Status of Judgment: **Draft**
Appeal No. VA01/2/002

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 1988

VALUATION ACT, 1988

Texaco Ireland Ltd. **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Garage/Filing Station at Map Reference 6Bb Barrack Hill, Townland: Waterlands South, ED: Kinsale Urban, County Cork

B E F O R E

Fred Devlin - FSCS.FRICS	**Deputy Chairman**
John Kerr - MIAVI	**Member**
Maurice Ahern - Valuer	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 28TH DAY OF MARCH, 2002

By Notice of Appeal dated the 16th day of July 2001, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of £115 (€146.02) on the above described hereditament.

The Grounds of Appeal as set out in the said Notice of Appeal are that; "The basis of the calculation of the NAV in respect of the forecourt / throughput is incorrect and results in an excessive RV in respect of the subject property."

1. This appeal came before the Tribunal by way of an oral hearing held in the District Court premises in Cork on the 9th November 2001. At the hearing the appellant was represented by Mr. David Freeman FRICS FSCS FCI Arb. of James Adam. The respondent was represented by Mr. Liam Cahill BA, MIAVI, a District Valuer in the Valuation Office.

2. Prior to the commencement of the oral hearing the valuers exchanged written préces of evidence and valuations and submitted copies to the Tribunal. At the oral hearing the valuers adopted these préces as being their evidence in chief given under oath.

3. The property which is the subject of this appeal comprises a modern petrol filling station with retail shop, forecourt, car wash and canopy situated on the north side of the Cork Road just outside Kinsale. The area of the retail accommodation is agreed as follows:

Ground Floor	M^2	SQ.FT.
Retail Shop with offices and W.C.	107.3	1,155
First Floor		
Office Stores and Toilets	148.6	1,600

4. The property was purchased by Texaco in 1999 for £250,000 and was completely redeveloped at an additional cost of £500,000 thus giving a total outlay of £750,000 plus costs. When completed, Texaco entered into a license agreement with Mr. Dennis Murphy for a period of one year from the 31st March 2001. Under the license agreement the fee for the use of the premises is to be 15% of the gross profit of the business up to £250,000 per annum and 20% of the gross profit of the business in excess of £250,000 per annum. Under the license agreement Mr. Murphy is obliged to keep the premises open for business between the hours of 7am to 11pm on seven days of the week and to employ sufficient competent staff for this level of activity. Mr. Murphy is also obliged to keep the shop and forecourt area adequately stocked at all times and to participate in all promotional activities run by Texaco.

5. The property which is situated within two rating areas was listed for the 2000/4 revision and assessed at a rateable valuation of £122 of which £115 was attributed to that portion of the property located within the functional area of Kinsale UDC and £7 to that portion in the Cork County Council area. An appeal was lodged against the assessment of £115 and no change was made. It is against this decision that the appeal to this Tribunal now lies. No appeal was lodged against the £7 assessment apportioned to that part of the property located in the Cork County Council area. During the discussions at first appeal stage and in preparation for the appeal to this Tribunal the valuers agreed that the net annual value of the shop, stores and carwash bay was £11,000 in respect of that portion situated within the Kinsale UDC area. In the circumstances therefore the only matter in dispute is the Net Annual Value of the forecourt turnover.

6. Mr. Freeman in his evidence stated that the grounds of appeal were twofold:

a. That the method of calculating Net Annual Value in respect of forecourt sales throughput as used by the Valuation Office is arbitrary and produces an excessive figure.

b. That the estimate of forecourt turnover which is used to calculate Net Annual Value should be based on an average figure after an extended period. Where this is not possible the estimate of throughput should not penalise the ratepayer for exceptionally good management.

7. In regard to the first ground of appeal Mr. Freeman contended that the method of valuation currently used by the Valuation Office in valuing forecourt throughput, solely by reference to volume was unreliable in that it did not take into account the hypothetical tenant's ability to pay the 'rent' as envisaged in section 11 of the Valuation (Ireland) Act 1852. In his opinion regard must be had to the gross retail margin which is actually being achieved after making adjustments for spillage, credit card sales and promotional activities. In his experience 15% of gross retail profit was the industry norm in determining rents or license fees and hence should also be used in determining Net Annual Value. In essence he was of the opinion that the Commissioner of Valuation's methodology was fundamentally flawed and the fact that it had been in use for several years did not alter his opinion.

