

THE HIGH COURT

REVENUE

[2013 No. 863 R]

SHANE COLEMAN

APPELLANT

AND

THE REVENUE COMMISSIONERS

RESPONDENTS

JUDGMENT of Ms. Justice Donnelly delivered the 25th day of November 2014

Introduction

1. The appellant ("Mr. Coleman") is the author of *Foot in Mouth – Famous Irish Political Gaffes*. It is an entertaining and informative read. Mr. Coleman has written in amusing yet illuminating detail about political events of a certain infamy that have arisen since the foundation of the State. No doubt it succeeds in reaching out to a wider audience than those immersed in the minutiae of politics. It is clearly a work of non-fiction.

2. The respondents ("the Revenue Commissioners") decided that this work did not qualify for what is commonly known as the artist's exemption from income tax provided by s.195 of the Taxes Consolidation Act 1997 ("the Act of 1997"). That exemption is governed by guidelines drawn up by An Comhairle Ealaíon (The Arts Council) and the Minister for Arts, Heritage, Gaeltacht and the Islands with the consent of the Minister for Finance in accordance with the provisions of s.195 (12) of the Act of 1997 ("the Guidelines").

3. Mr. Coleman appealed that decision on a ground that is no longer at issue in these proceedings. On the 15th February, 2008, the Appeal Commissioner determined the appeal in Mr. Coleman's favour by holding that he was entitled to the artist's exemption on the ground that his book came within the category of biography.

4. It is against that determination of the Appeal Commissioner that the Revenue Commissioners have appealed by way of case stated. There was a lengthy procedural delay before the case stated was finally signed on the 18th October, 2013. The case stated was duly transmitted to the High Court and was heard on the 9th October, 2014. Understandably, Mr. Coleman queried the length of time it had taken to reach the High Court. It is undoubtedly true that the time taken for the case to be stated was excessive. It is incumbent on all involved, including the Appeal Commissioners, to ensure that cases stated are drafted and signed within a reasonable time. As the issue was not directly before me, I express no view as to whether and possibly more to the point, on what basis, a taxpayer would be entitled to prohibit the stating of a case on the grounds of excessive delay. As it came before me on a case stated, it appears I am required to proceed to determine the case in accordance with the statutory provisions.

The question of law

5. The question of law posed by the Appeal Commissioner for determination by this Court is as follows:-

"...whether I was correct, under the terms of section 195 of the Act of 1997, in holding that the appellant's book Foot in Mouth – Famous Irish Political Gaffes qualifies for the exemption from income tax provided by section 195 Taxes Consolidation Act, 1997 in that, as non-fiction, the book satisfies the requirement of paragraphs 9(i) and (ii) of the guidelines in force under the provisions of section 195 (13)(b) of the Act of 1997?"

The statutory framework

6. Section 195 of the Act of 1997 is less than straightforward in the manner in which it is drafted. Nonetheless, the relevant parts can be distilled. Subsection 1 defines "work" as meaning an "original and creative work" within certain defined categories, one of which is a book or other writing. Subsection 2 details that the exemption from income tax provided by the section applies to a "work" which has "cultural or artistic merit". The Guidelines drawn up under subs.12 (a) of the Act of 1997 are for the purposes of determining whether a work is original and creative and whether it has or is generally recognised as having cultural or artistic merit. Subsection 13 (a) provides that the Revenue Commissioners shall not determine that a work is original and creative or has, or is generally recognised as having, cultural or artistic merit unless it complies with the Guidelines for the time being in force under subsection 12. Subsection 13(b) provides that subs. 13 (a) shall with any necessary modifications, apply to, *inter alia*:-

(i) a determination by the Appeal Commissioners...

(ii) to the extent necessary, to the determination by the High Court of any question of law arising and specified in the statement of a case for the opinion of the High Court, by the Appeal Commissioners

7. The Guidelines drawn up in accordance with the provisions of s. 195(12) are not challenged in these proceedings. They represent the applicable law. Indeed, under the terms of s. 2 of the Interpretation Act 2005 these Guidelines come within the definition of a statutory instrument.

