

Appeal No. VA92/6/026

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

J.C. Cahill Services Limited

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Right to Install and Operate Video/Amusement Machines at Map Ref: 1R/1, Townland of Collinstown (Dublin Airport), E.D. Airport, R.D. Dublin - Fingal, Co. Dublin
Rateability of right to install gaming Machines

B E F O R E

Paul Butler

S.C. (Acting Chairman)

Mary Devins

Solicitor

Brian O'Farrell

Valuer

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 8TH DAY OF FEBRUARY, 1994

By Notice of Appeal dated the 2nd November, 1992 the appellants appealed against the determination of the Commissioner of Valuation in fixing a Rateable Valuation of £400.00 on the above described hereditament.

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

- "(a) the valuation is bad in law;
- (b) the Commissioner of Valuation acted in an ultra-vires manner in compiling and issuing a valuation list which was not in conformity to the Adaptation of Irish Enactments Order 1899 and in particular with Section 37 (*m*);
- (c) the valuation should be struck out on the grounds that the right to install or operate video/amusement machines is not rateable as per the Valuation Acts;
- (d) the valuation is excessive and inequitable in accordance with the provisions of the Valuation Acts."

Valuation History

This right was valued for the first time on 1990 Revision at R.V. £400.00. No change was made to the rateable valuation on 1990 First Appeal.

The Property

This consists of the right to install and operate video/amusement machines in Dublin Airport.

Written Submissions

Mr. Tom Davenport A.R.I.C.S. of the firm Lisney provided a written submission on the 10th January, 1994 on behalf of the appellant. Mr. Davenport said that the appellant provides video/amusement machines in the passenger terminal building at Dublin Airport under a license agreement with Aer Rianta. He said that the majority of the machines are located on the arrivals and departure floors as shown in photographs which form part of the said submission. He gave the valuation history and set out what he understood to be the grounds of appeal. The grounds of appeal recited in that submission at page 2 were not complete in that they did not refer to the issue of invalidity of the revision.

Mr. Davenport went on to describe the licence agreement as follows:-

"As at the relevant valuation date, J.C. Cahill Services Limited provided video amusement machines in the passenger terminal building Dublin Airport under a licence agreement with Aer Rianta. The licence was for a period of three years commencing on the 1st November 1987 and ended on 31st October 1990. A copy of this licence agreement is enclosed in an appendix to this submission.

The main terms and condition of the licence agreement are as follows:-

- (1) Aer Rianta takes 60% of the gross revenue from the machines and pays to the licensee the remaining 40%.
- (2) The number of machines are determined solely at the discretion of Aer Rianta. The Licensee has no rights in this regard.
- (3) The number of locations for machines are decided at the discretion of Aer Rianta.

- (4) The number of machines and locations can be reduced at the discretion of Aer Rianta at any time during the course of the licence agreement.
- (5) The Licensee has no right with regard to exact locations within the Airport Complex. The machines can be removed to inferior locations at the discretion of Aer Rianta.
- (6) The Licence agreement with Aer Rianta is for a period of three years. Should a contract be renewed at the commencement term of the new licence agreement, Aer Rianta can then insist that the new contract be supplied with new equipment. In addition Aer Rianta has the right to demand the Licensee to provide new machines at any time during the course of the licence agreement.
- (7) The Licensee is obliged to provide all video games and machines and to service, repair and maintain the machines. In addition, the licensee must discharge all outgoings such as wages and administrative costs etc. from his share of the receipts."

Mr. Davenport went on to deal with rateability, the rateable hereditament and rateable occupation which is more fully dealt with in the submission hereinafter referred to and, on the issue of quantum he estimated Net Annual Value at £10,500 yielding a rateable valuation of £65.00. In his estimate of Net Annual Value Mr. Davenport took the annual turnover on a three year average at £104,000 and made deductions therefrom under the headings "Assumed Tenants Profit Share", "Annual Leasing Charges on Equipment", "Spare Parts", "Labour Costs", "Travel Costs", "Cash Collection/Banking Charge", "Administration/Computer Cost", "Insurance", "Custom & Excise Duty" the net effect of which was to give, in his submission, an annual rental value of £10,500.

A written submission was received on the 9th December, 1993 from Mr. Frank O'Connor A.R.I.C.S. BSc (Surveying) a valuer with 13 years experience in the Valuation Office on behalf of the Respondent. In the said submission Mr. O'Connor set out the relevant dates and went on

to set out what he said were the grounds of appeal but no mention was made of the quantum issue therein. He commented on the grounds of appeal. He described the "hereditament" saying that it consists of the right to install and operate video/amusement machines as outlined in an agreement which he attached to his said submission. In valuing the "hereditament" he took the 1989 licence fee of £64,000 as being the net annual value and, applying the fraction of 0.63% arrived at a rateable valuation of £400.00.

Richard Cooke S.C. provided a legal submission received by the Tribunal on the 10th January, 1994. Mr. Cooke first dealt with the argument that the revision was invalid by reason of the fact that the revised "hereditaments" were recorded as being in the Townland entitled "Dublin Airport". For reasons hereinafter appearing it is not proposed to recite the arguments forwarded by either side on this issue.

