

Appeal No. VA07/4/001

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 2001
VALUATION ACT, 2001

Foras Áiseanna Saothair

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Office(s) at Lot No. Unit 7.8 Inis Carraig, Irishtown, Athlone, Athlone UD, County Westmeath

B E F O R E

John O'Donnell - Senior Counsel

Chairperson

Brian Larkin - Barrister

Member

Joseph Murray - B.L.

Member

JUDGMENT OF THE VALUATION TRIBUNAL

ISSUED ON THE 7TH DAY OF MAY, 2008

By Notice of Appeal dated the 16th day of November, 2007 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €130.00 on the above described relevant property.

The grounds of Appeal as set out in the Notice of Appeal are:

"The property ought not to have been included in the valuations list as the property is not rateable by virtue of the subsection 15(3) of the Valuation Act 2001, being property directly occupied by the state (including any land or buildings occupied by any Department or Office of state, the Defence Forces or the Garda Síochána or used as a prison or place of detention), as the appellant is an office of State and/or the State."

This appeal proceeded by way of an oral hearing held at the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 21st January, 2008. At the hearing the appellant was represented by Mr. Owen Hickey, B.L., instructed by Ms. Lisa Carty, William Fry Solicitors and the respondent the Commissioner of Valuation by Mr. James Devlin, BL, instructed by the Chief State Solicitor.

Ms. Carol Spain, a District Valuer in the Valuation Office was present and Mr. David Dunne, Manager, and Mr. Pat Kelly, Building Services Specialist, Foras Áiseanna Saothair gave evidence on behalf of the appellant.

Introduction

The subject property is located in the Inish Carraig Development at Golden Island, Athlone, Co. Westmeath opposite the Tesco supermarket. Part of the ground floor is used as an Employment Services Office by the appellant (“FÁS”). The rateable valuation of €130 as set out in the Valuation Certificate of the 23rd October, 2007 is appealed by FÁS. The ground of appeal is that the occupier is exempt from rates having regard to the Valuation Act, 2001 and in particular sub-section 15(3) thereof. The principal issue is the issue of rateability; quantum is not an issue.

The Appellant’s Case

Mr. Pat Kelly gave evidence on behalf of the appellant. He is part of the Facilities Management Department. He is a Building Services Specialist. He is involved in the design of Employment Services Offices. The subject property is an Employment Services Office. There are 78 such offices nationwide, which are permanent Employment Services Offices within the 26 counties. In addition there are 10 temporary offices and 20 training centres. The offices in question provide job vacancies information. They provide assistance for long term unemployed. They provide information to members of the public on training and allied matters. They also provide information on training initiatives for people to take up if they so wish. In addition they provide counselling.

The appellant also provides a process of apprenticeship registration in all trades. In all some 110,000 job vacancies are the subject of information provided by offices to potential employees. This information is available nationwide. For example, information in respect of a job vacancy in Cork will nonetheless also be available in the Westmeath office. The offices

also provide for special needs and disability grants for employees. They also provide various programmes which are provided throughout the country on a travelling basis. They run a variety of workshops which facilitate, inter alia, what are described as youths at risk and ex-offenders. In addition they also seek to deal with personnel referred from the Department of Social and Family Affairs (who are often long term unemployed). Information and advice in respect of training and “up-skilling” is provided. All of these programmes are free and no fee is charged. All people on courses carried out under the auspices of FÁS receive a training allowance. In addition there are apprenticeship courses for various trades within the construction industry and the motor industry.

Mr. Kelly indicated that at the time of his giving evidence there were somewhere between 125-130,000 people unemployed in Ireland (this figure previously had been around 90,000). He estimated that 45-50,000 of these were what were termed as long term unemployed.

Mr. Kelly also explained how the Labour Services Act, 1987 in effect combined three previous bodies run under the aegis of the State: being Manpower (which provided employment services and was a division of the Department of Labour), AnCo (which provided training) and the Youth Employment Agency.

While the main centres of the appellant are retained in larger cities, there are offices in every county. The employment services are also provided in every county and indeed in most rural towns.

