement for the exercise of the Case Stated jurisdiction of the High Court under s. 949AP(2) of the Taxes Consolidation Act, 1997 (as amended).This section provides that a party:

> "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." [Emphasis added]

43. Revenue claims that in this case there is agreement between the parties that the Commissioner applied the correct legal test and so there is no point of law at issue between them, but rather this is in substance an appeal by Mr. Byrne against findings of fact made by the Commissioner, which Revenue say is outside the Case Stated jurisdiction.

44. For his part, Mr. Byrne, in reliance on the *Hummingbird* case, claims that the meaning of the term '*erroneous on a point of law'* is more nuanced than that suggested by Revenue. In particular, he claims that the determination made by the Commissioner amounts, in the words of Kenny J., to *'conclusions or inferences from […] primary facts'* and that it is clear from *Hummingbird* that those conclusions are capable of amounting to an error on a point of law, if they are ones which no reasonable Commissioner could reach.

45. For its part, Revenue claims that the Commissioner applied the aforesaid legal test correctly by identifying certain objective factors and evidence to which she attached weight in coming to her conclusion (that Mr. Byrne should have been aware that he was participating in a transaction connected with fraudulent evasion of VAT).

46. In considering this preliminary objection by Revenue to this Case Stated, it is necessary to consider the actual decision made by the Commissioner to see if this case involves an error on a point of law, as that term is interpreted by the courts.

Mr. Byrne should have known about the VAT fraud – a finding on primary fact?

47. In reaching her determination that Mr. Byrne should have known about the VAT fraud, the Commissioner was involved in findings on primary fact. For example, she made a key finding on primary fact that the triangular payment arrangement between Mr. Byrne, McCarthy Oil and John Kelly Fuels was accepted by Mr. Byrne without question even though it was not a conventional business arrangement.

48. This Court can take no issue with this finding on primary fact since it could not be said, as required by the *Hummingbird* principles, that there was no evidence whatever to support this finding of fact. This is because the evidence to support this finding is to be found at pages 30 and 31 of Day 2 of the Transcript from the appeal hearing before the Commissioner.

49. The cumulative effect, of this key finding on primary fact and all the other findings on primary fact made by the Commissioner, was to lead to her conclusion that Mr. Byrne should have known about the VAT fraud.

50. In relation to the other key findings of fact, which supported the Commissioner's Determination, it also cannot be said that there was no evidence whatever to support those findings, as indicated by the following extraction of the findings, contained in the Commissioner's determination, followed by a portion of the evidence supporting same:

- **There was a transaction connected with fraudulent evasion of VAT:**

  "The fraud occurred in terms of the provision of invoices by persons who were not known to me to a retailer who on foot of those invoices deducted input VAT in circumstances where nobody accounted for that VAT to Revenue."

  (Cross-examination of Revenue Official: Day 3, p. 42, lines 4 – 8)

- **Triangular payment arrangement was 'unusual' and 'unconventional':**

  "Q. Right. But paying John Kelly directly wasn't a normal thing, was it, to be paying the principal directly rather than paying the distributor. That was unusual, wasn't it?

  A. It would have been, yes."

  (Cross-examination of Mr. Byrne: Day 2, p. 30, lines 22 – 26. See also Day 2, p. 31)

- **No enquires made regarding 'unusual' arrangement:**

  "Q. Did Mr. Kelly, did he explain to you why that unusual arrangement was being put in place?

  A. I suppose it was their business dealings with John Kelly Fuels that that was the way, that was the way they were running it."

(Cross-examination of Mr. Byrne: Day 2, p. 31, lines 19 – 23)

"Q. [D]id you question [Mr. Kelly] about that?

A. No, I didn't. I did not question him as to why. I asked him why that was the case and he said because that was their business dealings with John Kelly Fuels."

(Cross-examination of Mr. Byrne: Day 2, p. 32, lines 14 – 17)

- **Mr. Byrne requested change of arrangement in 2012:**

"I did in 2012 insist that I was receiving invoices from John Kelly Fuels…"

(Cross-examination of Mr. Byrne: Day 2, p. 30 lines 28 – 29)

- **Never heard of McCarthy Oil:**

"Q. Had you heard of McCarthy Oil before?