8. Paragraph 9 of the Guidelines provide as follows:-

"9. A non-fiction work in category (a) a book or other writing, will be considered original and creative only if,

(i) it comes within one of the categories cited in Appendix A (emphasis added), and

(ii) the essence of the work is the presentation of the author's own ideas or insights in relation to the subject matter, and the ideas or insights are of such significance that the work would be regarded as a pioneering work casting new light on its subject matter or changing the generally accepted understanding of the subject matter."

9. Appendix A of the Guidelines, in so far as relevant provides as follows:-

"Non-fiction categories applicable to be considered as eligible for a determination under Section 195.

1. The following categories of literature (and any combination thereof) coming fully within the terms of reference of the Arts Council encompassing the subjects of fiction writing, drama, music, film, dance, mime or visual arts, and related commentaries by bona fide artists:

Arts criticism;

Arts history;

Arts subject works;

Arts diary;

Autobiography;

Belles-lettres essays;

Biography;

Cultural dictionary;

Literary translation;

Literary criticism;

Literary history;

Literary diaries"

10. Subsection 6 provides a right of appeal to the Appeal Commissioners against a failure by the Revenue Commissioners to make a determination for a claim for exemption under the section. Subsection 7 provides that the Appeal Commissioners shall hear and determine an appeal as if it were an appeal against an assessment of income tax. Under subsection 8 (a) of s.195 of the Act of 2007 the Appeal Commissioner considers any evidence adduced by the parties, the particular work itself (in this case the book) and is entitled to consult with any third party as he or she may consider necessary to assist him.

The basis for the Appeal Commissioner's determination

11. In order to understand the reasoning of the Appeal Commissioner in making his determination on this appeal, it is necessary to outline his precise findings as set out in the case stated. He said as follows:-

"18. I held that on a strict view of the guidelines I could not find that the Appellant's book comes within the list of works in paragraph 1 of Appendix A to the guidelines. I felt that "biography" was the closest category to which the book might belong in paragraph 1 of Appendix A but not an actual biography in the normal sense of the word (the need to give words their ordinary meaning was ruled on by the Supreme Court in Kiernan v De Bruin)

19. I indicated that I have a general policy that what happens in one case is really of no great relevance to another case; one taxpayer's affairs are different to another's. The decisions that Revenue make in a particular case are not binding on me, they are not binding on them. I took the view that the Appellant was entitled to consistent treatment and that I should apply an approach which I believed to be similar to that adopted by the Revenue.

20. In this regard, I was satisfied that I had to apply the terms of the Taxpayers Charter as published by Revenue a copy of which is annexed to and forms part of this case stated (Appendix 4). While I understood the position adopted by the Respondents in relation to Mr. Fergus Finlay's book Snakes and Ladders, I believed it involved a fairly free interpretation of the guidelines. In that regard I do not consider that it was any more of a stretch, and in fact, I considered it to be less of a stretch for me to take the view that the Appellant's book Foot in Mouth – Famous Irish Political Gaffes comes within the category of biography. I was satisfied that, at the very least, the Appellant's book is a set of mini biographies. Adopting a similar approach to the Appellant's case as I believe Revenue had adopted in the case of Mr. Finlay's book, I was satisfied that a reasonable construction of the category of biography in paragraph 1 of Appendix A enable me to hold that the Appellant's book is biography and I so determined.

21. With regard to the requirements of paragraph 9(ii) of the guidelines, bearing in mind Revenue's approach to the matter and while it was a close enough call, I took the view that readers of the Appellant's book would be given insights that they might not have had before, that people who are not political buffs might be informed by it and that the book, therefore, satisfied the requirements of paragraph 9(ii) of the guidelines."

12. The case stated records that counsel for the Revenue Commissioners told the Appeals Commission with respect to Mr. Finlay's book *Snakes and Ladders* that, following advice from the Arts Council, it was decided that the book was a fictionalised account of political events and therefore not governed by the terms of Appendix A.

13. In his case stated, the Appeal Commissioner included in an Appendix:-

"a commentary of the approach of the Appeal Commissioner to matters of statutory interpretation that arise in connection with the legislation and in particular, the guidelines governing claims to artistic exemption."

