Appeal No. VA06/4/001

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Health Service Executive **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Office(s) at Lot No. 3G/A, Castletroy, Ballyvarra, Limerick 1, County Limerick.
Exemption - office of State - Section 15(3)

B E F O R E

John O'Donnell - Senior Counsel	**Chairperson**
Fred Devlin - FRICS. FSCS	**Member**
Brian Larkin - Barrister	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 26TH DAY OF MARCH, 2007

By Notice of Appeal dated the 27th day of September, 2006 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €370.00 on the above described relevant property.

The Grounds of Appeal as set out in the Notice of Appeal are:
"The Property is occupied by the Health Service Executive and as such is property directly occupied by the state (and without prejudice to the generality of the foregoing, an office of state) within the meaning of Section 15(3) of the Valuation Act, 2001."

This appeal proceeded by way of an oral hearing held on the 22nd January 2007 at the offices of the Valuation Tribunal, Ormond House, Ormond Quay Upper, Dublin 7. At the hearing the Appellant was represented by Mr. Brian Murray, SC with Mr. Michael Tuite, BL, instructed by Messrs D.G. O'Donovan, Solicitors. The Respondent was represented by Mr. Donal O'Donnell, SC with Mr. Brendan Conway, BL, instructed by the Chief State Solicitor.

Both sides furnished written legal submissions. The appellant called oral evidence.

INTRODUCTION

Section 15(3) of the Valuation Act, 2001 ("*the Act*") provides:

> "*Subject to section 16, relevant property, being a building or part of a building, land or a waterway or a harbour directly occupied by the State (including any land or building occupied by any Department or office of State, the Defence Forces or the Garda Síochána or used as a prison or place of detention), shall not be rateable."*

The issue for determination between the parties herein is whether the land occupied by the Health Service Executive (hereinafter *"HSE"*) is land occupied by "*the State*"; in the alternative, land occupied by an "*office of State*".

The Appellant's contention is that the HSE does fall within these terms as set out in Section 15(3) and therefore the property is not rateable. The Respondent contends that the HSE falls outside these terms and so the property occupied by the HSE is rateable.

It should be noted that the property in question comprises single storey offices acquired by the HSE in 2002 and subsequently refurbished. It is located in Plassey Technological Park, one mile east of Limerick city centre. It was inspected by the Revision Officer on the 10th May, 2006 and a valuation was assessed in the sum of €370. It was deemed rateable by the relevant Revision Officer. The premises provide facilities wherein a number of functions carried out by the HSE are performed. Areas within the premises include a PPARS Department, an Environmental Health Department, a Local Health Office Department, a Projects Office, Internal Audit Department and a Technical Services Department as well as other lobby, meeting and kitchen facilities. The parties agreed that the issue of the quantum of the valuation was not a matter of controversy before the Tribunal; in effect the premises

was serving as a test premises in order to obtain a Determination from the Valuation Tribunal as to whether or not property occupied by the HSE is rateable.

THE EVIDENCE

After opening submissions on behalf of the HSE, evidence was given on behalf of the Appellant by Mr. Patrick McDonald who is the Assistant National Director of Finance, HSE. He is based in Limerick. In his evidence he emphasised the significance of the HSE having its own vote of monies in the budget. His role meant that he had a personal responsibility to oversee the discharge of and accounting for the monies voted to the HSE. He observed that the only other body which had its own vote which was not a Department was the Court Services.

His evidence was that a corporate plan for the HSE had been agreed and approved by the Minister for Health and Children, and a service plan has been agreed but has not yet been approved by the Minister. In addition, the national service plan is in effect an annual agreement between the Minister for Health and Children and the HSE. This plan reflects government and ministerial priorities. It must be laid before the Oireachtas and must be published. Once so approved the HSE is required under the Health Act, 2004 to manage the services so as to ensure they are delivered in accordance with this plan.

In his view complaints which had previously been dealt with by the Department of Health and Children were now dealt with by the HSE under a new regulatory framework. In addition, parliamentary questions concerning the affairs of the HSE are now dealt with by a dedicated unit within the HSE (in the CEO's office). Mr. McDonald pointed out that no other "*non-department*" provided this level of response to parliamentary questions.

Mr. McDonald also gave evidence in relation to the two sets of accounts prepared by the HSE. The appropriation accounts are the responsibility of the CEO. The annual income and expenditure accounts are signed off by the Board of the HSE, but must be submitted simultaneously to the Minister for Health and Children and the Comptroller and Auditor General. The CEO in his role as Accounting Officer is obliged to notify the Comptroller and Auditor General in circumstances where he has requested written directions from the Board in relation to expenditure. Every month the Comptroller approves the issue of monies to

government Departments from the Exchequer. Mr. McDonald was of the view that this was unique to government Departments and the HSE.

