

THE HIGH COURT

[2022] IEHC 305

[2020 97 R]

BETWEEN

THE REVENUE COMMISSIONERS

APPELLANT

AND

HENRY WALSH

RESPONDENT

JUDGMENT of Ms. Justice Emily Egan delivered on the 26th day of May, 2022

Introduction

1. This is an appeal by the Revenue Commissioners (“revenue”) by way of a case stated against a determination of the Tax Appeals Commission (“the TAC”) of 17 July, 2020 (“the determination”). The matter appealed is the determination of the TAC that the grant by Kerry Cooperative Creameries Ltd (“Kerry Co-Op”) to the respondent of a right to subscribe for shares in Kerry Co-Op and/or the exercise of that right by the respondent did not give rise to a liability to income tax on behalf of the respondent.

2. The question posed to the court by the relevant Appeal Commissioner (“the commissioner”) is as follows: “*Was I correct in law in determining that the receipt by [the respondent] of the Patronage Shares was a capital receipt and was outside the charge to income tax?*”

Background facts

3. At all material times the respondent owned and ran a dairy farm in Oranmore, County Galway and traded as a dairy farmer. He was a member of Kerry Co-Op and held 755 ordinary shares in Kerry Co-Op as of 31 March 2011.
4. In the milk quota year 1 April 2010 to 31 March 2011, the respondent supplied 473,586 litres of milk to Kerry Creameries Ltd, a company nominated by the board of Kerry Co-Op as a purchaser of raw milk from its members. Kerry Creameries Ltd is and was a subsidiary of Kerry Group Plc.
5. The gross amount due to the respondent in respect of the milk supplied from Kerry Creameries Ltd in the milk quota year 2010/11 was €150,438.02. There was no written contract for this milk supply. The average attainable monthly milk price to be paid by Kerry Creameries Ltd in any milk quota year was published each month in the creamery league in the Irish Farmers Journal. This publication included a comparison of the price paid by Kerry Creameries Ltd compared to other co-ops to ensure a “like for like” comparison of milk prices between co-ops. A summary of the “like for like” milk prices between co-ops for the year in question showed that the monthly milk prices paid by Kerry Creameries Ltd were generally in line with those paid by other creameries.
6. Under the rules of Kerry Co-Op (“the Rules”), the respondent, as a milk supplier had a right to be invited to subscribe at par for one patronage share in Kerry Co-Op for every 4,506.09 litres of raw milk supplied by him in the milk quota year. On this basis, the respondent subscribed for 107 patronage shares for which he paid €133.75 bringing his total shareholding in Kerry Co-Op to 862 shares.
7. The respondent received from Kerry Co-op a “Patronage Shares Statement” dated 18 May, 2011. This showed that he had supplied 107,435 qualifying gallons of milk in the relevant Milk Quota Year. It also set out his entitlement in relation to the patronage shares and stated:-

“Set out below is your Patronage Shares Statement, which shows the number of Patronage Shares earned based on the milk (butterfat adjusted) within quota supplied by you for the milk year outlined above. The Board has allocated to you the number of Patronage Shares set out ...on the statement. The cost of your shares at €1.25 per share...will be debited to your milk account in May and NO FURTHER PAYMENT is required. Your Patronage Shares have been allocated to your Share Account and a share certificate in respect of these shares is attached. This should be retained safely. If you do NOT wish to take up the Patronage Shares allocated, you should return the attached Share Certificate ... to arrive not later than 25th May 2011 otherwise you will be assumed to have accepted the Patronage Shares allocated to you.”

8. The sum of €133.75, being the cost of the patronage shares, was debited to the respondent’s milk account with Kerry Creameries Ltd in April 2011.

9. Revenue raised a notice of assessment for the year in question on the basis that the market value of the patronage shares for which the respondent had subscribed needed to be included in his accounts as additional trading income subject to income tax, USC and PRSI. Accordingly, a notice of amended assessment was issued claiming an additional sum payable to the collector general of €2,001.64. The respondent appealed that assessment to the TAC.

