

Status of Judgment: Distributed

Appeal No. VA01/1/046

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 1988
VALUATION ACT, 1988

An Post
APPELLANT

and

Commissioner of Valuation
RESPONDENT

RE: Post Box at Map Reference (adjacent to) 10 O'Connell Street Lwr, Ward: North City, County Borough of Dublin
Exemption for public purposes and rateable occupation

B E F O R E

Henry Abbott - Senior Counsel

Chairman

John Kerr - MIAVI

Member

Michael Coghlan - Solicitor

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 6TH DAY OF FEBRUARY, 2002

By notice of appeal dated the 24th April 2001 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of £3 on the above described hereditament. The Grounds of Appeal as set out in the Notice of Appeal were that:

1. The Valuation is excessive and inequitable
2. The Valuation is bad in law
3. Post Boxes are not rateable hereditaments or otherwise rateable
4. Post boxes are not in law subject to the valuation code
5. Post Boxes of An Post are in any event exempt under section 63 of the Poor Relief (Ireland) Act 1838
- 6 The Valuation for rating purposes of post boxes is contrary to the law of the European Community and its implementing instrument in the state

The oral hearing commenced on the 16th of July and resumed on the 23rd of July 2001. Mr. Diarmuid Rossa Phelan BL appeared for the appellant instructed by the Solicitor's Office in an Post and Mr. Dan Feehan BL instructed by the Chief State Solicitor appeared for the respondent.

Mr. Phelan opened the case and indicated that one appeal only i.e. VA 01/1/046 would be argued at this oral hearing although the other two appeals were on the same principles. He said that there were three points to the appellant's appeal to the Tribunal (a) the subject was not in the occupation of An Post (b) did not have a rateable value and (c) was entitled to the public purposes exemption. He said that he would be relying on the provisions of directive 97/67/EC of the European Parliament and of the Council of the 15th of December 1997 on Common Rules for the Development of an Internal Market for Community Postal Services and the improvement of quality of services in addition to other arguments used in seeking the exemption.

Preliminary Issue

Counsel for the respondent objected that on the basis of the decision of the Tribunal in the Appeal *VA88/0/101 Ebeltoft t/a Hunters v Commissioner of Valuation* and on settled practice from then, it was not open to the appellant to expand the grounds of appeal beyond those relied upon at first appeal. The Tribunal decided that there was a preliminary issue to be dealt with.

The Tribunal concluded that since that decision the Tribunal had reviewed the position in relation to the expansion of grounds of appeal. In particular in the Appeal *VA95/5/015 John Pettitt v Commissioner of Valuation* the Tribunal had decided that it was open to them to allow new grounds of appeal to be advanced at Tribunal stage in exceptional cases.

The Tribunal ruled that, as the present appeal was a sample or test case for many similar constructions around the country that the grounds of appeal could justifiably be extended. In so doing the Tribunal did not accede to the rationale of the argument advanced by the appellant that the grounds of appeal before the Tribunal ought to be expanded by reason of the fact that the earlier stages of Valuation appeals are dealt with on a more administrative level. The experience of the Tribunal is and has been that valuers on both sides of appeals apply the highest degree of expertise to their work and the Tribunal does not wish its decision to allow an extension of the grounds

of appeal in exceptional circumstances to justify a less rigorous approach at the earlier stages of revision or appeal.

The Evidence

Mr. Michael Kelly gave evidence that he was the person in An Post in charge of the contracts for the management and construction of Post Boxes such as the subject. He stated that An Post did not have any lease or agreement with the Corporation in relation to the situation or provision of the post box the subject of this appeal and that it appeared that the Dublin Corporation owned the land in O'Connell Street on which the post box was constructed. He stated that there was co-operation between An Post and the local authorities in relation to the placement and removal of such post boxes. The only restriction on the movement of post boxes was that An Post would first seal the post box so that it could not be used by the public for posting letters and to ensure that all post had been removed therefrom prior to sealing. Such was the level of co-operation that the local authority could in certain circumstances indicate that they would engage a contractor to construct or relocate a post box. Mr. Kelly considered that the subject predated the 1908 legislation enabling the postal authority to place such post boxes on the roadway. Mr. Des Killen gave evidence on behalf of the appellant in accordance with his *précis* of evidence and when asked under cross examination whether he conceded that the post box was a construction fixed to land such as would fall into one of the categories referred to in the schedule of section 2 of the Valuation Act 1986 namely "all constructions affixed to the land", Mr. Killen replied that while the subject might fall into a category referred to in the schedule, that did not say that it should have a valuation if the valuation from the outset was *de minimis*, or, if the occupation was not rateable occupation.

The Submissions

Counsel for the appellant submitted that the occupation by the appellant of the subject was not rateable occupation on two grounds:

- A.** The Telecommunications Act 1983 did not seem to vest the property in the box in An Post and the wording of the Valuation Act 2001 would seem to back up this view.
- B.** The tenure of An Post was far too tentative being subject to the requirements of the local authority who have a tenure in the subject sufficient to meet the criteria set out in the judgement of Barrington J. in

the case **Telecom Eireann and the Commissioner of Valuation**
Supreme Court 1991 No. 937.

In relation to the claim for exemption for public purposes he set out the criteria arising from the examination of the issue as set out in a number of Valuation Tribunal decisions and in the case **Commissioner of Valuation v. Trinity College 1919 2IR 519**. He also referred to the passage from Keane on Local Government. He said that the requirements giving rise to public purposes exemption were,

- a) No private profit was to be derived from the subject.
- b) Current user of the subject was the material test.
- c) The user had to be open to all the public and not to a restricted section thereof
- d) Ownership- each member of the public had to have an interest in the property.

