Appeal No: VA17/5/775

AN BINSE LUACHÁLA
VALUATION TRIBUNAL

NA hACHTANNA LUACHÁLA, 2001 - 2015
VALUATION ACTS, 2001 - 2015

William Grant & Sons Irish Manufacturing Ltd **APPELLANT**

and

Commissioner Of Valuation **RESPONDENT**

In relation to the valuation of

Property No. 5005693, Industrial Uses at Local No/Map Ref: 1.27AB. 30AB. 37BK/1 Clonminch, Tullamore, County Offaly.

B E F O R E

Stephen J. Byrne - BL **Deputy Chairperson**

Liam Daly – MSCSI, MRICS **Member**

Sarah Reid - BL **Member**

JUDGMENT OF THE VALUATION TRIBUNAL

ISSUED ON THE 15TH DAY OF AUGUST, 2022

1. THE APPEAL

1.1 By Notice of Appeal received on the 12th day of October, 2017 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value '(the NAV') of the above relevant Property was fixed in the sum of €547,000.

1.2 The sole ground of appeal as set out in the Notice of Appeal is that the determination of the valuation of the Property is not a determination that accords with that required to be achieved by section 19 (5) of the Act because :

1) *"That the valuation is incorrect having regard to the available rental, sales and cost evidence and to the levels of value ascribed to similar or related properties.*
2) *That the value does not make allowance for the age, any disabilities inherit in the subjects and for their physical state, use, size character and their particular situation.*
3) *Inappropriate invoices have been used to adjust any rental, sale and cost evidence.*
4) *There are items of plant and machinery within the valuation that are either consider[sic] to be excessive in value or considered to be non-rateable.*
5) *The MAV rate applied to the buildings and yards are considered to be excessive and should be reduced.*
6) *The measured areas of the building and yard are incorrect and the measurement of the various rateable items of plant and machinery are excessive.*
7) *An allowance to reflect the overall size should be granted to reflect the size of the appealed subject in comparison to similar subjects nearby.*
8) *An allowance is required to reflect the current disabilities associated with this site.*
9) *That consideration should be made to value the subjects on the contractors (cost) basis of valuation to reflect its use and specialist nature of building and plant and machinery."*

1.3 The Appellant considers that the valuation of the Property ought to have been determined in the sum of €250,000.

2. REVALUATION HISTORY

2.1 On the 25th day of May, 2017 a copy of a valuation certificate proposed to be issued under section 24(1) of the Valuation Act 2001 ("the Act") in relation to the Property was sent to the Appellant indicating a valuation of €547,000.

2.2 A Final Valuation Certificate issued on the 7th day of September, 2017 stating a valuation of €547,000.

2.3 The date by reference to which the value of the property, the subject of this appeal, was determined is the 30th day of October, 2015.

3. THE HEARING

3.1 The Appeal proceeded by way of an oral hearing held in person held at the Dublin Dispute Resolution Centre, Distillery Building, 145 - 151 Church Street, Dublin 7, on the 28th day of January, 2022. At the hearing the Appellant was represented Mr. Owen Hicky S.C. and Mr. Ruadhan Kenny of Mathesons Solicitors and evidence was given by Mr. Ken McCormack of Montagu-Evans and Mr. Joe Dunne of William Grant & Sons. The Respondent was represented by Mr. David Dodd BL, Mr. Karl Gibbons and Mr. Michael Collins of the Valuation Office and the Chief State Solicitors Office, respectively.

3.2 In accordance with the Rules of the Tribunal, the parties had exchanged their respective reports and précis of evidence prior to the commencement of the hearing and submitted them to the Tribunal. At the oral hearing, each witness, having taken the oath, adopted his précis as his evidence-in-chief in addition to giving oral evidence.

4. FACTS

4.1 From the evidence adduced by the parties, the Tribunal finds the following facts.

4.2 The Appellant is engaged in the business of distilling manufacturing and does so from an industrial production plant in Ballard &, Clonminch, Tullamore, Co. Offaly.

4.3 The overall process of distilling requires successive, individual processes, involving distinct and separate machines (hereafter referred to as 'installations') in order to successfully ferment organic and non-organic compounds into alcoholic forms, capable of being used by the Appellant in the manufacturing of their products.