The Rules

10. Kerry Co-Op is a registered industrial and provident society. The principal object of Kerry Co-Op is to *“develop and improve the industry of agriculture in Ireland by the introduction of the most approved methods including manufacture and sale of butter, cheese and other milk and farm products”*. Co-op members having a milk quota under the milk quota regulations (i.e. the European Communities (Milk Quota) Regulations, 2008, S.I. 227/2008) and having milk to sell are obliged to sell milk within their quota to Kerry Co-Op or to a

nominated purchaser at the current price fixed by Kerry Co-Op, or the nominated purchaser, as the case may be.

11. At the relevant time all members of Kerry Co-Op held one or more shares in that body but could not hold shares in excess of a nominal value €125,000. There were three categories of shares namely; A ordinary shares of €1.25 each, B ordinary shares of €1.25 each and C ordinary shares of €1.25 each. All shares ranked *pari passu* save that the B and C ordinary shares restricted the rights of their holders to be nominated for election, to nominate other members for election, to attend and vote at certain meetings and to requisition certain meetings of the Society.

12. Rule 9.(C)(i) provided that A ordinary shares could only be allotted, issued, transferred or transmitted to and held by persons who were milk suppliers. Where a holder of A ordinary shares ceased to be eligible to hold them, the Board of Kerry Co-op was required to convert those shares into B ordinary shares or C ordinary shares, as the case might be. As a consequence, if a milk supplier sold, say, 100 A shares to a non-farmer/non-milk supplier, they would be converted to B or C ordinary shares, as the case might be.

13. Rule 9.(C)(vii) governed the power of the Board of the Co-op (“the Board”) to issue patronage shares in the following terms:

“The Board shall, in every year within six months of the relevant Milk Quota Year, up to and including the Milk Quota Year ending 31st March 2013, invite any milk supplier who has in the immediately preceding Milk Quota Year supplied his Raw Milk or such lessor [sic] portion thereof as the Board shall determine to the Society or a Nominated Purchaser to subscribe at par for Patronage Shares. The number of Patronage Shares which each such Milk Supplier shall be invited to subscribe shall be one Patronage Share for every 4,546.09 litres of Raw Milk supplied by him in each such Milk Quota Year to the Society or a Nominated Purchaser. Only Raw Milk supplied which does not

exceed each such Milk Supplier's quota inclusive of leased milk quota under the Milk Quota Regulations will be taken into account in computing each such Milk Supplier's entitlement to subscribe for Patronage Shares so however that a Milk Supplier who fails in respect of any Milk Quota Year to supply his Raw Milk to the Society or to a Nominated Purchaser or, transfers leases or otherwise alienates his milk quota to another person who does not or did not supply Raw Milk to the Society or Nominated Purchaser in any relevant Milk Quota year shall not, save with the written approval of the Board whose decisions shall be final and binding, be entitled to subscribe for Patronage Shares. The particular class of share which a Milk Supplier shall be entitled to receive upon him accepting an offer to subscribe for Patronage Shares shall be determined by the Board in accordance with the Rules governing the eligibility of persons to hold the different classes of Shares. Any invitation to subscribe for Patronage Shares given by the Board pursuant to this clause shall lapse unless the Shares described in the invitation are accepted and paid for within three months of the date of the invitation. An invitation to subscribe for Patronage Shares shall be personal to the Milk Supplier and shall not be capable of assignment to any third party except in the course of administration of any such Milk Supplier's estate."

Procedure before the commissioner

14. The respondent before this court, the appellant before the commissioner, submitted a Notice of Appeal to the TAC advancing seven separate grounds of appeal against the amended assessment. It is not necessary to set out all of these grounds of appeal. However grounds a) to d) are of particular relevance and pleaded as follows:

“(a) Neither the receipt of the invitation to subscribe for Patronage Shares nor the acquisition of the Patronage Shares by [the respondent] at par was income of [the

respondent] *and specifically not income of [the respondent's] trade of supplying raw milk to Kerry Creameries Ltd within the charge to income tax under Case I of Schedule D.*

(b) Alternatively, if (which is not admitted) the receipt by [the respondent] of the invitation from Kerry Co-op to subscribe for Patronage Shares falls to be treated as income of [the respondent's] trade, the money's worth of such an invitation was nil.