On cross-examination Mr. McDonald acknowledged that the function of the HSE was to deliver a health service to the general public. The 2004 Act was enacted to permit a central body to administer its function in a more efficient manner. The estimates for 2007 suggested that the HSE would require a budget of €14 billion. In his view all functions of the old Health Boards had been transferred to the HSE. However, persons formerly employed by the Health Boards who are now employed with the HSE are not given the status of civil servants by virtue of their transfer.

Mr. Bernard Gloster also gave evidence on behalf of the Appellant. He is the Local Health Office Manager for the HSE, responsible for the primary, community and continuing care service (PCCC) in North Tipperary and East Limerick. The PCCC is one of the three main strands of the HSE. In the course of carrying out its primary, community and continuing care service it provides a wide variety of services to members of the public. These include general practice, disability services, elderly care hospitals, mental health services, environmental health services, dentistry, audiology, nursing home registration, childcare and protection, GMS scheme and others.

In addition the HSE has the power to appoint authorised officers who can enter and inspect premises, e.g. nursing homes and places providing care for children. The HSE also has a prosecutorial function to prosecute persons for various breaches of regulations, e.g. sale of tobacco to minors. This power is reserved to the Local Health Office Manager.

In cross-examination Mr. Gloster accepted that prior to his engagement by the HSE he had been employed as General Manager of the Midwestern Health Board. The functions carried out under the current statutes were powers previously operated by the Health Boards. He acknowledged that the Department of Health and Children assists the Minister in preparing legislation and also assists in developing policy in relation to health service provisions.

The evidence also suggested that there was a degree of liaison between the Health Board and the Department of Finance, though not as much liaison as there is now. Mr. McDonald and Mr. Gloster contended that the Chief Executive Officer of the HSE was the Accounting

Officer in respect of the HSE rather than the Secretary General of the Department of Health and Children.

Witness statements were also provided by the Appellant from Mr. Joseph Hoare (who is employed as a Chief Assistant Technical Services Officer) and Mr. Frank Gleeson (Principal Environmental Health Officer). The role of Mr. Hoare was to report directly to the Assistant National Director of Estates (West) who in turn reports further up the line (the Technical Services Officer is currently absent due to illness). The Estate Management Service provided by Mr. Hoare includes capital programmes, energy and environmental management, maintenance support, support and advice in various other roles. The technical services provided include not just property related services but also other administrative functions relating to the management of the health care infrastructure dealing with lands, building, plant and equipment.

Mr. Gleeson's role as Principal Environmental Health Officer requires him to deal with a variety of environmental health services. These include monitoring and control of food stuffs, water sampling, inspection of nursing homes, pest control, sale of poisons and information on influenza and various other services to the public relating to environmental health. By agreement the statements furnished in writing by these witnesses were accepted as evidence without these two witnesses being formally called to give sworn oral testimony.

No evidence was called by the Respondent.

THE SUBMISSIONS

Submissions on behalf of the HSE: Introduction

On behalf of the Appellant, Mr. Brian Murray, SC submitted that the HSE must be regarded as being "*the State*" in any ordinary sense of that term. This was so having regard, *inter alia*, to the functions carried out by the HSE, the control and organisation of its operation, its degree of absorption into central government and the source and expenditure of its funding. Established by the 2004 Health Act, the HSE discharges on a nationwide basis the functions of the former Health Boards as well as certain functions of the Department of Health and Children. The coordination by the HSE of the National Health Policy is now to a very large extent integrated into government. Significantly, the HSE has its own vote in the budget. The 2006 Book of Estimates provides that the Health Service Executive has a vote of almost

€9.5 billion. This is by some distance the largest vote, the next highest being the Department of Education and thereafter the Department of Social and Family Affairs (the Department of Health and Children has a vote of €209 million).

Mr. Murray in addition attached significance to the fact that the CEO of the HSE is an Accounting Officer responsible to account for the expenditure by HSE in the same way as a Department Head is also so responsible to the Government. The only other non-government Department with a CEO which has such a role is the Courts Service. In his submission the HSE should be treated as an administrative unit akin to a government Department. It deals with all complaints about the health service; it even has its own section designated specifically to answer parliamentary questions arising about the health service.

In addition the HSE carries out a wide variety of functions under an equally wide variety of legislation. It provides health services and it also prosecutes, investigates and if necessary applies to the Courts for assistance.