A. I had not, no."

(Direct examination of Mr. Byrne: Day 2, p. 18, lines 2 – 3)

- **Dealt with unnamed and partially named representatives from multiplesuppliers:**

(Cross-examination of Mr. Byrne: Day 2, pp. 45 - 48)

- **Fuel regularly delivered from unliveried trucks:**

"Q. There might have been no livery on it?

A. Maybe not, no, because a lot of these supplier and distributors, they wouldn't have a livery."

(Cross-examination of Mr. Byrne: Day 2, p. 48, lines 5 -7)

- **Dealt only with representatives:**

"No, because I would deal with reps. Personally I would just deal with the rep at the road.

[…]

I was comfortable once I was making the payments to John Kelly Fuels I didn't raise any issues."

(Cross-examination of Mr. Byrne: Day 2, p. 84, lines 25 – 26 and p. 85, lines 6 – 7)

- **McCarthy Oil representative not giving evidence on Mr. Byrne's behalf:**

"Q. Is Mr. Kelly going to give evidence for you, do you mind me asking?

A. No."

(Cross-examination of Mr. Byrne: Day 2, p. 25, lines 16 – 18)

- **Rationale for not contacting distributor directly:**

"Q. Your business model is, I will get supplies from different people.

A. Correct."

(Cross-examination of Mr. Byrne: Day 2, p. 34, lines 6 – 8)

"Q. I am just wondering why when you are very alive to margin you didn't want to pick up the phone and order a supply from John Kelly Fuels?

A. [I]f I was ordering from a large company like John Kelly Fuels, or any of the large companies, they will only supply you a container which is 40,000 or 45,000 litres and payment will be up front or perhaps even before the delivery arrives.

(Cross-examination of Mr. Byrne: Day 2, p. 34, lines 27 - 29, p. 35, lines 1 – 5)

- **Never contacted John Kelly Fuels directly to check arrangement:**

"Q. Even when the invoice is coming from John Kelly Fuels, as you think, but never an occasion to ring up John Kelly Fuels directly?

A. No, because I dealt with Aidan [Kelly] all the way through."

(Cross examination of Mr. Byrne: Day 2, p. 40, lines 16 – 19)

- **Never called to the premises of FQ Services, McCarthy Oil or John Kelly Fuels:**

"Q. […] I think it follows from what you said you didn't visit the premises of any of these people, did you?

A. No, no."

(Cross-examination of Mr. Byrne: Day 2, p. 78, lines 26 – 29)

- **Fuel from other suppliers not tested, yet aware of issue with fuel-laundering:**

"Q. I think we are agreed that there was no testing of any of the supplies other than the one test that you have given in response to that specific item?

A. Yes, because at the time there was, as I say, a lot of media attention."

(Cross-examination of Mr. Byrne: Day 2, p. 79, line 5 - 9)

- **No 'clear procedures' for checking suppliers:**

"Q. Well no, I am just asking you about that phrase, the phrase that was used that you had very clear procedures and I just wondered, did you have procedures?

A. Well, no, no.

[…]

Q. Well did you have any procedure?

A. Well the procedure was, in our discussion [Aidan Kelly] made it clear to me that they were acting as agents for John Kelly Fuels. I was familiar with John Kelly Fuels and that was the only issue. That was the only discussion we had in relation to …"

(Cross-examination of Mr. Byrne: Day 2, p. 29, lines 12 - 24)

- **Other suppliers interposed themselves into supply chain:**

"A. Well I wouldn't know a lot about a lot of my suppliers obviously.

Q. So the answer to that is yes, you didn't know much about them?

A. I didn't know much about them, no.

Q. You didn't have any background check done on the reps that you were….

A. No, as I wouldn't with any other rep."

(Cross-examination of Mr. Byrne: Day 2, p. 74, lines 21 – 28)

(See also Day 3, p. 27, lines 20 et seq.)

- **Evidence unclear in relation to transactions/Amendments made to some invoices:**

"Q. In some of the invoices then manuscript amendments made, is that right?