In relation to the private profit aspect, it was submitted that as no extra profit was made by An Post from letters posted in the subject over and above letters handed in over the counter, no private profit could be made from the post box. He opened at length the EC directive referred to and the implementing regulation made thereunder, Statutory Instrument number S.I.310 of 2000. He also opened the implementing legislation of Luxembourg as a sample of what other states may have done in relation to the taxation issue of installations such as the subject, where they were given tax-exempt status.

Counsel for the appellant referred to the requirement of the directive and regulations in relation to the provision of universal services, of open access to the public and affordability of service as indicating strong public purposes as conferred by the directive and implementing legislation.

Counsel for the respondent Mr. Feehan submitted that the question as to whether the subject was capable of generating private profit should be judged regarding the subject as an integral part of the service that An Post were providing and that that service could yield profit and this question should be judged in the context of the objective of the directive which was to open up competition in the market. He submitted that there was in fact occupation and that the subject was plainly fixed to the ground and that such occupation was highlighted by the fact that nothing could be done with the box until it was emptied and sealed by An Post personnel.

He submitted that in any event section 54 of the Act of 1983 provided as follows

“54.— the Property vested in either company on the vesting day shall, from the commencement of the next following financial year, cease to be exempt from the rate chargeable by a local authority notwithstanding that the property may appear as exempt on a valuation list.”

Mr. Feehan further submitted that the title of the directive 97/67/EC indicated that it was for the purpose of providing common rules for the development of “the internal market of community postal services” and that this essentially implied the development of the services for profit and competition and the entry of new operators within it. The essential aspect of the development of a market would be to have two or more players and this was inconsistent with the traditional non-profit service providing tradition of the Department of Post and Telegraphs and the setting up of a more commercially orientated structure in An Post by the 1983 Act. He said that universality tasks describe the service and not the monopoly of An Post or any other body. He said that the nature of rates was that they were not a tax on the provision of services. All hereditaments and property had to be rated and it was only by gaining an exemption from such rating that any property would not be rated. Mr. Feehan conceded that prior to the passing of property under the 1983 Act to An Post, the subject would have been exempt.

In reply, Counsel for the appellant submitted that section 54 of the 1983 Act was a neutral section in relation to the issue of gaining an exemption under the rules at statute and common law and that the meaning of the section was that there was to be no block exemption for An Post property as there had been hitherto.

Decision of the Tribunal

Occupation. The Tribunal holds that O’Connell Street is either owned by the Corporation or that it follows the more usual pattern of ownership of the adjoining building owners subject to the management of the roads authority in the form of the Corporation. The occupation of the appellant is to be distinguished from that of Telecom Eireann as decided in the **Telecom Eireann** case (supra) insofar as the subject is undoubtedly fixed to the ground. The control exercised by An Post of the subject is almost total but still appears to depend to a large degree on co-operation and

sometimes agreed interference of the local authority. However in the end of the day the subject is street furniture in a non-rated public place which can be moved by the local authority. The Tribunal accordingly is of the view that there is no rateable occupation of the subject.

De Minimis Issue

Notwithstanding the arguments advanced by the appellant through the evidence of Mr. Killen, the Tribunal is of the view that it is bound by the decision of Barron J. in *Irish Management Institute 1990 2IR p409* and find that notwithstanding the difficulties involved, the subject is capable of some valuation.

Public Purpose Exemption

The Tribunal holds that traditionally, constructions such as the subject had very widespread access and provided unlimited service for the widest number of people in the state. They have come into the hands of An Post through the 1983 Act marked with that certain equity of use, which has continued in practice to the present day. In addition, the requirements of the directive 97/67/EC and the implementing legislation, of universality of service and of reserving the function of providing this service in relation to the fundamental public requirement of a basic affordable and available postal service to An Post, reinforces the public aspect of the service provided by the subject and the fundamental role of the subject in providing a vital initiating function for this activity within its own vicinity for the public.

The respondent is bound to decide the rateability issue on the basis of *rebus sic stantibus*. The Tribunal adjudges that the subject as found is indelibly marked with the public purpose.

In relation to the provisions of section 54 of the 1983 Act, the Tribunal considers that the section in its clear terms does not purport to repeal the whole process of exemption for public purposes in relation to all An Post property. A more realistic interpretation of the section would be that the property of An Post is not to be exempted by reason only of the fact that it has appeared as exempt on the Valuation list. It is easy to understand that by reason of the fact that all An Post property was probably exempt when it was owned by the state without any examination in relation to whether any of the other requirements of the public purposes exemption were or needed to be examined, it was necessary to implement section 54 to reflect the change

from State ownership. It is noted by the Tribunal that the English cases referred to by Keane J. in his work on Local Government highlighted the fact that even in England property owned by the Post Master General retained the benefit of public purpose exemption even when the statutory and case law framework became less liberal than in Ireland. It is against this historical “blanket” treatment of an Post exemption that Section 54 must be seen. It is noteworthy in this context that the same formula of words were not used in the Valuation Act 2001 when changing the status of exemption in relation to certain hereditaments with a public element.

Conclusion

Accordingly the Tribunal finds that the property should not be recorded in the valuation list and the valuation be struck out.