



AN COIMISIÚN UM ACHOMHAIRC CHÁNACH  
TAX APPEALS COMMISSION

Between

**150TACD2023**

██████████

**Appellant**

and

The Revenue Commissioners

**Respondent**

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**Determination**

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## Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 (“the TCA 1997”) brought on behalf of ██████████ (“the Appellant”) in relation to Notices of Assessment issued by the Revenue Commissioners (“the Respondent”) on 12 November 2009, in the total sum of **€36,573,727**.
2. This appeal is concerned with **Article 5** of the Waste Management (Environmental Levy) (Plastic Bags) Regulations 2001 (S.I. 605/2001) (“**the Regulations**”) and the **Environmental Levy** on single-use **plastic bags** supplied to customers in retail outlets of the Appellant.
3. In relation to the liabilities assessed, credit was given for payments made by the Appellant in the sum of €15,311,616, leaving a balance due and payable of €36,573,727. The agreed total amount of the Environmental Levy now at issue in this appeal is in the sum of **€8,535,638**, comprising:
  - €4,647,338 for the period from 1 July 2004 to 30 June 2005; and
  - €3,888,300 for the period from 1 July 2005 to 30 June 2006.
4. The amount of liabilities in the sum of €8,535,638 is no longer in dispute between the parties. However, the central issue in dispute in this appeal is the interpretation of Article 5(a) of the Regulations. The Regulations provide for the imposition of a Levy on plastic bags, supplied at point of sale or otherwise, in supermarkets, service stations other sales outlets, where such bags are not **excepted bags**, within the meaning of Article 5 of the Regulations (“**the Levy**”).
5. The appeal proceeded by way of a hearing on 9 May 2023. Both the Appellant and the Respondent were represented by Senior Counsel. In addition to submissions, the Commissioner heard sworn oral testimony from the Appellant’s witness ██████████ (“the Appellant’s witness”).
6. At the outset, the Commissioner considers it relevant and appropriate to set out the manner in which the Commissioner will deal with the issue in dispute. The Commissioner intends firstly to set out the background to this appeal and the applicable legislative provisions. The Commissioner will then set out a summary of the evidence and submissions made by both parties to the appeal. The Commissioner then considers it relevant to set out the Commissioner’s material findings of fact and the Commissioner also sets out the facts in dispute, so that it is clear to all parties. Thereafter, the Commissioner will proceed into the analysis of the issue before reaching her Determination. For ease of

reference, the Commissioner has broken down her considerations in the analysis section into a series of subheadings namely, statutory interpretation, the statutory scheme, the interpretation of Article 5 of the Regulations, to include what Article 5 of the Regulations is concerned with, the interpretation of dimension prescribed, the context of Article 5 of the Regulations, the purpose of the legislation, the Interpretation Act 2005, the conclusion and the burden of proof.

## **Background**

7. On 27 June 2008, the Respondent issued a Notice of Assessment to the Appellant in respect of the Levy on plastic bags for the accounting period 1 July 2004 to 30 June 2005, in the total sum of amount of €12,869,048, less an amount of €3,012,434 already paid by the Appellant, leaving a balance due and owing to the Respondent of €9,856,614 (**“the June 2008 Assessment”**). On 14 July 2008, the Appellant duly appealed the June 2008 Assessment.
8. On 18 July 2008, the Respondent issued Notices of Assessment to the Appellant in respect of the Levy on plastic bags for the accounting period 1 July 2005 to 30 June 2006 in the total amount €10,928,276, less an amount of €3,378,042 already paid by the Appellant, leaving a balance claimed by Revenue of €7,550,234 and the accounting period 1 July 2006 to 30 June 2007 in the total amount of €11,785,830, less an amount of €3,701,451 already paid by the Appellant, leaving a balance claimed by the Respondent in the sum of €8,084,379, (**“the July 2008 Assessments”**). On 30 July 2008, the Appellant duly appealed the July 2008 Assessments. On 19 September 2008, the Respondent vacated the June 2008 Notices of Assessment.
9. On 10 October 2008, the Respondent issued a Notice of Assessment to the Appellant in respect of the Levy on plastic bags for the accounting period 1 July 2004 to 30 June 2005 in the total amount of €12,869,048, less an amount of €3,012,434 already paid by the Appellant, leaving a balance claimed by the Respondent of €9,856,614 (**“the October 2008 Assessment”**). On 15 October 2008, the Appellant duly appealed the October 2008 Assessment. On 17 October 2008, the Respondent vacated the July 2008 Assessments and the October 2008 Assessment.
10. On 12 November 2009, the Respondent issued Notices of Assessment to the Appellant in the aggregate sum of €36,573,727 in respect of the Levy on plastic bags (**“the 2009 Assessments”**) (the 2009 Notices of Assessment being at issue in this appeal). By letter dated 30 November 2021, enclosing the Respondent’s Outline of Arguments, the Respondent indicated that the total amount of the Levy at issue is now in the sum of

€8,535,638 (previously, €36,573,727). At paragraph 6 of the document entitled “Statement of Facts And Issues”, “A. Facts On Which The Parties Agree”<sup>1</sup> the amounts of the Levy remaining at issue, are set out as follows:

<b>Date of Notice of Assessment</b>	<b>Accounting period</b>	<b>Levy claimed to be due per Revenue calculations</b>	<b>Levy already paid by</b>	<b>Balance claimed to be due</b>
12 November 2009	1 July 2004 to 30 June 2005	€7,659,772	€3,012,434	€4,647,338
12 November 2009	1 July 2005 to 30 June 2006	€7,266,342	€3,378,042	€3,888,300
12 November 2009	1 July 2006 to 30 June 2007	€3,701,451	€3,701,451	€0
12 November 2009	1 July 2007 to 30 June 2008	€5,219,689	€5,219,689	€0
			<b>Total:</b>	<b>€8,535,638</b>

11. On 19 November 2009, the Appellant duly appealed the 2009 Assessments to the Commission.

12. [REDACTED]

<sup>1</sup> “Statement of Facts And Issues”, “A. Facts On Which The Parties Agree”, paragraph 6, Core Book of Appeal, page 84

13. [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

14. On 30 November 2021, the Respondent wrote to the Appellant to state that the total amount of the Levy now at issue is in the sum of **€8,535,638** (previously €36,573,727). The correspondence states that:

*“The Revenue Commissioners wish to draw to the attention of the Tax Appeals Commission that, consequent on a detailed review of the calculations supporting the assessments and for the reasons set out in the enclosed Outline of Arguments, the Revenue Commissioners have concluded that the total amount of the environment levy at issue is €8,535,638, comprising:*

- €4,647,338 for the period from 1 July 2004 to 30 June 2005; and*
- €3,888,300 for the period from 1 July 2005 to 30 June 2006”*

15. While the Notices of Assessments originally contained amounts assessed in respect of “[REDACTED]” plastic bags (bags supplied at the checkout), it now only concerns plastic bags which are called “[REDACTED]” plastic bags (supplied by a company of that name). [REDACTED] plastic bags are commonly referred to as “bag-on-roll” or “flimsy” bags and are the plastic bags (often without handles) that are generally made available to customers at appropriate points throughout a supermarket for food hygiene and safety purposes to contain products such as fish, meat, poultry, fruit and vegetables.<sup>2</sup>

16. The amounts claimed in the 2009 Notices of Assessment relate to different types of [REDACTED] plastic bags, each with a different code. The codes and quantities of [REDACTED] plastic bags that remain in issue are set out at paragraph 8 of the document entitled “Statement of Facts And Issues”, “A. Facts On Which The Parties Agree”<sup>3</sup> as follows:

Bag code	Quantity of bags after agreed deductions on which Levy is	Quantity of bags no longer being	Quantity of bags remaining at issue in the appeal

<sup>2</sup> “Statement of Facts And Issues”, “A. Facts On Which The Parties Agree”, paragraph 7, Core Book of Appeal, page 84

<sup>3</sup> “Statement of Facts And Issues”, “A. Facts On Which The Parties Agree”, paragraph 8, Core Book of Appeal, page 85



19. On 18 July 2022, the Department wrote to the Respondent to confirm that it has been unable to locate any samples of the plastic bags at issue in the appeal. Again, the Commissioner notes that it is not the responsibility of the Department to retain the original plastic bags at issue in this appeal. The correspondence states that:

*“The Department has conducted a thorough review of its files in this regard, including examining the original case files. There are no plastic bags in those files, nor any record of bags being sent to archive. The case files are in good order upon inspection, and it seems unlikely that they would have been separated from the sample bags where those still in the Department’s possession. In the Department’s view it appears likely that the original sample bags, which were the only examples held by the Department, [REDACTED]”*

20. The parties disagree on the proper interpretation of the Regulations, in particular the interpretation of Article 5(a) of the Regulations and the dimension set out therein. The Appellant contends that the plastic bags that remain in issue are **excepted bags** within the meaning of Article 5(a) of the Regulations and that no amounts are therefore due in respect of the Levy, in respect of those plastic bags. The Respondent contends that the plastic bags that remain in issue are **not excepted bags** within the meaning of Article 5(a) of the Regulations and that the amounts set out in the 2009 Notices of Assessment are due in respect of the Levy, in respect of those plastic bags, in the reduced sum of **€8,535,638**.

