**APPROVED** **[2024] IEHC 611**

# THE HIGH COURT

**2023 292 R**

**BETWEEN**

**CORNELIUS O'SULLIVAN**

**PLAINTIFF**

**AND**

**THE REVENUE COMMISSIONERS**

**DEFENDANT**

**JUDGEMENT of Mr Justice Nolan delivered on the 6th day of November, 2024**

## Introduction

**1.** This judgment concerns a case stated for the opinion of the court pursuant to Section 949 of the Taxes Consolidation Act 1997 as amended ("TCA 1997"), in relation to the determination of the Tax Appeal Commissioner ("TAC") on the 21st of March 2023 ("the determination"). A preliminary issue was raised by the Appellant that a Notice of Amended Assessment to income tax for the year 2005, dated the 6th of December 2011, was raised outside of the four-year time limit provided for the making or amendment of an assessment pursuant to Section 955(2)(a) of the TCA 1997.

**2.** The TAC found that the Appellant had not made a full and true disclosure of all material facts necessary for the making of an assessment of the chargeable income in his 2005 tax return. As a result of that finding, the TAC determined that the Appellant was not entitled to rely on the protective provisions of Section 955(2)(a) of the TCA 1997 and that the Respondent was not estopped from raising the Amended Assessment to income tax outside of the four-year time limit contained in Section 995.

**3.** It is from her determination about the Appellant brings this case stated.

## Background

**4.** For many years the Appellant was a director and minority shareholder of a company called Mulcahy McDonough and Partners Limited ("MMP Ltd"), a firm of Chartered Surveyors. On foot of tax advice in December of 2005, a company called Tramult Ltd ("Tramult") was incorporated with an authorised share capital of 1,000,000 ordinary shares of €1.00 each. The Appellant, was also a minority shareholder in Tramult holding 80 ordinary shares out of a total of 304 ordinary shares on issue in the company. In December 2005, MMP Ltd. subscribed for 150 ordinary shares of €1.00 in Tramult at a premium of €9,860 per share and became the controlling shareholder in the company.

**5.** On the 21st of December 2005, the shareholders of Tramult, which included the Appellant and MMP Ltd, passed a special resolution amending the memorandum and articles of association of Tramult to increase the ordinary shares to 2,000,000, and then to allocate 152 ordinary shares of €1 each to MMP Ltd at a premium of €9,868 per share, totaling €1,500,000. Tramult allocated 304 ordinary shares of €1 each between 5 individuals, one of whom was the Appellant.

**6.** Rights attaching to the ordinary shares of Tramult moved or transferred to the ordinary shares of the company, that is to say from the ordinary shares held by MMP Ltd to the ordinary shares held by the Appellant and other ordinary shareholders.

**7.** On the same day, a special resolution was passed by Tramult resolving that the company be wound up. On foot of the liquidation, the Appellant received the sum of €394,697.00 in respect of a capital distribution of his shares.

**8.** The details of this transfer and distribution were not included in the Appellant's tax return for 2005, which was signed by the Appellant on the 20th of October 2006 and was submitted to the Respondent on the 11th of November 2006.

**9.** Some four and a half years later on the 16th of February 2011, an inspector of the Respondent sent a letter to the Appellant stating that it had commenced an investigation into his tax affairs for the year 2005 concerning the tax consequences of the transactions involving the transfer of share rights to him by MMP Ltd. He set out details of his knowledge of the transaction. He asked how the funds were received and utilised and noted that having reviewed his tax returns, the inspector was unable to establish that the transaction and the amounts had been returned for tax purposes.

**10.** The Appellant says that the disposal of the shares by him on liquidation was a capital gains tax disposal giving rise to no liability to capital gains tax due to the consideration received being equal to the acquisition cost of the shares, the acquisition cost being subject to the connected party rules within the tax legislation.

**11.** As is normal practice in the process of finalising a liquidation, tax clearance was sought from the Respondent in respect of Tramult and on the 10th of July 2006, the Respondent confirmed that there were no outstanding liabilities for the company, and it was not intended to carry out an audit and it was in order to finalise the liquidation.

**12.** Correspondence passed between the parties and then on the 6th of December 2011 the Respondent issued a Notice of Amended Assessment for the year ending the 31st of December 2005. A notice of appeal was lodged on the 22nd of December 2011 and acknowledged on the 11th of January 2012. There was then a delay as the parties awaited the decision of the High Court in the case of *Hughes v Revenue Commissioners* [2019] IEHC 807. The appeal was subsequently transferred to the Tax Appeal Commission.

**13.** The Appellant submits that the Amended Assessment is invalid since it was made outside of the four-year time limit provided by Section 955(2)(b)(1). This is the net issue between the parties. All other issues feed into this one key question. Did the four-year time limit apply to the raised Amended Assessment?

**14.** The Appellant then requested that the TAC determine as a preliminary issue whether the Amended Assessment was raised outside of the four-year time limit provided for.

## The Hearing

**15.** The hearing in relation to the preliminary issue took place on the 13th of February 2023. Outline arguments were submitted by the Appellant and the Respondent in advance of the hearing. The only witness was the Appellant. He was examined and cross examined by both parties. I will return to the evidence.

## Material Findings of Fact

**16.** The TAC made the following material findings of fact: -

*(i)* The Appellant was a director and minority shareholder in MMP Ltd.

*(ii)* The Appellant held twenty ordinary shares out of a total of 76 ordinary shares on issue in MMP Ltd.

*(iii)* On the 1st of December 2005 Tramult was incorporated and had authorised share capital of 1,000,000 ordinary shares of €1 each.

*(iv)* The Appellant was also a minority shareholder in Tramult holding 80 A ordinary shares out of a total of 304 A ordinary shares on issue in Tramult.

*(v)* In December 2005, MMP Ltd subscribed for 150 ordinary shares of €1 in Tramult at a premium of €9,869 pair share and became the controlling shareholder in Tramult.

*(vi)* On the 21st of December 2005, the shareholders of Tramult, which included the Appellant and MMP Ltd, passed a special resolution amending the Memorandum and Articles of Association of Tramult as follows:

a. The authorized share capital of Tramult of 1,000,000 ordinary shares of €1.00 each was increased to 2,000,000 by the creation of an additional 1,000,000 A ordinary shares of €1.00 each.

b. Tramult allocated 152 ordinary shares of €1 each to MMP Ltd at a premium of €9,896 per share, totally €1,500,000.

c. Tramult allocated 304 A ordinary shares of €1.00 par as follows:

i. 80 ordinary shares to the Appellant;

ii. 16 ordinary shares to POD;

iii. 72 ordinary shares to JW;

iv. 68 ordinary shares to NB;

v. 66 A ordinary shares to JD.

d. Rights attaching to the ordinary shares of Tramult moved or transferred to the A ordinary shares of Tramult, that is to say from the A

ordinary shares held by MMP Ltd to the A ordinary shares held by the Appellant and other A ordinary shareholders.