Section 15 - "The State"

Section 15 deems non-rateable properties "*directly occupied by the State*". In this regard Mr. Murray submitted that the State does not have an independent existence but rather occupies such property as it does occupy through the agency of different entities. There are a wide range of such agencies from for example the Houses of the Oireachtas to for example commercial entities controlled by the State. The Legislature could not have intended to cover under Section 15(3) every entity which was in some way connected with the State. However, it was appropriate to suggest that an entity which is so closely identified with the State as to lead a reasonable observer to say that it was the State could be said to come within the words "*the State*" in Section 15(3). In looking at the issues of function, control and funding it was clear firstly that the core function of the HSE is the promotion of health services across the State. It is under the dominion of and effectively absorbed into the State, being directly accountable to the State and in effect controlled by it. It is funded centrally and has its own vote in the Book of Estimates.

Functions of the HSE

Section 7 of the Health Act, 2004 indicates that the object of the HSE is to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and

protect the health and welfare of the public. The section requires the HSE to deliver or arrange to deliver health and personal social services as well as to provide education, training and advice. It is obliged to have regard to policies of government and can undertake research projects as well. Mr. Murray submitted that the evidence of Mr. Gloster set out in the appendices to Mr. Gloster's witness statement made it clear that the various roles and functions were such as to be legitimately regarded as governmental functions. He drew in addition a significant distinction between the HSE and a profit making body such as Aer Lingus. In real terms the functions of the HSE were much closer to those of a government Department than any other entity in the State.

Control of the HSE

Mr. Murray contended that the degree of integration and absorption into the government made the HSE unique. It was in effect indistinguishable from a government Department. The nature and extent of the control exercised by the government over the HSE was evident in an analysis of various sections of the 2004 Act. Section 10 sets out the powers of the Minister for Health and Children to issue directions to the HSE which the HSE was obliged to comply with. Sections 11, 13 and 14 set out the role of the relevant Minister in relation to the appointment and removal of members of the Board of the HSE. Part 4 of the Act dealt with the role of the Chief Executive Officer, who is not only the Accounting Officer but can be required to attend Oireachtas Committee meetings. While the HSE is entitled to appoint employees these are to be recruited in accordance with the Public Service Management (Recruitment and Appointments) Act, 2004 (Section 22(1)). It is also notable that the terms and conditions of employment of employees as well as their grades are set by the HSE but with the approval of the Minister for Health and Children and with the consent of the Minister for Finance.

Mr. Murray also submitted that the extent to which the various corporate and service plans drawn up by the HSE had to be submitted for approval to the Minister and the Oireachtas before implementation made it clear that the HSE could not be regarded as being completely autonomous or independent of the control of the Minister and the Houses of the Oireachtas.

Funding of the HSE

Mr. Murray drew our attention to Article 28.4 of the Constitution which directed the government to prepare estimates of the receipts and estimates of the expenditure of "*the*

State". He noted that the sum voted in the Book of Estimates to the HSE was 25% of the total vote (he noted in passing that the Health Boards did not have a separate vote but now the HSE does). The Courts Service also has a separate vote and indeed its own CEO who is also an Accounting Officer.

In addition certain taxes collected are passed directly to the HSE, e.g. excise duties on tobacco and health contributions from self-employed persons. Mr. Murray also contended that the HSE was entirely dependent on the State for funding. Any major capital spending required prior written Ministerial permission under Section 34 of the Health Act; Section 36 of the same Act requires the HSE to keep all proper and usual accounts of monies expended by it and the said accounts are required to be submitted to the Comptroller and Auditor General as well as the relevant Minister.

Examining the wording of Section 15(3), Mr. Murray submitted that the HSE could reasonably be said to fall within the definition of a Department of State which carries out functions at the heart of the central governance of the State. It was clear that the Section could not and did not apply to all public bodies. All of the entities within the brackets in Section 15(3) carry out functions at the heart of the governance of the State and must be regarded as being manifestations of the State. The fact that the HSE might be regarded by some as being a "*semi-State*" public body did not prevent it from occupying property qua "*the State*".

"***office of State***"

Mr. Murray pointed out that the phrase "*office of State*" used a small "o" for office and therefore suggested that we should give the ordinary common sense meaning to the phrase "office". It should not (contrary to the Respondent's submission) be regarded as a separate type of office to e.g. the Office of the Attorney General or the Office of the Director of Public Prosecutions. In his contention if it was to be regarded as a separate administrative unit akin to a government Department then it was in a very true sense "*the State*". While it is undoubtedly the case that the decision of **Slattery v Flynn [2003] 1 ILRM** made it clear that a taxing statute will be construed strictly before any taxation is imposed, in his submission this was irrelevant here because no ambiguity arose.