4.4. The process of distilling involves mixing of at times organic and non-organic compounds, depending on the stage of the process, resulting in a change and/or reaction in the said compounds.

4.5 Only when a sufficient level of pre-determined change and/or reaction has been achieved from the compounds contained in the Appellant's installations, is a process considered complete, and the substance passed on to the next installation for further processing.

4.6 Three distinct items of plant machinery fall to be considered in this Appeal: A yeast tank, a Lauter Tun, and an effluent tank. Two additional items (a CIP and a filling tank were included in the grounds of appeal but withdrawn prior to the Hearing).

4.7 Both the Lauter Tun and yeast tank contain mechanical components described by the expert witness as 'agitation elements' within their internal housing, which operate to circulate and/or impact the compounds added to the installation and which facilitate a reaction and/or change in the compounds contained therein.

4.8 The process undertaken in each installation, as described by the Appellant's expert witness Mr. Dunne, is as follows:

a) Latur Tun: This is a large tank where wort (a sugary liquid extracted from the 'mashing' of barley in a separate process) is combined with barley grain and recirculated by way of a mechanical arm inside the tank. This process was described as a filtering one and the contents of the installation are recirculated until the wort liquid gains a pre-determined level of clarity at which point it is passed to a separate installation (a fermenter) for conversion to alcohol.

b) Yeast Tank: This was described as a mixing chamber used to propagate yeast. Dried yeast and wort (described above) are combined in the installation and as a result of the two substances being exposed to each other and agitated by way of a mechanical arm inside the tank, the compound metabolises resulting in a higher yeast cell count being produced. This higher concentration yeast is then passed to a separate installation (a fermenter) for conversion to alcohol.

c) Effluent Tank: This is a tank where final liquids and compounds used during the distilling processes are mixed to reduce their chemical make-up (specifically their pH level) to a level considered safe for discharge in line with environmental licence requirements imposed on the Appellant in that regard.

(The Tribunal notes that no expert evidence was called by the Respondent, and no objections were raised to Mr. Dunne's evidence at the hearing. The Tribunal therefore takes Mr. Dunne's evidence as correct and unchallenged in the circumstances).

4.9 The Respondent has deemed several of the Appellant's plant machinery "relevant property" within the meaning of the Valuation Acts, as amended. The Appellant has accepted same and only raises an objection to the above three installations being deemed rateable in the circumstances.

5. ISSUES

The issue be determined is whether the Appellant's installations (namely a Lauter Tun, a yeast tank and an effluent tank) are "relevant property" within the meaning of the Valuation Acts, as amended, or in the alternative, fall within Schedule 5 of the Valuation Act, being non-rateable plant and thereby exempt from rateability.

6. RELEVANT STATUTORY PROVISIONS:

6.1 Three provisions of the Valuation Act 2001, as amended, arise in the present Appeal:

6.2 "Plant" as defined in Section 3 of the Act:

> *"(a) any fixture or structure so attached or secured to, or integrated with, premises comprising any mill, factory or building erected or used for any such purpose as to be of a permanent or semi-permanent nature, or*
>
> *(b) any fixture or structure associated with such premises that, although free-standing, is of such size, weight and construction as to be of a permanent or semi-permanent nature;"*

6.3 Section 51(1) which provides:

> *(1) "In determining, under any provision of this Act, the value of a relevant property, the following shall be valued and taken account of in such determination—*
>
> > *(a) any plant in or on the property, being plant specified in Schedule 5,*
> > *(b) the water or other motive power (if any) of the property, and*
> > *(c) all cables, pipelines and conduits (whether underground, on the surface or overhead and including all pylons, supports and other constructions which pertain to them) that form part of the property."*

6.4 Schedule 5 which provides:

> *"1. A construction affixed to a relevant property (whether on or below the ground) and used for the containment of a substance or for the transmission of a substance or electric current, including any such construction designed or used primarily for storage or containment (whether or not the purpose of such containment is to allow a natural or chemical process to take place), but excluding any such construction used solely to induce a process of change in the substance contained or transmitted (in paragraph 2 referred to as the "substance concerned").*
>
> *2. For the purposes of paragraph 1 the following shall not be regarded as a construction used solely to induce a process of change in the substance concerned, namely any individual item of plant used or primarily used –*
>
> *(a) for containment or transmission, or*
> *(b) for one or more actions or a series of actions,*
>
> *that may take place, before or after, the occurrence of action that induces, in a separate construction affixed to the property, a process of change in the substance concerned.*
>
> *3. The fact that particular plant is not used on its own, but rather is used in conjunction with one or more other items of plant, does not disbar it from being regarded as an individual item of plant for the purposes of the preceding paragraphs.*
>
> *4. All fixed furnaces, boilers, ovens and kilns.*
>
> *5. All ponds and reservoirs."*

7. APPELLANT'S CASE

7.1. The Appellant called two witnesses in support of their case, the bulk of their claim being grounded in the legal submissions described below.