*(vii)* On the 21st of December 2005 a special resolution was passed by Tramult resolving that the company be wound up. On foot of the liquidation of Tramult, the Applicant received €394,697 in respect of a capital distribution of his shares in Tramult.

*(viii)* The details of the December 2005 transfer and distribution were not included in the Appellant's tax return for 2005 which was signed by the Appellant on the 20th of October 2006 and was submitted to the Respondent on the 11th of November 2006.

*(ix)* The Appellant did not tick the 'Expression of Doubt' box in the 2005 tax return.

*(x)* The Amended Assessment was raised by the Respondent on the 6th of December 2011.

She found there were three matters of material fact which were in issue. She determined those three issues of material fact. I have set these out at para.38.

**The Points of Law on which the Opinion of the High Court is Sought**

**17.** The TAC has sent forward seven questions of law for the opinion of the High Court. These are as follows: -

i. Did the Commissioner err in determining, on the facts and submissions opened in the appeal, that the Appellant did not make a full and true disclosure within the provisions of Section 955 of the TAC 1997?

ii. Did the Commissioner err and fail in her determination to apply the facts and submissions made in the appeal, in connection with CRO documentation opened at the appeal and in particular form B5 of Tramult Ltd dated the 21st of December 2005, in ascertaining the correct interpretation of Section 955 TCA 1997 wherein such form B5 constituted the entire information used by the Respondent and was the sole basis upon which the Respondent initiated their enquiries and investigation into this case?

iii. Did the Commissioner err and fail in her determination to correctly apply the contents of a letter dated 10th of July 2006 from the Respondent to Tramult Ltd which contents are replicated in paragraph 57 of the determination, to the provisions of Section 955 Taxes Consolidation Act 1997.

iv. Did the Commissioner err in determining that the Appellant is not entitled to the protective provisions of Section 955(2)(a) by reason of the manner in which he completed his tax returns?

v. Did the Commissioner err and fail to correctly interpret and/or apply Section 956 of the TAC 1997 as that Section applies to the facts of this case, including, but not limited to, for the purposes of interpreting Section 955 of the TCA 1997?

vi. Did the Commissioner err and fail to properly apply, for the purposes of Section 955 of the TCA 1997, the manner in which the Appellant completed his relevant income tax return using Form 11 for 2005 with reference in particular to Capital Gains Tax and all other completed income tax returns for years prior and post 2005 (such returns having been accepted by the Respondent including forming the basis for refunds for tax paid)?

vii. Did the Commissioner err in finding the material facts such that a reasonable commissioner could not have found said material facts?

**The Legal Principles Applicable to a Case Stated**

**18.** In *McMullin Brothers Ltd v McDonagh* [2015] IESC 19 Blayney J. (O'Flaherty and Denham J.J. concurring) distilled from *Mara v Hummingbird Ltd* [1982] ILRM 421 and the English authorities five principles of law which were endorsed in *MacCarthaigh (Inspector of Taxes) v Cablelink Ltd and Others* [2003] IESC 67. These were: -

> *"(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*
>
> *(2) Inferences from primary facts are mixed questions of fact and law.*
>
> *(3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.*
>
> *(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.*
>
> *(5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."*

**19.** In this case, one can read the TAC for references to the Circuit Judge.

**20.** In *Cintra Infrastructures Internacional SLU v Revenue Commissioners* [2023] IEHC 72, Butler J. dealt with the issue between primary facts and purely legal questions and those which comprises secondary facts or inferences drawn from primary facts which are characterised as mixed questions of fact and law. The pertinent part of her decision reads as follows:-

"*Accepting findings of primary fact made by the Commissioner unless there is no evidence to support them but the court being at large as regards purely legal questions. The more difficult category for the appellate court lies in between primary facts and purely legal questions and comprises secondary facts or inferences drawn from primary facts by the Appeal Commissioner which are characterised as mixed questions of fact and law. Indeed, it seems to me that a mixed question of fact and law will not necessarily comprise an equal division between matters legal and matters factual and the extent to which an inference is predominantly factual or predominantly legal will vary, not just on a case-by-case basis, but as regards different findings in a single case. If inferences are based on an incorrect view of the law they can be set aside but if the Appeal Commissioner has taken a correct view of the law, the resulting inferences should not be set aside unless they are such that no reasonable Commissioner could have drawn them."*

**21.** Those principles have been approved more recently in *Byrne v Revenue Commissioners* [2021] IEHC 262, in which Twomey J. noted the "*high threshold*" facing an Appellant in a case stated, having regard to the curial deference due to the Tax Appeals Commission. Twomey J.'s observations were, in turn, endorsed in *McNamara v Revenue Commissioners* [2023] IEHC 15 by Barr J., though Barr J. did sound a note of caution, referencing the observations of Murray J. in *Stanberry Investments Ltd v Commissioner of Valuation* [2020] IECA 33, a case which the Appellant has raised in this court, that curial deference depends on a tribunal having provided a properly reasoned decision, and was not a mechanism for compensating where the decision was not so reasoned.

**The Relevant Statutory Provisions**

**22.** The key statutory provisions which form the basis of this case stated are Sections 955 and 956 TCA 1997.

**23.** Section 955(2) of TCA 1997, as amended by Section 17(1)(g) of the Finance Act 2003, provides for a four-year time limit on assessments to tax or amendments to such assessments by the Respondent in the following terms:

> *"(2)(a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of four years commencing at the end of the chargeable period in which the return is delivered and*
>
> *(i) no additional tax shall be payable by the chargeable person after the end of that period of four years; and*
>
> *(ii) no tax shall be repaid to the chargeable person after the end of a period of four years commencing at the end of the chargeable for which the return is delivered,*
>
> *by reason of any matter contained in the return*."
>
> "(3) *Nothing in this subsection shall prevent the amendment of an assessment-*
>
> *(i) Where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),*
>
> *(ii) to give effect to a determination on an appeal against an assessment,*
>
> *(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,*
>
> *(iv) to correct an error in calculation, or*

*(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person…,*

*and tax shall be paid or repaid where appropriate in accordance with any such amendment and nothing in this Section shall affect the operation of Section 804(3).*" (emphasis added)

**24.** Section 955(4) of TCA 1997 specifically deals with an 'Expression of Doubt' to be contained in a return and provides: -

"(*4)(a) Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable person, that person may deliver the return to the best of that person's belief as to the application of law to or the treatment for the tax purposes of that matter but that person shall draw the inspector's attention to the matter in question in the return by specifying the doubt and, if that person does so, that person shall be treated as making a full and true disclosure with regards to that matter.*

*(b) This subsection shall not apply where the inspector is, or on appeal the appeal commissioners are, not satisfied that the doubt was genuine and is or are of the opinion that the chargeable person was acting with a view to the evasion or avoidance of tax, and in such a case the chargeable person shall be deemed not to have made a full and true disclosure with regard to the matter in question".*

**25.** The Appellant says that Section 956(1)(b) TCA 1997 is also relevant in the context of the inquiries commenced by the Respondent in their letter of the 16th of February 2011.