Mr. Murray also referred to the written submissions of the Respondent. Insofar as it may be suggested that the relevant "*office of State*" must be within or closely related to a Department of State the HSE in his submission came within such definition. Noting that the Respondent had submitted that previous Determinations of the Valuation Tribunal in relation to the issue of what constituted an "*office of State*" were incorrect, Mr. Murray submitted that the Tribunal should only depart from earlier decisions made by the Tribunal if there was clear or patent error and noted the views expressed by the Supreme Court in relation to the Refugee Appeals Tribunal about the significance and desirability of consistency of decisions. In his submission the term "*office of State*" allowed a distinction to be drawn between bodies exercising indispensable aspects of State function and duty and those whose function is more incidental to that function. The operation of semi-State commercial companies might be examples of bodies that come within the latter formulation; on any version the functions of the HSE come within the former.

The provisions of Section 63 of the Poor Relief (Ireland) Act, 1838 were also outlined, which exempted from rates property "*dedicated to or used for public purposes."* The category of "*public"* property that should not attract rates is regarded as being a broad one. The 2001 Act must be taken to have continued the position that existed prior to the enactment of that Act save and insofar as it expressly departed from its earlier position. In his submission the formula utilised ("*State or office of State*") must be taken to encompass bodies within the State apparatus discharging the functions of the State. This included the HSE.

Mr. Murray also directed our attention to Determinations of the Tribunal in **VA04/2/038 - Legal Aid Board, VA05/3/003 - FETAC, VA05/3/061 - Personal Injuries Assessment Board, and VA06/2/089 - National Breast Screening Board**. In each of these cases the relevant entity was deemed to be an "*office of State*". While not all public bodies could be regarded as being "*offices of State*" those which were engaged in governmental type business as opposed to business of a commercial nature could be said to come within the concept of an "*office of State*". In addition the functions, staffing and sources of funding were relevant factors to be considered (**Legal Aid Board**). In **FETAC** the strong degree of Ministerial control (including but not limited to the appointment and removal of personnel) as well as the high degree of integration, control, funding and accountability led the Tribunal to the conclusion that **FETAC (Further Education and Training Awards Council)** was an office of State. Similar consideration prompted the Tribunal to conclude that the **Personal Injuries**

Assessment Board and the **National Breast Screening Board** were each an "*office of State*" within the meaning of Section 15(3).

THE RESPONDENT'S SUBMISSIONS

On behalf of the Respondent, Mr. Donal O'Donnell, SC adopted the précis of the Respondent's evidence prepared by Mr. David Molony, B.Sc., M.R.I.C.S., a District Valuer in the Valuation Office.

In his submission the approach taken by the Appellant to the interpretation of Section 15(3) was flawed. It was clear that not all "*State bodies*" could be regarded as being "the State" within the terms of Section 15(3). The question then was: Where do you draw the line? Insofar as previous Determinations of the Valuation Tribunal appear to rely on the degree of State control over the entity in question as being determinative of whether or not the entity came within the terms of Section 15(3) he submitted this was an incorrect approach to take. There was no warrant, either within the Act or elsewhere utilising only the element of control to decide whether an entity was or was not "*the State*" or an "*office of State*".

In his submission neither the "*status*" of an employee of the HSE nor its connection with government policy were of any relevance. It was noteworthy for example that the HSE simply implements but does not formulate government policy and therefore cannot be regarded as part of the government in any real sense.

Mr. O'Donnell noted that the offices, the subject matter of this appeal, from which the work in question was done had been rateable under the 1988 Valuation Act. In order for the Appellant to succeed one would have to hold that the clear intention of the 2001 Act (which was to deem such property rateable) was later set at nought by the 2004 Health Act, not by any express words contained within the statute but rather *sub-silentio*. In his submission this was an unsound manner in which to interpret the legislation in question. The purpose of the 2001 Act in his submission was to shrink the area of exemption of rateability. The effect of Section 15(3) was to narrow or shrink the area of exemption; properties which had previously been exempt were now included as rateable under Section 15(3).

By contrast the 2001 Act makes it clear where it expressly deems certain properties not rateable (in Schedule 4); it also expressly deems certain properties to be rateable, e.g. State occupied harbours – see Schedule 3 and Section 14.

Our attention was drawn to the decision of the High Court in **Slattery v Flynn [2003] 1 ILRM page 450**. While the statement is *obiter* to the main *ratio* of the Judgment, it is clearly suggested as a fundamental principle that a provision which seeks to exempt from rateability will be construed strictly. Similar observations are to be found in **O'Connell v Fyffes (Supreme Court) unreported, 24th July 2000 (Keane CJ, Murray and Hardiman JJ)**. Keane CJ held that the Court must apply a strict interpretation of taxing statutes both in relation to charges to tax and to reliefs from tax.