### **Legislation and Guidelines**

21. The legislation relevant to this appeal is as follows:-

22. Section 2 of the Waste Management Act 1996 (“the 1996 Act”), Community acts given effect to by this Act, inter alia, provides:-

*(2) The purposes for which the provisions of this Act are enacted include the purpose of giving effect to the Community acts specified in the Table to this section.*

23. Section 72(1) of the 1996 Act (as inserted by Section 9 of the 2001 Act and as amended by Section 12 of the Environment (Miscellaneous Provisions) Act 2011) provides inter alia as follows:

*(1) In this section – ... “plastic bag” means a bag –*

*(a) made wholly or in part of plastic, and*



*(b) which is suitable for use by a customer at the point of sale in a supermarket, service station, or other sales outlet,*

*other than a bag which falls within a class of bag specified in the regulations under subsection (2) as being a class of bag excepted from this definition.*

*(2) The Minister may, with the consent of the government, make regulations providing that there shall be chargeable, leviable and payable a levy (which shall be known as an “environmental levy” and is in this section referred to as the “levy”) in respect of the supply to customers at the point of sale to them of the goods or products to be placed in the bags, or otherwise of plastic bags in or at a specified class or classes of supermarket, service station or other sales outlet.*

*(3) The amount of the levy shall be specified in the regulations under subsection (2) but shall not exceed an amount of 70 cent for each plastic bag supplied to a customer.*

*(4) The levy shall be payable by the person who carries on the business of selling goods or products in or at the supermarket, service station or sales outlet concerned or, if two or more persons each carry on such a business in or at the particular premises, whichever of them causes to be made the particular supply of plastic bags concerned.*

.....

*(9) A person who fails to –*

*(a) pay a levy which is due and payable by virtue of regulations under subsection (2), or*

*(b) comply with the provision of regulations under that subsection, or*

*(c) comply with any term or condition of a scheme referred to in subsection (6)(k) carried out by him or her in which he or she has assented to participate (and which assent has not, by notice in writing given to the person carrying out the scheme before the failure occurs, been withdrawn), shall be guilty of an offence.*

24. Article 3(1) of the Waste Management (Environmental Levy) (Plastic Bags) Regulations 2001 (S.I. 605/2001) (“the Regulations”), Imposition of levy, person liable, rate of levy and exceptions, provides:-

*(1) On and from the 4th day of March 2002, there shall be charged, levied and paid a levy (which shall be known as the environmental levy and is in these regulations referred to as “the levy”) in respect of the supply to customers at the point of sale to*

*them of goods or products to be placed in the bags, or otherwise of plastic bags in or at any shop, supermarket, service station or other sales outlet.*

25. Article 5 of the Regulations, Excepted bags, provides:-

*The following classes of plastic bags are excepted from the definition of a plastic bag –*

*(a) plastic bags solely used to contain-*

- (i) fresh fish and fresh fish products,*
- (ii) fresh meat and fresh meat products, or*
- (iii) fresh poultry and fresh poultry products*

*provided that such bags are not greater in dimension than 225mm in width (exclusive of any gussets), by 345mm in depth (inclusive of any gussets), by 450mm in length (inclusive of any handles);*

*(b) plastic bags solely used to contain the products referred to in paragraph (a) where such products are contained in packaging, (including a bag), provided that such plastic bags are not greater in dimension than the dimensions referred to in paragraph (a);*

*(c) plastic bags used solely to contain-*

- (i) fruit, nuts or vegetables.*
- (ii) confectionary.*
- (iii) dairy products*
- (iv) cooked food, whether cold or hot, or*
- (v) ice*

*provided that such products are not otherwise contained in packaging and where such bags are not greater in dimension than the dimensions referred to in paragraph (a);*

*(d) plastic bags used to contain goods or products sold:*

- (i) on board a ship or aircraft used for carrying passengers for reward, or*
- (ii) in an area of a port or airport to which intending passengers are denied access unless in possession of a valid ticket or boarding card, for the purposes of carrying the goods on board the ship or aircraft referred to in subparagraph (i);*



you would describe a plastic bag without gussets. It is very much left to the supplier and the customer to agree a specification.

- 28.3. Reference was made to Article 5(a) of the Regulations at page 375 of the Book of Authorities and the dimension therein. The witness gave evidence that he has never come across a plastic bag being described with reference to a depth and it is not something that is used in the industry. The witness confirmed that if a customer came to him with a dimension as per Article 5(a) of the Regulations, he would have to seek clarification.
- 28.4. The witness confirmed that he has made samples of the plastic bags at issue in this appeal and evidence was given in relation to the samples. He testified that he made the samples personally from film in the company's warehouse. The witness confirmed that he measured the plastic bags and verified that they are correct by using a tape measure. In addition, he had a colleague measure them also. The witness gave detailed evidence as to the various sample plastic bags and their various dimensions.
- 28.5. In addition, the witness testified that the sample plastic bags are in his opinion all within the permitted dimension under the legislation and they are made up in format in the way that is seen on a roller with gussets. Further, the witness testified that there is a sample of a plastic bag with the gussets opened up which the witness described as the "permitted maximum opened out" and the "permitted maximum with gussets".
- 28.6. The witness gave evidence that plastic bags tend to be made gusseted usually at the behest of the customer, because if there is a roll of plastic bags that is for example 345mm wide on the store display, it takes up quite a lot of space. So, instead, what is done is a side gusset is used, so that the actual width is reduced to 225mm, and is stored in a little dispenser in the store. The witness stated that it therefore takes up less space in the store.
- 28.7. The witness stated that the word "depth" is not used in the industry and the term "face width" or "open width" is used to describe the dimension folded. The witness confirmed that if a customer requested a plastic bag with a dimension of 245mm wide, depth 345mm, length 450mm, he would seek clarification. This is so the witness could break that down into what would be the recognised formula of "face width", "open width" and length. The witness testified that the use of dimensions to include depth, is illustrative of someone not having an understanding of how the industry operates.

- 28.8. The witness gave evidence that he carried out an analysis as to percentage differences in weight and reference was made to paragraph 17 of the witness's statement.<sup>4</sup> The witness testified that it would be normal to measure plastic bags and to check them in terms of the plastic bag weight, rather than the physical dimension.
- 28.9. The witness testified that quality control takes place in relation to the dimension of a plastic bag and would have taken place at the time the plastic bags at issue were manufactured. The witness further stated that at the time the plastic bags at issue in this appeal were manufactured, there was rudimentary machines used and not all plastic bags were uniform, such that there may be a variance of up to 10mm, maybe 15mm, in terms of length or width.
- 28.10. On cross examination by Senior Counsel for the Respondent, the witness confirmed that he is not an independent expert witness and it was agreed that he was a witness with experience in the industry and that the basis upon which he was giving evidence was in the capacity as a witness as to fact.
- 28.11. The witness confirmed that he was not employed with the company at the time of manufacture of the plastic bags at issue in this appeal and has no personal knowledge of those plastic bags. It was put to the witness that he has dealt with microns and weight in his statement, but that is not what the legislation is concerned with and the witness agreed. The witness agreed that when the plastic bag is pulled from the roll, the gusset is flat.
- 28.12. The witness was asked what prompted him to carry out the exercise in relation to the weight of a plastic bag. The witness testified that it was due to his knowledge of the industry, such that this is how he would do a comparison of plastic bags, as, generally speaking it is about environmental issues and customers are looking at a reduction of weight of a material, not of a specific size. It was put to the witness that this may be the case since 2015 and the implementation of an EU Directive, but that prior to that this was not the case. The witness agreed.

*Appellant's submissions*

29. The Commissioner sets out hereunder a summary of the legal submissions made by Senior Counsel appearing on behalf of the Appellant:-

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<sup>4</sup> Core Book of Appeal, page 81

29.1. Reference was made to the principles of statutory interpretation. Reference was made to [REDACTED] the comprehensive statement as to the principles of construction which apply to taxation statutes, in the judgment of McKechnie J. in *Dunnes Stores*. It is confirmed [REDACTED] [REDACTED] that “*The Act of 2001 and the Regulations “must be regarded as taxation measures”*”. It follows that the “strict” or “literal” approach to construction applies to those provisions. Section 5 of the Interpretation Act 2005 does not apply and a “purposive” approach identified by O’Donnell J. in *Bookfinders v The Revenue Commissioners* [2020] 3 IR 80 (“*Bookfinders*”), where the purpose of a provision allows for a departure from the literal meaning of the words used, is not permissible.

29.2. The principles enunciated in the decision of Henchy J. in *Inspector of Taxes v Kiernan* [1981] IR 117 (“*Kiernan*”) and repeated again in *Dunnes Stores* and *Bookfinders* are relevant to the interpretive task and the rule against doubtful penalisation. At page 122 of the decision, Henchy J. states:

*“Secondly, if a word or expression is used in a statute, creating a penal or taxation liability, and there is useless or ambiguity attaching to it, the word should be construed strictly as so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language... as used in the statutory provisions in question here, the word “cattle” calls for such a strict construction.”*

29.3. What also appears from the judgment of the Supreme Court in *Dunnes Stores* (at paragraph 62) is that the provisions of the 1996 Act and the Regulations are complex and difficult, and in such cases, a Court will only go so far in giving effect to the legislative intention. At paragraph 62, McKechnie J. states:

*“At the outset, it must be said that both the relevant sections of the Act and those of the Regulations are difficult to construe. This may in part stem from the unusual nature of the levy system. As appears from what is above set out, the relevant measures in their final form do a number of things:-*

- (i) *They make an accountable person directly responsible for the payment of the levy to the Revenue Commissioners: this is whether the customer is charged on all applicable occasions, or on some only or indeed if at all. It is therefore not simply a collection device. If the obligation had stopped at this point, the supplier of goods or products could have sub-vented in whole or*

*in part the levy cost to the customer. But the obligation went further.*

- (ii) *It obliged that person to charge the customer an amount equivalent to the levy so the subvention option as a matter of choice was not available. If operated in this manner the ultimate liability for the basis amount specified in Regulation 4 should always be that of the customer”.*

29.4. Any suggestion that the burden is on the Appellant to prove that its interpretation of Article 5(a) of the Regulations is correct, is incorrect. The task of statutory interpretation is not weighted against the Appellant. The presumption against doubtful penalisation operates to ensure that a charge to tax (including one that is part-defined by an exception or exemption) is not levied unless the words used are sufficiently clear. The Appellant relies on the plain meaning of the words used. In no sense is it suggested that anything other than a literal interpretation need apply herein.