**26.** It provides: -

"*(1)(b) the making of an assessment or the amendment of an assessment by reference to any statement or particular referred to in paragraph(a)(i) shall not preclude the inspector-*

*(i) from making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular, and*

*(ii) subject to Section 955(2), from amending or further amending an assessment in such manner as he or she considers appropriate.*

*(c) any inquiries and actions referred to in paragraph (b) shall not be made in the case of any chargeable person for any chargeable at any time after the expiry of the period of four years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner.* (emphasis added)

**27.** The meaning of the last phrase in that Section is of relevance in this case.

**The Determination of the TAC**

**28.** She noted that the matter came in front of her as an appeal against a Notice of an Amended Assessment to income tax raised by the Respondent on the 6th of December 2011 for the tax year 2005. The total amount of tax under appeal is €185,508. She noted that the Appellant had raised a preliminary issue in the appeal and contended that the Amended Assessment was raised outside of the four-year time limit provided for the making or amendment of an assessment pursuant to Section 955(2)(a) of the Taxes Consolidation Act 1997.

**29.** She noted that this was nominated as a lead appeal in a group of appeals, all of which relate to the same or similar subject matter. She set out the position of the Appellant in MMP Ltd and the transactions which occurred in December of 2005 as set out above.

**30.** However, the key issue was that the transaction that took place in December of 2005 was not included in the Appellant's tax returns for 2005. A number of years later, on the 16th of February 2011, the Respondents sent a letter to the Appellant which is the subject matter of this appeal.

**31.** She noted that from time to time the appeal had been stayed to allow the progression of a case stated to the High Court in the matter of *Hughes.* That decision was then appealed to the Court of Appeal. However, the appeal was subsequently withdrawn. Following its withdrawal, the stay on the appeal within the Commission was lifted.

**32.** She then set out the primary legislation which I have set out above. She noted the Appellant's submissions, most, if not all of which, are set out in the submissions to me which I will discuss below.

**33.** The Appellant gave evidence. He stated that he was in the habit of completing his own tax returns and submitting them to the Respondent. He was consistent in the manner in which he made his returns and in particular the CGT section of those returns. He said that he filled out the 2005 tax return in a way he had always done and as he considered he did not have any CGT liability in 2005, he did not complete any part of the CGT section on the tax return form, namely the Form 11, relating to that tax.

**34.** He gave a number of reasons as to why he was of the view it was not necessary for him to complete the CGT Section. First amongst them what was that all of the details of the December 2005 transaction and distribution relating to Tramult and MMP Ltd had been sent to the Company's Registration Office ("CRO") and to the Respondent. He said that his tax advisers had received confirmation from the Respondent that everything in relation to the

transaction was in order. As a result, he considered that the December 2005 transaction and distribution had been dealt with and as he had no CGT to pay, he did not include any details of the transaction in the return. Some years he would fill it in and some years he wouldn't. In relation to the 'Expression of Doubt' box, which is contained on the form, he said he had not ticked it because there was no doubt in his mind in relation to whether he had a liability to CGT, relying upon the correspondence received from the Respondent.

**35.** He said that the firm advice which he had received from his advisers was that there was no CGT liability. He stated that when he said he had admitted to returning the detail of the capital distribution to him on liquidation, he meant that it was not put in his tax return. He was adamant that he had no liability and indeed that it had never crossed his mind.

**36.** The Respondent did not call any witnesses but made their submissions which I will set out in more detail when I deal with the submissions before me.

**37.** After making her findings of material fact, she noted that there were three issues between the parties. These were as follows: -

*(i)* The B5 return of Tramult to CRO dated the 21st of December 2005 was also a submission of the Respondent;

*(ii)* The Respondent's letter of the 10th of July 2006 was a tax clearance letter which related to the Appellant's tax involvement with the December 2005 transaction and distribution;

*(iii)* The Appellant made a full and true disclosure of all material facts necessary for the making of an assessment for 2005.

**38.** In regard to the B5 return dated the 21st of December 2005, she noted that whilst this contained the Appellant's name and address, which was handwritten, it did not contain the Appellant's PPS number or any other information which would have linked the Appellant to the B5 return. She noted that while counsel for the Appellant had submitted that the Respondent

would have been notified of the identity of the directors of Tramult and their PPS numbers prior to issuing the letter of the 16th of February 2016, there was no documentary evidence to support this. She noted that the burden of proof rested with the Appellant in relation to this material fact and since the Appellant had not adduced any evidence which would tend to suggest that the B5 submission to the CRO was also submitted to the Respondent, she felt it was reasonable that the Appellant should have been able to produce some documentary evidence but that he had not done so. Therefore, she found the Appellant had not discharged the burden of proof to establish that the B5 return of Tramult to the CRO was also a submission to the Respondent. She found that this was a material fact which she did not accept.

**39.** In relation to the alleged tax clearance letter of the 10th of July, she set it out in full. Under cross examination the Appellant agreed that it related to the tax affairs of Tramult and did not contain any specific reference to him or his tax affairs. She noted that the letter did not contain any reference to "*tax clearance*", the 2005 transaction and distribution nor his tax position, in any shape or form. She found that this letter was not a tax clearance letter and therefore this material fact was not accepted.

**40.** In relation to whether the Appellant had made a full and true disclosure of all material facts necessary for the making of an assessment for 2005, the TAC noted that under cross examination the Appellant did not agree it was necessary to populate the section of the Form 11 which is titled 'Capital Gains' when a disposal takes place. Instead, it was the Applicant's position that it was only necessary to populate the section if a capital gain or loss occurs in a given year**.** He was clear in his opinion and indeed went so far as to say, "*no capital gains, move on*". He repeated that his tax advisor had received a clearance letter relating to the 2005 transaction and distribution. However, he had not seen it himself, but he knew from his advisors that the matter had been cleared up with the Respondent and the CRO. It was put to him that

this was the letter of the 10th of July 2006 and that there was no other correspondence which he could point to.

**41.** The TAC said that this argument did not find favour with her. She noted that the tax regime in the State is run on a self-assessment basis, with chargeable persons being required to make full and true disclosures of all material facts to the Respondent in order to allow the Respondent to assess the tax position of the chargeable person and to make an assessment of the correct tax liability, if any, which may arise. She then quoted from the case of *Hanrahan v Revenue* [2022] IEHC 43, a decision of Stack J. which was overturned in part by the Court of Appeal ([2024] IECA 113) but not on the relevant issue in this case, which I will refer to below. She concluded that having considered all the evidence, the Appellant had not discharged the burden of proof to establish that he had made a full and true disclosure of all material matters in his 2005 tax return.