A. On price, yes.

Q. Yes. I just wondered, that's a significant departure from just somebody who was delivering on behalf of somebody else, isn't it? That's not somebody who is just delivering, that is somebody that you are actually having discussions with about the price of the ... (INTERJECTION)

A. Yes."

(Cross-examination of Mr. Byrne re FQ Services invoice: Day 2, p. 65, lines 13 - 22)

51. In light of the foregoing evidence, which supports each finding on primary fact by the Commissioner, these findings could not be said to be fall into the category of findings on primary fact for which *'there was no evidence whatever to support them'* (per Kenny J.). Accordingly, it seems to this Court that there is no basis for these findings on primary fact to be disturbed on a Case Stated.

Conclusions drawn from these findings on primary fact

52. However, while these findings on primary fact cannot be disturbed by this Court for the foregoing reasons, it is clear from *Hummingbird* that any conclusions which are drawn by the Commissioner from these findings on primary fact can be disturbed if these conclusions are ones which no reasonable Commissioner could draw.

53. It is clear from the terms of the Determination that, from these findings on primary fact, the Commissioner reaches the conclusion that Mr. Byrne should have known about the VAT fraud. This conclusion, that he *'should have known'*, is plainly not a finding on primary fact, but rather a conclusion or inference which is drawn from the foregoing findings on primary fact. Indeed, in the words of the Commissioner, it is the *'cumulative effect'* of these findings on primary fact, that leads to the conclusion, that Mr. Byrne should have known about the VAT fraud.

54. This conclusion that Mr. Byrne should have known about the VAT fraud is not a finding on primary fact (since it is not a 'fact' *per se,* but rather a conclusion drawn from facts), nor is it a decision on a point of law *per se* (in the sense of say whether to apply the 'beyond reasonable doubt' or 'balance of probabilities' standard of proof). Rather, it is a conclusion from findings on primary fact which is a mixed question of fact and law as per Kenny J. in *Hummingbird*. (As is clear from *Hummingbird*, the expression which is used to describe an error which is made by a commissioner in reaching a conclusion on such mixed questions of fact and law is nonetheless described as an 'error on a point of law', even though literally speaking it is not an error on a point of law, in the same way as say applying the wrong piece of legislation or caselaw might be).

55. To take an example from a different context, it is a finding on primary fact that X's fingerprints are on the weapon, that Y's blood is on X's clothes, that X does not have an alibi, that X recorded a YouTube clip saying he was going to assault Y and that X had a motive to assault Y. However, in a civil assault claim, it is not a finding on primary fact by the judge that X had assaulted Y on the balance of probabilities. Rather it is clear that this conclusion by the judge from the foregoing findings on primary facts is a mixed question of fact and law. Thus, to take the example a step further, if a commissioner concluded that X had *not* assaulted Y, it would be subject to review by this Court as an error on a point of law, on the grounds that no reasonable commissioner would reach this conclusion.

56. And so it is in this case, if the Commissioner applies the facts to reach a conclusion that Mr. Byrne should have known something, this is not a finding on primary facts, but a mixed question of fact and law, in the same way as a conclusion that on the balance of probabilities X assaulted Y. If no reasonable commissioner could reach this conclusion, then it amounts to an error on a point of law.

57. On this basis, this Court does not accept Revenue's assertion that, as there is no claim that the Commissioner applied the wrong legal test, the Commissioner's Determination should not be subject to the Case Stated jurisdiction. For the foregoing reasons, this Court also rejects Revenue's assertion that the Commissioner's Determination contains only findings of fact. Based on the foregoing analysis, this Court concludes that the Commissioner reached her conclusion based on the findings on primary facts, and this amounted to a conclusion of mixed questions of fact and law, and as such, that conclusion is properly subject to this Case Stated procedure. Thus, this Court rejects Revenue's suggestion that the Determination should not be subject to the Case Stated procedure.

58. Having determined that the Commissioner's determination is properly subject to the Case Stated procedure, the next question is whether the conclusion drawn by the Commissioner was one which no reasonable commissioner could draw so as to amount to an error on a point of law.