The Appeal Commissioner said that the principles outlined therein were relevant to and form the framework of the analysis adopted in making the determination in this case.

The role of the High Court in a case stated

14. The Supreme Court in *Ó Culacháin v. McMullan Brothers* [1995] 1 I.R. 217 authoritatively set out the principles applicable to cases stated for determining whether a particular decision was correct in law. Blayney J. said at p. 222:-

"(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."

15. These principles followed clearly from earlier decisions including *Mara v. Hummingbird Ltd.* [1982] I.L.R.M. 425.

Statutory Interpretation – The natural and ordinary meaning of words

16. In his case stated, the Appeal Commissioner made reference to the case *Kiernan v. De Brún*. That case is reported as *Inspector of Taxes v. Kiernan* [1981] 1 I.R. 117. The Supreme Court (per Henchy J.) at p. 122 stated that "(w)here statutory provisions are addressed to the public generally, a word should be given the meaning which an ordinary member of the public would intend it to have when using it ordinarily." The Supreme Court also went on to say that:-

"[t]hirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed."

The Revenue Commissioners' case

17. Counsel for the Revenue Commissioners in written and oral submissions relied upon the law as set out above. Counsel submitted that the Appeal Commissioner had determined the appeal correctly at para. 18 and in accordance with law that the appellant's book was not a biography in the normal sense of the word having regard to the requirement to give words their ordinary meaning. It was submitted that this was a finding of primary fact by the Appeal Commissioner based upon evidence and that this finding of fact should not be disturbed as per dictum 1 above in *Ó Culacháin v. McMullen Brothers*. Thus, they submit, the book does not come within any category as set out in Appendix A.

18. The Revenue Commissioners submitted that the plain meaning of the statute must be applied. The Revenue Commissioners also relied on the dictum of Kennedy C.J. in the case of *Commissioners of Inland Revenue v. Doorley* [1933] 1 IR 750 at p. 766 as follows:-

"The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable."

The Revenue Commissioners contended that having regard to paras. 19 and 20 of the case stated, the Appeal Commissioner was engaging in this type of greater indulgence, in that he ultimately found it possible to grant an exemption despite his finding that it was not biography.

19. The Revenue Commissioners further contended that having made a finding, the Appeal Commissioner then adopted a mistaken view of the law in going on to reach conclusions which set the aforementioned finding at naught and contradicted it. They argued that:-

(i) He exceeded his powers under s.195(8) by assuming an equitable jurisdiction to apply "consistent treatment" as per the treatment that the Appeal Commissioner was of the view had been applied to Mr. Finlay's book;

(ii) The Taxpayer's Charter is a Revenue Commissioners' practice statement and is not binding upon and has no application to the discharge of the statutory functions of the Appeal Commissioners;

(iii) In basing his determination on an assumed position of the Revenue Commissioners in circumstances where there was no evidence before him that the Revenue Commissioners had adopted "a fairly free interpretation" of the Guidelines in relation to Mr. Finlay's book, and at the same time ignoring the submission that the Revenue Commissioners adhered strictly to the terms of s.195 and the Guidelines;

(iv) By basing his determination on a non-existent category in Appendix A viz mini-biographies and equating this non-existent category with biography;

(v) By purporting to enlarge the exemption for biography between statute and the Guidelines;

(vi) By failing to base his determination solely on the evidence adduced by the parties and on consideration of Mr. Coleman's book by reference to the Guidelines.

20. In the alternative, the Revenue Commissioners submitted that the Appeal Commissioner reached conclusions such that no reasonable Appeal Commissioner could have arrived at, or reached conclusions based on a mistaken view of the law as follows:-

(i) By asserting that the Appeal Commissioner made an assumption as to the treatment by the respondents of Mr. Finlay's book is unreasonable in the absence of evidence;

(ii) That it was a mistaken view of the law for the Appeal Commissioner to believe he could depart from the principle of

giving words their plain meaning as per the Supreme Court in *Kiernan*;