**42.** She considered his contention that the Respondent was aware of the Appellant's involvement in the 2005 transaction and distribution prior to the expiration of the four-year time limit contained in Section 955 but did not agree with that contention.

**43.** She then carried out an analysis of Section 955 of TCA 1997. She said it contained a protective section which provides that the Respondent is not entitled to raise or amend assessments outside of a four-year time limit in circumstances where a chargeable person has made a full and true disclosure of all material facts necessary for the making of an assessment. Since she had found that the Appellant had not made a full and true disclosure of all material facts, it followed that he was not entitled to rely on the protective provisions of Section 955 (2)(a) of the TCA 1997. In those circumstances, she found that the Respondent was not estopped from raising the amended assessment outside of the four-year time.

**44.** She referred to the cases *The Revenue Commissioners v Droog* [2016] IESC 55 and *Stanley v The Revenue Commissioners* [2017] IESC 279. She noted that in both of the cases

the court accepted that the chargeable persons had made full and true disclosures of all material facts necessary for the making of an assessment.

**45.** Thereafter, she dealt with the submission that the failure on the part of the Appellant to tick the 'Expression of Doubt' box in the 2005 tax return was relevant. She noted that he said that he had no question in his mind, nor had he been advised of any potential issue in relation to income tax pertaining to this matter. She concluded that the fact that he did not tick the 'Expression of Doubt' box in his 2005 tax return did not impact upon her preliminary determination.

**The Appellant's Submissions**

**46.** The written submissions ranged over a number of issues and focused initially on the transaction itself, the concept of which was struck down by the decision of Allen J. in *Hughes,* and the three matters of material facts which were in issue. Of the seven questions which form part of the case stated, all bar one concern Section 956. The written submissions set out extracts from *Droog* and the views of Clarke J. (as he then was) as to the difference between Section 955 and 956. The Appellant noted that Stack J. in *Hanrahan* did not consider Section 956 and therefore, that decision logically cannot be authority for the treatment of that section. While the Respondent in their submission had argued that the Appellant was negligent in failing to include an 'Expression of Doubt' in his return, the TAC did not deal with that issue. The Appellant argued that Section 956 was an issue from the very outset. Indeed, the written submissions have a specific heading titled "*Section 956 grounds for the belief that the return was insufficient"*.

**47.** The Appellant submits that Section 956 is relevant because it allows the Respondent to make enquiries at any time outside the expiry of four years where there are reasonable grounds for believing that the return has been completed in a fraudulent or negligent manner. Whilst

this was referred to by Mr. Costello of the Respondent, in his letter of the 4th of August 2011, there was no evidence to support any fraudulent or negligent actions. Further, no evidence was tendered by the Respondent at the hearing.

**48.** Notwithstanding detailed argument in relation to the point both in writing and orally, the Appellant says that there was no analysis in regard to the nature and effect of Section 956 and since it was an essential aspect of the Appellant's appeal that there was an interaction between the two sections, that this mistake must amount to an error of law.

**49.** These submissions were delivered seven days before the judgment of Mulcahy J. in *The Revenue Commissioners v Tobin* [2024] IEHC 196.

**50.** In oral submissions Mr. Howard SC for the Appellant, while commending the written submissions, focuses his argument upon this alleged failure on the part of the TAC, to deal with Section 956. In this regard he acknowledges that *Tobin* interprets the two sections as being different however in light of Mulcahy J.'s analysis the section that should operate here is Section 956. Whilst the TAC in a general way referred to Section 955 and Section 956, she never gave reasons. This is relevant since the Respondent says that the issue about the tax return was identified after an enquiry and investigation. However, Mulcahy J. said the two provisions operate in different circumstances; Section 955, where there is no enquiry and Section 956, where there is an enquiry or an investigation.

**51.** However, the TAC accepted the evidence of the taxpayer that he had no doubt when he filled in the form that he was not required to refer to the payment he received for the distribution of the company because he had no gain. In those circumstances it could not have been anything other than a full and true return where there was no issue from the Respondent that the gain was not subject to Capital Gains Tax.

**52.** He submits that based upon the Respondent's own correspondence and submissions that there clearly was an enquiry and an investigation and therefore Section 956 should apply.

The Respondent had argued that the failure to tick the 'Expression of Doubt' box was negligence, but no finding was made by TAC in relation to the failure to tick the 'Expression of Doubt' box. Therefore, notwithstanding his view that *Tobin* is incorrectly decided, which he did not resile from, on the factual matrix in this case, it makes no difference.

**53.** The Appellant submits that curial deference which the courts have in relation to findings of administrative bodies only arises where there is a properly reasoned decision and no legal error. But here there was a legal error since the TAC did not deal with Section 956 and did not give clear reasons.

**54.** His second argument relates to the absence of appropriate reasoning, even in relation to Section 955. He says the Respondent's position is illogical in that they say there is no CGT liability, but the taxpayer did not provide a full and true return by failing to express a doubt even though the Revenue treated it as income. The TAC did not apply the correct test or provide reasons for it because the taxpayer has to understand how she came to her decision. He relies upon the cases of *Droog*, *Stanley* and *Stanberry Investments Ltd*.

**The Respondent's Submissions**

**55.** The Respondent tackles the Appellant's submission head on. It says that insofar as it may be contended that the taxpayer's subjective belief is that tax was not due, that is irrelevant and points to *Tobin.* It is a fact that the Appellant did not tick the 'Expression of Doubt' box on the 2005 tax return. Further, the Appellant's argument that his 2005 return was not being dealt with in the same way as previous returns is illogical since this return only deals with the year of 2005.

**56.** The Respondent argues that Section 955 and Section 956 are quite separate and distinct, in that Section 955 refers to the making or amending of assessments, while Section 956 refers

to the taking of enquiries or investigations. That the two are separate is confirmed not only by a plain reading of both texts but also by Section 956(1)(b).

**57.** The making or amending of an assessment is either out of time under Section 956 or it is not. If the enquiries are actions which precede an assessment or amended assessment were out of time, the Appellant could have availed of the safeguards contained in the section. That would be by way of judicial review. The Appellant never judicially reviewed the assessment. This submission is particularly relevant to a matter which arose during the hearing. However, this point was not argued before the TAC.

**58.** A return must be both full and true containing all material facts and here the taxpayer's return was not full and true and accurate in every respect. The return in this case was also inaccurate; at a minimum in failing to record that a disposal had taken place for CGT.

**59.** In his oral submissions, Mr. Burke SC for the Respondent says the *Tobin* is correctly decided and that the two sections are separate and distinct provisions.