(c) Further, if the receipt by [the respondent] of the invitation to subscribe for Patronage Shares fell to be treated as income, the acceptance of that invitation by receiving an allotment of Patronage Shares did not give rise to income of [the respondent's] trade.

(d) If (which is not admitted) the acceptance of the invitation to subscribe for Patronage Shares by receiving the allotment of Patronage Shares did give rise to income in [the respondent's] trade, the money's worth of each such share was €1.25, which sum [the respondent] paid to Kerry Co-op in respect of each Patronage Share allotted and accordingly no sum falls to be taken into computation under Case I of Schedule D in respect of [the respondent's] trade."

15. As there are a significant number of other appeals relating to the issue of patronage shares by Kerry Co-Op, the commissioner directed that the instant appeal should be the lead appeal to be heard and determined first. Accordingly, at a case management hearing, and with the agreement of the parties, the commissioner indicated that he would in the first instance hear and determine what was described as the core issue in the appeal namely:

"Whether the receipt by [the respondent] of patronage shares for which he subscribed was a receipt of his trade as a milk supplier, and thus within the charge to income tax, or was instead a capital receipt and outside the charge to income tax."

16. The commissioner further directed that any hearing and determination in relation to the other issues arising in the appeal, including grounds b) and d) above, would be stayed pursuant to s. 949 E2 of the Taxes Consolidation Act, 1997 as amended (“TCA 1997”) until the above core issue had been heard and determined.

17. It thus appears that evidence was not led and legal argument was not advanced *inter alia* in relation to appeal grounds b) and d) (together with other grounds which are not of immediate relevance and which were similarly “parked”). This is of relevance because, as will appear below, revenue contended that the commissioner’s determination on the core issue trespassed on the issues or questions which had been parked without it having been given an opportunity to lead evidence or advance legal argument in respect thereof.

The determination

18. The commissioner issued a lengthy and thorough determination.

19. The commissioner stated that, in deciding the agreed core issue, there were three distinct questions to be answered namely:

“(i) *Were any benefits received by [the respondent] pursuant to Rule 9.C(vii) received in consequence of his trading activities, or were they instead received by him in his capacity as a member of Kerry Co-op?*

(ii) *If the benefits received by [the respondent] were a consequence of his trading activities, what precisely were those benefits? And,*

(iii) *Did any benefits received by [the respondent] pursuant to the Rules have a value which falls to be taken into account when calculating the full amount of his profits or gains in the year of assessment?”*

20. I will refer to “*the benefits received by [the respondent] pursuant to Rule 9.C(vii)*” as “the relevant benefit”.

Question (i)

21. The commissioner noted that, in order for profits or gains to arise or accrue from a trade, they must result from the carrying on of the trade, in this instance the trade of a dairy farmer supplying milk.

22. The commissioner did not accept the respondent's argument that the relevant benefit was not a trading receipt but was a right of membership of the co-op. Rather he held that all of the evidence pointed inexorably to a finding that it was the respondent's trading activities with Kerry Group which gave rise to his entitlement to receive the relevant benefit under the Rules.

23. In reaching that conclusion on question (i), the commissioner focussed primarily on the rules of Kerry Co-Op itself, which it was agreed by the parties governed the relationship between the respondent and the co-op. Having considered those rules, the commissioner was satisfied that the respondent became entitled to the relevant benefit *qua* milk supplier and not *qua* member. The commissioner found, as a material fact, that the invitation to subscribe for patronage shares was not merely calculated by reference to the respondent's trading activities with Kerry Co-Op or its nominee but were a direct result of those trading activities. The respondent's trade with Kerry Co-Op did more than give him an opportunity to exercise his rights under the Rules; it was instead the *causa causans* of his entitlement to the relevant benefit.

24. In reaching this conclusion, the commissioner also had regard to the wording of the Patronage Shares Statement issued to the respondent which referred extensively to his status as a milk supplier rather than as a member of the co-op. His view was that the Rules and the Patronage Shares Statement demonstrated that the relevant benefit was part of the consideration received from Kerry Co-Op in exchange for supplying its nominated purchaser with raw milk. I emphasise that the commissioner stated that, although it illustrated the understanding of Kerry

Co-Op and the respondent as to why the latter was entitled to a relevant benefit pursuant to the Rules, the Patronage Shares Statement could not of itself be determinative of the question.