(iii) That it was unreasonable and/or a mistaken view of the law for the Appeal Commissioner to adopt a "*stretch*" (para. 20, case stated) to take the view that Mr. Coleman's book comes within the category of biography when he had found as a fact that it did not (para.18, case stated);

(iv) That the Appeal Commissioner's departure from consideration of Mr. Coleman's book by reference to the terms of the Guidelines in favour of a comparison with the assumed evaluation of another book (Mr. Finlay's) by the respondents is unreasonable and/or a mistaken view of the law;

(v) That the Appeal Commissioner's conclusion that he had to apply the terms of the Taxpayers Charter rather than the established principle of giving words their ordinary meaning, as per *Kiernan*, is unreasonable and/or a mistaken view of the law;

(vi) On any reasonable reading of the book it consists of a series of political gaffes or blunders and the author's comments on them – it cannot reasonably be considered to be biographical in nature or content.

21. Finally, the Revenue Commissioners submitted that the requirements of para. 9 (ii) of the Guidelines for the work to be regarded as pioneering were not satisfied. The Revenue Commissioners pointed to the finding of the Appeal Commissioner with respect to the reference that readers of the book "*might*" be given insights they had not had before. This, it was contended, fell well short of the test that the book be so groundbreaking that it must be regarded as a pioneering work casting new light on its subject matter or changing the generally established view of the subject matter.

22. The Revenue Commissioners indicate that although the case stated does not address the second leg of the test for artists exemption, *i.e.* the question whether the book has cultural or artistic merit, it appears that the Appeal Commissioner had ruled in the appellant's favour on that and it is not in issue.

Mr. Coleman's case

23. Mr. Coleman represented himself in the High Court. He made both written and oral submissions. He expressed surprise that, although the book had been relatively successful in terms of copies sold, the tax liability was relatively small in comparison with the costs of the case in that Senior and Junior Counsel were briefed for the Revenue Commissioners, and the utilisation of time in a busy court.

24. Mr. Coleman argued that the book was both "*original and creative*" and had "*cultural or artistic merit*". His arguments as to artistic or cultural merit are unnecessary to recite as this had been determined in his favour and was not at issue in this appeal. Mr. Coleman argued that it was original in that the type of book had not been written before. He said that it required extensive research of Dáil debates going back to the foundation of the State, newspaper files from the 1920s onwards and research of archives and biographies. I think it fair to observe that it was not contested that a large amount of research had gone into the book. Mr. Coleman submitted that it was creative especially as it brought humour and lightness to what was at times very heavyweight material. He argued that the goal was to draw in readers who might only have a passing interest in politics and political history. Mr. Coleman referenced the lay out of the book in terms of background, gaffe and impact which, he said, was designed to make it accessible to readers. He further submitted that the book was a combination of fact, anecdote and analysis aimed at giving the reader an enjoyable and accessible account of the major "*gaffes*" committed by the country's politicians since the foundation of the state.

25. Mr. Coleman argued that the Appeal Commissioner's finding that this book was a "set of mini-biographies" was correct. He contended that if there was a survey of people not many of them would be able to identify some or all of the characters he referenced, for example: "Ernest Blythe, Joe Jacob, John Jinks, Patrick Connolly, Paddy Donegan, Jim Tully, Gerry Collins, Oliver J. Flanagan or Peter Brooke". He submitted that these people had played roles of varying importance in Irish political history.

26. Mr. Coleman argued that the book did not offer a traditional biography of these people and the other 37 politicians featured. He said that it didn't talk of place of birth and upbringing but that each chapter, each mini-biography, does provide context and background that establishes their import to the political set-up of the day. He referenced the "background" chapter on Ernest Blythe. This gave certain detail of Blythe's role in the activities of the Irish Volunteers and his subsequent ministerial roles as well as his later service in the Seanad and his significant career with the Abbey Theatre.

27. Mr. Coleman argued strongly that his book was pioneering as there was no generally accepted understanding of the subject matter. As an example, he queried how many people, even those active in politics, were aware that just one vote had prevented the leader of the Labour Party from becoming President of the Executive Council (Taoiseach in today's terms) in 1927. He further argued that the book is pioneering because it introduces understanding of the subject matter to an audience that would not have had access to that information in any practical matter. He finally submitted that that was genuinely "ground breaking".