**60.** Mr. Burke then refers to Section 956(2). He says the Respondent had the right to send the matter to the TAC to ascertain whether there had been negligence or fraud. Under those circumstances there was no jurisdiction or entitlement for the TAC to consider it now, since the 30 days has expired. They could have initiated a judicial review, but time has passed. Had Section 956 (2) applied, the onus would have fallen on the Respondent to explain if there had been negligence or fraud.

**61.** Whether it was Capital Gains Tax or income tax is of no consequence. He was being asked to make a return. He was asked for details of disposal of assets. In the decided cases, particularly *Hanrahan,* the offence was far less than in this case. If the transaction is never referenced, then the Respondent is in a very difficult position to have any knowledge.

**Section 956(1)(b)**

**62.** Before I go through the correspondence, case law and a discussion of the matter, I would like to refer to the Respondent's argument in relation to Section 956(1)(b). In his reply, Mr. Howard has raised an issue that it would be unfair to decide the matter on this basis given that it had not been argued either in submissions before the TAC or indeed in written submissions to this court. Whilst the issue of judicial review is referred to in the submissions of the Respondent, and indeed I have highlighted them, it seems to me that this point did not form a material argument before the TAC. In those circumstances I have decided it will not be fair to decide the case on that issue. That is not to say that the point is not a valid one, but since it did not form part of what was before the TAC, and since the law relating to a case stated is very restrictive, it would not be appropriate to rely upon these submissions, honestly put forward.

**The Correspondence**

**63.** It seems to me that in order to understand the arguments being put forward, the correspondence is crucial. On the 16th of February 2011, the Appellant received a letter from the special projects team of the Respondent titled "*Notification of a Revenue Investigation*". The writer said that the office had commenced an investigation into the Appellant's tax affairs for the years 2005 and in particular the tax consequences involving the transfer of share rights to him from MMP Ltd. In his letter, Mr. Costello of the Respondent, set out the nature of the transaction and suggested that the transaction was chargeable to income tax. He asked for details as to how the funds were received and utilized.

**64.** He continued "*I have reviewed your tax returns and am unable to establish that the transaction and the amounts have been returned for tax purposes. Please note that, if there has been a failure to make complete and accurate tax returns it must be rectified immediately".* He went on to say that there would be potential tax consequences.

**65.** On the 9th of March, the Appellant responded. He said that he had subscribed for shares in Tramult in 2005. The company made a capital distribution to him on liquidation and then said "*the details of which I omitted to return in my income tax return for the tax year 2005. I will now amend the relevant return and forward same within the next week or so when I have recovered the necessary file."*

**66.** He added that no tax liability arose in respect of the disposal under the provisions of Section 547 TCA 1997, and then inquired under what provision the Respondent was relying upon with regard to this liability.

**67.** On the 20th of April 2011, Mr. Costello replied saying that he did not agree with the interpretation of the tax treatment of the transaction and that the entire value of the rights received by the Appellant was chargeable to income tax, while no amount remains subject to capital gains tax. He suggested a meeting.

**68.** On the 16th of June 2011, Cogent Tax Group ("Cogent"), the Appellant's tax advisors, wrote informing the Respondent that the inquiries related to a period outside the terms laid down in Section 955 TCA 1997, and that the point had recently been upheld in the *Droog* case. They asked if a meeting would be beneficial to clarify any point. Notwithstanding that both parties had suggested a meeting, no meeting took place.

**69.** The Respondent replied on the 4th of August 2011, saying that it disagreed with the contention that the inquiries related to a period outside the terms laid down in Section 955. It said that the Respondent's position was that the returns "*did not contain a full and true disclosure of all material facts and accordingly the four-year time limit under Section 955(2) did not apply".*

**70.** It went on to refer to Section 956. He added:- "*my inquiries in this case were made at a time i.e., at any time, after the expiry of the 4 year time period and at which time I had*

*reasonable grounds for believing that the return was insufficient due to its having been completed in a fraudulent or negligent manner".*

**71.** Thereafter on the 6th of December 2011, an amended assessment was raised for the year of 2005.

**72.** In response a letter was received from Cogent on the 22nd of December 2011. It referred to three taxpayers, one of which is the Appellant. It stated that they were appealing under three different Sections of the TCA 1997 namely Sections 933, 955 and 956.

**73.** In a rather scattergun approach, the letter made seven points. Firstly, it said the assessments were invalid and excessive. Secondly, that to categorise the payment as distributions was inaccurate and that no distributions were received. The third point was that the assessments were out of time by virtue of Sections 955 and 956. The fourth point was that the Respondent was precluded by Section 955 from making the assessments. The fifth point was that the assessments were prohibited by Section 956 as it was an "*action*" outside the four-year time limit. The sixth point was that the assessments were invalid as the Respondent had not proceeded with the taxpayer's earlier appeal against the enquiry outside the four-year time limit that the matter required to be listed for hearing before the appeal commissioners. The seventh point was that the Respondent's interpretation of Section 955 as set out in earlier correspondence was incorrect and finally for the avoidance of doubt, the letter constituted an appeal under Section 955 and Section 956.

**74.** On the 11th of January 2012, the Respondents wrote back as follows:- *"as regards Section 956 TCA 1997 please note that the legislative requirement with regard to the making of a timely notice of appeal under Section 956(2)(a) has not been met in the case and accordingly an appeal under Section 956 may not be accepted*". The letter went on to say that there had been no "*earlier appeal*" and that the appeals under Section 955 and Section 933 would be listed in due course before the TAC.

**Observations on the Correspondence**

**75.** It took quite some time for the correspondence to play out. The first notification of an issue was in February of 2011 while the last letter was eleven months later, in January of 2012. Bearing in mind the importance to the Appellant, one would have thought that the parties would have acted with greater speed and alacrity than seems to have been the case. There's a further matter of comment relating to the letter or '*Notice of Appeal'* of the 22nd of December. It referred to three different taxpayers, which seems to me to be inappropriate. I have deliberately not named the other two taxpayers. However, as an observation, it is clear that they also were members of Tramult. The use of bullet points makes the interpretation of the letter difficult. It is not clear whether the bullet points refer to all three taxpayers or some combination of the three or simply one. For example, reference is made to the Respondent's failure to proceed with an earlier appeal, yet there was no earlier appeal in this case. Further, there is no detailed argument behind the bullet points. All in all, I find the letter to be unsatisfactory.

**The Caselaw**

**76.** Before I go into an analysis of the other relevant case law, I think it is appropriate to refer to the decision of Allen J. in *Hughes* which delayed the hearing of the appeal before the TAC. That case dealt with a net legal issue as to whether the enhancement in the value of the shares in a company was chargeable to income tax as a distribution to them by a connected company. The learned judge succinctly described the transaction as a scheme devised to liberate millions from a company and put the money into the hands of the shareholders. He found that the Articles of Association are a contract between the members and the company, and between the members *inter se*. The resolutions, which are passed by the members and not by the company, create a contract between the members and the company, and the members *inter se*, as to how the assets of the company are to be distributed in the event of a winding up. He said

that it was correct to describe the resolutions as resolutions of the company and it did not follow that they were not also resolutions of the members. The resolution and the amended articles of association amounted to an agreement between the shelf company and the Hughes family and that the rights in the second company formerly enjoyed by the first company would henceforth be enjoyed by the Hughes. This was a transfer and therefore subject to income tax.