It was thus clear that if any ambiguity arose in relation to the statute, the statute must be construed strictly. While there had been some debate about the significance of the "*o*" in "*office*" not being capitalised, the submission of the Respondent was that this was not a matter of significance.

In order for an entity to come within Section 15(3) the entity occupying the property in question must be part of the central government and the executive power of the State. Thus the "*State*" referred to in the section must be of the same substance and rank as a Department of State or the Gardaí or the Defence Forces. An example of this would be the Office of the Attorney General. The phrase "*any Department or office of State*" had the effect of requiring that any "*office*" must be similar to a Department.

In the submission of the Respondent the administration of a nationwide health service is not central to the functions of government. This was not one of the functions traditionally or historically carried out by a government whose principal roles were to collect monies and to defend its people. The 2004 Act which established the HSE could not be said to have created a new Department or office of State. Indeed the State had never concerned itself with matters such as e.g. public transport or health in the 19th and early 20th Centuries. While the government had in the course of the 1960s taken on roles in relation to these services this had the effect of increasing the number of hereditaments exempt from rating. During the 1980s a number of these roles were devolved or hived off to independent bodies over whom the Minister in question retained a general discretion. However, in all other respects such

independent bodies were completely autonomous and independent of government control. Examples were ComReg and the Irish Aviation Authority. So the fact that a Minister might retain an element of discretion or control in respect of a body established by statute did not make such a body automatically a Department or office of State.

The allocation of resources to Health Boards throughout the country did not in a sense bring this function back under government control; rather it offered these functions and services on a nationwide basis. In addition the provision of budgets to the Health Boards was part of a design to try to ensure that the State obtained value for money for the monies spent by it in respect of services.

In that context therefore Mr. O'Donnell submitted that the correct question to ask was: What does the 2004 Act do having regard to the pre-existing provisions of the 2001 Act and the earlier situation?

A close examination of the 2001 Act demonstrates that while State property is relevant property and eligible to be rated it is excluded from rateability only if it comes within the ambit of Section 15. Schedule 4 on the other hand makes it clear that certain types of property are not rateable under any circumstances. Thus in his submission it was clear that State property should be rated unless very clearly exempted from rating in clear and express terms.

Mr. O'Donnell also considered the issue of Ministerial supervision. In his submission the fact that the Minister for Health and Children retained a degree of supervision over the HSE did not in any sense make the HSE unique. It was inevitable that the central government of a State would retain a form of supervision over a body which was otherwise independent or largely independent. In this regard the appropriation of €9 billion to the HSE meant that it was hardly surprising that a central government would want to exercise some element of control over the expenditure in respect of such funds. Further as previously pointed out it was a feature of many such semi-State bodies that a degree of supervision or discretion was retained by the relevant Minister.

"office of State"

While the presence or absence of a capital "*o*" in the word "*office"* was not of major significance for the correct interpretation of the concept, an *"office of State"* was an office such as the Office of the Tánaiste, Office of the Attorney General and other like Offices. In the same way as there is a defined number of Departments of State established by the Ministers and Secretaries Act, 1924 as amended the term "*office of State*" must also be indicative of a defined or limited number of such Offices of State. This makes clear sense when one examines the phrase "*by any Department or office of State*" utilised in Section 15(3). In Mr. O'Donnell's submission there was no apparent schematic or legislative drafting reason for the use of capitals in Department and lower case for office. For example the phrase "*office of State*" is used in the Road Vehicles (Registration and Licensing) Regulations of 1982 (S.I. No. 311/1982), the definition section of which reads as follows:

> *"Department of State" includes a separate office of State"*.

Similarly, the Copyright and Related Rights (Librarians and Archivists) (Copying Protected Material) Regulations of 2000 (S.I. No. 427 of 2000) provides an exemption in favour of:

> "*Any library or archive administered as part of a government Department, an office of State, or other office or agency operating within the aegis of a Minister of the Government."*

In his submission an office of State was and should be treated as a cognate body either within or closely related to a Department of State. So the Office of the Tánaiste is not necessarily linked to any Department of State but is involved with or closely related to the central government of the State in the manner of a Department of State. The Office of the Attorney General is a separate administrative unit akin to a government Department although it is not itself a Department of State. Similar observations apply to the Office of the Director of Public Prosecutions, the Commissioner of Valuation, the Revenue Commissioners, the Office of Public Works and other similar bodies.