In support of his second ground of appeal Mr. Freeman said that the Valuation Office in arriving at his estimate of forecourt throughput had annualised the throughput achieved in the first ten weeks of trading. This he said was totally unrealistic, as no allowance was made for the seasonal nature of trade in Kinsale nor for the exceptional business acumen of Mr. Murphy. In his opinion Net Annual Value should be based upon an estimate of the likely turnover that could be achieved on a year on year basis by a typical operator. Mr. Murphy he said was an excellent manager and ran both elements of the business in an exceptional manner which had the effect of attracting customers from other outlets in the vicinity. There was however no guarantee that this would continue in the longer term.

8. Mr. Freeman in additional oral evidence said that the major oil companies had very refined methods of selecting sites for filling stations. As far as the subject was concerned the estimate of annual throughput was in the order of 1.5 million litres and this figure should be used in arriving at Net Annual Value. Mr. Freeman said that in arriving at his opinion of Net Annual Value he had assumed a gross retail profit margin of 3.3 pence per litre or 15 pence per gallon a figure which he frequently used in advising Texaco in relation to rents or license fees. Once the gross retail margin was calculated the license fee on average was 15% of this figure. Variations above and below the 15% would be made for stations with unusually high forecourt throughput or those with low throughput.

9. Under cross-examination Mr. Freeman agreed that a license fee is not equivalent to a rent in the accepted sense of the word. He also agreed that in arriving at an estimate of the rent as envisaged at Section 11 of the Valuation (Ireland) Act 1852, the petrol companies could not be excluded as being the hypothetical tenant.

Mr. Freeman in his evidence put forward the following estimate of Net Annual Value.

Estimated Annual Throughput	330,000 gallons
Gross Profit Margin	3.3 p per litre or 15 p per gallon

Adjustments

Adjustments for

a. Product Losses — 0.2% of Throughput
    i. Cost to Operator — £1,650
b. Credit Card Sales
    i. Cost of Credit Card Sales — 1.6% of pump price
       i.e. 4.5 p per gal
c. Superclub Sales
    i. Cost of Superclub Sales to Operator — 0.6% of pump price
       i.e. 1.6 p per gal

Total (b) + (c) = 6.1 p per gallon

Applying to 25% of Net gallonage

Accordingly therefore he calculated the Net Annual Value as follows :

Estimated Annual Throughput			330,000 gallons		
Product Loss (a)	@	0.2%	=	660	
Net Throughput				329,340	
25% of Sales Credit Card / Superclub			(b+c)		
Retail Margin on 75% of Throughput			=	15p per gallon	
Retail Margin on 25% of Throughput			=	8.9p per gallon	
Value of Forecourt Throughput					
75% of Throughput - i.e. 247,005 gallons	@	15p	=		£37,051
25% of Throughput - i.e. 82,335gallons	@	8.9p	=		£7,328
	Total Sales		=		£44,379
	Less product lost				£ 1,650
	Nett Sales				£42,729
Nett Annual Value	@	15%	=		£6,409

Equivalent to Say 2 p per gallon

Estimate of Nett Annual			
Buildings and Car Wash			£12,940
Forecourt	330,000 @ 2p per gallon	=	6,600
Net Annual Value			£19,540
Rateable Valuation	@ 0.5%	=	£98 (€124.43)

Apportioned Kinsale UDC £91 and Cork County Council £7.

In support of his valuation Mr. Freeman gave details of six filling stations occupied by licensees with similar retail margins to the subject premises, as set out in Appendix 1 attached to this judgement. He also included one comparison also provided by the Valuation Office at 3.6 p per gallon on a throughput at 220,000 gallons against a projected throughput of 300 to 330,000 gallons. This comparison was a Texaco Station in Middleton developed a cost of £595,000. This comparison is attached as Appendix 2.