**77.** This is the decision that all the parties were awaiting before the matter came before the TAC. After the case stated and the preparation and exchange of the written submissions, Mulcahy J. delivered his judgement in *Tobin*. That decision is crucial to a number of issues that are raised in this appeal.

**78.** There are a number of cases which are directly relevant to Section 955 and Section 956. The first of these is the case of *Droog*. As Mulcahy J. noted in *Tobin,* the court's focus was on whether the time limits in those provisions applied to a specific procedure under the TAC 1997, relating to tax avoidance, rather than the interpretation of the provisions themselves. Clarke J. (as he then was) noted that the relevant section, which is the same section that we are dealing with in this case, created an obligation on all relevant persons to make a tax return. An assessment is then made by reference to the particulars contained in that return.

**79.** Both parties have referred me to the following passage:-

> "*It follows that, at least in general terms, ss.955 and 956 are designed to prevent the reopening of the tax affairs of a taxpayer in respect of the types of tax covered by Part 41 outside of a four-year period except in circumstances where the original return was, or was reasonably suspected to be, fraudulent or negligent. Even if such a reasonable suspicion exists no ultimate exposure to adverse tax consequences can be placed on the taxpayer concerned unless it is ultimately established that the relevant return was in fact not full and true in its disclosure".*

**80.** However, he made it clear that was in the context of a case where a taxpayer had made a fully compliant return, however the safeguards contained in the legislation had no application where the taxpayer has given incomplete or incorrect information to the Revenue. Nonetheless, it is easy to see why the Appellant considered that Section 955 and Section 956 should be seen together. But as Mulcahy J. has said in *Tobin* the context is all important.

**81.** In *Hanrahan* the question at the heart of the case was whether the notice of opinion of the Respondent was prohibited as being out of time by reason of Section 955(2) of the TAC 1997, in the context of a return which failed to disclose a relevant transaction as a transaction between connected persons and whether that was a full and true disclosure within the meaning of the section as would permit him to rely on the time limit in Section 955(2), just as in this case.

**82.** In what seems to me to be a relevant passage, Stack J. said at para 91;-

> *"The word "assessment" in s. 955 (2) (a) does not refer, as the appellant appears to suggest, to the formal document which issues to a taxpayer who files a tax return under the self-assessment system, but to the process of assessing the tax payable or, in this case, the amount of allowable losses which may be deducted from chargeable gains. In my view, the argument made conflates the assessment with the formal notice of assessment".*

**83.** She found that it was clear that the section only had application in the case of "*a fully compliant tax return*", as clearly stated in *Droog* and that on the facts before her the Appellant have not made a full and true disclosure of all material facts necessary for the making of an assessment. She concluded that the Appellant was not a person who could avail of Section 955(2) to prevent an assessment from capital gains tax for the appropriate year.

**84.** The case of *Stanley* has also been cited. This case did not deal with the particular section but dealt with the meaning of the words *"full and true return*" in the context of a tax return.

The court concluded that the obligation to file a full and true return was satisfied by providing a correct return saying;- "*provided that the taxpayer has fully and correctly completed those parts, omitting no relevant detail that ought to be provided therein, he/ she will have complied with the requirements of s.46 (2)(a)".*

**85.** The last case is *Tobin.* I have some sympathy, as noted above, with counsel while preparing and submitting their submissions. It is clear that it was a cornerstone of the Appellant's argument that Sections 955 and 956 should be seen together and that the Respondent cannot amend an assessment unless at the time the inspector has reasonable grounds for believing that the return is insufficient due to it having been completed in a fraudulent or negligent manner.

**86.** Clearly that argument favors the Appellant since there is no suggestion in this case, nor did the TAC find, that the Appellant had been guilty of fraud or negligence in the manner in which the tax returns were made. Whilst arguments were made in the submissions that the failure to tick of the 'Expression of Doubt' box could be seen as being negligent, that was not the basis upon which the TAC formed her determination.

**87.** Given the decision in *Tobin,* it is now clear and I accept in full, not only the logic of Mulcahy J.'s reasoning, but also out of the comity of judgments, that Section 955 and Section 956 are not to be read together but in fact apply to different circumstances. At para. 43 he said:-

> *"Two other features of the immediate context to Section 955(2) are of relevance. These are the provisions of Section 956(1)(c), and the provisions of Section 955(4). Section 956(2) applies a four-year time limit preventing Revenue making any further enquiries in relation to the accuracy of a return unless it reasonably suspects that the return is insufficient due to fraud or negligence. The disapplication of the limitation period in Section 956 is thus expressed in markedly different terms than the disapplication in Section 955".*

**88.** Further, he noted that Section 955(4) made provision for the subjective belief of the taxpayer regarding what should be included in the return. Where the taxpayer had a doubt as to the correct treatment for tax purposes in regard to any matter, the taxpayer would be treated as having made a full and true disclosure where the return is made is made to the best of that person's belief as to the correct treatment, provided that the taxpayer has specified in the return the matter in respect of which there was a doubt, in the 'Expression of Doubt' box. He said:-

> "*The necessary implication of this provision is that the return will be treated as full and true* even if incorrect *so long as a belief that it was correct was genuinely held".*

He went on to say at para. 49:

> *"The proximate statutory provisions certainly do not suggest that "true" be interpreted to import the taxpayer's subjective view as to whether the information in the return is true. Section 956 (1) limits the power of Revenue to reopen tax affairs after four years and in the absence of fraud or negligence. There is no such time limitation in Section 955(2), and the use of those concepts in the most proximate statutory provision strongly suggests that there was no intention to incorporate any subjective element into that Section."*

**89.** That being the case, it is not surprising that Mr. Howard shifted his focus somewhat onto what he perceived to be, the failure on the part of the TAC to deal with Section 956, which he said was an important part of his client's appeal.

