

Appeal No. VA05/3/006 & 007

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

West Link Toll Bridge Ltd.

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Toll(s) at Property Number 664438 & Property Number 664432, Palmerstown Lower, Palmerstown West, Palmerstown, (VA05/3/006) & Diswellstown, Castleknock Knockmaroon, Castleknock, (VA05/3/007) County Dublin.

B E F O R E

Fred Devlin - FSCS.FRICS

Deputy Chairperson

John Kerr -BBS. ASCS. MRICS. FIAVI

Deputy Chairperson

Brian Larkin - Barrister

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 21ST DAY OF DECEMBER, 2005

By Notices of Appeal dated the 7th day of July, 2005, the appellant appealed against the determination of the Commissioner of Valuation in fixing rateable valuations of €18,000 (VA05/3/006) and €83,000.00 (VA05/3/007) respectively on the above described relevant properties.

The Grounds of Appeal are set out in the sheets attached to the Notices of Appeal, copies of which are attached at the Appendix to this Judgment.

INTRODUCTION

1. These appeals proceeded by way of an oral hearing held in the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 28th September, 2005.
2. At the hearing the appellant was represented by Mr. Donal O'Donnell, SC, and Mr. Paul Coughlan, BL, instructed by Ms. Eve Mulconry, Arthur Cox Solicitors. Mr. James Connolly, SC, and Mr. Brendan Conway, BL, instructed by the Chief State Solicitor, appeared on behalf of the respondent, the Commissioner of Valuation. Fingal County Council as a Notice Party was represented by Mr. James Macken, SC, instructed by Ms. Mary Crealey, Law Agent for Fingal County Council (Mr. Des Bruton appeared on hearing day).
3. With the consent of the parties these appeals were held contemporaneously with Appeals Ref. **VA05/3/008 & VA05/3/009 Celtic Roads Group (Dundalk) Ltd. v Commissioner of Valuation** as the appellant in those appeals is an associated party to the appellant in the subject appeals and as many of the substantial issues in dispute are largely the same in both instances.

THE PROPERTY CONCERNED

4. The property in these appeals consists of the tolls arising from the West Link Toll facility and the buildings used in connection therewith.

RATING HISTORY

5. The property was first valued in 1994 and was the subject of appeals to this Tribunal under references **VA94/2/025 – VA94/2/033**. As a result of these appeals the tolls were assessed at total rateable valuation of IR£6,460 (€8,202). The property was listed for revision in 2000 and the rateable valuation was agreed at £45,200 (€57,392) using the Receipts and Expenditure Method of valuation. The total figure was apportioned between the two rating authority areas as follows:

Fingal County Council Area £37,000 (€46,980)

South Dublin County Council Area £8,200 (€10,412)

6. The property was again listed for revision in 2004 and on the 29th of November, 2004 the Revision Officer issued valuation certificates pursuant to section 29 of the Valuation Act, 2001 to the following effect:

Tolls Fingal County Council Area RV €70,000

 South Dublin County Council Area RV €15,000

7. Following appeals to the Commissioner of Valuation new valuation certificates were issued as follows:

Tolls Fingal County Council Area RV €83,000 – VA05/3/007
South Dublin County Council Area RV €18,000 – VA05/3/006

It is against these determinations by the Commissioner of Valuation that the appeals to this Tribunal now lie.

DOCUMENTS SUBMITTED

8. As part of the evidence introduced to the Tribunal a number of documents were submitted including.
- i. The draft Director's report and financial statements for West Link Toll Bridge Ltd. for the financial year ending the 31st of December, 2004.
 - ii. Guidance Note published by the Joint Professional Institutions Rating Valuation Forum on the Receipts and Expenditure Method of valuation for non-domestic rating (the Guidance Note).
 - iii. Supplemental agreement (including Schedules 1-12) between the National Roads Authority and West Link Toll Bridge Ltd. dated the 4th of June, 2001.
 - iv. Précis of evidence and statement by Mr. David Carson, LLB, PDA, FCA, a Partner in Deloitte and Touche, Chartered Accountants.
 - v. Annual Report and Financial Statements for NTR plc for the financial year ending the 31st of December, 2004.
 - vi. Application Note G - Revenue Recognition published by the Institute of Chartered Accountants in Ireland dated November, 2003.
 - vii. Précis of evidence by Mr. David Geary, B. Comm., FCCA, MCT, the Treasurer of NTR plc the ultimate parent company of West Link Toll Roads Ltd.
 - viii. Précis of evidence and statement by Mr. Brendan Murtagh, FCCA, a Partner in LHM Casey & McGrath. Mr. Murtagh is a past president of the Association of Chartered and Certified Accountants in Ireland.
 - ix. Local Government (Toll Roads) Act, 1979
 - x. Roads Act, 1993 (No. 14/1993) as amended.
 - xi. Valuation Act, 2001.
 - xii. Comprehensive books of authorities prepared by the solicitors for both parties.