High threshold facing any applicant in a Case Stated under the Taxes Consolidation Act

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

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

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

62. This high threshold arises because of the well-established and uncontroversial *'curial deference'* which the courts grant to specialist statutory bodies which have been set up by the Oireachtas with expertise, in this case, in tax matters. See, for example, the statement of O'Connor J. *in Karshan (Midlands) Ltd v. Revenue Commissioners* [2019] IEHC 894 where he states at para. 7 that:

> "In this appeal the Court is restricted to identifying the law and applies a deference to the Commissioner who has experience in determining facts with an eye to the applicable law."

and at para. 9 where he described the Case Stated jurisdiction as one that *'is inherently deferential to the fact finder'*.

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

64. The high threshold facing an applicant in Mr. Byrne's position is also highlighted by the fact that the burden of proof is on a taxpayer to establish that he is entitled to, in this case, the input VAT credits he seeks, and not on Revenue to establish that it is entitled to

disallow the credit which Mr. Byrne seeks. This is clear from the judgment of Charleton J. in *Menolly Homes Limited v. The Appeal Commissioners & Anor* [2010] IEHC 49 at para. 22:

> "The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable".

65. As noted by Sanfey J. in the recent decision of *O'Sullivan v. Revenue Commissioners* [2021] IEHC 118 at para. 90, there is a good reason why Mr. Byrne has this heavy onus:

> "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." [Emphasis added]

66. In this case, the existence of this burden of proof on Mr. Byrne, meant that he would, or should, have known that he could be challenged by Revenue regarding his entitlement to input VAT credits which he claimed entitled him to deduct (from his VAT bill to Revenue) almost half a million euro in VAT payments, on business expenses incurred by him.

67. In seeking this deduction, the obligation is upon him to satisfy Revenue that these VAT input credits are deductible which, in the particular circumstances of this case, involving alleged VAT fraud in the supply chain, would mean satisfying the Revenue that he should not have known that they were connected with VAT fraud. The particular circumstances in this case also included, as noted hereunder, the fact that Mr. Byrne was sufficiently concerned about the unusual payment arrangement for his fuel, upon which he was claiming VAT input credits (which involved him getting invoices from McCarthy Oil which was supplying the fuel, yet he was paying the sums due to John Kelly Fuels), such that he ceased this arrangement within three years of its commencement.

68. Bearing in mind this high threshold, it is now proposed to consider the key issue in this case of whether no reasonable commissioner could have concluded that Mr. Byrne should have known of the VAT fraud.

Would no reasonable commissioner conclude Mr. Byrne should have known of fraud?

69. For Mr. Byrne to succeed this Court must decide that, in light of the findings on primary fact set out at para. 50 above (for which, it has been noted, there was evidence), no reasonable commissioner could conclude that the only reasonable explanation for the purchase of the fuel by Mr. Byrne was that it was connected to a VAT fraud.

70. When one considers this evidence, it is true that it is not so overwhelming that this Court could eliminate the possibility that another commissioner might conclude that there was another reasonable explanation for the purchase of the fuels, other than VAT fraud.

However, that is not the test to be applied by this Court on a Case Stated.

71. The test for determining whether there has been an error on a point of law is whether no reasonable commissioner could reach the conclusion drawn. As already noted, this is a significantly higher threshold than this Court concluding that the Commissioner got it wrong and indeed higher than a test of whether another commissioner might reach a different conclusion.

72. It is this Court's view that the cumulative effect of the foregoing findings of primary fact is such that, while it cannot be said that the there is a 'smoking gun' or that another commissioner might not reach a different conclusion, it cannot however be said that no reasonable commissioner could have reached the conclusion reached by the Commissioner.

73. This is because this is not a situation in which there is no evidence or very little evidence to support the Commissioner's conclusion. There is a quite a lot of evidence, *albeit* that it is cumulative in effect, rather than of the 'smoking gun' nature.

74. In particular, it is to be noted that the evidence before the Commissioner is that Mr. Byrne accepted that he entered into an arrangement that was not normal in relation to the supply of fuel (which is an industry in which he knew there was a well-publicised degree of fraud/criminality), whereby he would receive the fuel from one company and be invoiced by that company, but yet he would pay the purchase price to another company.