25. The commissioner's determination records that his answer to question (i) was reached having considered "*the nature and character of the benefit/s received by [the respondent], pursuant to Rule 9.C(vii)..., the context in which it was received, and the understanding of the parties in relation thereto*" (*emphasis added*). The first of these - the nature and character of the relevant benefit received by the respondent - is important for reasons explained at paragraph 48 below.

26. Having concluded that the relevant benefit/s resulted from the respondent's activity as trader, the commissioner stated that they "*potentially fall to be treated as a trading receipt in the hands of [the respondent]*". The commissioner stated that whether or not this is so depends upon the answer to question (ii); namely what precisely were the benefits received by the appellant pursuant to the Rules?

Question (ii)

27. The commissioner noted that, like question (i), the starting point for consideration of question (ii) must be the wording of the Kerry Co-Op Rules themselves. The commissioner determined that the wording of Rule 9.(C)(vii) was quite clear and that what a qualifying milk supplier was entitled to receive thereunder was an invitation to subscribe at par value for one patronage share for every 4546.09 litres of raw milk supplied during the relevant period.

28. The commissioner found that there was a distinction to be made between the invitation to subscribe for the patronage shares and the actual subscription and allocation of the shares. He further found that the former was the only benefit conferred on the respondent as a direct result of his milk supply. Effectively therefore, the commissioner found that the relevant benefit was the invitation to subscribe for the patronage shares and not the subsequent allotment of

those shares. He determined that the respondent's decision to exercise his right to subscribe for the patronage shares, was an investment decision, and not a trading decision.

Question (iii)

29. Having so found, the commissioner went on to consider question (iii), namely whether the relevant benefit had a value to be considered when calculating the amount of the respondent's profits or gains in the year of assessment. He determined that the right to subscribe for patronage shares at par value did not have a value itself because the invitation was personal to the milk supplier and could not be assigned except in the course of the administration of the milk supplier's estate. This benefit was not marketable and was "*merely a personal advantage which by its nature cannot be turned into money.*" The commissioner therefore determined that, as the right to subscribe for the patronage shares did not have a value, it did not constitute a trading receipt to be taken into account when calculating the full amount of his profits or gains in the year of assessment.

30. For the sake of completeness, the commissioner considered the position if he was incorrect in his answer to question (ii) and if the relevant benefit included the allocation of the patronage shares and not merely the invitation to subscribe for those shares. In such circumstances, would there have been a transfer of value to the respondent which might fall to be treated as a trading receipt?

31. On this "fall back issue", the commissioner found that no transfer of value took place on the formal allotment of the shares. Rather, the only transfer of value was a transfer from the respondent to Kerry Co-Op of the share subscription moneys. A further impact of that share subscription might be that the members who did not acquire patronage shares, or who acquired a smaller number of patronage shares by reason of their having supplied a lesser amount of milk, would suffer a dilution of their shareholding in favour of members such as the respondent.

This, however only resulted in a value shift to the respondent from certain members (those members whose shareholding remained the same and those members whose shareholdings did not grow proportionately). This could not be a trading receipt.

32. Ultimately, therefore the commissioner determined that even if the relevant benefit received by the respondent pursuant to the Rules included the allocation of the patronage shares themselves, there would still have been no value passing from Kerry Co-Op to the respondent which would require to be taken into account when calculating the full amount of his profits or gains in the year of assessment. The commissioner therefore determined that the receipt by the respondent of the patronage shares for which he subscribed was not a receipt of his trade as milk supplier but was rather a capital receipt.

Structure and summary of this court's findings

33. Revenue's central contention is that the commissioner correctly answered question (i) but that, having determined that the relevant benefit resulted from the respondent's activity as a trader, he should at that point have found in favour of revenue on the core issue.

34. The respondent, on the other hand, although generally satisfied with the outcome of the determination cross appeals in relation to question (i).