- xiii. Précis of evidence and valuation prepared on behalf of the appellant by Mr. Desmond Killen, FRICS, FSCS, IRRB, a Director of GVA Donal O Buachalla.
- xiv. Précis of evidence and valuation prepared on behalf of the Commissioner of Valuation by Mr. Shay Aylward, B.Comm., FCCA, a Staff Valuer in the Valuation Office.

BACKGROUND

9. From the evidence tendered the following material facts emerged.
- i. The appellant company entered into an agreement on the 16th of October, 1987 with Dublin County Council for the operation of the “Toll Scheme” pursuant to section 9 of the Local Government (Toll Roads) Act, 1979 which Act was repealed under the provisions of the 1st Schedule to the Roads Act, 1993. The relevant toll scheme was made by the County Council on the 10th of June, 1985 following protracted negotiations with the appellant and in due course the agreement was approved by the Minister for the Environment and Local Government on the 22nd of September 1988.
 - ii. The scheme as approved by the Minister provided for the construction of a four lane divided carriageway, bridge and ancillary buildings. The agreement provided that the appellant company was to provide, operate and maintain a toll road as a public road. In addition the appellant was to manage, supervise and operate a system of tolls for all traffic (with some minor exceptions) using the toll road for a period of thirty years. The agreement also provided that a percentage of the proceeds (the Gross Toll Revenue- GTR) of the toll would be paid to the Minister when traffic exceeded stipulated levels.
 - iii. By virtue of the Roads Act, 1993, all agreements, toll schemes etc. relating to national roads entered into by a local authority (including Dublin County Council) under the provisions of section 9, the Local Government (Toll Roads) Act, 1979 were deemed to have been entered into by the National Roads Authority.
 - iv. Negotiations between the appellant and the government for the provision of a second bridge and associated road works commenced in 1997. On the 2nd of March, 2000 the National Roads Authority made a “New Toll Scheme” pursuant to section 57 of the Roads Act which scheme was approved by the

Minister for the Environment and Local Government on the 13th of December, 2000. The supplemental agreement dated the 7th of June, 2001 pursuant to section 63 of the Roads Act, 1993 (as amended) between the National Roads Authority and the appellant provided for “the design, construction and funding of the new works and for the tolling and maintenance of the original works and the new works by amending the original agreement i.e. the 1987 agreement in the manner aforesaid”. This “supplemental agreement” provided for an increase in the toll charges and made arrangements for the calculation of the percentage of the gross toll revenue share (the GTR Share) payable to the Minister. Construction of the new works commenced in mid 2001 and was completed in 2003.

- v. Arising out of the supplemental agreement the toll road is that section of the M50 lying between the N3 and N4 intersections. The toll road is approximately 3.2 kilometres long with a six lane carriageway (three lanes in each direction) widening to fourteen lanes at the toll collection plaza.

THE VALUATION EVIDENCE

10. Mr. Killen in his evidence contended that the rateable valuation of the property concerned be €46,720 apportioned between the two rating authority areas as follows:

Fingal County Council Area	€38,310
South Dublin County Council Area	€8,410

Mr. Killen arrived at his opinion of rateable valuation using the Receipts and Expenditure Method of valuation having regard to the Guidance Note as set out hereunder.

		€	
Gross Toll Income			48,904,576
Less Gross Toll Revenue Share			(15,094,340)
West Link Toll Income			33,810,236
Legal & Other Costs			€5,431
Admin & Other Costs	9,972,890		
Add profit on disposal	<u>202</u>		
	9,973,092		
Less 40% NTR plc recharge	802,127		
Less Financial expenses	258,013		
Less depreciation	214,916		
Less Directors' Remuneration	22,000		
Less Operational Leases	<u>38,048</u>	<u>1,335,104</u>	<u>8,637,988</u>
			<u>8,692,419</u>
Amount Available for tenant's share, rent & rates			25,117,817
Deduct Tenant's Share 10% of gross income			<u>4,890,457</u>
Amount Available for rent & rates			20,227,360

	Fingal	South Dublin
Percentage	81.86%	18.14%
Amount Available for Rent & Rates	16,558,117	3,669,243
Rate in the €1.00	56.83	61.04
Rates Adjustment Factor	1.151395	1.16261
	14,380,918	3,156,040
NAV/Rates Factor	0.2664%	0.2664%
Rateable Valuation of Tolls	38,310	8,408
Valuations	38,310	8,410

11. Mr. Shay Aylward in his evidence contended that the rateable valuation of the property concerned be €101,000 apportioned between the rating authority areas as follows:

Fingal County Council Area €83,000

South Dublin County Council Area €18,000.