Evidence was also given on behalf of the appellant by Mr. David Dunne, Manager, whose role involved (inter alia) management accounting. Mr. Dunne explained how the appellant was funded. Funds in question are provided nationally from the National Vote (Vote 34, K1 to K4). Exchequer funding is provided in the sum of €750,000,000. The balance is provided through the National Training Fund. Mr. Dunne confirmed that the Director General of the appellant has the function of and is treated as the equivalent of an Accounting Officer which is the equivalent to a Secretary General within a Government Department. Indeed, the Director General was so described in Dáil Committees (see copy extract provided from the 1997 Public Accounts Committee at the Appendix hereto). Any queries in respect of finances came to the Director General from the Comptroller and Auditor General. In addition to the Director General there is also an Assistant Director General. There were six main

functioning units within the organisation over which the Director General and Assistant Director General presided. Mr. Dunne explained that the National Training Fund was funding that came from PRSI payments levied on employers, which was then channelled to FÁS. The total funding provided to FÁS in 2008 was €1.1 billion, of which €750,000,000 came directly from Exchequer funding and the remaining €300,000,000 came from the National Training Fund. In addition €30,000,000 per annum was provided by the EU to the appellant. The vast majority of the monies received by the appellant is paid to trainees.

On cross-examination Mr. Dunne claimed that the Director General was the same grade as Secretary General and the Assistant Director General was the same as Assistant Secretary General. As an Accounting Officer he understood the Director General to be responsible for the accounts of the organisation. He explained that the appellant had a Board of Management and Directors. It holds property in its own name. It sues and can be sued in its own name. It is a body corporate with its own personality. It was also clear that some civil servants working for FÁS are seconded from Government Departments. The Director General himself had been in a Government Department previously. Mr. Dunne estimated that there were some 2,241 permanent pensionable employees employed by the respondent. Mr. Dunne explained that the appellant was audited every year by the Comptroller and Auditor General as a state body. Any issues raised are dealt with by the Comptroller and Auditor General in liaison with the Director General. The Director General is appointed by the relevant Minister, as is the Board. He explained that the government of the day have a major input into the policies of FÁS. In addition payments to trainees are linked to payments by the Department of Social Welfare. The size of these payments cannot change without government sanction or approval (in this regard the relevant Minister is the Minister for Enterprise, Trade and Employment).

The Tribunal was also referred to the list of board members of the Board of FÁS. It is clear therefrom that FÁS board members are appointed by the Minister for Enterprise, Trade and Employment and comprise a Chairman, representatives from employer, Trade Union, educational, Social Welfare and youth interests, a representative of the Minister for Finance, two representatives from the Minister for Enterprise, Trade and Employment and two FÁS employee members.

The Respondent's Case

The respondent adopted the précis prepared by Ms. Spain of the Valuation Office.

Legal Submissions

The Appellant's Legal Submissions

On behalf of the appellant Mr. Hickey indicated that he would be relying on the terms of the Labour Services Act, 1987 ("the Act") and the decision of this Tribunal in the **VA06/4/001 - Health Service Executive (HSE)** case as well as other allied decisions.

In his submission FÁS was in exactly the same position as the HSE was in the case earlier determined by the Tribunal. Mr. Hickey emphasised the centrality and national importance of the function carried out by FÁS. In the instant case the relevant function was the provision of employment and training rather than health. Otherwise, however, he submitted that the function was a central core function of government. Mr. Hickey submitted that the issue of employment generally is an issue for government in electoral terms also. Mr. Hickey also drew the attention of the Tribunal to funding received by FÁS by way of expenditure voted by the Oireachtas. The total Exchequer and National Training Fund allocation to FÁS for 2008 of €1.083 billion can be described as "*of considerable significance*". He noted that the HSE under their Oireachtas vote received funds of the order of €9 billion.

Mr. Hickey also made submissions in relation to the organisational structure of the appellant. It was clear in his submission that the Director General was an Accounting Officer. He referred to the 1987 Act and drew the Tribunal's attention to the power of the Minister to advance funds to the appellant, provided for in Section 10. Section 11 sets out the requirement on the appellant to keep accounts and submit those accounts to the Comptroller and Auditor General: Section 12 sets out the requirement to provide a report to the Minister on its activities on an annual basis.