**90.** However, before I go to deal with that, I should conclude with a number of further observations in relation to the *Tobin* case. There was no doubt from the decision, that the words "*full and true*" equates with "*accurate*" and "*correct*" which is appropriate in circumstances where the system is one of self-assessment. Mulcahy J. said as follows: -

*"an interpretation which equates "full and true" with "accurate" or "correct" no doubt poses a significant onus on the taxpayer, but that seems to me to be consistent with the existence of a system of self-assessment. It also has the virtue of being more straightforward to apply, consistent with the requirements for clarity and the imposition of both liabilities and exemptions in taxation statutes".*

**91.** As noted in para. 59, the taxpayer's subjective belief, however well informed, as to the accuracy of his tax returns content is not a relevant consideration in ascertaining whether they can be regarded as a true and full disclosure of all material facts. It must be accurate in every respect. Subjectivity is not the yardstick. That is very relevant in this case where the Appellant has been adamant throughout, that he had no doubt whatsoever that he had made full disclosure of all relevant matters. Therefore, I find that the Appellant's belief as to the accuracy of the tax return is irrelevant in the determination of the Respondent.

**Discussion and Decision**

**92.** It seems to me that the starting point of an analysis of this case is to ask what was the TAC being asked to deal with? The correspondence from the Respondent and in particular the letter of the 11th of January 2012 made it clear. That letter said :-

*"As regards Section 956 TCA 1997 please note that the legislative requirement with regards to the making of a timely notice of appeal under Section 956 to pay has not been met in the case and, accordingly, an appeal under Section 956 may not be accepted".*

**93.** Any appeal under Section 956 was out of time. The only appeals that were to proceed related to Section 955 and Section 933 which, as noted in the letter were to be listed for hearing.

**94.** Prior to the matter commencing before the TAC, an application was made that a preliminary issue should be heard. As is clear from the outline of arguments submitted by the

Appellant, the issue was whether the notice of assessment was valid in circumstances where it was issued outside the four-year time limit under Section 955(2)(a). The submissions of the Respondent again confirmed that the preliminary issue was restricted to Section 955. The determination itself, clearly states that the preliminary issue related to the making of an Amended Assessment raised outside of the four-year time limit provided in Section 955(2)(b).

**95.** The written submissions to this court in relation to Section 956, were restricted to an assertion that Stack J.'s decision in *Hanrahan* could not be an authority for the treatment of the section. At para. 33 of his written submissions, the Appellant submitted that Section 956 was relevant in relation to the issue of an 'Expression of Doubt', but the TAC found that that was not material to her determination. Further, under the heading "*Section 956 grounds for the belief that the return was insufficient*", the Appellant submitted that the letter of the 4th of August 2011 from the Respondent, which had used the words "*fraudulent and negligent*" but did not identify his reasons for believing that the return was insufficient due to it being completed in a fraudulent or negligent manner.

**96.** Both parties have outlined arguments in relation to Section 956. The Appellant stated that it was an essential aspect of his appeal that there was an interaction between Section 955 and Section 956. Further, he argued that it was impossible to discern from the determination the view taken by the TAC as to the effect of Section 956 and that she didn't engage in the interpretation or application of the section or make any findings. That, however, is to misdescribe the issues which the Respondent was raising. The Respondent clearly expressed the view that Section 956 was not relevant. It posed the question that it would be up to the Appellant to explain the relevance of Section 956 at the hearing.

**97.** However, notwithstanding all of the arguments put forward by the Appellant about the failure to engage with Section 956 and the importance to the Appellant, the actual relevance to the issue, post *Tobin,* has never been clarified. Whilst I appreciate that the correspondence

refers to investigations and inquiries and Section 956, it is clear that that was a secondary or subsidiary argument. Mr. Costello's primary argument was that the returns did not contain a full and true disclosure of all material matters and therefore the four-year time limit in Section 955(2) did not apply.

**98.** It seems to me, that the argument that the TAC failed to deal with this issue, which was said to be a very significant aspect of the appeal, is a moot point. The law has been clarified. The law is that there is no interaction between Section 955 and 956, as found by Mulcahy J. in *Tobin*, a conclusion with which I fully agree.

**99.** Further, it seems to me, the TAC was not asked to deal with Section 956 as a preliminary matter, and notwithstanding that it appeared in submissions, in my view her failure to refer, analyse or engage with the section does not in any way invalidate her determination on that ground. I can see no error of law on this issue and therefore, I cannot accept it.

**100.** Even if question 5, which relates to the TAC's failures to correctly interpret or apply Section 956 for the purposes of interpreting Section 955, could be answered in the affirmative, which it cannot in my view, it would make no difference. The determination, on its face, specifically relates to Section 955. In his written submissions, the Appellant only referred to Section 956 as being relevant in the context of the enquiries commenced by the Respondent in their letter of the 16th of February 2011 and in relation to amending an assessment that had been completed in a fraudulent or negligent manner.

**101.** The Appellant argues that post *Tobin* this case should be decided under Section 956 and not Section 955, since the matter clearly arose out of inquiries and investigations. However, in my opinion, there is no evidence that that is the case and I cannot agree with this submission. It is clear from the very outset, that the Respondent dealt with this matter on the basis of a failure to make full and true disclosures of all material facts. I accept the submissions of the Respondent that the Appellant simply did not fill in all the information that was required of

him. He knew what transactions had taken place, and he was adamant that it did not give rise to a tax liability. But he should still have informed the Respondent of the transaction. His failure to do so has meant that he did not give a full and true disclosure of all material facts upon which an assessment could be made.

**102.** Further, it should be re-emphasised that this case stated is not a rehearing, as the principles relating to a case stated make clear. The purpose of a case stated is to see whether any error of law has arisen. The findings of primary fact found by the TAC should not be disturbed unless there is no evidence to support them (*Mara (Inspector of Taxes) v Hummingbird* [1982] ILRM 421).

**103.** I have read the transcript of the evidence before the TAC, as urged upon me by the Appellant. It is clear that Mr. Dwyer BL, counsel for the Appellant, focused his arguments on the basis that Section 955 was qualified by Section 956. That is what I might call the *Tobin* point. His other arguments were on the matters which form the substance of the determination of the TAC. It was never submitted to the TAC that in order to reach her determination on the specific question before her, she was required to deal with Section 956. The reason why that is important is because that is the basis of the attack mounted in oral argument on her determination.

**104.** I was referred to the transcript and particularly page 171. From the comments of counsel for the Respondent, it is clear that reference to Section 956 was not material to the questions being asked. All that was said was that the Respondent was not suggesting that the TAC should not deal with the matter but that it wasn't entirely necessary. I agree that it was not necessary for the TAC to analyse Section 956.

**105.** It was also urged upon me to look at the correspondence which led to the questions which formed part of the case stated. This I have done, but it is clear that the relevance of

Section 956 related to the question to be asked in the context of interpreting Section 955, namely:

> "*Did the TAC err or fail to correctly interpret and/or apply Section 956 to the TCA 1997 as that Section applies to the facts of this case, including, but not limited to, for the purpose of interpreting Section 955 of the TCA 1997*."