Mr. Aylward in arriving at his opinion of rateable valuation also used the Receipts and Expenditure Method of valuation and adhered to the Guidance Note. Mr. Aylward's calculations of rateable valuation are set out hereunder.

Income	€	€	€
Gross Toll Income			48,904,576
Expenditure			
Legal & Other Costs		54,431	
Admin & Other Costs		9,972,890	
Add Profit on disposal		202	
			10,027,523
Less rates	0		
Less 40% NTR plc recharge	802,127		
Less Financial Expenses	258,013		
Less Depreciation	214,916		
Less Director's Remuneration	22,000		
Less Operational Leases	<u>38,048</u>	<u>1,335,104</u>	<u>8,692,419</u>
Amount Available for Tenant's Share, Rent & Rates			40,212,157
Deduct Tenant's Share	10% of gross income		<u>4,890,458</u>
Amount Available for Rent & Rates			35,321,699

	Fingal	South Dublin
Percentage	81.66%	18.14%
Amount Available for Rent & Rates	28,914,343	6,407,356
Rate in the €1.00	56.83	61.04
Rates Adjustment Factor	1.358029	1.384552
Profits Available for Rent	21,291,403	4,627,747
Consumer Price Index 134.8	216.5	216.5
Rent Adjusted to 1988 Values	€13,256,726	€2,881,387
NAV/Rates Factor	0.63%	0.63%
Rateable Valuation of Tolls	83,517	18,153
Valuations Say	83,000	18,000

12. A perusal of the valuations submitted by Mr. Killen and Mr. Aylward indicates wide areas of agreement in their approaches. Nonetheless there are two elements in their calculations in which they differ and which give rise to the substantial differences between the amounts available for the payment of rent and rates in accordance with the Guidance Notes.
13. Mr. Aylward in his valuation used the gross toll revenue figure (exclusive of VAT) as the starting point. Mr. Killen on the other hand deducted the GTR Share in the first instance and used the resultant figure as being the income of the undertaking. Mr. Killen in so doing relied upon the advice of Mr. David Carson and legal opinion to the effect that the appellant does not have the right to use the entire toll road income as it sees fit and that in any event the GTR Share is “a charge payable by or under any enactment” as envisaged in section 48(3) of the Valuation Act, 2001.
14. Mr. Aylward in his evidence said he had formed the opinion that all the toll income represented the relevant revenue of the undertaking in accordance with the Guidance Note. Mr. Aylward’s approach in this regard was supported by Mr. Murtagh’s evidence who drew attention to paragraph 5.12 of the Guidance Notes which states that “receipts should include all income directly and indirectly derived from the occupation of the property”. Mr. Murtagh said that in his opinion the GTR Share had all the characteristics of a rent and in accordance with the Guidance Note such payments should not be allowed as an expense. Mr. Murtagh said that under the agreement between the appellant and the National Roads Authority the Minister is effectively the landlord and another hypothetical tenant would have to offer a similar sum to the Minister in order to occupy the property and undertake the venture of the collection of tolls. In short as far as Mr. Murtagh was concerned the GTR Share should not be allowable as an expense. Mr. Aylward in his evidence adopted a similar view.
15. The second major item of difference between the valuers is in relation to what is known as the NAV/rates factor. Mr. Aylward in his calculations had applied a figure of 0.63% to convert net annual value to rateable valuation whilst Mr. Killen applied a figure of 0.2664%
16. Mr. Killen said in oral evidence that in recent times he had been engaged in negotiations with the Valuation Office in relation to the valuation of a number of public utility operations for rating purposes under the provisions of section 53 of the Valuation Act, 2001. These valuations, Mr. Killen said, were prepared and agreed

using the Receipts and Expenditure Method of valuation and applying the principles contained in the Guidance Note. In negotiations it was, Mr. Killen said, agreed to apply a rates adjustment factor of 0.2664% in order to reduce net annual value at 2004 levels to 1988 rateable valuations. This figure, Mr. Killen said, was introduced by the Valuation Office following an analysis of 5,000 properties selected on a nationwide basis. In this regard Mr. Killen referred to and quoted from a letter from the Valuation Office dated the 31st of May, 2005 which stated as follows,

“Adjustment of the valuation.

Likewise, in accordance with section 58 of the Act; since the existing valuation list is still force, the valuation appearing on the Certificate has been adjusted to make it relative to values appearing on the Existing Valuation List. This adjusted valuation is €_____ and is the equivalent of the traditional rateable valuation.”