Mr. Cooke quoted the relevant part of Section 12 of the Valuation (Ireland) Act, 1852 as follows:-

- "12. For the purposes of this Act the following hereditaments shall be deemed to be the rateable Hereditaments; viz.,
- (i) All Lands, Buildings and opened Mines;
 - (ii) All Commons and Rights of Common and all other Profits to be had or received or taken out of any Land;
 - (iii) All Rights of Fishery;
 - (iv) All Canals, Navigations, and Rights of Navigation;
 - (v) All Railways and Tram Roads;
 - (vi) All Rights of Way and other Rights or Easements over Land;
 - (vii) The Tolls levied in respect of such Rights and Easements;
 - (viii) All other Tolls."

Mr. Cooke submitted that the subject matter of this appeal was described by the Commissioner of Valuation as "the right to install and operate video/amusement machines". He said that the appellant in this appeal is identified by the Commissioner of Valuation as the occupier of the hereditament. He submitted that it would appear that the only category of hereditament into

which the subject matter of this appeal could fall is "All rights of way and other rights or easements over land". Mr. Cooke adopted the following definition of an "easement", namely:-

"An easement is a privilege without profit, which the owner of one tenement, which is called the dominant tenement, has over another, which is called the servient tenement, to compel the owner thereof to permit to be done or to refrain from doing something on such tenement for the advantage of the former".

He submitted that the nature of the interest of the appellant in this case is to be ascertained from the written record of the arrangement between the appellant and Aer Rianta as agent for the actual owner of the property, namely the State in the form of the Minister for Tourism and Transport who is described in the Valuation List as the immediate lessor. He said that the first agreement between the appellant and Aer Rianta was to last from the 1st November, 1987 to the 31st October, 1990 and that the second agreement was from the 1st January, 1991 until the 31st December, 1993. The terms of the agreement are that the appellant is licensed to provide video playing machines at Dublin Airport at locations to be agreed with Aer Rianta and that the gross takings of the machines are collected and controlled by Aer Rianta. By far the greater proportion of the gross income of the machines is retained by Aer Rianta, while all the expenses of operating the same is borne out of the lesser share of the gross revenue allowed to the appellant. Overall control of the buildings in which the machines are located and of the location within those buildings of the machines is under the control of Aer Rianta.

Mr. Cooke submitted that it is in effect an agreement whereby Aer Rianta on behalf of the State hire the equipment and services of the appellant for the purpose of exploiting the potential of the buildings which are controlled of necessity absolutely by Aer Rianta. In this arrangement the State, through its agent, Aer Rianta, is the predominant occupier at all times and the appellant has not what constitutes a rateable hereditament for valuation purposes. Mr. Cooke submitted, that, conversely, if this is a rateable valuation separate from the buildings which are in the ownership of the State and controlled by Aer Rianta, the appellant is not the rated occupier of that hereditament.

Oral Hearing

The oral hearing took place in Dublin on the 12th day of January, 1994. Richard Cooke S.C. appeared on behalf of the appellant, instructed by M. Roche & Company, Solicitors and Aindrias O'Caoimh Barrister-at-Law, instructed by the Chief State Solicitor, appeared on behalf of the respondent. Mr. Davenport and Mr. Cahill (Director of the appellant company) gave evidence on behalf of the appellant and Mr. Frank O'Connor of the Valuation Office gave evidence on behalf of the respondent.

Mr. Cooke went through his written submission in some detail. He said that Aer Rianta is the predominant occupier of the premises and that the State's take from the operation amounts to 60% of the gross takings from the machines. He said what is brought on to the site by the appellant are personal, moveable chattels. The 1986 Act made plant rateable but the machines are not "plant". Both licence agreements were produced.

In the course of his evidence Mr. Cahill said that the machines were entirely moveable. They plug into sockets and can be moved about on their own wheels.

Mr. O'Caoimh submitted that the situation is very akin to that of the Telecom Eireann case (VA90/3/069). He said that it was the right that was being valued and not the machine itself and, by reason thereof, who takes the money out of the machine is something of a red herring. By reason of the findings second hereinafter contained we are not dealing with the arguments adduced on the quantum issue.

Determination

It appears from the foregoing that the first issue raised by the appellant was that of the invalidity of the revision. This matter was fully argued before the Tribunal in the **Rainbow Bookshops** Appeal (VA92/4/029). In that case the Tribunal made its determination in favour of the respondent. At the hearing of this appeal it was agreed between the parties that the Tribunal would take on board all the arguments advanced in that case without the necessity of hearing separate evidence and submissions (save Mr. Cooke's written submission referred to above) in relation thereto. The Tribunal, accordingly, finds in favour of the respondent on this issue for the

same reasons as appear in the said judgement of **Rainbow Bookshops -v- Commissioner of Valuation** (VA92/4/029).

The licence agreements, both in letter form, and the appellant's acceptance appended thereto and dated respectively 12th November, 1987 and 31st December, 1990 amount to what is in essence a joint enterprise between the appellant and Aer Rianta. Aer Rianta are by far the dominant partner in this enterprise. The appellant provides, at his own expense, moveable plug-in video playing machines placed in locations at Dublin Airport. Aer Rianta's function is to collect all monies from the machines and to pay at least 40% of the gross revenue therefrom to the appellant. The Tribunal is satisfied that the right enjoyed by the appellant does not amount to an easement but essentially to a contract for the hire of goods and services. The Tribunal is further satisfied that the occupation enjoyed by the appellant is not, having regard to the moveable nature of the machines, sufficiently exclusive to satisfy the criteria of rateability and is distinguishable from the fixed telephone apparatus which were the subject matter of the **Telecom Eireann** Appeal (VA90/3/069).

The Tribunal, therefore, finds that the subject "right" is not rateable.