29.5. Section 72(1) of the 1996 Act is important. It frames the charge to the Levy. Section 72(2) provides that the Minister may make Regulations that a Levy shall be chargeable, leviable and payable on the supply “... *of plastic bags in or at a specified class or classes of supermarket, service station or other sales outlet*”. The definition of “plastic bag” is provided for in Section 72(1) of the 1996 Act. The Levy applies to plastic bags suitable for such use which do not fall within a specified class of exceptions as set out in Article 5(a) of the Regulations.

29.6. The relevant words of Article 5(a) are as follows:

*“... provided that such bags are not greater in dimension than 225mm in width (exclusive of any gussets), by 345mm in depth (inclusive of any gussets), by 450mm in length (inclusive of any handles)”.*

29.7. The first point of note is the singular use of the word “dimension” in the phrase “in dimension” in Article 5(a) of the Regulations. The singular “dimension” tends normally to be used as a description of magnitude or special extent. The word dimension in Article 5(a) of the Regulations, followed by the words “width”, “depth”, and “length”, is inconsistent with the idea that it was intended to encompass each of these separately.

29.8. The Respondent does not address anywhere the singular use of the word “dimension”, the use of the word “by”, or explain how the anomalies arising from

its suggested interpretation can be squared with the scheme and purpose of the 1996 Act or the Regulations. The interpretation suggested ignores the words used, and undermines the scheme and purpose of the provisions. It is not a credible interpretation and cannot arise where the principles of interpretation are faithfully followed. The Respondent urges that the words are read as if "by" is not there.

- 29.9. The legislature could have provided: “... *provided that such bags do not exceed one or more of the following dimensions: in width 225m (exclusive of any gussets) in depth 345mm (inclusive of any gussets) in length 450mm (inclusive of any handles)*”. This is the construction that the Respondent would like to place on the provision, but it is not reflective of the provision as written.
- 29.10. If the Respondent’s approach is accepted, the maximum permitted excepted bag would contain more plastic than the bags actually in issue in this appeal. The purpose of the Regulations is to reduce plastic bag use, in the interests of reducing the extent of plastic waste. Therefore, the Respondent’s interpretation undermines that aim. Given that the aim of the legislation is ultimately to reduce the amount of plastic in the environment and given that it is not a measure purely aimed at raising revenue, it appears wholly incorrect that the result should be more single use plastic, and not less.
- 29.11. It is relevant to contrast Article 5(a) of the Regulations with provisions restricting the scope of the zero-rating of VAT to bread by reference to the composition of bread by ingredients. Reference was made to paragraphs 65 to 67 of the Judgment of the Court of Appeal in *Bookfinders*, wherein the Court considered the following words: “*fat, sugar and bread improver, subject to the limitation that the weight of any ingredients specified in this subclause shall not exceed 2% of the weight of flour included in the dough*”. The Court of Appeal held that on a plain reading of that provision, the use of the word “any” must mean “any one of”, since the word “any” proceeded a list. This is an example of a clear and precise way in which the legislature can indicate that exceeding one single measurement will exclude a product from an exemption or exception. That is not what has occurred here. In Article 5(a) of the Regulations, the clear indication is that a single measurement is to take place. It is clear that plastic bags which are used to segregate fresh meat, fish, fruit and vegetables for hygiene reasons were intended to be excluded from the scope of the Levy.



- 29.12. The use of the measurements in Article 5(a) of the Regulations is simply present to enhance the description of those bags and to ensure that bags which might be of a similar size and type to “vest” bags used at point of sale (i.e. checkout) are not to be excepted from the Levy.
- 29.13. The difference in measurement is functionally irrelevant and creates an arbitrary, indeed wholly inexplicable, distinction between one flimsy bag suitable for use to segregate fresh meat, fish, fruit and vegetables and another flimsy bag suitable for the same use.
- 29.14. If, as the Respondent contends, the use to which the plastic bags are put is a relevant feature of the context in which the words of Article 5(a) of the Regulations are used, its own interpretation undermines this purpose. A difference of 1mm in the length of a plastic bag makes no functional difference whatsoever to its use as a means of segregating fresh meat, fish or vegetables.
- 29.15. Added to all of the foregoing, is the now abandoned, wholly illogical interpretation of “depth” as a subset of length. This is no longer in issue, but is symptomatic of an approach which appears nowhere in the Regulations, but which was actually relied on in the calculation of the assessments in this appeal, now hugely reduced from the original amounts, but still representing a very substantial liability for which support is not to be found in the Regulations or the 1996 Act. Reference was made to correspondence from the Department.<sup>5</sup>
- 29.16. At this remove, there is no prospect of the Appellant being able to revisit and charge the particular customers.
- 29.17. Reference was made to paragraph 2 of the Outline of Arguments on behalf of the Respondent<sup>6</sup> where the Respondent introduces depth, not as described by the Department previously, but as a new description. It must be clear [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- 29.18. The approach to interpretation is literal and text in context. If there is an ambiguity or a looseness of language, which there clearly is, that cannot be held against the Appellant, particularly when the Respondent has no difficulty leaving an

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<sup>5</sup> Book of Documents, page 23

<sup>6</sup> Core Book of Appeal, page 34

assessment of €36,573,727 in existence until November 2021, when the Respondent must have known this was incorrect.

29.19. In the Respondent's submissions the word used is always "dimensions". There is an "s" on every occasion. It is not possible to simply import an "s" into the section. That is not what Article 5(a) of the Regulations state.

29.20. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

29.21. Section 4 of the Interpretation Act 2005 is quite clear in relation to the use of singular and plural, wherein it states that "*Any provision of this Act applies to an enactment except insofar as the contrary intention appears in this Act, in the enactment itself or where relevant in the Act under which the enactment is made. Enactment includes a statutory instrument as defined under the Interpretation Act. And the use of singular and plural in the same provision shows a contrary intention.*"

#### *Respondent's submissions*

30. The Commissioner sets out hereunder a summary of the legal submissions made by Senior Counsel appearing on behalf of the Respondent:-

30.1. Reference was made to page 458 of the Book of Authorities and the opening paragraph, paragraph 2, of the Judgment of McKechnie J. in the Supreme Court in *Dunnes Stores* wherein he states that:

*"As of 4 March 2002, Ireland became the first country in the world to introduce a plastic bag levy with a view to discouraging unnecessary and excessive use of plastic bags thus reducing their impact on the environment."*

30.2. The legislation and the Regulations were designed to implement what MacMenamin J. at paragraph 124 of his Judgment in *Dunnes Stores* described as "*an entirely laudable social purpose*".

30.3. [REDACTED]  
[REDACTED]

30.4. Reference was made to page 488 of the Judgment of McKechnie J. in *Dunnes Stores*, wherein at paragraph 5 McKechnie J. considers the statutory scheme and states that:

*“The principal statutory provision in this case is to be found in s. 72 of the 1996 Act (as inserted by s. 9 of the Waste Management (Amendment) Act 2001). Subsection 1 of that section, in its definition of plastic bag, specifies three criteria which must be satisfied in order for such a bag to warrant the charging of the levy, these are that:*

- (i) it must be made wholly or in part by plastic;*
- (ii) it must be suitable for use by a customer at the point of sale in a supermarket, service station or other sales outlet; and*
- (iii) it must not fall within a specified class of exceptions to be identified by the 2001 Regulations: five such classes were in fact described.*

*Three of these impose particular product and use specification: they also have a measurement proviso in that the bags must not be greater than 225mm in width (exclusive of any gussets), 345mm in depth (inclusive of gussets) and 450mm in length (inclusive of handles). If the bags do not fit within **each** of these specifications, then they are not a recognised exception, and should they fulfil the above two criteria then they will be deemed a “plastic bag”*

30.5. [REDACTED]

[REDACTED] Reference was made to paragraph 10 of the Judgment of McKechnie J., wherein he states that:

*“In the briefest of terms, therefore the underlying scheme in its essential meaning can be introduced as follows: (i) its object and purpose is to help prevent or reduce the generation of waste by cutting down on the use of plastic bags as defined...”*

30.6. That is the purpose of the legislative scheme and it is a provision that is directed at the world at large. There is an argument that there is some unfairness that the Appellant is now being asked to pay a Levy. However, the structure of the legislation and the Regulations is such that the person who had the liability to pay

was the retailer, just as a retailer is liable to pay VAT for example, but as the regulations make clear, the retailer was not lawfully entitled to absorb the Levy, because that would defeat the purpose. The purpose was to change consumer behaviour.