The phrase "*office of State*" therefore must mean a body which is clearly analogous to a Department of State at the heart of central government which discharges and exercises executive powers. Mr. O'Donnell noted that an examination of the function carried out by

the HSE was not necessarily a helpful test. There is an element of circularity about a "*function test"*; if the State becomes involved with the function exercised by the body in question it becomes a "*State function*". What was significant in the instant case however was that at no stage had central government ever provided a health service. Prior to the coming into existence of the Health Boards the health service had been provided by religious orders or private entities. The coming into existence of the Health Boards did not create a new State function or service; rather it created a new body which was funded through the relevant Department to provide a health service. The creation of the Health Boards did not create a new State function or office of State and it was therefore illogical to suggest that the creation of the HSE created a new State function or office of State. Indeed it was clear in his submission that under the 2001 Act the property occupied by Health Boards became rateable. The 2004 Act does not expressly reverse the effect of the 2001Act. Mr. O'Donnell submitted that it was unlikely to have been intended by the Legislature to make significant changes to the rating code by a side wind or in some form of implicit or unconscious manner. Similarly, it could not be said that the State would in some way implicitly create a new "*office of State*".

The decisions in **Slattery v Flynn** and **O'Connell v Fyffes** referred to above make it clear that one could not improperly infer the creation of an "o*ffice of State*" as to do so would be to create by inference or implication a new exemption from rateability not expressly provided for in the legislation. Nor was it sufficient to suggest that because the CEO was answerable as an Accounting Officer to the Oireachtas that this determined the issue of whether or not the HSE was a Department or office of State. Having regard to the enormous budget provided to the HSE it was entirely appropriate that the Oireachtas would wish to retain some sort of control or answerability in respect of the expenditure of such funds. This could not and did not mean of itself that the entity over which the relevant CEO presided was therefore an office of State.

Mr. O'Donnell also suggested that the previous decisions of the Tribunal were of no real assistance in this regard. Indeed in the **Legal Aid Board** case it is submitted that the analysis carried out by the division of the Tribunal was in fact an analysis of the criteria and indicia which identified public bodies and State sponsored bodies only, and not offices of State. He suggested that the Tribunal fell into error on that occasion in identifying an office of State as being an entity which was identical to or subsumed into the concept of a public body and/or a State sponsored body. Far from the level of control and integration being of significance, as

was the case in the **Legal Aid Board** decision, it was suggested on behalf of the Respondent that control and integration was a hallmark of semi-State bodies, whereas offices of State are typically devoid of direct Ministerial or governmental control.

THE APPELLANT'S REPLY

In reply Mr. Murray, on behalf of the Appellant, contended that the HSE was clearly discharging a central government function. He suggested we were no longer bound to consider only the functions discharged by a central government in the mid 19th Century. In his submission the functions set out in Section 7 of the 2004 Act must be regarded as being core functions of any central government. In his submission the HSE was clearly analogous to a Department of State. It had its own vote, its own Accounting Officer and answered its own parliamentary questions. It was at the heart of central government discharging and exercising an executive power. While the Attorney General and the Revenue Commissioners were independent of the executive, the degree of direction and control exercised by the relevant Minister over the HSE could not be said to in some way distance the HSE from the machinery of State.

Mr. Murray said it was clear that new offices had come into being since the mid 19th Century (such as the Office of An Tánaiste or An Bórd Pleanála) which were clearly offices of State exercising core functions but would not necessarily be part of what might be regarded as the "traditional" roles of central government.

Mr. Murray noted that it was suggested that the employees of the HSE were not civil servants. However this was not dispositive of the matter if the employees in question were public servants. In this regard he referred to the **Personal Injuries Assessment Board** and the determination of the Valuation Tribunal.

Mr. Murray accepted that the Health Boards may have been rateable under the 2001 legislation. He noted however that there was no decision that deemed them to be rateable or not rateable. However matters had in any event moved on and the HSE was a significantly different entity to the previous conglomeration of Health Boards. The HSE now had its own vote in the Budget. It had its own Accounting Officer. It now dealt itself with complaints or parliamentary questions. It was noteworthy too that policies expressly directed by the relevant Minister still had to be implemented by the HSE. For example, the recent central

policy in respect of strategies to deal with cancer was, although implemented by the HSE, directed by the Minister for Health and Children.

In conclusion his submission was that a combination of the nature of the function carried out by the HSE together with its financial inter-independence and relationship with the Oireachtas meant that the HSE had to be regarded as "*the State"*; or in the alternative an *"office of State"* within the meaning of the Section 15(3).