17. Mr. Aylward said that in his opinion the 0.2664% factor was specific to global valuations and could not be translated into general application. The fact was that all properties in the valuation lists in the Fingal and South Dublin rating authority areas were valued using the 0.63% rates adjustment factor. Mr. Aylward said his valuation methodology was the correct one in this instance and furthermore he defended his use of the consumer price index since the agreement between the appellant and the National Roads Authority provided for future increases in toll charges by reference to this index.

THE APPELLANT’S SUBMISSION

18. Mr. O’Donnell in his submission argued that the Commissioner of Valuation failed to take into account the legal context in which the appellant operates the toll under its agreement with the National Roads Authority. This figure had given rise to the inclusion of the GTR Share in the revenue stream when calculating the net annual value of the property concerned when using the Receipts and Expenditure Method of valuation. The fact is that under the agreement the appellant is obliged to hand over the GTR Share to the Minister and in such circumstances the revenue share should be treated as a charge payable by or under an enactment within the meaning of section 48(3) of the Valuation Act, 2001.
19. Mr. O’Donnell in a comprehensive examination of the Roads Act, 1993 drew the Tribunal’s attention to a number of sections which he considered to be relevant to this

appeal. Section 63(5), Mr. O'Donnell said, seemed to indicate that the performance of the agreement between the appellant and the National Roads Authority was not to be dealt with by the law of contract alone. This section would appear to create a statutory duty to perform the agreement and as far as the Roads Authority is concerned a statutory facility for securing performance under this section by providing: *“The parties to an agreement under this section shall carry out the agreement in accordance with its terms and conditions and a road authority shall have all such powers as may be necessary for that purpose”*.

20. Under section 59(1) where a toll scheme is established the charging of tolls is a matter for the roads authority even if the making of an agreement under section 3 is envisaged. In this regard section 59(1) of the 1993 Act provides,

“59.—(1) Subject to the provisions of this Part, a road authority may charge and collect tolls of such amounts as may be specified for the time being in bye-laws made by it under section 61 in respect of the use of a toll road.”

21. Section 61(1) enables the Roads Authority after consultation with the Commissioner of the Garda Síochána to make such bye-laws as it considers expedient for the purposes of the operation and management of a toll road. Section 61(3) (a) identifies some of the matters which can be dealt with in the bye-laws by the following terms, *“Without prejudice to the generality of subsection (1), bye-laws under this section may—*

(a) specify the amounts of the tolls that shall be charged, or the scales and other provisions by reference to which they shall be charged, in respect of the use of a toll road by vehicles and road users of each class specified in the bye-laws and may specify different such amounts by reference to such circumstances or combinations of circumstances (whether relating to classes of vehicles or road users, seasons of the year, days of the week, times of the day or otherwise) as the road authority may consider appropriate”

22. The legal issues involved in this appeal were identified by Mr. O'Donnell as follows under A, B, C and D.

A. The Statutory Framework for Toll Roads and Agreements for their Operation.

1. The Commissioner of Valuation failed to take into account the legal context in which the Appellant operated the tolls on foot of its agreement with the NRA dated 7th June 2001.
2. The legislation governing the operation of tolls in the Republic is the Roads Act, 1993 (repealing the Local Government (Toll Roads) Act, 1979)
3. The NRA was established pursuant to section 16 of the 1993 Act.
4. By virtue of section 58 of the 1993 Roads Act, a road authority was empowered to adopt and bring into force a scheme for the establishment of tolls in respect of the use of a public road.
5. By virtue of section 59 of the 1993 Act, the charging of tolls was a matter for the road authority: *“Subject to the provisions of this Part, a road authority may charge and collect tolls of such amounts as may be specified for the time being in bye-laws made by it under section 61 in respect of the use of a toll road.”* . (However section 59(3) merely refers to the collection of tolls by the person specified in the agreement.)
6. By virtue of section 61(1) of the 1993 Act, a road authority may after consultation with the Commissioner of the Garda Síochána, make such bye-laws as it considers expedient for the purposes of the operation and management of a toll road. Section 61(3) specifies the amount of tolls that can be charged.
7. By virtue of section 63 of the 1993 Act a road authority is empowered to enter into an agreement with a third party regarding the operation and management of a system of tolls.
 - Section 63(1) stipulates,

“Where a toll scheme is approved by the Minister, a road authority may, with the consent of the Minister, enter into an agreement with another person under which, upon such terms and conditions as may be specified in the agreement (including the payment to, or retention by, the person of all or part of the proceeds of tolls in respect of the toll road the subject of the scheme), the person agrees to do all or one or more of the following:

 - (a) to pay some or all of the cost of the construction of the road,*
 - (b) to pay some or all of the cost of the maintenance of the road,*
 - (c) to construct or join or assist in the construction of the road for or with the authority,*
 - (d) to maintain or join or assist in the maintenance of the road for or with the authority.*
 - (e) to operate and manage (including provide, supervise and operate a system of tolls in respect of the use of the road) the road for or with the authority,*

(f) such other things connected with or incidental or ancillary to or consequential upon the foregoing as may be specified in the agreement.”