30.7. It was for the Appellant to ensure that, as the entity who was going to be responsible for paying the Levy that it received the money from the consumer, and if it did not, there is no unfairness in it having to pay, as the legislative scheme provides. [REDACTED]

*“(iii) In turn, such “accountable persons” are obliged to impose an equivalent amount on each customer to whom a plastic bag is supplied (article 6): so if functioning as intended, the outlet, save for administrative costs, should not be at a loss.*

*(iv) Such persons must itemise for each customer every charge imposed and must also keep detailed records of the number of plastic bags, as defined, which have been supplied in the circumstances indicated: in addition, they must also make periodic returns and payments to the Revenue Commissioners in respect thereof (articles 7, 11 and 10).*

*(v) The Revenue Commissioners are given the power to estimate what they say is the true liability where no returns have been made or where they have reason to believe that the returns so made constitute an underpayment by the accountable person (articles 12 and 13).”*

30.8. Reference was made to [REDACTED]

■ the purpose of the provisions, wherein he states that:

*“The preamble to the 1996 Act indicates that the measures enacted related to the prevention, management and control of waste and that such measures were intended to give effect to Council Directive 75/442/EEC on waste, as amended by Council Directive 91/156/EEC. Even disregarding ss. 7 and 29 of the 1996 Act, it appears quite evident that, by virtue of s. 72, the intention of the Oireachtas was to make provision for the imposition of an environmental levy in respect of plastic bags so defined in the sales outlets as mentioned. The purpose of these provisions was clearly intended to prevent and/or reduce the extent of plastic bag wastage, as at that time such wastage was perceived to be an ever-increasing problem in this jurisdiction. In that context, I agree with*

*what the trial judge said at para. 6.3, to the effect “[t]he point of the statutory provision (s. 72) is to reduce as much as possible the presence of discarded plastic bags littering our towns and countryside”. Accordingly, at least at a broad and general level, this cannot be doubted”.*

- 30.9. Reference was made to Directive 2015/720 (“the 2015 Directive”) amending Directive 94/62 (“the 1994 Directive”). It is evident that the 2015 Directive is introducing for the first time in EU law, a concept of what is called lightweight plastic bags by reference to microns. Prior to that, it appears nowhere and so it does not support the case being made by the Appellant. Reference was made to the decision in *Cronin (Inspector of Taxes) -v- Cork and County Property Company Limited* [1986] IR 599, wherein the Supreme Court said in relation to legislation that is subsequently amended, it is not appropriate to look to later legislation to interpret an earlier provision.
- 30.10. There is no dispute between the parties as to the use for which the plastic bags were supplied. Rather, the only issue is whether the plastic bags were within the permitted dimension, so as to qualify as excepted bags within the meaning of Article 5 of the Regulations. The permitted dimension is designed to reflect the use to which the excepted bag is intended to be put when required for food safety/hygiene reasons and no other type of use. The permitted dimension facilitates packaging of the specified products for which they are used, so that plastic bags of varying dimensions may be excepted bags, as long as they do not exceed a permitted dimension.
- 30.11. The Regulations are clear and unambiguous in providing that exemption from the Levy is available only to plastic bags that “*are not greater in dimension than*” the dimension specified for width, depth and length. If the dimensions, or any one of them, exceeds the specified dimension, then the plastic bag is not an “excepted bag”.
- 30.12. It is suggested by the Appellant that the word “dimension” as it appears in Article 5(a) to (c) means “the multiplication of all three of its measurements, width by depth by length”. The submission appears predicated on an assumption that the 2001 Regulations mandates an exercise to calculate the volume or cubic capacity of the bag. Had the Oireachtas so intended, it could readily have so expressly provided. The error in the Appellant’s argument is that it requires one to essentially “write into” the Regulations words that do not appear.



impossible to interpret the provisions or that the provisions are ambiguous, and that is not correct.

30.20. Reference was made to the decisions in *Kiernan, Dunnes Stores, Bookfinders and Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 (“*Heather Hill*”) in the context of the approach to statutory interpretation. *Kiernan* is authority for the proposition that a word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein. Words cannot simply be ignored in the legislation. The jurisprudence establishes that all of the rules of interpretation come into play. Even when looking at the literal meaning, context must be considered and the only rule that does not come into play in a taxing statute is section 5 of the Interpretation Act 2005.

30.21. The height of the Appellant’s evidence is that the word "depth" was not used commonly within the industry. This simply confirms the position adopted by McKechnie J. in *Dunnes Stores*, such that we are not dealing with a term of art here, but a piece of legislation which must be interpreted on its ordinary meaning. In *Kiernan*, the Court rejected the notion that the term "cattle" was used with a special meaning so as to incorporate pigs.

30.22. The 2015 Directive is not relevant herein. In 2023, it may be the case that reference to microns is preferable, but in 2001, the legislature were concerned with plastic bag waste and this is confirmed by the decision of McKechnie J. in *Dunnes Stores*.

30.23. The Respondent does not agree that the “box” created by the Appellant is helpful to the interpretation of Article 5(a) of the Regulations. As per the evidence of the Appellant’s witness, the permitted maximum cannot be made in the same material as the plastic bags at issue. Therefore, it is representative of a box, not a plastic bag.

### **Material Facts**

31. Having read the documentation submitted, and having listened to the sworn oral testimony and legal submissions at the hearing of the appeal, the Commissioner makes the following findings of material fact:

- 31.1. In addition to the findings of material fact, the Commissioner finds that the facts as set out in the document entitled “Statement of Facts and Issues, A. Facts On Which The Parties Agree” at paragraphs 1 to 10 inclusive of that document and which is attached herein in **Appendix 1** to this Determination are also material facts found.
- 31.2. The Appellant is [REDACTED].
- 31.3. The Respondent is the body charged under the 2001 Regulations with the collection of the Levy imposed on certain plastic bags.
- 31.4. On 27 June 2008, the Respondent issued a Notice of Assessment to the Appellant in respect of the Levy on plastic bags for the accounting period 1 July 2004 to 30 June 2005, in the total sum of amount of €12,869,048, less an amount of €3,012,434 already paid by the Appellant, leaving a balance due and owing to the Respondent of €9,856,614.
- 31.5. On 18 July 2008, the Respondent issued Notices of Assessment to the Appellant in respect of the Levy on plastic bags for the accounting period 1 July 2005 to 30 June 2006 in the total amount €10,928,276, less an amount of €3,378,042 already paid by the Appellant, leaving a balance claimed by the Respondent of €7,550,234 and the accounting period 1 July 2006 to 30 June 2007 in the total amount of €11,785,830, less an amount of €3,701,451 already paid by the Appellant, leaving a balance claimed by the Respondent in the sum of €8,084,379.
- 31.6. On 19 September 2008, the Respondent vacated the June 2008 Notices of Assessment.
- 31.7. On 10 October 2008, the Respondent issued a Notice of Assessment in respect of the Levy on plastic bags for the accounting period 1 July 2004 to 30 June 2005 in the total amount of €12,869,048, less an amount of €3,012,434 already paid by the Appellant, leaving a balance claimed by the Respondent of €9,856,614.
- 31.8. On 17 October 2008, the Respondent vacated the July 2008 Assessments and the October 2008 Assessment.
- 31.9. On 12 November 2009, the Respondent issued Notices of Assessment to the Appellant in the aggregate sum of **€36,573,727** in respect of the Levy on plastic bags.



31.10. By letter dated 30 November 2021, enclosing the Respondent's Outline of Arguments, the Respondent indicated that the total amount of the Levy at issue was now in the sum of **€8,535,638** (previously, €36,573,727).

31.11. The parties are in agreement that the amount of the Levy at issue is in the sum of **€8,535,638**.

31.12. [REDACTED].

31.13. [REDACTED].

31.14. [REDACTED].

31.15. [REDACTED] were the manufacturers of the plastic bags at issue in this appeal.

31.16. Whilst Notices of Assessment originally contained amounts assessed in respect of [REDACTED] plastic bags (bags supplied at the checkout), it now only concerns plastic bags which are called [REDACTED] plastic bags (supplied by a company of that name).

31.17. [REDACTED] plastic bags are commonly referred to as "bag-on-roll" or "flimsy" bags and are the plastic bags (often without handles) that are generally made available to customers at appropriate points throughout a supermarket for food hygiene and safety purposes to contain products such as fish, meat, poultry, fruit and vegetables.

31.18. The amounts claimed in the 2009 Notices of Assessment relate to different types of [REDACTED] plastic bags, each with a different code. The codes and quantities of [REDACTED] plastic bags that remain in issue are set out at paragraph 8 of the document entitled "Statement of Facts And Issues", "A. Facts On Which The Parties Agree" and are as follows:

<b>Bag code</b>	<b>Quantity of bags after agreed deductions on which Levy is</b>	<b>Quantity of bags no longer being pursued by Revenue</b>	<b>Quantity of bags remaining at issue in the appeal</b>
-----------------	--	--	--

	claimed Revenue	by	
██████	██████		██████
██████	██████		██████
██████	██████	██████	█
██████	██████		██████
██████	██████		██████
██████	██████		██████
██████	██████	██████	█
Total:	83,961,800	27,057,550	56,904,250
Levy claimed by Revenue (@15c per bag)	<b>€12,594,270</b>	<b>€4,058,632</b>	<b>€8,535,638</b>

31.19. There is agreement in relation to the codes and quantities of plastic bags remaining in issue, but disagreement remains as to whether they are **excepted bags**.

31.20. It is contended for by the Respondent that it is the dimension of “width” that exceeds the permitted maximum as follows:

TABLE OF CODES FOR DIFFERENT ██████ BAG TYPES

Bag Code Measurement	Max allowed – L:450mm, W:225m, D: 345mm	Dimension exceeded
██████	L:300 x W:250	Width

████	L:375 x W:300	Width
████	L:375 x W:225+75	N/A
████	L:300 x W:250	Width
████	L:350 x W:275	Width
████	L:360 x W:250	Width
████	L:350 x W:225	N/A

31.21. Neither the Appellant nor the Respondent has samples of the plastic bags at issue.

31.22. On 22 June 2022, the Respondent wrote to the Department seeking confirmation as to whether the Department has samples of the plastic bags at issue in this appeal and if so, requesting that the samples be provided to the Respondent.

31.23. On 18 July 2022, the Department wrote to the Respondent to confirm that it has been unable to locate any samples of the plastic bags at issue in the appeal.

31.24. The Appellant's witness created samples of the plastic bags at issue.

31.25. Article 5 of the Regulations contain no reference to the weight of a plastic bag and reference is made only to use and dimension.

31.26. Plastic bags tend to be made gusseted, so that width is reduced when flat and stored in a dispenser, which therefore takes up less space in the store.

31.27. In 2001, it was not commonplace to measure plastic bags in terms of the plastic bag weight.

31.28. There is quality control in relation to the dimension of a plastic bag and quality control would have taken place at the time the plastic bags at issue were manufactured.

31.29. Plastic bags can be manufactured and purchased by the retailer with and without a gusset, for use by the consumer.