THE LAW

The Health Act, 2004 ("the Health Act") provides for the dissolution of the previous Health Authority and Health Boards and transfers their functions and employees to the HSE. The object of the establishment of the HSE is set out in Section 7. Its object is "*to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public*". The functions previously carried out by the Health Boards under specific legislation are transferred to the Executive [HSE] under Section 59 of the Health Act. Section 7(4) provides:

> *"The Executive shall manage and shall deliver, or arrange to be delivered on its behalf, health and personal social services in accordance with this Act and shall -*
>
> *(a) integrate the delivery of health and personal social services,*
>
> *(b) to the extent practicable and necessary to enable the Executive to perform its functions, facilitate the education and training of –*
>
> *(i) students training to be registered medical practitioners, nurses or other health professionals, and*
>
> *(ii) its employees and the employees of service providers,*
>
> *and*
>
> (c) *provide advice to the Minister in relation to its functions as the Minister may request."*.

It is thus clear that the Health Act imposes as a matter of law the responsibility for delivering a health service to the people of Ireland on the HSE. The nature of this function is of

considerable significance when considering whether property occupied by the HSE can be said to be occupied by "*the State*" or "*by any Department or office of State*" within the meaning of Section 15 of the Valuation Act 2001. As observed by Mr. O'Donnell on behalf of the Respondent in his elegant submission the provision of a health service was not traditionally or historically a function of central government, its roles being confined to protector and tax collector. However, the roles played by central government have expanded and increased at a very considerable rate over the last 50 years. Even a casual study of the titles and responsibilities of government Departments over this period demonstrates how the government has refined or developed in a more nuanced way its role in some areas and has minimised its role in other areas. This is not simply an issue of nomenclature. The Executive has taken on (willingly or unwillingly) a considerable number of new functions which cannot be regarded as ancillary or secondary functions but rather are now primary functions of government. One of these functions is the provision of a health service to the public.

It is of course true that the establishment of the Health Boards represented on one view an attempt to devolve this role away from central government to "*local*" regional administrative authorities. We note the argument that the establishment of the HSE effectively relocates to a central authority the functions and powers previously exercised by the previous regional authorities. It does appear to us, however, that the process of what might be called "recentralisation" does not have the effect of distancing the Executive any further from the role of providing a health service than was the case under the old regime. Indeed, from one perspective, the process of "*recentralisation*" has brought the Executive and the HSE closer. In practical terms too it makes little sense for an Executive to distance itself from the HSE in such a way as to suggest that, for example, the issues facing the HSE are not also in a real sense issues for government.

A candidate seeking votes in the forthcoming General Election would surely receive short shrift from would-be voters were he or she to inform the electors that the provision and delivery of a health service (and any problems arising therefrom) were not the function or responsibility of government. We are therefore of the view that the HSE in managing and delivering or arranging for the delivery of a health service to the public is performing an essential central government function.

The issue of control was canvassed in the course of submissions by both sides and indeed was referred to frequently in the course of previous Determinations of the Valuation Tribunal. We accept that the issue of control is to some extent a matter of degree. In any of the statutory provisions which give to the Minister for Health and Children various powers to impose his or her own will on the general operation of the HSE, there are the kinds of powers which other statutes give to other entities established by legislation which could not, however, be regarded as exercising central executive functions. Thus the power to remove members of the Board of the Executive, and the power to issue "*general written directions*" to the HSE are commonly to be found in other legislation establishing what might be called "*semi-State*" entities. Mr. O'Donnell points out that so far as the legislation expresses a desire on the part of the Oireachtas to ensure a degree of accountability in respect of expenditure of monies voted by the Oireachtas to the HSE, this is not in any way surprising given the amount of funds voted each year to the HSE. However, it is impossible to ignore the extent of the funding voted to the HSE on an annual basis.

As Mr. Murray points out the amount voted to the HSE in the 2006 Book of Estimates represents 25% of the total vote. It is notable that (with the possible exception of the National Gallery) all of the other 40 services who receive funds by way of voted expenditure are unquestionably entities carrying out State functions. They could not be regarded as semi-State or semi-commercial entities in any way whatsoever. It is striking that in addition to the vote given to the Department of Justice, Equality and Law Reform a separate vote is given to An Garda Síochána, the Prisons and the Courts Service. Indeed the Courts Service has its own CEO who is also an Accounting Officer. In the same way monies are voted not only to the Department of Health and Children but also to the Health Service Executive. Again the Health Service Executive has its own CEO who is also an Accounting Officer. While again the amount of money provided by central government to any given entity is not of itself determinative of whether or not the entity can be regarded as being a state entity, the sizeable fund voted to the HSE on an annual basis is of considerable significance. It is also significant that the Legislature has in a very deliberate way made it clear that in a manner akin to the Secretary General of a government Department, the CEO of the HSE is an Accounting Officer; that is, he is accountable to the Oireachtas for the expenditure of the monies in question.