- Section 63(2) provides, inter alia, “*for the application of the proceeds of tolls, systems of accounting for tolls collected and the methods and times of payment of proceeds of tolls to the persons to whom they are to be paid under the terms of the agreement*”
- Section 63(5) appears to create both a statutory duty to perform the agreement and a statutory facility for securing performance.

B. Inclusion of the Revenue Share in the Figure for Toll Receipts.

- 1) The Receipts and Expenditure or Profits Method was the appropriate methodology in calculating the NAV for rating purposes. (Ref. **East Link Ltd. v Commissioner of Valuation VA93/4/015**, 11th May 1998 and Ryde on Rating.) It is agreed that Gross Toll Receipts is the starting point in the NAV calculation.
- 2) It was disputed that the Revenue Share and Licence Fee which under Clause 4.3 of its Agreement with the NRA, the appellant is obliged to pay over to the Minister for Transport should be included in the Gross Receipts figure.
- 3) The Toll Bye-laws made by the NRA pursuant to section 61 of the 1993 Act reveal that the level of tolls to be collected by the Appellant was predetermined by the NRA through a formula which imposed a maximum amount in respect of each class of vehicle. The primary entitlement to the toll must rest with the state as the entity which, through the NRA, fixed the maximum level of toll and by virtue of Regulations 2, 6 and 11 of the Bye-laws, imposed the obligation to pay the toll on road users, without giving the Appellant any discretion in power of dispensation that would allow it to permit use without payment of the toll or indeed any adjustment of the amount of the toll. **The Trustees Fitzgerald Memorial Park v Commissioner of Valuation – VA95/1/001** (“Fitzgerald”) was cited and in summarising the methodology to be used when applying the Profits Method it stated that “*Receipts shall be determined by considering all income reasonably able to be derived from occupation of the hereditament.*”
- 4) In the case now before the Tribunal it is submitted that only that part of the toll proceeds that can be kept by the appellant could be considered to be income capable

of being derived from the relevant property. It was argued that there would have been no agreement without the revenue share and so that part of the toll proceeds to be yielded up as revenue share was never within the grasp of the appellant or capable of being derived by it from the toll. Thus it would not be regarded as forming part of the gross receipts.

- 5) The Appellant indicated that it would adduce evidence that would demonstrate that in its statutory accounts the revenue share was not treated as part of the gross receipts and would not be taken into account in ascertaining the gross profit. The appellant further indicated that there was evidence to suggest that to include the revenue share gross receipts would be wholly inconsistent with the generally accepted principles of accounting practice. Apropos of that it was urged that a hypothetical tenant acting on the basis of competent accounting advice would never include the revenue charge in a calculation of his likely profit. Thus the arguments advanced by the respondent in that regard were at variance with commercial reality.
- 6) Case law established the following principles:
 - a) Identification of the most appropriate method of determining the NAV was a question of fact not of law (ref. **Mersey Docks and Harbour Board v Birkenhead Assessment Committee** [1901]AC175, '180 and **Roadstone v Commissioner of Valuation** [1961], R239, now cited in **East Link v Commissioner of Valuation** VA93/4/015, judgment dated 11th May, 1998.
 - b) No particular method must be used to the exclusion of other methods - the determination can be reached in whatever way is most suitable to achieve a fair, balanced and equitable result [**Commissioner of Valuation v Dundalk Gas Company** (1929) and **Roadstone v Commissioner of Valuation** (1961)]
 - c) Regard must be had to common sense and economic considerations [**Roadstone v Commissioner of Valuation** (1961) and **IMI v Commissioner of Valuation** (1990)]
 - d) Profit earning ability was the basic element in determining the NAV and it was based not on actual profits, but on what the prospective tenant would anticipate would be his profits. [**Rosses Point Hotel v Commissioner of Valuation** (1987)]