Conclusion

28. With reference to some of the core submissions made by Mr. Coleman, it is necessary to emphasise that it is not for this Court to make a determination generally as to whether the book is original or creative. More specifically, it is not for the High Court in these proceedings to take upon itself a fresh or original determination as to whether the book *Foot in Mouth* is or is not a biography. The role of the High Court is to determine the point of law set out in the case stated of the Appeal Commissioner. The point of law is whether the determination was correct in law that the book qualifies from the exemption from income tax provided by s.195 of the Act of 1997 in that, as non-fiction, the book satisfies the requirements of paras. 9 (i) and (ii) of the Guidelines then in force.

29. The approach the High Court must take to that task has been laid down by the Supreme Court in *Ó Cúlacháin v. McMullen Brothers*. I must respect a finding of primary fact unless there is no evidence to support it. This case is unusual in so far as the Appeal Commissioner made a finding of fact which he subsequently set aside in favour of another "*reasonable construction*". At para. 18 of the case stated, the Appeal Commissioner correctly quoted the law, *i.e.* that words are to be given their ordinary meaning. He then held that the book was "*not an actual biography in the normal sense of the word*".

30. If one regards the above finding, *i.e.* it is not a biography in the normal sense of the word, as a finding of primary fact, then the Appeal Commissioner must be incorrect in law in holding that it was a biography within the meaning of the Guidelines then in force. In considering whether it is a finding of primary fact it is necessary to consider the overall approach the Appeal Commissioner adopted in reaching his conclusion that the book was biography. The Appeal Commissioner said that this finding of fact was on "*a strict view*" of the Guidelines. Despite this he went on to make his determination by reference to "*a fairly free interpretation of the guidelines*" that he believed the Revenue Commissioners had taken in another case. On the basis of the decision in *Doorley*, the Appeal Commissioner

was obliged to give effect to the clear and express terms of the legislation in considering the artist's exemption from income tax. The liability to income tax having been established, that exemption must be brought within the letter of the Act of 1997 and the Guidelines made thereunder as interpreted by the established canons of construction. There was no basis in law for adopting any other approach to the interpretation of the Act and the Statutes.

31. In adopting his "*reasonable construction*" test by perceived comparison, the Appeals Commissioner did not apply any established method of statutory interpretation. Instead the Appeal Commissioner sought to apply s.195 and the Guidelines to Mr. Coleman's book on the basis that the appellant was entitled to consistent treatment from the Revenue Commissioners and that he, as Appeals Commissioner, had to apply the Taxpayers' Charter (more properly the Revenue Commissioner's Customer Service Charter) to Mr. Coleman.

32. The Taxpayers' Charter says that the Revenue Commissioners will administer the law fairly, reasonably and consistently. Obligations of the Revenue Commissioners with respect to the Taxpayers' Charter were considered in the case of *Keogh v. Criminal Assets Bureau* [2004] IESC 32, [2004] 2 IR 159. In that case the Supreme Court observed that the Revenue Commissioners had specifically accepted that fair procedures required that full, accurate and timely information was given in respect of a notoriously difficult code. In the circumstances, the Supreme Court held that there was a failure of fair procedures in failing to inform the taxpayer of his statutory right of appeal. Importantly, the Supreme Court noted that the Charter contained many praiseworthy statements of an aspirational nature and that statements of that nature would not normally give rise to rights. In the *Keogh* case it was held that the Revenue Commissioners had taken on a duty to inform taxpayers of certain matters but had not complied with it. It was in that sense that the Taxpayers' Charter was applicable to the matter at issue in that case.

33. Undoubtedly the Revenue Commissioners should apply the law in a fair, reasonable and consistent manner. That will be the result of applying the relevant statutory provisions as to tax due or exemption applicable. In my opinion, a commitment to fair, reasonable and consistent application of the law does not permit the clear provisions of a statute to be disregarded in favour of perceived consistency. Thus, the focus must always be on the implementation of the statutory code rather than a comparative analysis of cases. Otherwise, the result is endless comparison of cases in a heedless pursuit of supposed consistency and reasonableness to the exclusion of the actual implementation of the statutory code. Taxpayers' rights will be fully protected in a decision-making system which applies the law regarding the duty to pay tax or the right to avail of exemptions as set out in the statutory code.