## Issues on which the Parties Disagree

32. The Commissioner observes that the issues on which the parties disagree, are set out in the document entitled “Statement of Facts and Issues, B. Issue on Which The Parties Disagree” at paragraphs 11 to 13. The Commissioner considers it appropriate to set out these matters as follows:

*“11. The parties disagree on the proper interpretation of the Regulations, including the interpretation of Article 5 of the Regulations and the dimensions set out therein, and, therefore, that any amounts are due in respect of the Levy on the plastic bags that remain in issue.*

*12. ██████████ contends that the plastic bags that remain in issue are “excepted bags” within the meaning of Article 5 of the Regulations and that no amounts are therefore due in respect of the Levy in respect of those plastic bags.*

*13. Revenue contends that the plastic bags that remain in issue are not “excepted bags” within the meaning of Article 5 of the Regulations and that the amounts set out in the 2009 Notices of Assessment, as reduced by Revenue pursuant to its letters and Outline of Arguments dated 30 November 2021, are due in respect of the Levy in respect of those plastic bags”*

## Analysis

33. The appropriate starting point for the analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49 (“*Menolly Homes*”) at paragraph 22, Charleton J. states that:

*“The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable”.*

34. The Commissioner also considers it useful herein to set out paragraph 12 of the Judgement of Charlton J. in *Menolly Homes*, wherein Charlton J. states that:

*“Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute...”*

35. The Commissioner notes that the Appellant [REDACTED], which challenges the Levy's application to certain plastic bags suitable for certain uses, including the carrying of specified groceries. The Respondent is the body charged under the Regulations with the collection of the Levy.
36. This appeal arises from Notices of Assessment raised by the Respondent on 12 November, 2009, in the total sum of **€36,573,727** (now agreed to be in the total sum of **€8,535,638**). The Commissioner observes that the assessments, as referenced to above in the "Background" section to this Determination, were raised following a review and audit of the Appellant's activities relating to the Levy on plastic bags, which commenced on 22 February 2007. The trading period specified by the notifying letter was 1 October 2005 to 31 December 2005, for which the Appellant was asked to make available its trading records, in order to facilitate what was intended. Further, the Appellant was informed that the audit would focus on the categories of excepted bags, as provided for in **Article 5 of the Regulations**. As a result, the Respondent concluded that the plastic bags in dispute were subject to the Levy, whereas the Appellant took the opposite view.
37. The Commissioner has considered the submissions from the parties in respect of correspondence dated 5 October 2007, issued by the Department, wherein the correspondence states that width is a measurement from one end to the other along the base, length is a measurement from top to bottom (including handles) and depth is a measurement from top to bottom, excluding handles. In other words, depth is a subset of length. The correspondence went on to assert that in the case of a two-dimensional bag, length and depth are the same axis of measurement. The Appellant states that this is clearly incorrect and not what is described in the Regulations. Further, the Appellant states that the Respondent in its Outline of Argument in this appeal, abandons this interpretation and states "*Revenue no longer relies on that letter of 5 October 2007 and has adjusted the calculation of the amount of bags on which the E-Levy arises accordingly*".<sup>9</sup>
38. The Commissioner considers that this appeal has a lengthy history, but at this remove, the sole issue for determination by the Commissioner is the correct interpretation of Article 5(a) of the Regulations. The Commissioner does not consider correspondence from 2007 to be of assistance in that regard and has not relied on such correspondence in her analysis of the issue herein. Moreover, the amount of assessment and the bags at issue

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<sup>9</sup> Outline of Arguments on behalf of the Respondents, page 7, Core Book page 38

are agreed as per the document entitled “Statement of Facts and Issues, A. Facts On Which The Parties Agree” at paragraph 6 and 8 therein.<sup>10</sup>

39. [REDACTED]  
[REDACTED]  
[REDACTED]. Therefore, whilst the parties made submissions in respect of the history relating to this appeal and the manner in which the raising of assessments were conducted, the Commissioner will deal only with the sole issue arising, namely the interpretation of Article 5(a) of the Regulations and the interpretation of the specified dimension therein.
40. The Commissioner observes that there no longer arises an issue in relation to quantum and the sole issue remaining in this appeal is whether or not the plastic bags are excepted bags within the meaning of Article 5 of the Regulations. The Commissioner notes that the agreed revised figure of €8,535,638, as opposed to the sum of €36,573,727 would be due and owing by the Appellant should the Commissioner make a finding that the plastic bags are not “excepted bags”, within the meaning of Article 5 of the Regulations.
41. The Commissioner notes that she is dealing with Notices of Assessment raised in November 2009 [REDACTED]  
[REDACTED]  
[REDACTED]. The Commissioner has considered [REDACTED]  
[REDACTED] in addition to the written submissions of the parties and the sworn oral testimony and legal submissions made at the hearing of the appeal.
42. The parties disagree on the proper interpretation of the Regulations, in particular the interpretation of Article 5(a) of the Regulations and the dimension set out therein. The Appellant contends that the plastic bags that remain in issue are “excepted bags” within the meaning of Article 5 of the Regulations and that no amounts are therefore due in respect of the Levy, in respect of those plastic bags. The Respondent contends that the plastic bags that remain in issue are not “excepted bags” within the meaning of Article 5 of the Regulations and that the amounts set out in the 2009 Notices of Assessment are due in respect of the Levy, in respect of those plastic bags, in the reduced sum of €8,535,638.

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<sup>10</sup> Statement of Facts and Issues, Core Book of Appeal, pages 84 and 85

43. The following table sets out the basis upon which the Respondent contends that the said bags exceed the dimension specified in the Regulations, as appears at page 25 in the Outline of Arguments on behalf of the Respondent,<sup>11</sup> as follows:

TABLE OF CODES FOR DIFFERENT █████ BAG TYPES

Bag Code Measurement	Max allowed – L:450mm, W:225m, D: 345mm	Dimension exceeded
█████	L:300 x W:250	Width
█████	L:375 x W:300	Width
█████	L:375 x W:225+75	N/A
█████	L:300 x W:250	Width
█████	L:350 x W:275	Width
█████	L:360 x W:250	Width
█████	L:350 x W:225	N/A

44. The Table of Codes for Different █████ Bag Types states that certain of the plastic bags exceed the maximum width (225mm) provided for in Article 5(a) of the Regulations and therefore, are not excepted bags.

45. The Commissioner had the benefit of hearing evidence from the Appellant’s witness who has worked in the packaging industry for over 20 years. In addition, the Commissioner has had the benefit of considering samples created for the appeal, in circumstances where no plastic bags at issue are available, for the reasons set out above. The Commissioner has considered the samples and their varying dimensions. The Appellant also had created a “box” bag which was made from cardboard rather than plastic, but nevertheless reflected the maximum dimension permitted under Article 5(a) of the Regulations. The Respondent took issue with the “box” bag as it was a box and not a

<sup>11</sup> Core Book of Appeal, page 56

plastic bag. Furthermore, the box was made from cardboard and not the material that the plastic bags at issue in this appeal were made from.

46. The Commissioner considers the aides and evidence of the witness to be helpful to her consideration of the within appeal, but nevertheless not determinative, because the Commissioner observes that the issue in the within appeal relates to the proper statutory interpretation of Article 5(a) of the Regulations. Both Senior Counsel made comprehensive submissions as to the principles of statutory interpretation. Therefore, the Commissioner considers it appropriate to initially set out herein, the jurisprudence establishing the well settled principles of statutory interpretation relating to taxation statutes.

### **Statutory Interpretation**

47. In relation to the approach that is required to be taken in relation to the interpretation of taxation statutes, the starting point is generally accepted as being the Judgment of Kennedy CJ. in *Revenue Commissioners v Doorley* [1933] I.R. 750 at page 765 wherein he held that:

*"The duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms...for no person is to be subject to taxation unless brought within the letter of the taxing statute, that is...as interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament."*

48. Whilst the parties' representatives made comparable submissions in relation to the relevant decisions applicable to the interpretation of taxation statutes, the Commissioner gratefully adopts the following summary of the relevant principles emerging from the judgment of McKechnie J. in the Supreme Court in *Dunnes Stores* and the judgment of O'Donnell J. in the Supreme Court in *Bookfinders*, as helpfully set out by McDonald J. in the High Court in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 ("*Perrigo*") at paragraph 74:

*"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were*



reaffirmed recently in *Bookfinders*. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

(a) *If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*

(b) *Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "... context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";*

(c) *Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;*

(d) *Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.*

(e) *In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;*

(f) *Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.*

(g) *Although the issue did not arise in *Dunnes Stores v. The Revenue Commissioners*, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in *Revenue Commissioners v. Doorley* [1933] I.R. 750 where Kennedy C.J. said at p. 766:*

*"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is*

*not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible.”*

49. The Commissioner is of the view that in relation to the approach to be taken to statutory interpretation, *Perrigo*, is authoritative in this regard, as it provides an overview and template of all other Judgements. It is a clear methodology to assist with interpreting a statute. Therefore, the Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning as per subparagraph (a) of paragraph 74 of *Perrigo*. In addition, as per the principles enunciated in subparagraph (b) of paragraph 74 of *Perrigo*, context is critical.
50. Furthermore, the Respondent directed the Commissioner to the recent decision in *Heather Hill* and submits that the approach to be taken to statutory interpretation must include consideration of the overall context and purpose of the legislative scheme. The Commissioner was directed to the dicta of Murray J. at paragraph 108 of his decision in *Heather Hill*, wherein he states that:

*“it is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is not clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed”.*

51. The Appellant argues that where there is an ambiguity in a tax statute it must be interpreted in the taxpayer’s favour. That is not incorrect. In *Bookfinders*, O’Donnell J. explained that this rule against doubtful penalisation, also described as the rule of strict construction, means that if, after the application of general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words should be construed strictly “so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language”.