C. The GTR Share as a Charge Payable by or under an Enactment.

1. Section 48(3) of the Valuation Act 2001 sets out the principles for the ascertainment of the Net Annual Value. It was contended by the appellant in the alternative, without prejudice to the previous submissions, that the Respondent Commissioner erred in refusing to treat the aforementioned Revenue Share as a charge payable by or under an enactment within the meaning of section 48 of the Valuation Act, 2001.
2. It was argued that even if the said GTR Share should be included in the gross receipts, it was nevertheless deductible when calculating the NAV because it was a charge, “*payable by or under any enactment in respect of the property*” within the meaning of the 2001 Act. The agreement between the NRA and the appellant which made provisions for the GTR Share, it was suggested, could not be equated with a private contractual arrangement because it was an agreement which had an explicit statutory basis, i.e. section 63 of the 1993 Act. It was emphasized that while the obligation to hand over the GTR Share found expression in the agreement, as already referred to at paragraph 7 above under section 63(5) the performance of the agreement (which included the GTR Share provision) was accorded the status of a statutory duty. Thus it was submitted that the GTR Share fell to be regarded as a charge “*payable by or under any enactment in respect of the property*” within the meaning of section 48 of the 2001 Act.
3. It was submitted in this connection that Ryde on Rating on which the respondent was relying when arguing that the fact that profits might, by private arrangement or “*even under statutory compulsion*”, be directed from the actual occupier to some other person, was immaterial in determining the rateable valuation by reference to the Profits Method, was at variance with the express terms of section 48 of the 2001 Act and could not represent the legal situation in this Jurisdiction.

D. A Relevant Precedent

1. The appropriate precedent for the subject appeal was the West Link Case itself which was valued in 2000. In that valuation the GTR Share was deducted from the Gross Receipts in order to calculate the NAV. It was submitted by the appellant that the West Link valuation, as it currently appears in the list, was decided by section

63(1) of the 2001 Act to be a correct statement of value and therefore that the methodology used to calculate the NAV in the West Link valuation in 2000 was correct. Accordingly as the GTR Share was deducted in the previous valuation of West Link and the methodology deemed correct, the same methodology should be used in this case.

THE RESPONDENT'S CASE

- 1) The valuation of the subject property was based on the Profits Method of valuation as described in Ryde on Rating and Halsbury's Laws of England and by reference to the jurisprudence of the Tribunal in the East Link case.
- 2) The fact that the Roads Act, 1993 provided a statutory framework under which a "Revenue Share" or "Gross Total Revenue Share" might be charged by the NRA was not determinative for the purposes of section 48(3) of the 2001 Act – it merely established a statutory connection.
- 3) The obligation imposed on the Appellant to make the "GTR Share" payments to the Minister arose under a private contractual agreement between the parties. Therefore the provisions of section 48(3) of the 2001 Act were not satisfied as a matter of fact or as a matter of law and consequently the Minister correctly disallowed the deduction sought from the Gross Receipts of the Revenue Share portion.
- 4) The approach adopted by the Appellant in arriving at the NAV was in error as follows: -
Re. the "Licence fee deductions" as a matter of fact, no licence was required and the amount deducted arose from the "GTR Share" clause in the agreement with the NRA.
- 5) The "GTR Share" was part of a "rent" package offer from the occupier for the right to occupy the toll facility. Therefore any payment of a "Licence Fee" or "Revenue Share" arose on foot of an agreement entered into after the acceptance of the hypothetical tenant's (rental) offer. This was not expenditure necessarily incurred to earn the toll income. The "GTR Share" payments were an allocation of the toll income by agreement to another party (NRA) and did not arise as a result of an imposition "*by or under any enactment*" within the meaning of section 48(3)

of the 2001 Act. Such “Revenue Share” payments were not imposed by statute but resulted from proposals made by the successful tenderer. The agreement was entered into under the provisions of the Roads Act and was analogous to a rental agreement under the Landlord and Tenant Act.

- 6) As West Link Toll Bridge Ltd. was the subject of this revision, the company could not also be considered as a comparison under section 49(1) of the Valuation Act, 2001. There was no comparable property within the relevant rating area of Fingal County Council and South Dublin County Council, therefore the provisions of section 49(2) of the 2001 Act were relevant and the calculated NAV was accordingly adjusted to November 1988 levels.
- 7) Any argument by the Appellant that the Respondent was precluded from disallowing the “Licence Fee” because of the Respondent’s previous conduct was misplaced. As no reliance had been placed by the Appellant on any previous ruling or approach by the Respondent so that it acted to its detriment no question of estoppel arose.
- 8) While the payments to the NRA were referred to in the Appellant’s accounts as a “Licence Fee” the agreement between the Appellant and the NRA referred to the payment of a GTR Share. To deduct such a profit share payment would be equivalent to deducting a portion of passing rent (see clause 4.3 of the Agreement). The purpose of the Agreement providing for such payments was to prevent the toll road company obtaining “super profits” but this was in the nature of a royalty payment and not a “Licence Fee”. In the circumstances the payment was not a “charge” payable under an enactment. The fact that there may have been a statutory entitlement to charge such a “Revenue Share” merely pointed to a statutory connection but the obligation to make the payment remained an obligation under a private contract.
- 9) It was submitted that the amount for which a deduction was being sought was not a permissible deduction in the valuation methodology adopted by the Tribunal in **Fitzgerald**. Primarily, the deduction sought could not be considered as “*outgoingas a result of the operation of the undertaking within the subject property*” within the meaning of Para. 5.28 of the UK Rating Forum document on the Receipts and Expenditure Method.
- 10) The principle of *rebus sic stantibus* requires not only that the physical condition of a hereditament be taken as it is at the date of valuation, but also that any restrictive