75. Mr. Byrne's knowledge regarding the unusual nature of the arrangement is set out at line 14, p. 31, Day 2 of the Transcript, where he accepted the following proposition that:

> "the normal way [was] that if you got an invoice it would be coming from the person that was supplying you with the goods"

and at lines 5 - 26, p. 36, Day 2, where he acknowledged that the *'invoice and payment [were not] matching up'* as he was paying '*John Kelly Fuels and we have an invoice from McCarthy Oil for that amount'* which he accepted was not *'straightforward'*.

76. Yet his only explanation for not paying McCarthy Oil even though he believed that it had bought the fuel from John Kelly Fuels, was simply that he was requested to pay John Kelly Fuels. This is clear from pp. 31 and 32 of Day 2 of the Transcript where the following exchange took place:

> "Q. Did Mr. Kelly, did he explain to you why that unusual arrangement was being put in place?
>
> A. I suppose it was their business dealings with John Kelly Fuels that that was the way, that was the way they were running it.
>
> Q. But did he explain to you why that was…

A. Well he just said that they were obviously taking the fuel, buying it or whatever agreement they had so that the payments were made payable to John Kelly Fuels.

Q. Well are we sure that that's the explanation that he gave or sort of, are you thinking that maybe that that's the explanation? Do you think that's what he said to you?

A. Well the explanation was that *they were buying the fuel, taking the fuel from John Kelly Fuels depot and that the payments were to be made payable to John Kelly Fuels Depot*.

Q. But in which case if they were buying it and they were supplying to you why would you then be paying John Kelly*? Why would you not be paying McCarthy because they have bought the fuel and they are giving it to you?*

A. Yes*. Well he requested me that the payments were made to John Kelly Fuels*." [Emphasis added]

77. To any business person, and clearly Mr. Byrne was such a person, since he operated two separate service stations in County Offaly, it should ring alarm bells that fuel purchased by McCarthy Oil from John Kelly Fuels would be supplied to Mr. Byrne, and that while invoices would come from McCarthy Oil for this fuel, he was to make payments to John Kelly Fuels. The alarm bells should be greater when one is dealing with very large sums of money (in this case, he paid over €2.5 million in total for that fuel over a three year period), and even more so when one bears in mind that the payments are being made in relation to a commodity (diesel fuel) which he knew (from media coverage) had a well-publicised risk of fraud attached. Those alarm bells regarding fraud should have rung louder again because he was aware that in his own area at that time, the risk of fraud involving fuel was a live issue, since there were Revenue checks going on in various forecourts. (See Transcript Day 2, pp. 79 and 80).

78. Indeed, Mr. Byrne was sufficiently alive to the possibility of fraud in relation to his purchase of fuel from McCarthy Oils, that he sent off for testing some of the diesel supplied to him.

79. However, while this fact illustrates that Mr. Byrne was alive to the possibility of one risk of fraud (namely the laundering of diesel), which attached to his dealing with these companies in an unusual manner, for some reason, he was not alive to another risk of fraud (namely VAT fraud) attaching to his dealing with these companies in this unusual manner.

80. In addition, Mr. Byrne was also sufficiently concerned about these unusual arrangements to cease the triangular payment arrangement within a couple of years of its commencement. At pp. 35 - 37 of Day 2 of the Transcript, he was asked to explain his reasoning for this change, and as can be seen it was because it wished to revert to a

more 'straightforward' payment arrangement where he paid the company that issued the invoice:

"Q. When – you said that the arrangement in relation to payments changed in 2012. Did I understand you correctly the initiative came from you, is that correct?

A. Yes.

Q. Who, was it your wife in her capacity as a bookkeeper drawing that to your attention or was it, how did that come to pass that change in the way you do business?

A. Well I suppose in discussions with my wife at the end of the year accounts or whatever, it would *be much clearer to have an invoice and a payment matching up*, you know, as opposed to… (INTERJECTION)

Q. Well she wouldn't have needed it for clarity purpose because you always knew if it's a McCarthy's invoice that's a John Kelly Fuels?

A. Yes.

Q. Mr. Kelly hadn't told you it was coming from anywhere else?

A. Yes.

Q. He said it was coming from John Kelly Fuels. So it wasn't for reasons of clarity in the accounts that she needed that information, did she?

A. Well if my online *payments were being paid to Kelly Fuels, it would be much more straightforward if the invoices were Kelly Fuels*. That was my opinion.