7.2 The first witness called by the Appellant was Mr. John Dunne, Engineering manager with the Appellant who had provided a written statement to the Tribunal outlining the processes and internal workings of the installations, the subject matter of this Appeal. Mr. Dunne described the purpose and use of each of the three installations and his evidence in that regard is summarised in paragraph 4.8 above. In cross examination of Mr. Dunne, the Respondent asked the witness to confirm that the purpose of the yeast tank was to make more yeast and that same was the sole purpose of the said installation, Mr. Dunne agreed. The Respondent also asked Mr. Dunne if the 'clear' wort that comes out of the Latur Tun was different from the wort that went into it and he responded that it was, and that filtering was the main aim of that process. Finally, as regards the effluent tank the Respondent asked Mr. Dunne what the primary aim of the tank was and Mr. Dunne gave evidence that the pH of the liquid in the tank is around pH 11/12 alkaline and in order to be safe for discharge, it had to be a lower pH level, around 9. His evidence was that the purpose of the effluent tank was to reduce the alkaline level to an acceptable level and in response to a question from the Tribunal, Mr. Dunne confirmed that the attainment of a lower pH level was a requirement of the Appellant's discharge licence for effluent substances.

7.3 The second witness called by the Appellant was Mr. Ken McCormack of Montagu-Evans whose précis of evidence was accepted, and no challenge or further questions were put to this witness at the hearing.

8. RESPONDENT'S CASE

8.1 The Respondent called one witnesses, Mr. Gibbons, in support of their case, the bulk of their claim being grounded in the legal submissions described below.

8.2 Mr. Karl Gibbons of the Valuation Office adopted his précis of evidence and no challenge or further questions were put to this witness.

9. SUBMISSIONS

9.1 The Appellant was represented by Mr. Hickey SC who provided written and oral submissions in relation to the subject matter installations and the application of Schedule 5 to same. The Respondent was represented by Mr. Dodd BL who also provided written and oral submissions to the Tribunal.

9.2 A shared booklet of authorities was submitted including the following cases:

a. *Kilsaran Concrete v Commissioner of Valuation* [2017] 1 IR 29
b. *Caribmolasses Company Limited v Commissioner of Valuation* [1994] 1 IR 29
c. *Bulmers Limited (Formerly Showerings (Ireland) Ltd.) v Commissioner of Valuation* [2008] IESC 50
d. *Beamish and Crawford v Commissioner of Valuation* [1980] ILRM 149
e. *Cement Limited v Commissioner of Valuation* [1960] IR 283
f. *Carbery Milk Products v Commissioner of Valuation* (VA95/4/026
g. Irish Bitumen Storage Limited (VA08/3/020)

9.3 It was the Appellant's firm case that applying a 'What goes in – What goes out' test, it was obvious that the substances that were put into the plant / installations differed fundamentally to what came out of the said installations at the conclusion of its process. Further that this was due to the significant biological and/or biochemical reaction that took place inside the said installations. It was also the Appellant's case that this change in substance was in fact the sole purpose of each of the installations and so the Schedule 5 exemption applied to the Appellant. Insofar as the expert evidence confirmed that the compounds fundamentally changed once they had been processed in the installations, Mr. Hickey was of the view that this satisfies the requirement of a 'process of change' within the meaning of Schedule 5 and that plant 'induced' same.