covenants and private arrangements which included an agreement for the apportionment of profits from that hereditament as between the occupier and a third party such as the NRA must be ignored. (Ref. Halsbury's Laws of England); **Robinson Bros. (Brewers) Ltd. v Durham County Assessment Committee**); Ryde on Rating; **Port of London Authority v Orsett Union** (1919) 1 KB 84 and **Clement (Valuation Officer) v Addis Limited** (1988) 1 AER 593.

Ryde on Rating states that where an undertaking was occupied in order to earn profits, these profits may be said to be limited by statute in two ways:

- (1) by a limitation of the charges which the trading occupier can make as between him and the public and
- (2) by an appropriation of the whole (or part) of the profits when earned to particular objects.

It was clear from the cases cited, in particular **Port of London Authority v Orsett Union** (1920 AC 273) that limitations of the former kind must be taken into account, but limitations of the latter kind must not for rating purposes.

(See also **Rhymney Railway Co.** (1869 LR 4 QB 276) and **Brecon Markets Company v St Mary's Brecon** (1877) 36 LT 109.

- 11) The West Link valuation arrived at in 2000 was the subject of agreement between the parties. That figure related only to the rateable valuation and did not cover the valuation methodology used to arrive at that figure.

FINDINGS AND DETERMINATION OF THE TRIBUNAL

The Tribunal having carefully considered all the evidence and written submissions tendered and the legal argument adduced and having examined all the authorities and precedents cited finds and determines as follows.

Findings

1. The parties to this appeal were represented by counsel and the Tribunal is indebted to them for the depth and quality of their submissions. This, coupled with the range and scope of authorities introduced, was of immense assistance to the Tribunal.

2. The Tribunal was provided with a series of written reports prepared by senior management staff of the appellant company and by auditors and valuers dealing with various matters of detail and again this was of great assistance to the Tribunal.
3. The valuers in preparing their submissions agreed that the Receipts and Expenditure Method of valuation was the most appropriate method having regard to the nature of the property concerned. They further agreed that the accounts and financial statements for the fiscal year 2004 would form the basis for their respective valuations. In arriving at their valuations the valuers adhered to the Guidance Notes on the Receipts and Expenditure Method of valuation prepared by the Joint Professional Institutions Rating Valuation Forum and in so doing agreed upon many items of allowable expenditure leaving only two substantive issues to be resolved by the Tribunal. This professional and responsible approach was once again of great assistance to the Tribunal.
4. The Tribunal is indeed indebted to all those involved with the pursuit of this appeal for the quality of submission and argument which enabled the Tribunal to reduce the matters in dispute to a number of net issues as listed below:
 - i. In arriving at the “divisible balance” should the GTR Share be deducted as an item of expenditure?
 - ii. The calculation of the tenant’s share
 - iii. The appropriate rates reduction factor to apply to the net annual value calculated in accordance with the Guidance Note.

5. The GTR Share

- a) The supplemental agreement between the NRA and the appellant dated the 7th June, 2001 which provides at clause 4.3 for the payment to the Minister for the benefit of the Exchequer of the GTR Share cannot be equated with a private contractual arrangement as it has an explicit statutory basis. Sections 58, 59, 61 and 63 of the Roads Act, 1993 as amended impact on the arrangements to a greater or lesser extent.
- b) In particular section 63(1) as amended states as follows.

“Where a toll scheme is adopted by a road authority, the road authority may, with the consent of the Minister, enter into an agreement with another person under which, upon such terms and conditions as may be specified in the agreement (including the payment to, or retention by, the person of all or part

of the proceeds of tolls in respect of the toll road the subject of the scheme), the person agrees to do all or one or more of the following:

(a) to pay some or all of the cost of the construction of the road,

(b) to pay some or all of the cost of the maintenance of the road,

(c) to construct or join or assist in the construction of the road for or with the authority,

(d) to maintain or join or assist in the maintenance of the road for or with the authority.