Q. That was your opinion.

A. Yes.

Q. In what way more straight forward? What was it that happened in your own mind that said … (INTERJECTION)

A. Well I just felt that we were paying John Kelly Fuels and we have an invoice from McCarthy Oil for that amount.

Q. Was that a misgiving that you had back in December?

A. No.

Q. When did that misgiving start in your mind?

A. *Well it just came to me for no reason. I can't say when it came to light, but I just said I am paying John Kelly Fuels so can you give me John Kelly Fuels invoices."* [Emphasis added]

81. Then at pp. 75 and 76 of Day 2 of the Transcript, he was further questioned on this issue:

"Q. You recognised that this was an unusual arrangement, this sort of triangular arrangement was an unusual one?

A. Oh, it may have been different but it was obviously their wish that that was the way it was to be.

Q. *Absolutely and that was their wish, but you were concerned enough about it to say it's an arrangement that has to stop?*

A. *Well as long as, we needed to have the invoice and payment the same name."* [Emphasis added]

82. It is of course possible that another commissioner might well conclude from this evidence that a reasonable explanation for the purchases was, not VAT fraud, but some unusual kind of agency and it was reasonable for Mr. Byrne to simply accept that the *'payments were to be made payable to John Kelly Fuels'*. A reasonable commissioner could perhaps, based on the evidence, come to the view, as suggested by Mr. Byrne's counsel, that Mr. Byrne was somewhat naïve in the manner in which he spent over €2.5 million on the supply of fuel. On this basis, such a commissioner could reach the conclusion that there was a reasonable explanation for the purchases, other than VAT fraud, such as the unusual agency where McCarthy Oil, as alleged agent of John Kelly Fuels, would buy fuel off John Kelly Fuels and then after delivery to Mr. Byrne issue invoices in the name of McCarthy Oil, which were to be paid, for some unexplained reason, not to McCarthy Oil, but to John Kelly Fuels. In reaching such a conclusion, a commissioner would presumably rely on Mr. Byrne's evidence that in his discussions with Mr. Aidan Kelly he took them *'at face value'* (See Transcript Day 2, p. 30, lines 3 - 5).

83. This conclusion is not beyond the realms of possibility for a reasonable commissioner, but it would require the commissioner to accept that Mr. Byrne was correct to accept everything at face value that he was told in the particular circumstances of this case. Such a commissioner in reaching this conclusion might also be influenced by the demeanour of Mr. Byrne, and other witnesses, and the manner in which they gave their evidence.

84. As previously noted, it is not for this Court to determine if the Commissioner, in reaching her conclusion, was correct. Rather this Court's role is restricted to determining whether no reasonable commissioner could have reached the conclusion reached by the Commissioner based on the evidence given during the hearing of the appeal.

85. In this regard, while it is possible that a commissioner could take the foregoing benign view of whether Mr. Byrne should have known that there was VAT fraud going on and

conclude that he was simply naïve, it is a much greater step, for this Court to decide that no reasonable commissioner could conclude from all the evidence that the only reasonable explanation for the purchases was that they were connected to the fraudulent evasion of VAT.

86. It seems to this Court that a reasonable commissioner could reach a less benign assessment of Mr. Byrne's actions when one considers the cumulative effect of the evidence (and not simply the unusual triangular payment arrangement).

87. This is because when one considers the cumulative effect of the fact that:

- the triangular payment arrangements were unusual,
- notwithstanding which, Mr. Byrne had no procedures in place to check on the standing of suppliers (even though the onus is on him to satisfy Revenue regarding the validity of his claim),
- in the context of a commodity that was open to fraud,
- in respect of payments of considerable sums of money (over €2.5 million),
- in an area that was subject to fraud inspections,
- which commodity was delivered in non-liveried trucks,
- where other suppliers were interposed into the supply chain,
- with the absence of any corroborating evidence from Mr. Byrne to support his benign view of the supply chain (notwithstanding his obligation to satisfy Revenue regarding the validity of his claim),
- where Mr. Byrne was sufficiently suspicious to test a sample of the fuel for fraudulent fuel laundering, and,
- where he was sufficiently concerned about the unusual payment arrangement to cease it after three years,

in this Court's view, a reasonable commissioner could reach the conclusion that the only reasonable explanation for the purchases was that they were connected to VAT fraud.