Mr. Hickey accepted that while the Director General was not formally made an accounting officer this was of no real significance. He referred in particular to the Committee of Public Accounts agenda for the meeting of the 10th April, 1997 in which Mr. John Lynch, Director General of FÁS is described as "*Accounting Officer*". Mr. Hickey suggested that even if the appellant had a degree of autonomy in its day to day operation, it carried out a central executive function and was, in the circumstances, an office of State. In his submission the

determinations of the Tribunal in relation to **VA04/2/038 - Legal Aid Board** and **VA05/3/003 - FETAC** were correct and should be followed.

Mr. Hickey also referred the Tribunal to Section 17 of the Act which empowered the Minister to give directions to FÁS in relation to activities which the Minister wanted it to carry out or not to carry out. This was further evidence (in his submission) of the control which the Minister in question was enabled to exercise over FÁS. In his submission the degree of proximity to the Minister, together with the centrality of the function exercised and the nature and extent of the Oireachtas-voted funds were three matters of considerable significance. He acknowledged that being answerable to or audited by the Comptroller and Auditor General was not of itself enough.

Mr. Hickey also referred the Tribunal to various tests which had been set out in previous Tribunal determinations and suggested that if FÁS was examined in relation to the criteria set out in those tests FÁS would be deemed to constitute an office of State within those criteria. It was close to the epicentre of government policy. There was a certain level of integration and control by the State. The functions it carried out were closely associated with the relevant department (in this case the Department of Enterprise, Trade and Employment). Its functions were more closely associated with government business than a commercial or cultural public body. Sometimes more than one government Minister may be involved (it is notable that the Minister for Finance has an involvement and indeed four Ministers are permitted to nominate persons to the Board). Board officers held office for a certain period. Ministerial control is considerably greater than in respect of other public bodies (e.g. Aer Lingus). While the entity is independent in name it is so integrated within State business that it may be called an "*office of State*". It is accountable in the sense that at the end of its financial year accounts must be submitted to the Comptroller and Auditor General. While it is a body corporate and independent in its functions the Minister is empowered to issue directions to be followed by the entity on issues of policy. Remuneration of the Board must have the consent of the relevant Minister as well as the Minister for Finance.

Mr. Hickey submitted in conclusion that the appellant came within the rubric defined in Section 15(3). It did not have to be a government department. If the entity was akin to a department of State that was sufficient. In his submission it was appropriate having regard to all of the circumstances that the appellant should be regarded as an office of State for the

purposes of sub-section 15(3) of the Valuation Act and accordingly the subject property occupied by the appellant should not be rateable.

The Respondent's Submissions

On behalf of the respondent Mr. Devlin submitted that the Tribunal should construe Section 15(3) by looking at what the ratepayer is, not what it does. He referred us to the decision of the Supreme Court in **Revenue Commissioners v Doorley** [1933] IR 750. In this case the Supreme Court made it clear that a law which gave rise to an exposure to or an exemption from tax must do so in clear and unambiguous terms: *"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."* The High Court in **Slattery v Flynn** [2003] ILRM 450 has made it clear that any ambiguity which arose in this context should be construed against the taxpayer.

Mr. Devlin submitted that we should look at the phrase *"directly occupied by the State"* with emphasis on the word "directly". While the Defence Forces and Gardaí would clearly fulfil the description of *"office of State"* the question must be asked as to why they are included in the section at all. In his submission the answer to this question is that the draftsman felt that neither the Defence Forces nor the Gardaí came within the concept of *"Department or office of State"* as envisaged in the section. In his submission the provisions of Schedule 4, Paragraph 12 of the Valuation Act would be unnecessary if the approach taken by the Valuation Tribunal in relation to the HSE in the previous decision about this entity is correct.

Mr. Devlin also asked the Tribunal to consider the use of the word *"including"* in the section. This can mean the enlarging of a pre-existing group; it can also be defined as *"meaning and including"*. Mr. Devlin submitted the properties within brackets in the sub-section should be read as being an enlargement of the State, with the State now being able to hold property itself. It is clear from decisions such as **Comyn v Attorney General** [1950] IR 142 that the State can own property.