**106.** It seems to me that it was only in the context of establishing what an objective standard was, that Section 956 was referred to at all. Since the two sections are not interconnected and one does not interpret the other, I cannot see what the relevance of Section 956 is to the determination of the TAC. Whilst I am discussing question 5, it seems to me that I should refer to the words "*but not limited to*". It is not clear to me what these words specifically refer to. The fact of the matter is that the TAC was asked to interpret Section 955 through the prism of section 956, she was not asked to do anything else. Therefore, I do not believe that the words "*but not limited to*" have any extra meaning or import.

**107.** At para. 30 of the determination, the TAC noted that it was submitted that if the manner in which the Appellant completed his tax return for 2005 was wrong, then it does not make sense that the Respondent had concluded that all of the other tax returns completed by the Appellant were not wrong. This seems to me to be in illogical proposition. Just because the Respondent dealt with previous or subsequent assessments in a certain way, does not mean that it is precluded from challenging the returns for 2005. Therefore, I find there is no merit in this argument.

**108.** The Appellant relies upon the fact that the Respondent made submissions both to the TAC and to this court on Section 956. However, submissions are not evidence, they are simply submissions. If it were otherwise, then each and every challenge to any determination of an administrative body or court, placing reliance upon submissions, so as to form the basis of an appeal, would give rise to legal chaos. Therefore, just because the parties raised the section,

does not mean that her determination is in anyway defective, in circumstances where it was not relevant to the issue she had to decide, namely whether the four-year time bar came into play having regard to Section 955(2).

**109.** In her determination she dealt with the three material facts which were at issue in some detail. These were the B5 return to the CRO, dated the 21st of December 2005, the Respondent's letter of the 10th of July 2006 and the Appellant's view that this was a tax clearance letter and, the crucial question as to whether the Appellant had made a full and true disclosure of all material facts necessary for the making of an assessment of 2005.

**110.** In answering those questions, it seems to me that there was no need for the TAC to deal with Section 956, notwithstanding all of the arguments put forward by the Appellant about the failure to engage with Section 956 and the importance which the Appellant placed upon the requirement to engage with it.

**111.** There was one further argument raised before this court in regard to Form 11, that there was nowhere on the form for the Appellant to inform the Respondent about the transaction. The Respondent says that this is not correct and that a proper examination of the form shows this not to be the case. I am satisfied that that is correct. Had the Appellant wished to disclose the transaction, the form allows him to do so. This is not a case of the Appellant forgetting or being ignorant of the issue. This is a case in which the Appellant relied upon his tax advice to such an extent, that he fervently believed he had no tax liability and therefore did not have to make a disclosure. The issue as to the boxes on the form is irrelevant.

**112.** Turning to the three issues which the TAC dealt with, it seems to me that bearing in mind the legal prism with which a case stated of this nature must be seen, as set out in *O'Mara* and the other leading authorities, that there is no basis to overturn or challenge in any way her finding in relation to the B5 return. Having read the document, it is patently clear that it simply was for the attention of the CEO and could never be regarded as a submission to the

Respondent. The second issue related to whether or not the letter of the 10th of July 2006 was a tax clearance letter. It clearly was no such letter. For the reasons set out in the TAC's determination, in my view she was perfectly correct in coming to the view that it was not a tax clearance certificate.

**113.** The final issue is whether or not in all the circumstances the Appellant made a full and true disclosure of all material facts. In this regard it seems to me that the words of Mulcahy J. are particularly relevant where he said:

> "*The answer posed to the question at the opening of this judgment is that for a tax return to be regarded as a true and full disclosure of all material facts, it must be accurate in every material respect; a taxpayer's subjective belief, however well informed, as to the accuracy of its contents is not a relevant consideration."*

**114.** As counsel for the Respondent said, all the information in relation to this transaction was in the hands of the Appellant. If the Appellant simply says nothing about it, then how can the Respondent form a view as to the accuracy of the tax return. It seems to me that Stack J. was perfectly correct when she pointed out that the argument before her conflated the making of a tax return with the making of an assessment. The same argument was made in this case, to the same effect. The obligation placed on the Appellant by the legislation is to make a true and full disclosure of all material facts. It is immaterial as to whether it was a capital gain or receipt of income. Indeed, it seems to me that that might be where the difficulty arose. The Appellant was focused on the capital gains issue and not on the income tax transaction. It is up to the Appellant to make the assessment based upon the true and full disclosure of all material facts. That is not dependent upon the view, no matter how honestly held, of the taxpayer, that in this case that he didn't have to make any disclosure since in his view, he didn't have any tax liability. That is not his call, it is the call of the Respondent. Without full disclosure of all the information the Respondent was left in the dark. I do not believe that the Respondent's position is illogical

in regard to the issue of CGT liability versus income tax liability. As I noted above, this is where the Appellant fell into error by focusing on any potential CGT liability, the issue of income tax liability was not assessed. Either way, I do not believe that the TAC erred in her determination.

**115.** In relation to the Appellant's second argument that the TAC did not give reasons for her determination under Section 955, it seems to me that that cannot be correct. She gave clear and precise reasons. The burden of proof rests with the Appellant. I am of the opinion that the TAC discharged her duties in a clear and concise way and gave a properly reasoned decision.

**Conclusions**

**116.** For the reasons I have set out above, I answer the questions posed in the case stated in the following way:-

i. Did the Commissioner err in determining, on the facts and submissions opened in the appeal, that the Appellant did not make a full and true disclosure within the provisions of Section 955 of the TAC 1997? **NO.**

ii. Did the Commissioner err in failing in her determination to apply the facts and submissions made in the appeal, in connection with CRO documentation opened at the appeal and in particular form B5 of Tramult limited dated the 21st of December 2005, in ascertaining the correct interpretation of Section 955 TCA 1997 wherein such form B5 constituted the entire information used by the Respondent and was the sole basis upon which the Respondent initiated their enquiries an investigation into this case? **NO.**

iii. Did the Commissioner err and failing in her determination to correctly apply the contents of a letter dated 10th of July 2006 from the Respondent to Tramult limited

which contents are replicated in paragraph 57 of the determination, to the provisions of Section 955 Texas consolidation Act 1997. **NO.**

iv. Did the Commissioner err in determining that the Appellant is not entitled to the protective provisions of Section 955(2)(a) by reason of the manner in which he completed his tax return? **NO.**

v. Did the Commissioner err and fail to correctly interpret and/or apply Section 956 of the TAC 1997 as that Section applies to the facts of this case, including but not limited to, for the purposes of interpreting Section 955 of the TCA 1997?

**NO.**

vi. Did the Commissioner err and failed to properly apply, for the purposes of Section 955 of the TCA 1997, the manner in which the Appellant completed his relevant income tax return using Form 11 for 2005 with reference in particular to Capital Gains Tax and all other completed income tax returns for years prior and post 2005 such returns having been accepted by the Respondent including forming the basis for refunds for tax paid? **NO.**

vii. Did the Commissioner err in finding the material facts such that a reasonable commissioner could not have found said material facts? **NO.**