52. The Respondent submits that there is no doubt or ambiguity in respect of the relevant provisions. If there is any doubt, then a consideration of the purpose and intention of the legislature should be adopted. Then, even with this approach, the statutory provision must be seen in context and the context is critical, both immediate and proximate, but in some circumstances perhaps even further than that.
53. There is abundant authority for the presumption that words are not used in a statute without meaning and are not superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain. In particular, the Commissioner is mindful of McKechnie J's dictum in *Dunnes Stores* at paragraph 66, wherein he states that:
- "each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning."*
54. The Commissioner will now in accordance with the guidance of statutory interpretation as summarised in *Perrigo* go through the various steps. The Commissioner must give the words their ordinary, basic and natural meaning and that should prevail. Then, even with this approach, the statutory provision must be seen in context and the context is critical, both immediate and proximate, but in some circumstances perhaps even further than that. Nonetheless, whatever approach is taken, as confirmed in *Perrigo*, the Commissioner must give each word and phrase used in the statute a meaning, as it is presumed that the Oireachtas did not intend to use words or phrases without meaning.
55. The purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the Court or Tribunal is to seek to ascertain the meaning of the words. The general principles of statutory interpretation are tools used for clear understanding of a statutory provision. It is only if, after that process has been concluded, a Court or Tribunal is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.
56. The Commissioner considers that Article 5 of the Regulations has a dual purpose, such that both use and dimension are relevant.

### **The Statutory Scheme**

57. The Commissioner observes the opening paragraph of the Judgment of McKechnie J. in the Supreme Court in *Dunnes Stores* wherein he states that:

*“As of the 4th March, 2002, Ireland became the first country in the world to introduce a plastic bag levy with a view to discouraging unnecessary and excessive use of plastic bags thus reducing their impact on the environment. The statutory basis for same is contained in the Waste Management Act 1996 (“the 1996 Act”) and the Waste Management (Environmental Levy) (Plastic Bag) Regulations 2001. Both were enacted at least in part against the backdrop of Council Directive 91/156/EEC of the 18th March, 1991 amending Directive 75/442/EEC on Waste (“the Directive”)”*

58. Section 2 of the 1996 Act provides that the purpose for which the provisions of that Act were enacted, include the purpose of giving effect to the Community acts specified in the table to that section. The Community acts include *inter alia* Council Directive 75/442/EEC on waste and Council Directive 91/156/EEC.
59. The principal statutory provision is to be found in section 72 of the 1996 Act (as inserted by section 9 of the Waste Management (Amendment) Act 2001). Section 72 frames the Levy. Section 72(1) of the 1996 Act, in its definition of plastic bag, specifies three criteria which must be satisfied in order for such a plastic bag to warrant the charging of the Levy, which are that: (i) it must be made wholly or in part by plastic; (ii) it must be suitable for use by a customer at the point of sale in a supermarket, service station or other sales outlet; and (iii) it must not fall within a specified class of exceptions to be identified by the 2001 Regulations: five such classes are described.
60. Also of note is section 72(2) of the 1996 Act which confers powers on the Minister to make Regulations referable to the Levy and which states that:

*“The Minister may, with the consent of the Government, make regulations providing that there shall be chargeable, leviable and payable a levy (which shall be known as an “environmental levy” and is in this section referred to as the ‘levy’) in respect of the supply to customers, at the point of sale to them of the goods or products to be placed in the bags, or otherwise of plastic bags in or at a specified class or classes of supermarket, service station or other sales outlet.”*

61. Section 72(5) of the 1996 Act provides that:

*“Regulations under subsection (2) shall provide for the following matters—*

- (a) the specification of the person or persons to whom the levy shall be payable (who or each of whom is referred to in this section as a ‘collection authority’),*
- (b) the conferral of powers on a collection authority with respect to the collection and recovery of the levy (and, for this purpose, the regulations may adapt, with or without*

*modifications, the provisions of any enactment relating to the estimation, collection and recovery of, or the inspection of records or the furnishing of information in relation to, any tax charged or imposed by that enactment)*".

62. Section 72(6) of the 1996 Act provides that:

*"an accountable person shall impose a charge equivalent to the amount of the levy on a customer in respect of the provision by him or her to the customer of a plastic bag, other than a plastic bag excepted under article 5".*

63. Section 72(9) of the 1996 Act provides that the Respondent is specified as the collection authority to whom the Levy shall be payable.

64. On the 19 December 2001, the Minister, having invoked the powers conferred on him by section 7 and section 29 of the 1996 Act, and by section 72 of that Act as inserted by section 9 of the Waste Management (Amendment) Act 2001, as the legal basis to validate the Regulations, made the Regulations. Under Regulation 3(1), retailers of the outlets specified are obliged to charge customers an amount equivalent to the Levy in respect of the supply to them of plastic bags. Regulation 3(1) provides that:

*"On and from the 4th day of March 2002, there shall be charged, levied and paid a levy (which shall be known as the environmental levy and is in these regulations referred to as "the levy") in respect of the supply to customers at the point of sale to them of goods or products to be placed in the bags, or otherwise of plastic bags in or at any shop, supermarket, service station or other sales outlet".*

65. Article 5 of the Regulations provides that in certain circumstances and subject to a number of conditions and requirements, certain classes of plastic bags are exempted from the statutory definition and therefore, do not attract the Levy. Article 5 of the Regulations is central to this appeal in terms of the issue to be determined and provides as follows:

*"The following classes of plastic bags are excepted from the definition of a plastic bag*

– (a) plastic bags solely used to contain

*(i) fresh fish and fresh fish products,*

*(ii) fresh meat and fresh meat products, or*

*(iii) fresh poultry and fresh poultry products*

provided that such bags are not greater in dimension than 225mm in width (exclusive of any gussets), by 345mm in depth (inclusive of any gussets), by 450mm in length (inclusive of any handles);

(b) *plastic bags solely used to contain the products referred to in paragraph (a) where such products are contained in packaging, (including a bag), provided that such plastic bags are not greater in dimension than the dimensions referred to in paragraph (a);*

(c) *plastic bags used solely to contain-*

- (i) *fruit, nuts or vegetables.*
- (ii) *confectionary.*
- (iii) *dairy products*
- (iv) *cooked food, whether cold or hot, or*
- (v) *ice*

provided that such products are not otherwise contained in packaging and where such bags are not greater in dimension than the dimensions referred to in paragraph (a);

.....” [Emphasis Added].

66. The Commissioner observes that Article 5 of the Regulations provides for specified classes of exceptions and three of these impose particular product and use specifications. In addition, there is also a measurement proviso in that the plastic bags must not be greater in dimension than 225mm in width (exclusive of any gussets), 245mm in depth (inclusive of gussets) and 450mm in length (inclusive of handles). If the plastic bags do not fit within these specifications, then they are not a recognised exception. The Respondent argued that Article 5 of the Regulations must be read in the context of the product/use specification and not just the specifications as to dimension. The Commissioner agrees with that argument.

67. The Commissioner considers it useful to set out a summary of the underlying scheme as enunciated in the dicta of McKechnie J. in *Dunnes Stores*, wherein at paragraph 10 he states that:

*“In the briefest of terms, therefore the underlying scheme in its essential meaning can be introduced as follows:*

- (i) *Its object and purpose is to help prevent or reduce the generation of waste by cutting down on the use of plastic bags as defined, which evidently do not include those which are exempted. It does so by introducing a financial disincentive in respect of the supply of such bags.*
- (ii) *It applies to specified outlets including supermarkets: on all such outlets there is imposed a direct liability to discharge the amount of the levy (s. 72(4) of the 1996 Act).*
- (iii) *In turn, such “accountable persons” are obliged to impose an equivalent amount on each customer to whom a plastic bag is supplied (article 6): so if functioning as intended, the outlet, save for administrative costs, should not be at a loss.*
- (iv) *Such persons must itemise for each customer every charge imposed and must also keep detailed records of the number of plastic bags, as defined, which have been supplied in the circumstances indicated: in addition, they must also make periodic returns and payments to the Revenue Commissioners in respect thereof (articles 7, 11 and 10).*
- (v) *The Revenue Commissioners are given the power to estimate what they say is the true liability where no returns have been made or where they have reason to believe that the returns so made constitute an underpayment by the accountable person (articles 12 and 13). Book of Authorities Page 459 of 819 3 I.R. Dunnes Stores v. Revenue Commissioners 491 McKechnie J. S.C.*
- (vi) *The Revenue Commissioners are also given power to recover the levy by the use of the mechanism or the procedure, inter alia, which applies to the recovery of income tax (article 15).*
- (vii) *Finally, provision is made so that an aggrieved person, that is the person who carries on the business of selling goods or products in the outlets affected, can appeal to the Appeal Commissioners in respect of the aforesaid matters (article 16)”.*

### **The Interpretation of Article 5 of the Regulations**

#### **(i) What Article 5 of the Regulations is concerned with**

68. As set out above and in conformity with the well-established principles of statutory interpretation the Commissioner will now consider the arguments relating to the

interpretation of Article 5 of the Regulations. The focus of all interpretive exercises is “to find out what the legislature meant: or as it is put, what is the will of Parliament”.<sup>12</sup>