35. In brief, for the reasons set out below, I can see no error in the commissioner's decision on either questions (i) or (ii). I find that the relevant benefit was solely the entitlement to receive an invitation to subscribe for the patronage shares (question (ii)) and, further that same was received by the respondent in consequence of his trading activities (question (i)). I do not express a concluded view on question (iii) as this is not necessary for the purposes of answering the case stated, particularly in circumstances where, by agreement, the issues arising were not fully argued before the commission or indeed the court.

The respondent's cross appeal in relation to question (i)

Preliminary

36. The respondent challenges the commissioner's finding that the relevant benefit, i.e. the invitation to subscribe for the patronage shares – was received by the respondent in consequence of his trading activities.

37. Section 18 (2) of the TCA 1997 provides:

“Tax under Schedule D shall be charged under the following Cases:

Case I – Tax in respect of –

(a) Any trade...”

Section 65(1) of TCA 1997 provides that:-

“Subject to this Chapter, income tax shall be charged under Case I or II of Schedule D on the full amount of the profits or gains of the year of assessment.”

38. Both parties cited the judgment of the High Court in *Robinson v. Dolan* [1935] IR 509, in which Hanna J. stated:

“In my opinion the principles laid down here enunciate for the purpose of this rule of the income tax code the meaning to be given to “trade” and “profits or gains”. They are the ordinary dictionary meanings “buying and selling and the result thereof”, “something earned”, “the reward of capital”. It is important to notice that under the rule these words are linked up by the phrase “arising or accruing from”. Read in relation to trade and profits, these words should give no difficulty. An ordinary paraphrase, if such is necessary, would be “resulting from the carrying on of the trade”, or, to accept Mr Fitzgibbon’s metaphor, the trade is the tree and the profits are the fruits thereof.”

39. There was no dispute between the parties as to the applicable principle of law. In order for profits or gains to arise or accrue from a trade they must result from the carrying on of the

trade. Any benefits received by the respondent pursuant to the Rules were received by him as a result of his carrying on the trade of a dairy farmer supplying milk if they were the result of his buying and selling milk; if they were “*something earned*” out of the respondent’s trade; or if they were a business payment received in return for something done by the respondent. The benefits must have resulted from the respondent’s activity as a trader, and not merely from his status as a trader. The fact that a formula relating to trade is used to calculate the amount of the benefit to be received does not automatically make the benefit received a trading receipt. In considering this question one must look at it primarily from the perspective of the respondent, which nonetheless entails a consideration of the view of Kerry Co-Op, to see whether he received the benefits as a result of his trading relationship with the co-op.

40. The respondent submitted that neither the right to subscribe for the patronage shares, nor the subscription for, or allocation of, those shares, resulted or arose from the carrying on of the trade but rather that the relevant benefit was afforded purely to satisfy Kerry Co-Op’s contractual obligation to him under the Rules.

41. The starting point must be the Rules, specifically Rule 9.(C)(vii). It cannot, in my view reasonably be said that the right to the relevant benefit arises *qua* member and not *qua* milk supplier. A shareholder who does not supply milk to Kerry Co-Op, or to a nominated purchaser, during the preceding year would not be entitled to receive an invitation to subscribe for patronage shares, notwithstanding that he would remain an A shareholder. Likewise, a B shareholder could become entitled to an invitation to subscribe for patronage shares under the Rule by supplying milk to Kerry Co-Op or its nominated purchaser, notwithstanding that they were not an A shareholder at the time of the supply or at the time the right to receive the invitation crystallised. Furthermore, a shareholder seeking to enforce their rights under Rule 9.(C)(vii) as against Kerry Co-Op would not succeed merely by proving that they were a

member of the co-op; they would also have to demonstrate that they had supplied the relevant amount of raw milk to the co-op, or its nominee, during the preceding milk quota year.