88. In this regard, the statement of Blayney J. in the Supreme Court decision *of Ó Cúlacháin v. McMullen Brothers Ltd* [1995] 2 I.R. 217 at 223 is particularly apt to the circumstances of the current case. In that case, he adopted the *Hummingbird* test and added the statement that:

> "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." [Emphasis added]

So it is in this case. It is essentially a matter of degree, since on the one hand, a different commissioner might well have taken a more benign view of Mr. Byrne's application for VAT input credits than the Commissioner.

89. However, this Court cannot conclude that no reasonable commissioner (who would have the benefit of observing the demeanour of all the witnesses, as the Commissioner did) would have drawn the conclusions reached by the Commissioner in this case in light of the cumulative effect of the foregoing evidence.

90. Before concluding, reference should be made to *Mahagében kft and Dávid v. Nemzeti* (Joined Cases C-80/11 and C-142/11), as Mr. Byrne placed particular emphasis on para. 62 of that decision to support his claim that it was not a matter for him to be detecting VAT fraud, but rather this was a matter for Revenue, and also to support his claim that he was entitled to take at face value what was said to him and not to query the unusual circumstances of the supply of the fuel. For context, it is relevant to quote paras. 59 to 62 of *Mahagében:*

"59. In those circumstances, it follows from the case-law referred to in paragraphs 53 and 54 of the present judgment that *determination of the measures which may, in a particular case, reasonably be required of a taxable person* wishing to exercise the right to deduct VAT in order to satisfy himself that his transactions are not connected with fraud committed by a trader at an earlier stage of a transaction *depends essentially on the circumstances of that particular case.*

60. It is true that, when there are indications pointing to an infringement or fraud, a reasonable trader could, depending on the circumstances of the case, be obliged to make enquiries about another trader from whom he intends to purchase goods or services in order to ascertain the latter's trustworthiness.

61. However, the tax authority cannot, as a general rule, require the taxable person wishing to exercise the right to deduct VAT, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right to deduct is sought has the capacity of a taxable person, that he was in possession of the goods at issue and was in a position to supply them and that he has satisfied his obligations as regards declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders operating at an earlier stage of the transaction or, second, to be in possession of documents in that regard.

62. *It is, in principle, for the tax authorities to carry out the necessary inspections of taxable persons in order to detect VAT irregularities and fraud* as well as to impose penalties on the taxable person who has committed those irregularities or fraud." [Emphasis added]

91. However, when one considers that statement at para. 62 in context (i.e. that it is *'in principle'* for the tax authorities to carry out inspections to detect fraud) and particularly in the context of the statement at para. 60 that:

> "when there are indications pointing to an infringement or fraud, a reasonable trader could, depending on the circumstances of the case, be obliged to make enquiries about another trader"

it seems clear to this Court that, for a person who is seeking to offset against his tax bill close to half a million in business expenses, para. 62 is not a charter to take everything at face value and ignore unusual circumstances regarding his purchase of fuel, particularly when one bears in mind that the onus is on a taxpayer to satisfy Revenue of his claim.

92. It seems to this Court that, in reliance on paras. 59 - 62 as a whole, one could not say that no reasonable commissioner could have reached the conclusion that the cumulative effect of the circumstances of the case called for more than simply taking what occurred at face value and waiting some three years to apply 'normal' payment arrangements (so as to be in a situation where *'I am paying John Kelly Fuels so can you give me John Kelly Fuels invoices'* (See Transcript, Day 2, p. 37, lines 2 - 4).

93. For all these reasons, this Court concludes that Mr. Byrne has failed to establish an error on a point of law on the part of the Commissioner.

94. In summary, and without seeking to in any way depart from this Court's conclusion regarding the application of the *Hummingbird* test to this case, one could perhaps put the matter another way. If one assumes that all commissioners are reasonable, it is possible that another commissioner *could have reached a different conclusion* from the Commissioner in this case, but this does not amount to an error on a point of law, since for there to be an error on a point of law, one would have to be able to say that there is not another commissioner who could have *reached the same conclusion* as the Commissioner. This Court does not believe that this is the case and so it must reject Mr. Byrne's appeal.