69. The Commissioner is satisfied that the Levy applies to plastic bags suitable for such use, which do not fall within a specified class of exceptions as set out in Article 5 of the Regulations. In considering Article 5 of the Regulations, the Commissioner intends to consider what Article 5 of the Regulations is concerned with, the interpretation of the dimension prescribed, the context of Article 5 of the Regulations, the purpose of the legislation and the Interpretation Act 2005.
70. The Commissioner observes that much of the Appellant’s argument rests on the singular use of the word “dimension” in the phrase “not greater in dimension than” in Article 5(a) of the Regulations. The Appellant argues that the “singular “dimension” tends normally to be used as a description of magnitude or special extent”.<sup>13</sup> Of note is the Appellant’s argument that the word “dimension” in Article 5(a) of the Regulations, followed by the words “width”, “depth”, and “length”, is inconsistent with the idea that it was intended to encompass each of these separately, as contended for by the Respondent. The Appellant argues that if that were the intention, “one would expect the word to be included in the plural and not the singular.”<sup>14</sup> Moreover, it is argued by the Appellant that the use of the word “by” between each of the several measurements prescribed is strongly suggestive of an intention to create a calculation, namely, width by depth by length.
71. The Commissioner has considered the Appellant’s submission wherein the Appellant provides an example of how the legislature, if it was intended to prescribe a maximum of width, depth and length, might have provided for this by stating “...provided that none of the dimensions are greater than the following: in width 225m (exclusive of any gussets) in depth 345mm (inclusive of any gussets) in length 450mm (inclusive of any handles).”<sup>15</sup>
72. The Appellant contends its interpretation of Article 5(a) of the Regulations is entirely consistent, not only with the words as they are written, but with the scheme and purpose of the provisions themselves. The Appellant’s interpretation is that it is clear that plastic bags which are used to segregate fresh meat, fish, fruit and vegetables for hygiene reasons, were intended to be excluded from the scope of the Levy and that the measurements set out in Article 5(a) of the Regulations are merely there to enhance the description of those plastic bags and to ensure that plastic bags which might be of a

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<sup>12</sup> Bookfinders v The Revenue Commissioners [2020] IESC 60, paragraph 63

<sup>13</sup> Outline of Argument of the Appellant, page 15

<sup>14</sup> Outline of Argument of the Appellant, page 15

<sup>15</sup> Outline of Argument of the Appellant, page 15



similar size and type to the type of bag used at the point of sale, are not to be excepted from the Levy.

73. The Commissioner is satisfied that Article 5(a) of the Regulations has a dual purpose, imposing requirements as to both the use and the dimension of a plastic bag, in order for it to be considered an excepted bag. The Commissioner considers the words in Article 5(a) of the Regulations relating to the use of a plastic bag to be plain and their meaning self-evident, such that they are capable of being understood on a literal interpretation. The Commissioner considers the uses of the plastic bags, as prescribed by Article 5 of the Regulations, to be uncontroversial.
74. The Appellant contends that the use of “dimension” in the singular in Article 5(a) of the Regulations, followed by the use of the word “by” *“plainly and obviously indicates a calculation: “225mm ... by 345mm ... by 450mm used to give a total (singular) dimension which cannot be exceeded.”*<sup>16</sup> The Commissioner notes that the Appellant argues that this is consistent with the use criterion, such that the plastic bags (commonly known as “flimsy” or “bag on roll” bags) are small, and suitable only for this use, which serves food hygiene purposes. The dimension criteria serves to describe, by calculation, the size of such a plastic bag. The Appellant states that the Respondent’s approach to interpretation ignores the words used namely, “dimension” and “by”, fails to give effect to the statutory scheme and imposes a liability not contemplated by the 1996 Act or the Regulations.
75. The Appellant argues that if the Respondent’s interpretation is accepted, it undermines the purpose of the exception, as a plastic bag, which is for example *“1mm larger on one dimension, smaller by 1mm on another, and equal on a third, and therefore of the same overall size as a bag conforming to each measurement would not be an excepted bag.”*<sup>17</sup> The Commissioner has considered the Appellant’s submission, such that this interpretation does not serve the purpose of the Regulations, and in fact, undermines the purpose by creating anomalies and arbitrary distinctions without logic or reason.
76. The Commissioner took note and has considered in detail the samples created by the Appellant in this appeal. The Commissioner notes the argument of the Appellant that if a plastic bag, which conforms precisely to the prescribed measurements in accordance with Article 5(a) of the Regulations, is turned 90 degrees on its side, creating an opening at the top, then on the Respondent’s interpretation, the plastic bag would not be an excepted bag, as the width of the bag at 450mm would exceed the maximum width of 225mm. Notably, the Commissioner observes the Appellant’s argument that this means that a bag

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<sup>16</sup> Outline of Argument of the Appellant, page 2

<sup>17</sup> Outline of Argument of the Appellant, page 2

with “a width of 226mm, depth of 344mm and a length of 449mm would, not be exempt from the Levy and thus chargeable, despite the fact that its volume is less than a bag conforming to the measurements, one sees that the Revenue interpretation creates an obvious absurdity.”<sup>18</sup>

77. The Appellant considers that the difference in measurement is “*functionally irrelevant and creates an arbitrary, indeed wholly inexplicable, distinction between one flimsy bag suitable for use to segregate fresh meat, fish etc and another flimsy bag suitable for the same use.*”<sup>19</sup> The Appellant states that what is contended for by the Respondent is not a credible interpretation and cannot arise where the principles of interpretation are faithfully followed. The Appellant submits that the Respondent urges the Commissioner to accept an interpretation whereby the words are read as if “by” is not contained therein.

78. The Respondent submits that retailers will supply, and customers will use, a plastic bag that is fit for its purpose of accommodating the specified products. Thus, the permitted dimension facilitates packaging of specified products for which they are used, so that plastic bags of varying dimension may be excepted bags, as long as they do not exceed a permitted dimension. [REDACTED]

[REDACTED] in *Dunnes Stores*, wherein Hedigan J. states that:

“... it seems to me that the applicant’s case in this regard takes no account of the detailed provisions that define what bags are exempted from the levy. If, as the applicants argue the requirement for applicability of the levy was supply at the point of sale what is the point in providing for exemptions in respect of the flimsy bags that are provided within shops for wrapping food products such as meat, bread and fish...”<sup>20</sup>

79. The Commissioner has no doubt that Article 5 of the Regulations is prescriptive in terms of the permitted use of plastic bags in order to be considered excepted bags, but that separately and in addition to use, certain permitted measurements are also prescribed. The Commissioner is satisfied that both the **use** and **size** must be in accordance with the requirements of Article 5 of the Regulations.

80. The Commissioner observes the Respondent’s position that Article 5(a) of the Regulations is clear and unambiguous in providing an exemption from the Levy, which is available only to plastic bags that “*are not greater in dimension than*” the dimension specified for width, depth and length. This means that if any one of the measurements,

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<sup>18</sup> Outline of Argument of the Appellant, page 16

<sup>19</sup> Outline of Argument of the Appellant, page 16

<sup>20</sup> *Dunnes Stores v The Revenue Commissioners* [2011] IEHC 469, para.6.2, Hedigan J.

exceeds the specified dimension, then the plastic bag is not an “excepted bag” for the purposes of Article 5(a) of the Regulations. Each dimension referred to in Article 5 of the Regulations is the maximum allowed with respect to that particular dimension (as discussed below).

81. The Respondent dismisses the Appellant’s argument that the use of the word “by” indicates a calculation, rather than a list of measurements. The Respondent states that this assumes that Article 5(a) of the Regulations requires a calculation of the volume or cubic capacity of a plastic bag and had the Oireachtas so intended, it could readily have so expressly provided. The Commissioner notes that the Respondent argues that “*The error in the Appellant’s argument is that it requires one to essentially “write into” (import) the 2001 Regulations words that do not therein appear, an impermissible exercise having regard to the decisions of the Supreme Court in Dunnes Stores and Bookfinders.*”<sup>21</sup>
82. The Commissioner is satisfied that in accordance with the guidance relating to statutory interpretation as set out in *Perrigo*, the meaning of the words used in the statutory provision must be seen in context. Section 72 of the 1996 Act provides for the meaning of “plastic bag” which encompasses its materials, such that it must be made wholly or part of plastic, in addition to its use, such that it is suitable for use by a customer at the point of sale, unless it falls within a class of bag specified in the regulations under subsection (2) as being a class of bag excepted from this definition. The Commissioner is satisfied that section 72 of the 1996 Act frames the charge to the Levy. Of note, the reference to a class of excepted bag in primary legislation is reference to Article 5 of the Regulations, which Regulation was made under section 72(2) of the 1996 Act. So, it is clear to the Commissioner that Article 5 of the Regulations is to be read in context, such that it addresses the use of plastic bags, other than those which are suitable for use at the point of sale.
83. The Commissioner notes that Hedigan J. in the High Court in *Dunnes Stores* thought initially that the wording of section 72 of the 1996 Act was ambiguous. However, after reading it carefully he found it just to have been “awkwardly phrased”. Nevertheless, section 72(2) is highly relevant for determining what comes within the overall definition as this confers powers on the Minister to make Regulations referable to the Levy, the Regulations at issue herein and which address excepted bags, as referred to in section 72(1) of the 1996 Act. Therefore, the context in which Article 5 of the Regulations should be considered is that it links to the overall meaning of a plastic bag for the purposes of the Levy and seeks to remove the obligation on a retailer to charge customers an amount

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<sup>21</sup> Outline of Arguments on behalf of the Respondent, page 21

equivalent to the Levy in respect of the supply to them of plastic bags, where a plastic bag is excepted. Thus, it creates an exception to certain plastic bags having regard to their use and size which might otherwise be subject to the Levy under section 72 of the 1996 Act. Also, in terms of context the Commissioner is satisfied that the use to which the plastic bags are put is a relevant feature of the context in which the words of Article 5 of the Regulations are used.