9.4 Mr. Hickey relied on and drew the Tribunal's attention to the Supreme Court's decision in *Caribmolasses Company Ltd. v Commissioner of Valuation* [1994] 3 IR 189 and emphasised a section at page 197 of the decision that

> *"The only finding there on which the respondents can rely is that the tanks, in addition to being used for holding and containment, as found expressly in sub-para. 5, are also used for blending, but in my opinion, it is clear from the nature of the blending, and the manner in which it is effected, that the tanks are not being used primarily to induce a process of change in the molasses. Firstly, no process of change is induced. The molasses remains molasses. What happens is that the different types of molasses, instead of forming a mass of irregular composition, are mixed so as to form a homogeneous whole. Secondly, even if there were a process of change induced in the*

molasses, it is not induced by the tanks. They are simply used to contain the molasses while the blending is effected by the molasses being pumped from one tank to the other."

9.5 Mr. Hickey also referred the Tribunal to decision (VA95/4/026) *Carbery Milk Products v Commissioner of Valuation* wherein three of eight disputed milk tanks were held to be rateable relevant property by the Tribunal on the basis that what went into the tanks (raw milk) was different in kind and make up to what came out (skimmed milk). In explaining their view the Tribunal held that:

"What in fact goes in is raw milk which has certain ascertainable percentage of fat and protein content and what comes out is not milk with that content but rather milk with a quite different content of both fat and protein. It is neither raw milk in its natural state nor skimmed milk in its natural state. It is a product different from both.

Could we test this proposition by rhetorically asking whether or not, if there was no requirement for storage and if the manufacturing process so permitted, could the raw millk as delivered by the four co-operative societies be pumped straight into the manufacturing process and avoid altogether these tanks. From the evidence of Mr. Holland we are quite satisfied that this could not take place. Accordingly, it is our view and we so find that in respect of these five tanks, the same are designed or used primarily to induce a process of change in the milk contained therein and as such are non-rateable plant within the meaning of the aforesaid Reference No.1"

9.6 Insofar as Schedule 5 refers to 'inducing' a process of change, Mr. Hickey referred the Tribunal to *Mitchelstown Creameries v Commissioner of Valuation* Appeal No. VA88/0/094 - 99 wherein the phrase 'induce a process of change' in the context of milk processing was considered (albeit under the old Act) to mean *"to bring about or cause a process of change".* (*The Tribunal notes that the Mitchelstown case concerned the operation of Schedule 2 of the 1860 Act and not the amended provisions currently under consideration. However, the Appellant stated that legislative phrases of 'process of change' and 'influence' contained in the earlier legislation are comparable to the present wording of Schedule 5*).

9.7 The Appellant relied on the Supreme Court decision in *Kilsaran Concrete v Commissioner of Valuation* [2017] 1 IR 29 and the fact that within the much larger system of processing and manufacturing concrete and asphalt, only the mixing pans in which the physical or chemical change of the constituent substances took place, were held by the Supreme Court to satisfy the 'process of change' condition.

9.8 In refuting the Appellant's position, Mr. Dodd BL for the Respondent placed significant emphasis on the *Caribmolasses* decision *ibid* and the Supreme Court's view of what he considered to be similar circumstances; that is the blending or mixing of components which result in the same substance emerging, albeit of a different consistency, which he said does not amount to a process of change.

9.9 The Respondent maintained that five propositions emerge from the authorities, as follows:

a) The onus of proof was on the Appellant to show that the constructions came within the exemption.

b) Blending does not of itself constitute a process of change.

c) The plant must be designed or used primarily to induce a process of change.

d) The plant must induce the change, not just allow change to occur by containment.

e) The process of change relied upon, does not have to take place in the container for which exemption is sought, though ordinarily it will.

f) Each individual element must be considered - the Tribunal cannot look at the installation as a single unit where it is engaged in a continuous process.

9.10 In respect of the second point (b above), the Respondent argued that the Supreme Court were clear in *Caribmolassas ibid* that notwithstanding the fact that a process was undertaken in respect of different molasses substances, there was no process of change produced because what in fact occurred in the machines was a homogenising of the substance into an acceptable, singular mix of molasses. In an oft cited phrase, Mr. Dodd emphasised that 'molasses is still

molasses' and in a similar vein the yeast and wort were still yeast and wort when they emerged from the Appellant's installations.

10. FINDINGS AND CONCLUSIONS

10.1 On this appeal the Tribunal has to determine if the Appellant's installations are "plant" within the meaning of Section 51 and deemed rateable hereditaments, or if they can be excluded because they are designed or used primarily to induce a process of change in the substance contained or transmitted, as set out in Schedule 5 of the Act.