42. Rule 9.(C)(vii) makes some eight separate references to “*milk supplier*” and five further references to the “*Milk supplied*” (or the “*supply*” of milk). In its first sentence, the Rule provides that it is applicable to “*any milk supplier who has in the immediately preceding milk quota year supplied his raw milk or such lessor (sic) portion thereof as the Board shall determine to the society or a nominated purchaser.*” It is unarguable that it is the supply of milk which triggers the right to receive the benefit under the Rule and, indeed this much is conceded by the respondent. The respondent, however, submitted that there is a distinction between the triggering of the relevant benefit on the one hand and the source of the relevant benefit on the other. Whilst therefore accepting that the trigger for the relevant benefit may be the supply of milk in any particular year, this, he states does not mean that the source of the relevant benefit, is the milk supplied pursuant to the trade. Rather, the source of the benefit is the Kerry Co-op Rules themselves.

43. In my view, an analysis of Rule 9.(C)(vii) demonstrates that, there is no substantive distinction to be made here. In the light of how Rule 9.(C)(vii) is drafted, it is the milk supply, in any particular year that gives rise to the invitation to apply for the subscription shares. Whilst, of course, the invitation would not issue if the co-op Rules were differently drafted, it equally would not issue without the milk supply. In any event, given that only members of the co-op may supply milk; and given that all suppliers of milk are members of the co-op; in practice, the supply of milk is the source of any individual member’s invitation to subscribe.

44. The respondent argued that what is taxed under Case 1 Schedule D is the result of the activity as trader and that a tax payer cannot be liable thereunder merely because of their status as trader.

45. This is correct. However, the relevant benefit does not arise merely because of the respondent's status as trader. It does not arise because the respondent is a person who generally supplies milk to the co-op but because he has actually supplied a particular quantity of milk in the relevant year, and has therefore actively traded with the co-op. The invitation to subscribe was received because of, and as a result of, the respondent's trading activity.

46. Finally, like the commissioner, I am of the view that the wording of the Patronage Share Statement which refers to the respondent's milk supplier number and not his membership number is of some limited relevance. It states: "*Dear milk supplier, ... set out below is your Patronage Share Statement, which shows the number of Patronage Shares earned, based on the milk ... supplied by you for the milk year outlined above.*" This use of the word "earned" suggests that the understanding of both Kerry Co-Op and the respondent was that the latter was entitled to the relevant benefit pursuant to the Rule as a result of the supply of milk, by way of something earned in return for the supply of milk; or in the words quoted by Hanna J. in *Robinson v. Dolan*, the supply of milk, is the tree and the invitation to subscribe for the shares are one of the fruits thereof.

47. For all of the above reasons, I conclude that the commissioner was correct in his answer to question (i) and that the relevant benefit, namely the right to subscribe for the shares, was received by the respondent as a result of his carrying on the trade of dairy farmer supplying milk to the Kerry Co-Op's nominee; was earned in consequence thereof; and was part of the business payment received by the respondent in return for his supplying milk. Furthermore, I am satisfied that the relevant benefit resulted from the appellant's activity as trader and not merely from his status as trader. For all the above reasons, I can identify no legal error in the commissioner's answer to question (i).

Revenue's appeal in relation to the commissioner's answer to questions (ii) and (iii) and to the "core issue"

Preliminary

48. Revenue argued that, as question (i) was determined in its favour this inexorably meant that the receipt by the respondent of the patronage shares was an income receipt within the charge to income tax. However, in answering question (ii), the commissioner concluded that the relevant benefit was solely the right to receive an invitation to subscribe for the shares and not the share subscription/allocation thereafter. As noted at paragraph 25 above, the commissioner's decision that the relevant benefit/s resulted from the respondent's activity as trader was, in part at least, dependent upon his view of "*the nature and character of the benefits*" themselves. Thus, it is not in my view correct for revenue to argue that, if the relevant benefit was identified in a manner different to that of the commissioner - and was held to relate instead to the share subscription/allocation - his answer to question (i) would necessarily have been the same. In short, the commissioner's combined decisions on questions (i) and (ii) cannot be interpreted as a finding that the actual shares subscription or the receipt by the respondent of the patronage shares arose from the respondent's activity as trader.

49. Revenue argue that the commissioner ought not to have embarked upon question (ii). For my part, I can quite see why the commissioner found it necessary to identify the relevant benefit received in consequence of the trading activities. This is because, in order for an income tax exposure to arise (and thereafter to be computed), the benefit in question must be capable of being monetised or realised either in money or in money's worth. As it would, in due course be necessary to decide whether or not the relevant benefit had a monetary value, and what that was, it was entirely in order for the commissioner to first identify what the relevant benefit was.