10. Mr. Liam Cahill in his evidence acknowledged that Mr. Freeman had considerable expertise in advising a major oil company in relation to the appropriate license fee or rent in regard to company owned sites. However as far as this appeal is concerned Mr. Freeman was attempting to overturn the method of valuation for filling stations which was accepted by practitioners in the private sector including Mr. Freeman himself in recent appeals, three of which are included as comparisons in Mr. Cahill's précis of evidence. Mr. Cahill contended that the Comparison Method was the most appropriate method of valuation particularly having regard to the requirements of the Valuation Acts. In essence he said what Mr. Freeman was seeking was a type of Profits Method which up until now was not considered to be an appropriate method for the valuation of filling stations. Use of the Comparative Method ensured that filling stations were valued on a uniform basis as required under the Valuation Acts. The method proposed by Mr. Freeman ignored the valuation of similarly circumstanced property and if implemented could be unduly influenced by the business acumen of the actual occupier and not that of the hypothetical tenant as envisaged under the Valuation Acts.

Mr. Cahill expressed the view that Mr. Freeman was influenced by license fees in proposing that the Net Annual Value should be based on 15% of gross retail profit. License fees, he contended, were distinctly different from rents and were not a reliable guide to rental values or Net Annual Value.

Under cross examination Mr. Cahill said he had relied on actual throughput figures as provided in order to arrive at his evidence of annual forecourt throughput. He was well aware that Kinsale was a tourist area and that throughput in the summer period would be higher than at other times of the year. He had taken this into account in arriving at his estimate of what annual throughput a hypothetical tenant in the market would hope to achieve on a year on year basis.

11. Mr. Cahill contended for a Rateable Valuation of £115 calculated as set out below:

Agreed Nett Annual Value on buildings and car wash		£11,000
Estimated Throughput 400,000 gals @ 3p per gal		<u>£12,000</u>
Total Nett Annual Value		£23,000
Rateable Valuation	@ .5%	£ 115

In support of his valuation Mr. Cahill put forward five comparisons as set out in Appendix 3 attached to this judgement.

12. Mr. Freeman in his final submission referred to a previous decision of this Tribunal.

VA97/4/001 - Irish Shell Ltd. v Commissioner of Valuation

He also referred to **Roadstone Ltd. v Commissioner of Valuation, 1961 IR 239.**

Mr. Freeman said he conceded the fact that the current method of valuation for valuing filling stations was based on so many pence per gallon of throughput. However this did not necessarily mean it was the correct method or that it could not be challenged. He had given the matter considerable thought and in deciding to pursue this appeal he was influenced and encouraged by the findings in the cases above referred to.

13 Findings and Determination

(1) Mr. Freeman is an acknowledged expert in the valuation of filling stations and has acted as a consultant to one of the major oil companies for over twenty-five years. Accordingly therefore he has an extensive knowledge of and experience in the petrol retail industry.

(2) It is common case that petrol retailing has undergone a significant change over the past 5 – 10 year period and the trend is for a smaller number of higher volume outlets with the smaller stations becoming obsolescent if not indeed obsolete. There is also evidence that the petrol companies are increasing the number of company owned sites which are operated by licensees under license agreements.

(3) Perhaps the most significant change has been in relation to the development of forecourt shops. Previously the custom of these shops was motorist generated. This is no longer the case where the range of merchandise on sale is more akin to that found in small supermarkets. To that extent therefore the forecourt shop has now become as important from a trading point of view as the forecourt itself and Mr. Freeman in his evidence stated that this was the case. Indeed the emergence of and the development of the forecourt shop concept has had an adverse effect on the traditional corner shop and in many instances a substantial portion of the shop turnover may be derived from non forecourt users. Mr. Freeman in his evidence said that the shop in the subject property was so well managed and stocked that it had attracted added custom from other filling stations in the vicinity.

(4) It has been the custom of the Valuation Office to value the forecourt shop relative to retail outlets in the vicinity and to value the petrol sales by reference to throughput. Where there is a car wash a separate figure is attributed to this facility and the resultant figures are then aggregated in order to arrive at the Net Annual Value of the Rateable Hereditament.

(5) In regard to forecourt sales there is no doubt that forecourt throughput is of major importance and petrol companies have according to Mr. Freeman developed a sophisticated method of assessing likely throughput in a selected location before carrying out a scheme of development or the upgrading of an existing facility.