10.2 Schedule 5(1) expressly excludes *'any such construction used solely to induce a process of change in the substance contained or transmitted'* and so three elements of the exemption arise for consideration. Firstly, whether the installations are used 'solely' to induce the change. Secondly whether the installations themselves induce a change in the substances. Thirdly, whether what occurs constitutes a 'process of change' within the meaning of the legislation. It appears to the Tribunal that these three questions are interlinked but insofar as possible, will be dealt with separately and in turn.

10.2 **"Solely"**

This phrase arises in the context of a plant installation having secondary uses or storage and/or containment functions. This eventuality has been considered in several of the authorities opened to the Tribunal and it is settled law that if the primary use of an installation is not to induce a process of change, then the exemption will not apply.

10.3 In *Mitchelstown Creameries v Commissioner of Valuation* (ibid) the Tribunal found:

> *"The Tribunal has no doubt that this is a highly sophisticated system and that a simpler layout to deal with storage would have been feasible. Nonetheless, storage is of the essence whereas the procedures by which a change is brought about is something that can be done by different methods, although at a great deal more expense and using more manhours than such an installation as this. The question for resolution is whether*

the primary purpose of the operation is for storage or is it to induce a process of change in the substance?

As this has been said above, storage cannot be dispensed with and, therefore, it must be put first in importance in the scheme of things. If it is first in importance, then the installation is designed or used primarily for storage."

10.4 **"Induced"**

The second consideration is whether the plant itself induces the change rather than merely containing the substances while a change occurs. It was accepted by the Respondent that the process of change relied upon does not have to take place in the container for which the exemption is sought, though ordinarily it will, and this was a position affirmed by the Supreme Court in *Kilsarran Concrete ibid*. The case made in the present Appeal was not whether the installations under consideration were themselves inducing a change, but whether the change, so induced, met the statutory test of constituting 'a process of change' in order for Schedule 5 to apply. The Tribunal does not therefore propose to comment on this aspect of the process.

10.5 **"Process of change"**

In determining the issue of 'process of change' two matters fall to be considered. In the first instance whether what goes into the installation is sufficiently, or at all, different from what comes out of it and secondly, whether the statutory test of a 'process of change' can be said to occur in respect of the substances put into the disputed plant installations.

10.6 Significant emphasis was placed, by both parties, on the Supreme Court decision in *Caribmolasses* v *Commissioner of Valuation* [1994] 3IR 149 and whether the same 'thing' (in layman's terms) was in being at the end of the processes undertaken in both the Latur Tun and the yeast tank. This is seems to the Tribunal to be the key question to be determined: whether notwithstanding the fact that yeast 'went in' and yeast 'came out' or wort 'went in' and wort 'came out', the said yeast and wort that resulted from the process, were sufficiently changed as a result and further, whether the plant / installations induced that change.

10.7 Although the *Mitchelstown Creameries v Commissioner of Valuation* Appeal No. VA88/0/094 - 99 case was not referred to in great detail by the Appellant, having considered the decision the Tribunal finds it to be instructive insofar as the Tribunal in that matter observed what is perhaps an obvious point that "*If the grain was not treated - to use a neutral term – in these installations in the way that has been descried by the witnesses, it would be of no use."* The uncontested evidence before the Tribunal was that the subject matter installations are necessary to facilitate the onward processing and progression of substances which start their life as wort, barley grains, yeast and other compounds, and which once put through different machines, are capable of being used in the next phase of the distilling process. Further, the evidence was that those same substances are not capable of being used in later stages of the distilling process until and unless they are sufficiently changed and the said change occurs in the lauter tun and yeast tank. The substances are not, it seems, any use to the Appellant unless they undergo a change from their original composition and reach a pre-determined level of composition that is capable of being used in the further stages of distilling production.

10.8 The Respondent invited the Tribunal to consider the legislative intention of the Oireachtas in amending the Schedule 5 plant exemption and argued that what had arisen was the Legislature essentially stepping in following the Superior Courts determination and interpretation of the exemption. To that end, Mr. Dodd argued that the legislative intention behind the provision ought to be considered and given weight in the circumstances. The Tribunal can only interpret the Valuation Acts, as amended, based on the provisions so enacted, and may only form a view on the legislative intention based on the text of the Act, as worded, and from the Act as a whole. The Tribunal does not intend to look behind the text of Schedule 5 or pre-suppose a distinct legislative intention in the mind of the legislature if same is not evident from the express provisions of the Act itself. The Tribunal does not therefore propose to comment or make a finding in respect of the Respondent's arguments in that regard.