Where does the HSE fit into Section 15(3) – if it fits in at all? The Respondent submitted that the Health Act could not in some sort of silent or implicit way effectively create a new Department or office of State. In his submission the rateability of the Health Boards up to 2004 meant that one would have required clear and express language to change the status, the land now occupied by the HSE having previously been occupied by the Health Boards in question. The dicta contained in **Slattery v Flynn** and **O'Connell v Fyffes Banana Processing Limited** imposed strict constraints in relation to the interpretation of what is in effect a taxation statute. Insofar as it is suggested that the scheme of the 2001 Act was to shrink areas of exemption, the lands occupied by the HSE should not be deemed "*not rateable*" unless clearly and expressly so provided by statute.

In our view the Health Act, 2004 does not create a new government function. Rather it imposes the obligation of fulfilling what remains a central government function on the new "*service*" (as it is described in Note 3 of the Book of Estimates). The function of providing a health service to the public remains a government function; the engine which now powers that function is the HSE. We note that there is some ambiguity as to whether or not property occupied by Health Boards in the past was or was not rateable under the 2001 Act. However, even if it was so rateable it seems to us that the HSE is a new entity. It is true that the HSE takes on many of the old prosecutorial and inspectoral roles but it also has additional sophisticated functions in relation to the provision and gathering of information and research as well as, of course, the overall responsibility for the provision and maintenance of the health service. In particular, the relationship of the HSE with the Oireachtas as set out in the Health Act distinguishes the HSE from the previous Health Boards. Therefore, even if property occupied by the Health Boards in the past was then rateable, the new and distinct character of the new and distinct entity means that the HSE is significantly different to the Health Boards for the reasons outlined above.

Where the HSE fits (if it fits at all) in the rubric contained in Section 15(3) of the Valuation Act was a matter of considerable discussion. It seems to us that the phrase "*the State*" includes but is not limited to the various entities contained in the following brackets. This means that "*any Department or office of State, the Defence Forces or the Garda Síochána"* or any "*prison or place of detention*" must be regarded as emanations of the State. To some extent therefore the distinction sought to be drawn between "*the State*" on one hand and "*office of State*" on the other hand is in the present context somewhat unnecessary. It seems

to us that only if the HSE could be regarded as not constituting a Department or office of State (the other bracketed entities are clearly irrelevant here) would the issue arise as to whether or not the HSE is some other emanation of "*the State*" which was not however included in the brackets in Section 15(3).

In our view, however, it is unnecessary to explore that issue further. It is of course clear beyond doubt that the HSE is not itself a Department. However, we are of the view that the HSE is clearly analogous and closely akin to a Department of State. We have already concluded that it exercises a central executive function. The fact that the HSE has a degree of autonomy in the carrying out of its day to day operation while subject to overall Ministerial discretion does not of itself deprive it of the character of an "*office of State*". There are undoubtedly other areas in which there is a degree of interaction between what might be regarded as the "headline" Department and the other services providing allied roles and functions. For example, there is clearly interaction between the Department of Justice, Equality and Law Reform on the one hand and the Garda Síochána, the Irish Prison Service and the Courts Service on the other hand. The interaction between the Department of Health and Children on the one hand and the HSE on the other hand also seems to us to permit a degree of autonomy to the HSE subject to its various responsibilities to the Oireachtas and to the relevant Minister as set out in the Health Act, 2004.

We note the caution urged on us on behalf of the Respondent in respect of the previous Determinations of the Valuation Tribunal in respect of the **Legal Aid Board, FETAC,** the **Personal Injuries Assessment Board** and the **National Breast Screening Board** Determinations insofar as they rely or appear to rely on the nature and extent of State control over the entity in question in determining whether or not the entity is an "*office of State*". However, these Determinations while of assistance to us are of only limited help in the instant case. This is because the primary object and function of the HSE of providing a health service nationally to members of the public is so manifestly a central executive function that the HSE is in this respect significantly different from those other entities under consideration in those Determinations, the functions of which might not necessarily be regarded as being as central as the function carried out by the HSE. In addition the relationship of the HSE with the Oireachtas and with the Government (even absent the exercise of Ministerial power, discretion or control) is qualitatively different to the relationship enjoyed by those other entities with those two powers.

DETERMINATION

The Health Service Executive is an office of State within the meaning of Section 15(3) of the Valuation Act, 2001. That being so, the property directly occupied by the HSE at the National Technological Park, Holland Road, Plassey, County Borough of Limerick are not rateable.

And the Tribunal so determines.