Answers to questions 2 and 3 of the Case Stated

95. For this reason, this Court's answer to the second question in the Case Stated, namely whether there was sufficient objective evidence to support a determination that Mr. Byrne should have known that he was participating in a transaction connected with VAT fraud and that the only reasonable explanation for the purchases was that they were connected with VAT fraud, is yes.

96. Similarly, the answer to the third question, whether the Commissioner was correct in law in her determination that Mr. Byrne should have known that he was participating in a transaction connected with VAT fraud and that the only reasonable explanation for the purchases was that they were connected to VAT fraud, is also yes.

97. In reaching this conclusion, it is important to emphasise that it is possible that another commissioner could have reached a different conclusion from the Commissioner but, as

noted by Blayney J. in *Ó Cúlacháin*, these are *'essentially matters of degree'.* While this Court has not found that no reasonable commissioner could have reached the Commissioner's decision, it is also important to emphasise that there was no finding by the Commissioner that Mr. Byrne had actual knowledge of the VAT fraud and similarly there is no finding by this Court to that effect.

98. Although the majority of the hearing before this Court was concerned with the second and third questions in the Case Stated, there is also however the first question in the Case Stated to be addressed.

The Commissioner's decision that there was VAT fraud?

99. The first question in the Case Stated is whether there was sufficient objective evidence to support the Commissioner's determination that there was a transaction connected with the fraudulent evasion of VAT.

100. To support this conclusion, the Commissioner relied on the evidence of a Revenue Officer of some 36 years' experience who had since 2010 been involved in investigations in the oil sector. His evidence, which was not controverted, was set out by the Commissioner at p. 8 of her determination:

> "The evidence of [Revenue Official] was that invoices from John Kelly Fuels, from McCarthy Oil and from FQ Services which appeared in the VAT records of [Mr. Byrne] and in respect of which input credits were taken, were not accounted for by any person or body. [Revenue Official] stated that fraud occurred in terms of the provision of invoices by persons who were not known to [Revenue], to a retailer who on foot of those invoices deducted input VAT, in circumstances where nobody accounted for that VAT to [Revenue]."

101. In addition, in the correspondence appended to the Case Stated, the Commissioner exhibited a letter dated 27th November, 2013 from Revenue to Mr. Byrne (which letter was opened by counsel for Mr. Byrne at the hearing before the Commissioner). It states, *inter alia*, that:

> "Further VAT assessments have now been raised as follows:
>
> 2010 €12432
>
> 2011 €190356
>
> These assessments have been raised disallowing the VAT inputs on *invoices from McCarthy Oil on the basis that the invoices are fake and are not issued by the party whom you claim to have received them from*. The claims are also disallowed on the basis that:
>
> 1. There was fraudulent evasion of VAT in the supply chain
> 2. The transactions in question were connected with that fraudulent evasion

3. You knew or should have known that, by your purchase, you were taking part in a transaction connected with the fraudulent evasion of VAT." [Emphasis added]

102. Although Mr. Byrne has disputed that he knew or should have known about the alleged VAT fraud, counsel for Revenue submitted to this Court, which submission was not controverted by Mr. Byrne, that Mr. Byrne had never sought to dispute that the invoices were false, nor had he sought to claim that they represented real transactions.

103. It seems clear to this Court therefore that the only evidence before the Commissioner regarding whether or not there was a VAT fraud was from the Revenue Official, in addition to the letter of 27th November, 2013, which evidence supported a finding that there was VAT fraud carried out in connection with the supply of fuel to Mr. Byrne.

Answer to question 1 of the Case Stated

104. Accordingly, this is not a case where there was no evidence whatever to support these findings on primary fact by the Commissioner, which is required by the *Hummingbird* case for this determination to be set aside. On this basis, this Court concludes that the answer to the first question is yes - there was sufficient evidence for the Commissioner's conclusion that there was a transaction connected with VAT fraud.

CONCLUSION

105. The answers to each of the three questions raised by the Commissioner is yes and the appeal on a point of law by way of Case Stated is rejected for the reasons set out.

106. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be put in for mention one week from the date of delivery of judgment, at 10.30 am.