(6) Mr. Freeman's primary contention is that the method of valuation used by the Valuation Office in valuing forecourt's throughput is inappropriate in today's market as it does not have regard to "gross retail margin". In his evidence he submitted the proposition that the forecourt volume is a function of price as clearly the lower the price the higher the volume. Accepting the logic of Mr. Freeman's argument to be true it would appear that forecourt volume is also a function of the gross retail margin as the lower the gross retail margin applied either by the operator or the pricing policy of the supplier, the lower will be the price at the pumps.

(7) Gross retail margin as a basis of valuation is not one which is commonly used in rating valuation practise. In relation to filling stations whilst gross retail margin may be under the control of the occupier there is no doubt that the petrol companies also have a major influence on the level of margin attained by the control they exercise in relation to pump prices which may vary from area to area depending upon their market share and other factors.

(8) Given the fact that the forecourt shop is now a major factor in the overall level of business achieved at individual stations it would be logical and consistent in Mr. Freeman's scheme of things that the valuation of the shop should similarly be assessed on a gross retail margin basis. Mr. Freeman did not canvas this particular argument at the hearing though it would appear that the annual license fee of the subject property is based on the gross profit of the business and not solely on the gross profit of the petrol sales element of the business.

(9) The Tribunal accepts Mr. Freeman's opinion that the provision of a forecourt shop is a very important factor in today's market. It does not however fully accept the proposition that it is of equal importance. For example whilst the Tribunal will accept the argument that the throughput of a well located filling station will be enhanced (perhaps significantly) by the added attraction of a well

appointed and well managed forecourt shop, it will not readily accept the converse of that argument that a well appointed forecourt shop will make up for the inadequacies of what is a poorly located petrol sales outlet.

(10) Under rating law the unit of assessment is the hereditament and in this instance the hypothetical tenant as envisaged under Section 11 will look at the entire property and take into account all the relevant factors before formulating an opinion of appropriate rental value. Foremost in these considerations will be an assessment of the sustainable level of forecourt throughput i.e. the level of throughput that could reasonably be expected to be maintained on a year on year basis on the assumption that the station is managed in an efficient manner with pump price levels that are generally in line with competition in the locale. The hypothetical tenant will of course also have regard to the presence or absence of a retail shop and obviously the size of the shop and all other relevant considerations will also be taken into account.

(11) At the end of the day Mr. Freeman's valuation by reference to gross retail margin in respect of the subject property is devalued by him at 2p per gallon. Presumably if a similar exercise were carried out in respect of a number of stations, figures above and below this level would be the outcome. From the schedule included by him in his evidence in relation to other Texaco stations, the license fee on average is 15% of the adjusted gross profit with an average gross retail margin of approximately 3.5p per litre or 16 pence per gallon. Applying a rent or license fee of 15% this is equivalent to 2.4 pence per gallon.

(12) Mr. Cahill in his evidence used five comparisons four of which are located in different parts of Co. Cork, whose Net Annual Values have been agreed at first appeal stage on a throughput rate ranging from 3 to 4.3 pence per gallon. Comparisons 1 and 2 are Texaco Stations and in these cases Mr. Freeman represented the company at first appeal stage.

(13) There is undoubtedly a significant difference between 2p per gallon as put forward by Mr. Freeman in this appeal as against a 3.5 and 4p per gallon agreed by him in previous appeals. Mr. Freeman contends that this is due to the different approach he has adopted in arriving at the net annual value by reference to gross

retail profit, a method hitherto not used by him or indeed any other practitioner. In support of this change he relied upon the findings of the two cases cited by him in his final submission:

a. **Irish Shell Limited v Commissioner of Valuation**
b. **Roadstone Limited v Commissioner of Valuation**

(14) This Tribunal must perforce determine the rateable valuation of this property in compliance with the relevant statutory provisions i.e. Section 11 of the Valuation (Ireland) Act 1852 and Section 5 of the 1986 Valuation Act. In the **Irish Shell** case at page 8 par 4(b) the Tribunal considered in some depth the proposition that:

(i) "once an established practice has the uniform support of a substantial body of practitioners in that particular area, and if such support has continued over a long period of time, then that practice should be accorded such an elevated status that the same could successfully resist any challenge to its continuing existence." And went on to say at

(ii) "In principle there is no doubt but that if a practise has gained such a widespread acceptance, in terms of generality and approval than it is accorded an evidential standing of considerable significance." And at

(iii) "A practise even if general and approved, could never be a successful defence to what otherwise would be a non-observance of or a failure to comply with a Statutory Provision."