(e) to operate and manage (including provide, supervise and operate a system of tolls in respect of the use of the road) the road for or with the authority,

(f) such other things connected with or incidental or ancillary to or consequential upon the foregoing as may be specified in the agreement.”

c) Section 63(5) states:

“The parties to an agreement under this section shall carry out the agreement in accordance with its terms and conditions and a road authority shall have all such powers as may be necessary for that purpose.”

This section in the Tribunal’s view creates both a statutory duty to perform the agreement and a statutory basis for ensuring its performance. Thus in the view of the Tribunal this satisfies the test contained in section 48(3) of the Valuation Act, 2001.

d) Having regard to the foregoing the Tribunal determines that the Toll revenue for the Receipts and Expenditure Method of valuation should be net of the GTR Share as contended for by the appellant. It is incorrect to treat the total toll receipts as gross income. The Toll bye-laws made pursuant to section 61 of the 1993 Act distinguish between charging and collection of tolls. The GTR Share passed over to the Minister per clause 4.3 of the 2001 agreement and that which was not within the grasp of the appellant cannot be deemed to be part of the receipts of the undertaking.

e) Even if the GTR Share should be included in the receipts it would in the opinion of the Tribunal be deductible as a charge “payable by or under any enactment” within the terms of section 48(3) of the Valuation Act, 2001.

- f) The deduction of the GTR Share from gross receipts is also consistent with best accountancy practice and is in conformity with the principles of statutory audit.

6. The Calculation of the Tenant's Share

Having regard to the Tribunal's findings in relation to the GTR Share and to the nature of the property concerned and bearing in mind the magnitude of the revenue stream and its security into the future the Tribunal has come to the conclusion that the appropriate tenant's share in this instance should be 10% of the net toll income of €3,810,236 i.e. €381,024.

7. The Rates Reduction Factor

In relation to this element in their calculation of the rateable valuation of the property concerned the valuers differed markedly in their approach. Mr. Killen in his calculation proposed that a composite figure of 0.2664% should be applied to the net annual value of the property concerned at 2004 levels in order to arrive at its rateable valuation. Mr. Killen said that this figure had been used by the Valuation Office in carrying out the valuation of public utility undertakings under sections 53 and 58 of the Valuation Act, 2001. The figure of 0.2664% he said reflected the relationship between current rental values and rateable valuations as at November 1988 adjusted for inflation between then and 2005. Mr. Aylward on the other hand applied the rates reduction factor of 0.63% currently in use in Fingal and South County Dublin rating authority areas and then applied a further adjustment for inflation calculated by reference to the consumer price index.

Having given the matter some thought the Tribunal has come to the opinion that Mr. Aylward's methodology is correct. The figure of 0.2664% put forward by Mr. Killen was a figure arrived at by the Valuation Office under particular provisions of the Valuation Act dealing with the valuation of statutory undertakings. The property concerned, however, is being valued in accordance with sections 48 and 49 of the Valuation Act and in the circumstances therefore it would in the Tribunal's opinion be unwise and possibly unfair to other ratepayers to introduce a rates reduction factor

different from that uniformly used in Fingal and South County Dublin rating authority areas.

Having regard to the foregoing the Tribunal determines the rateable valuation of the property concerned as follows:

1. Income

Gross Toll Income	€48,904,576	
Less GTR Share	<u>(€15,094,340)</u>	
Net Toll Income		€33,810,236

Less:

2. Expenditure

Legal & Other Costs	(€54,431)	
Administration & Other Costs	(€9,972,080)	
Add Profit on Disposal	<u>(€202,092)</u>	
Total	(€10,027,523) (a)	

Less:

40% NTR plc recharge	(€802,127)	
Financial Expenses	(€258,013)	
Depreciation	(€214,916)	
Directors' Remuneration	(€2,000)	
Operational Leases	<u>(€38,048)</u>	
Total	(€1,335,104) (b)	

Allowable Expenditure: a – b =	<u>(€8,692,419)</u>
Amount Available for Rent, Rates & Tenant's Share	€25,117,817
Less Tenant's Share	<u>(€3,381,024)</u>
Amount Available for Rents and Rates	<u>€21,736.793</u>

Apportioned	Fingal	South Dublin
	81.86%	18.14%
	€17,793,738	€3,943,055
Rate in €	€6.83	€1.04
Rates Adjustment Factor	1.35809	1.384552
Net Annual Value (04 levels)	<u>€3,102,031</u>	<u>€2,847,892</u>
Reduce to 1988 levels		
CPI – 134.8 to 216.5	x .6226327	x.6226327
Net Annual Value Say	€8,157,750	€1,773,190
Rateable Valuation @ 0.63%	€1,394	€1,170