Conclusion

10.9 The burden of proof in all appeals before the Tribunal lies with the Appellant. (VA00/2/032 *Proundlane Ltd. t/a Plaza Hotel*, VA07/3/054 *William Savage Construction* and VA09/1/018 *O'Sullivan's Marine Ltd*.) Specifically in the context of a plant exemption under Schedule 5, the Supreme Court in *Kilsarran Concrete* and also *Caribmolasses* confirmed this

to be the case in their considerations and this has been the approach taken by the Tribunal in coming to its decision in this Appeal.

10.10 The principles applicable to the interpretation of the provisions of the Valuation Act 2001, as amended, were summarised by MacMenamin J. in ***Nangle Nurseries v. Commissioner of Valuation*** [2008] IEHC 73 as follows: -

(1) While the Act of 2001 is not to be seen in precisely the same light as a penal or taxation statute, the same principles are applicable.
(2) The Act is to be strictly interpreted.
(3) Impositions are to be construed strictly in favour of the rate payer.
(4) Exemptions or relieving provisions are to be interpreted strictly against the rate payer.
(5) Ambiguities, if they are to be found in an exemption are to be interpreted against the rate payer.
(6) If, however there is a new imposition of liability looseness or ambiguity is to be interpreted strictly to prevent the imposition of liability from being created unfairly by the use of oblique or slack language.
(7) In the case of ambiguity, the Court must have resort to the strict and literal interpretation of the Act, to the statutory pattern of the Act, and by reference to other provisions of the statute or other statutes expressed to be considered with it.

10.11 Having considered the documentary and oral evidence adduced, the Tribunal is satisfied that the Appellant has discharged the onus of proof that on balance these installations benefit from the Schedule 5 exemption contained in the Valuation Acts, as amended. There is no element of storage or containment except in a peripheral or casual manner and insofar as there is such an element, the Tribunal is in no doubt that the primary purpose of these installations is to induce a process of change in the substances contained or transmitted in them. In coming to this conclusion, the Tribunal was persuaded by the expert evidence proffered by the Appellant which was uncontested and therefore accepted by the Respondent.

10.12 In respect of the yeast tank, the Appellant's uncontested expert evidence of was that the yeast compound put into the said installation, once mixed with the wort (and aided by the mechanical agitation of the compounds inside the machine), creates a chemically different yeast compound. In respect of the Latur Tun, the Appellant's uncontested expert evidence was that the wort liquid put into the machine, once processed and filtered through barley (aided by the mechanical agitation of the compounds inside the machine), creates a clearer wort that was different from the compound introduced to the said installation. As regards the effluent tank, the uncontested expert evidence was that the mix of chemicals introduced to the said tank had a pH level of between 11&12 and what came out was a reduced pH level of 9, as required in compliance with the Appellants environmental discharge licence obligations.

10.13 The Tribunal was strongly persuaded by the expert evidence of the Appellant's expert Mr. Dunne who was asked directly by the Tribunal to explain, in clear terms, what it is that happens to each of the compounds once they are put into each of the installations, the subject matter of this Appeal. Mr. Dunne's evidence is summarised at para 4.8 above, and the Tribunal thanks him for his efforts in explaining what are complicated manufacturing processes and complex biochemical reactions that arise in the distilling process. Based on his description of the reactions that result in a change in composition though not necessarily a change in substance (in layman's terms), the Tribunal is satisfied that a 'process of change' is undertaken in the Appellant's three plant installations, as envisaged by Schedule 5.

DETERMINATION:

Accordingly, for the above reasons, the Tribunal concludes, that the claim for exemption under Schedule 5(1)(a) of the Valuation Acts, as amended, succeeds and the Tribunal allows the appeal deeming the Appellant's installations (namely the Lauter Tun, yeast tank and effluent tank) to be non-rateable plant.

The Tribunal therefore directs that the certificate of valuation in respect of the Appellant's property be amended to reflect the successful claim for exemption under Schedule 5(1)(a) of the Valuation Act and a value of €0 be applied in respect of the three installations the subject matter of the Appeal.