(15) In this appeal as distinct from the **Irish Shell** case the Commissioner of Valuation has complied with the statutory provisions in first determining Net Annual Value before arriving at Rateable Valuation. Thus the primary findings in the Irish Shell Case do not in any way have a bearing on this appeal. However the above quoted references regarding "an established practise" are of some significance and relevance in the context of this appeal.

(16) In **Roadstone Limited v The Commissioner of Valuation** the passage referred to by Mr. Freeman at page 260 states:

> “ *It has been repeatedly decided that in arriving at his estimate of hypothetical rent the Judge is not bound to use any particular method but may arrive at his determination in whatever way is most suitable to produce the required result…the ascertainment of the Net Annual Value as directed by the section is a question of fact and not a question of law… and common sense and economic considerations must be the guides. To ascertain the hypothetical rent involves postulating a hypothetical tenant or tenants and a hypothetical landlord or landlords. The hypothetical tenant will consider what profits he can make out of the use of the hereditament after paying expenses and outgoings and will not pay a rent so large that it does not allow him a reasonable return: but if the demand for hereditaments of the class under consideration is large and the supply is small the rent he will pay may approximate to a rack rent.”*

It is the opinion of this Tribunal that nothing contained in this section of the judgement undermines the basis upon which the Commissioner of Valuation determined the Net Annual Value of the subject property or the comparisons. What it does however is to permit the appellant and this Tribunal to consider any other method in order “to arrive at its determination in whatever way is the most suitable to produce the required result.”

(17) This Tribunal acknowledges that there are several methods of arriving at Net Annual Value. In this case the Commissioner has relied upon the Comparative Method whereas the appellant has introduced a valuation based upon an estimate of gross retail profit. However there is uncontested evidence of rental value which indicates that the petrol companies are prepared to rent sites at rents equivalent to 12p and 6p per gallon. (Ref. Mr. Cahill’s comparisons 1 to 4) This evidence throws up figures greatly in excess of those put forward by Mr. Freeman and Mr. Cahill. This may be a recognition of the fact that petrol companies will be prepared to pay rents in excess of what might be market rents in order to obtain outlets in locations where they are not represented. Nonetheless this evidence

whilst it may be treated with some caution, cannot be ignored, as it is part of the market that exists for petrol sales outlets.

(18) Mr. Cahill in arriving at his estimate of annual throughput annualised the weekly sales for the period 2 April to 11 June 2001. The Tribunal accepts Mr. Freeman's contention that this could lead to an overestimate of what a hypothetical tenant would expect to achieve in a year on year basis. His estimate of likely throughput is 330,000 gallons per annum.

14 Determination

Having regard to the foregoing and all the evidence and arguments adduced including the evidence in relation to the rents being achieved for undeveloped sites by the petrol companies, the Tribunal has come to the conclusion that the 3p per gallon put forward by Mr. Cahill is fair and reasonable. However the Tribunal is of the opinion that the throughput estimate of 400,000 gallons per annum does not adequately reflect the fact that throughput at this station is seasonal and will drop off during the winter months. In the circumstances the Tribunal considers a throughput of 350,000 gallons to be more appropriate.

The fundamental basis for determining Net Annual Value is the rent which a hypothetical tenant would offer on the basis of one year with another. In relation to filling stations, the accepted method up to now has been the volume of throughput at so many pence per gallon. No evidence was offered in this appeal as to the basis of how this method of valuation was arrived at other than the fact that it is "the general practice". Were it not for the uncontested evidence that the petrol companies were paying rents for sites equivalent to between 12p and 6p per gallon, the Tribunal may have found some favour in the method of valuation put forward by Mr. Freeman.

Valuation

Estimated annual throughput		say	350,000 gals
Net Annual Value of Throughput	@	3p per gallon =	£10,500
Net Annual Value of other elements as agreed			£12,400
Net Annual Value of hereditament			£22,900
Rateable Valuation	@	.5% = say	£114
Rateable Valuation of portion situated in Co. Cork Area			£7
Rateable Valuation of that portion of the property situated in Kinsale UDC functional area			£107

Accordingly therefore the Tribunal determines the Rateable Valuation of the property which is the subject of this appeal to be £107 i.e. €135.86.