50. Naturally, the commissioner could have reversed the order of his consideration and identified the relevant benefit before deciding whether or not it arose from the trade. This,

however, is essentially a question of sequencing and I would not criticise the commissioner for the approach adopted.

51. Further, in my view, in entering upon this consideration of question (ii), the commissioner did not trespass upon the issues which had been parked as outlined at paragraphs 14 to 17 above. At question (ii), the commissioner was merely seeking to identify the relevant benefit and not to decide whether the relevant benefit had a “*money’s worth*” or alternatively what that money’s worth was, two issues which were arguably parked pursuant to paras. b) and d) of the grounds of appeal.

Question (ii)

52. In order to identify and define the nature of the relevant benefit, the starting point must be the wording of the Rules. It is common case that s. 22 of the Industrial and Provident Societies Act, 1893 as amended was applicable and that the Rules of Kerry Co-Op effectively had the status of contract between the co-op and its members and governed their relationship *inter se*. What a qualifying milk supplier is entitled to receive thereunder is an invitation to subscribe at par value for one patronage share for every 4,556.09 litres of raw milk he has supplied during the relevant period. The Rule provides that the invitation to subscribe will lapse unless it has been accepted and payment for the shares received within three months of the invitation.

53. Revenue submitted that there is no distinction between the right to receive an invitation to subscribe and the actual subscription for an allotment of the shares. It argued that there was, an automatic allocation by the Board of patronage shares to the qualifying milk suppliers and that there was therefore no real distinction between the crystallisation of the right to subscribe and the subsequent exercise of that right.

54. In making this argument, revenue relied heavily upon the Patronage Share Statement. It emphasised that the wording of this Statement demonstrates that, rather than comprising an invitation to subscribe, the respondent was actually informed that he had earned the relevant patronage shares which have been allocated to him and that the cost of the shares was thereafter automatically debited to the respondent's milk account. Further, a share certificate was enclosed with the statement which had to be returned by a specific date if the respondent did not wish to take up the patronage shares. Effectively therefore, revenue argued that the manner in which the respondent's entitlements under the Rules was given effect to demonstrated that the right to subscribe and the exercise of the right to subscribe including the share allotment were in reality one and the same.

55. In identifying the nature of the relevant benefit, the commissioner declined to have regard to the Patronage Shares Statement or to the manner in which the respondent's entitlement under Rule 9.(C)(vii) was given effect to administratively. I do not find any ambiguity in Rule 9.(C)(vii) and, absent same, I agree with the commissioner that the respondent's entitlements must be determined in accordance with the Rules and that the conduct of the parties subsequent to the respondent becoming a member of the co-op cannot be used to interpret the Rules. The fact that Kerry Co-Op elected to give effect to those benefits in a particular fashion, and that the respondent evidently acquiesced therein, does not alter the legal characteristics of the benefits received by the respondent under the Rules.

56. As Finlay J. accepted in *Re. Wogans Ltd*:

"...it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."

57. Furthermore, should a member of Kerry Co-Op entitled to receive an invitation to subscribe for patronage shares decline to take up that invitation, it is difficult to see how the patronage shares themselves could be deemed to be the relevant benefit. The relevant benefit arising under the Rules cannot change depending upon whether a member takes up the invitation to subscribe. Logically, therefore, the relevant benefit comprises the invitation to subscribe and not the subscription/share allocation.

58. Revenue also criticises the fact that the commissioner was prepared, in approaching question (i) to have regard to the wider factual matrix, including the Patronage Share Statement, but was not so prepared in approaching question (ii). Revenue submitted that this inconsistency in approach undermines the determination. However, pursuant to question (ii), the commissioner was identifying the nature of the relevant benefit. This is, in my view a question of law. There is a difference between discerning the source of the benefit and identifying its legal characteristics. The legal characteristics of the relevant benefit are to be found in the Rules.