34. In this case, the Revenue Commissioners and Appeal Commissioner were bound by the provisions of s. 195 of the Act of 1997 to apply the section and the Guidelines made thereunder. To disapply the clear and ordinary meaning of the words therein in favour of something called a "*similar approach*" that it was believed by the Appeal Commissioner that the Revenue Commissioners had taken with respect to Mr. Finlay's book, is wrong in law. In this case, the comparator book was not even one which had been viewed as biography – that book had been viewed as fiction. It was the decision to determine that Mr. Finlay's book was fiction that the Appeal Commissioner viewed as "*a fairly free interpretation*" of the Guidelines. Neither that book, nor any other book except *Foot in Mouth*, was before the Appeal Commissioner for determination as to qualification for the artist's exemption. His only function was to consider whether *Foot in Mouth* qualified under s.195 of the Act of 1997 and the Guidelines.

35. Mr. Coleman urged upon the Court that the finding that the book was a set of mini-biographies was a correct one. The Revenue Commissioners appeared to dispute whether any book which dealt with more than one person could ever be a biography. The Revenue Commissioners argument does not appear to take into account that biography as a concept could encompass in-depth biographical writing about a number of persons from perhaps a particular era. Similarly, s.18 (1) of the Interpretation Act 2005, provides that a word importing the singular shall be read as importing the plural. That being said, the Appeal Commissioner's reference to the book being mini-biography was made in the context of a paragraph where he was making a comparison with Mr. Finlay's book. In particular, he said that by adopting a similar approach to Mr. Finlay's book as he believed the Revenue Commissioners had, he was satisfied that "*a reasonable construction of the category was of biography.*" It is clear that his construction of the book as mini-biography is based upon his view of the approach the Revenue Commissioners had taken elsewhere, i.e. the Revenue Commissioners had "*a fairly free interpretation of the guidelines*". Thus, even if there was to be a finding that the ordinary meaning of the word biography, could include a book dealing with more than a single person it would not dispose of the issue here. The problem lies in the manner in which the Appeal Commissioner disappplied his finding of fact that this was not biography in the normal sense.

36. In my opinion, the Appeal Commissioner's original clear finding of fact, *to wit*, that *Foot in Mouth*, was not an actual biography in the normal sense of that word must stand. It is a primary finding of fact. There is nothing else in the statutory scheme that raises even a doubt as to any other possible interpretation that might be placed upon the word biography. The plain and ordinary meaning of biography is as a matter of law the correct interpretation. The Appeal Commissioner was not entitled to expand or alter the meaning of biography by reference to what he perceived as free interpretations of the statutory code by the Revenue Commissioners in another taxpayer's case. The Revenue Commissioners' commitment in the Taxpayers' Charter to fairness, reasonableness and consistency cannot be applied in a manner which overrides their duty and the Appeal Commissioner's duty to give effect to the plain meaning of a word in a statutory code which restricts an exemption from tax.

37. It may well be that the Appeal Commissioner believed that his approach would prevent arbitrariness of application of the statutory code. On the contrary, for an Appeal Commissioner to apply a test of "*consistency*" on the basis of an approach it is "*believed*" that the Revenue Commissioners took, over the application of the clear and ordinary terms of the statutory code, would produce the very arbitrariness that law and justice abhor.

38. On the basis of the primary finding of fact of the Appeal Commissioner that Mr. Coleman's book is not a biography, it is clear that it was incorrect in law for him to then hold that Mr. Coleman was entitled to an artist's exemption on the basis of the book being biography under Appendix A of the Guidelines. In light of my determination, it is not necessary to consider whether the Appeal Commissioner was correct in law in holding that the book was a pioneering work as outlined in paragraph 9 (ii) of the Guidelines.

39. In light of the foregoing, the answer I give to the question of law posed by the Appeal Commissioner for the determination of this Court is no.