Mr. Devlin submitted that an office of State must be an office held by an individual office holder. It is not necessary, however, that it be an entity whose office or function is created by the Constitution (though it would be hard to think of any such office holders whose office

was not created by the Constitution). In his submission an office of State must be construed as something akin to a Department of State. Therefore one looks at what a body is rather than what it does. He submitted that the appellant may perhaps be a public body, but this is insufficient. A public body is a much wider concept than an “*office of State*”. Previously under earlier legislation one examined the “*public purpose*” and use of the land. Mr. Devlin submitted that we must now look at the identity and makeup of the body in question. For example, the Irish National Organisation for Unemployed receives funds from the Exchequer. This of itself, however, was insufficient to make it an office of State.

Mr. Devlin further submitted that the employees of FÁS were not civil servants. Mr. Devlin reminded the Tribunal of its determination in the **HSE** case in which it held (correctly in his submission) that an “*office of State*” must be analogous to a Department of State (however in his submission the Tribunal erred in holding that the HSE was in such an analogous position).

In his submission having regard to the nature of the entity in question the appellant should not be regarded as an office of State.

The Appellant’s Reply

In reply Mr. Hickey submitted that the vote of €1.1 billion per annum was of significance. He submitted that the interpretation of statutory principles proposed by Mr. Devlin was similar to those submissions made in the **HSE** determination, yet the Tribunal decided that the property occupied by the HSE was not rateable having regard to the provisions of Section 15(3). In addition he submitted that the distinction between the Gardaí and Defence Forces on the one hand and the other offices of State on the other hand was an unreal one. The Gardaí and Defence Forces were not administrative entities but forces.

The Law

It seems to the Tribunal that the appellant entity has a number of striking resemblances to the HSE. In our view it performs a central governmental function: the provision of employment, employment training and employment information. It receives, the Tribunal understands, substantial funding from the State to carry out its functions. It is clearly obliged to account to the State for the manner in which it controls and spends its monies. It is closely linked with the Minister for Enterprise, Trade and Employment; however it would appear that other Ministers also have a role or function to play in relation to the overall operation of the

appellant entity. It is notable that the Oireachtas decided to centralise the functions of three different bodies into the one entity, being the appellant, by virtue of the provisions of the 1987 Act.

The 1987 Act indicates that a significant degree of supervision and control is exercised by the Comptroller and Auditor General, the Minister for Enterprise, Trade and Employment and other Ministers. While the day-to-day operation of the various centres operated by the appellant is left to the appellant to determine, it is in our view striking that the quantum of the payments made to trainees is not determined by the appellant itself, but rather is linked directly to payments made by the Department of Social Welfare. Furthermore, the quantum of these payments cannot be changed without prior government sanction. Given that the vast majority of the funding received by the appellant is spent paying trainees, it seems clear to the Tribunal that a very high degree of control, not simply of expenditure generally but of the nature and amount of expenditure on individuals such as trainees, rests with what might generically be termed the State.

The Tribunal determinations in the **Legal Aid Board** and **FETAC** cases are of assistance but not determinative. For example, we do not regard the fact that the staff of the appellant are not always civil servants to be determinative. We note that it was not determinative in the **FETAC** case.

We accept that the appellant body FÁS should not be regarded as being a Department. However, we accept the submission that the appellant is analogous to a Department of State. It is similar in some ways to a manifestation of a Department of State. The fact that it has a degree of autonomy in the carrying out of its day to day operations does not deprive it of the character of an office of State. It is in any event subject to overall Ministerial discretion in this regard. We do not accept that an office of State should be limited to an office occupied by an individual (such as the Attorney General, the President, Comptroller and Auditor General or the Office of Director of Public Prosecutions). We do not believe that sub-section (3) of Section 15 permits of such an unduly restrictive interpretation of the phrase “*office of State*”.

In our view therefore, having regard to the matters set out above, the appellant FÁS is an “*office of State*” within the meaning of Section 15(3) of the Valuation Act, 2001.

Determination

The subject property is occupied by the appellant which is an office of State within the meaning of Section 15(3) of the Valuation Act, 2001. Accordingly the property is not rateable. The appeal is allowed.

And the Tribunal so determines.