59. Pursuant to Rule 9.(C)(vii) there is a distinction between the entitlement to subscribe for the shares and the actual subscription. The Rules provide that this right to subscribe would lapse unless accepted and the shares paid for. The only benefit conferred on the respondent was the personal, non-assignable right to subscribe for patronage shares at par value. All the respondent received was an opportunity to increase his shareholding in Kerry Co-Op which he might or might not take up. The subscription and allocation of the patronage shares to the respondent was the outcome of a separate and distinct transaction and did not flow inevitably from the Rules, from the milk supply or from a combination thereof.

60. I therefore find that the Commissioner correctly answered question (ii) as posed.

Question (iii)

61. The commissioner concluded that as the right to subscribe for the patronage shares was a non-assignable and personal right, the relevant benefit had no actual value. It does not appear that revenue contended before the commissioner that the right to subscribe for the shares had a value in itself. Likewise, revenue did not so contend before this court. Further, revenue accepted that the absence of value or the inability to turn a merely personal advantage into money was crucial in deciding whether the receipt of the relevant benefit constituted a trading receipt.

62. However, I agree with revenue that question (iii), the issue of whether the relevant benefit, in this instance the entitlement to receive an invitation to subscribe for the patronage shares at par, had a value fell within appeal ground b) and was expressly “parked”. For that reason, it would have been preferable had the commissioner afforded the parties the opportunity to tender evidence or made legal submissions on this issue before concluding that the right to subscribe for the shares at par did not have any value.

63. For the same reason, I am of the view that the commissioner trespassed on the issues which had been parked in so far as he decided that the receipt by the appellant of the patronage shares themselves did not result in any passing of value.

64. It is not necessary for me to decide either of these issues; i.e., whether or not the right to subscribe for the patronage shares or the patronage shares themselves had a value, in order to answer the question posed in the case stated.

65. This is because the question posed in the case stated is whether the receipt by the appellant of the patronage shares themselves was outside the charge to income tax.

66. In my view, one can approach this answer as follows without any need to trespass upon the parked issues:

- (a) The Commissioner was correct in determining that the relevant benefit received by the respondent pursuant to Rule 9.(C)(vii) was not merely calculated by reference to his trading activities with Kerry Co-Op or its nominee but was a direct result of those trading activities. The relevant benefit was therefore received in consequence of the respondent's trading activities.
- (b) The Commissioner was correct in concluding that the only relevant benefit received by the respondent in consequence of his trading activities, was the personal, non-assignable right to receive an invitation to subscribe for an appropriate number of patronage shares at par value.
- (c) The Commissioner was correct to conclude that the subsequent share subscription and the allocation of patronage shares to the respondent by Kerry Co-Op was not received by the respondent in consequence of his trading activities and was the result of a separate and distinct transaction.
- (d) The receipt by the respondent of the patronage shares did not therefore flow directly or inevitably from the respondent's trade as a milk supplier and was not a trading receipt. It is therefore outside the charge to income tax.
- (e) Only in so far as necessary, I remit the matter to the commissioner for argument on the question of whether or not the right to receive an invitation to subscribe for the patronage shares at par has a value which falls to be taken into account when calculating the full amount of the respondent's profits in the year of assessment. Any such remission, shall be on the strict understanding that the commissioner correctly determined that the only relevant benefit arising in the course of trade was this entitlement to receive an invitation to subscribe for the patronage shares at par, rather than the receipt of the patronage shares themselves which receipt, therefore constitutes a capital receipt. Bearing this in

mind, and bearing in mind the position of the parties before me on this issue (see paragraph above 61) the parties may decide that it is not necessary for the commissioner to resolve this issue of whether or not the right to receive an invitation to subscribe for the patronage shares at par has a value.

- (f) As I find that the only relevant benefit received by the respondent as a result of his trading activities was the right to receive an invitation to subscribe for the appropriate number of patronage shares at par value, it is not necessary to decide whether the receipt by the appellant of the shares themselves had any value. I expressly decline to make any determination in respect of this issue, which, it seems, was intended to be the subject of further argument before the commissioner. It was also not necessary for the commissioner to have made a finding on this issue in respect of which it appears that full evidence and argument were not presented before the commissioner. In so far as necessary, therefore, I reverse the finding of the commissioner in this sole regard.