**(ii) Interpretation of dimension prescribed**

84. Having considered and determined that Article 5 of the Regulations specifies use, the Commissioner now turns to the interpretation of the dimension prescribed. The Commissioner must give each of the words in the statute a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning. The Commissioner cannot speculate as to meaning and cannot import words that are not found in the statute. The Commissioner is satisfied that there is no ambiguity to the word “dimension” such that the word is plain and the meaning self-evident. The Commissioner considers that the words in Article 5(a) of the Regulations are capable of a literal interpretation and there is no ambiguity therein.
85. As part of her consideration as to the correct interpretation of the words, the Commissioner has considered the use of the word “by” between each prescribed dimension. As such, to assist her with her interpretation, the Commissioner considered the English Dictionary meaning of the word “by” which states *inter alia*, “used to show measurements or amounts: *Our office floor space measured twelve meters by ten (= was 12 metres in one direction and ten in the other)*”. The Commissioner has also considered the English dictionary meaning of “dimension” which states: “a measurement of something in a particular direction, especially its height, length or width”.
86. The word “**by**” is a preposition. It can be used as a preposition to show something or thing that does something. For example, “the motorcycle was driven by John”. It can be used to show how something is done. For example, “they travelled by motorcar”. There are other examples of the use of the preposition “by” to demonstrate position or time. But the ordinary, plain meaning of the preposition and word “by” in this context, is to show measurement.
87. The Commissioner is satisfied that any reasonable bystander or member of the public, if asked the meaning of the words “by” and “dimension”, would be able to explain in the most simplest terms that it describes the measurement of each face of a bag and the “by”

is the preposition in this context which links those measurements. It is no more or no less complicated than that.

**(iii) The context of Article 5 of the Regulations**

88. Furthermore, the Appellant urges the Commissioner to consider the context of Article 5(a) of the Regulations and the purpose of the legislation. The Commissioner is satisfied that in accordance with the well-established principles of interpretation the Commissioner should not resort to a purposive approach to interpretation, unless the literal approach would produce an absurd result (paragraph (c) of *Perrigo*). However, the Commissioner is satisfied that in approaching the interpretation of Article 5(a) of the Regulations, she is permitted to consider the context. In fact, context is critical and the Commissioner is mindful of the words of McKechnie J. in the Supreme Court in *Dunnes Stores* wherein he states that: “... *context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.*”<sup>22</sup> The Commissioner has set out in detail above the statutory scheme.
89. In the first instance, the Commissioner must consider and interpret the literal meaning of the words in their context. The Commissioner is satisfied that the ordinary basic and natural meaning of the words in Article 5(a) of the Regulations referable to measurement is that if either dimension (singular) is breached then the bag is not an excepted bag. The Commissioner does not accept the Appellant’s argument that Article 5(a) of the Regulations implies a calculation as a consequence of the use of “dimension” in the singular namely, “...*not greater in dimension than...*”, followed by the use of the word “by”, resulting in a singular dimension that cannot be exceeded.
90. Article 5(a) of the Regulations is properly prescriptive in terms of the required dimension of an excepted plastic bag. The Commissioner considers its meaning to be self-evident, such that it is notably strict in terms of its description of each dimension. The length is depicted with reference to the words “(*inclusive of any handles*)”. Therefore, the Commissioner is satisfied that length can only be interpreted as the vertical and common sense dictates that this is the top to the bottom of a plastic bag with the top containing the opening and potentially any handles which is provided for in the wording. This is the plain and ordinary meaning of the first dimension. The word “by” is introduced thereafter, and the Commissioner will deal separately with the word “by” hereunder.
91. The Commissioner is satisfied that width can only be interpreted as the horizontal dimension, given that the dimension is expressed with reference to the words “(*exclusive*

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<sup>22</sup> Paragraph 63, McKechnie J. *Dunnes Stores v The Revenue Commissioners & Ors* [2020] 3 IR 480

*of any gussets*)". The evidence of the Appellant's witness is that plastic bags tend to be made gusseted usually at the behest of the customer, because if there is a roll of bags that is for example 345mm wide on the store display, it takes up quite a lot of space. So, instead, what is done is a side gusset is used, so the actual width is reduced to 225mm, and is stored in a dispenser in the store. The witness stated that therefore, it takes up less space in store. The Commissioner is satisfied there can be no doubt as to what width is referring to in Article 5(a) of the Regulations and that this is the plain and ordinary meaning of width in Article 5(a) of the Regulations. Finally, depth is referred to in the context of the words "*(inclusive of any gussets)*". As stated, the evidence is a gusset is to be found at the side of the bag. The Commissioner is satisfied that there also can be no doubt as to the meaning of the reference of depth in Article 5(a) of the Regulations. This is the plain and ordinary meaning of depth. The Commissioner considers that there can be no other logical meaning as to the words in Article 5(a) of the Regulations.

92. As stated above, the Commissioner is satisfied that the use of "dimension" in the singular followed by the use of the word "by" is not to be interpreted as a requirement for a calculation of all of the three requirements as to dimension, the interpretation urged on the Commissioner by the Appellant. On the contrary, the Commissioner considers that the use of the word in the singular clearly connotes that each "dimension" (singular) should be considered. Importantly, the Commissioner is of the view that the use of the word "by" does not change that interpretation, such that it implies that this can be read as to multiplication of each of the sides or a calculation as to volume. The Commissioner is satisfied that the argument advanced by the Appellant requires the Commissioner to read the words in Article 5(a) of the Regulations as a reference to "volume", which is not correct. The Commissioner considers that there can be no other plain and ordinary meaning as to the words in Article 5(a) of the Regulations such that each dimension describes the measurement of each face of a bag and the "by" is the preposition in this context which links those measurements. As stated, it is no more or no less complicated than that.

93. The Commissioner considers there to be an abundance of examples whereby the dimension of a product is described by the use of length x width x depth of a product. The Commissioner considers that the use of the letter "x" usually depicting "by" is commonplace and uncontroversial. The Commissioner is satisfied that dimension is regularly expressed by these interchangeable terms. For example, it is clear from open source material that if one purchases a bookshelf from [REDACTED], one is told of its

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■ [REDACTED]

“size and fit” using the formula “H90 x D25 x L80cm”. The Commissioner considers that it is common case that the “x” equates to “by” in such a formula and is used to describe the dimension of the bookshelf or [REDACTED] the “size and fit”. Common sense dictates that a purchaser is unlikely to be interested in the volume of the bookshelf, but depth is included to calculate the dimension of the bookshelf, so that the purchaser can assess if the bookshelf, not greater in dimension than “H90 x D25 x L80cm” would fit in the intended space. Moreover, the Commissioner is satisfied that if such a dimension were to be expressed literally in a sentence it is likely to read “the dimension of the bookshelf I purchased was 90cm in height by 25cm in depth by 80cm in length”. A further example proffered by Counsel for the Respondent is that, a swimming pool is measured using length x width x depth. A swimmer is unlikely to calculate the volume of water in a swimming pool, but may require knowledge of depth for safety purposes. The Commissioner does not consider that the use of the word dimension, singular, followed by the use of the word “by” in Article 5(a) of the Regulations, equates to a requirement for the calculation to give a total (singular) dimension which cannot be exceeded. Why then is reference to the gusset and handles required if it was simply interchangeable in terms of each side. This does not make sense to the Commissioner and is not the correct interpretation, having regard to the plain and ordinary meaning of the words in context.

94. The Commissioner is satisfied that the words “not greater in dimension” and the singular use of the word dimension can only mean, not greater in dimension than any of the three prescribed as to width, height or depth and the plain and ordinary meaning of the word dimension followed by the use of the word “by” does not indicate a calculation being involved. The Commissioner considers it clear and unambiguous as what the meaning of Article 5(a) of the Regulations refer to and is satisfied that the inclusion of references to handles and the gusset are properly included to assist with the description of each dimension, leaving no misunderstanding as to what an expected bag should not be greater in dimension than. The Commissioner is satisfied that the term “by” is a common word used often to describe the dimension of an object, as opposed to the sum of the object.
95. The Commissioner is satisfied that when considering the wording of Article 5(a) of the Regulations, in context, it is dealing with the dimension of plastic bags for a specific purpose namely fish, meat, poultry, nuts, fruit, vegetables, confectionery, dairy products, cooked hot or cold food and ice, such that these plastic bags are excluded from the Levy. It is common knowledge that such foodstuffs require differing plastic bags with differing

widths including a gusset or not, height, depth and potentially handles also. The Commissioner is satisfied that having regard to the requirements as to dimension in Article 5(a) of the Regulations, it is to accommodate the use for which the bag is put and must be read in this context. A large cooked chicken may require a bag with a gusset, but loose nuts may not require a bag with a gusset and so width is minuscule. Importantly however, the Commissioner does not accept that what is required of a retailer is that it acquires its excepted bags by reference to volume. The Commissioner considers that the retailer is not required by the legislature to engage in a mathematical equation as to the volume of bags purchased for use as specified, but is required by the legislature to engage in a much simpler exercise of ensuring that plastic bags for the uses specified in Article 5(a) of the Regulations, are not exceeded.

96. The Commissioner considers it is commonplace that when one enters a supermarket, there is usually a dedicated area for fruit and vegetables and meat and fish. A consumer in a supermarket expects that if they are purchasing items, such as loose fruit and vegetables, that there is available to the consumer “flimsy” plastic bags or plastic bags “on a roll” for placing their items in, before making their way to the checkout point for payment. These plastic bags are provided to the customer at various points around the supermarkets. The plastic bags are often varied, such that some have handles, some do not have handles and some have gussets and some do not. The consumer is not expected to carry, for example, loose apples without the provision of a plastic bag. However, the plastic bags made available by the retailer must be intended for this specific use and must not exceed a certain size, otherwise the plastic bag is not an excepted bag.
97. The Commissioner asked the Appellant’s witness the purpose of a gusset in such bags and his is that plastic bags tend to be made gusseted usually at the behest of the customer, because it takes up less space in store. The Commissioner notes the dicta of McKechnie J. in *Dunnes Stores*, wherein he also considered what members of the public expected when shopping in a supermarket and at paragraph 75 he states:

*“Every consumer has at least a broad understanding of what to expect or even demand of a retail outlet, certainly of a large supermarket. Accordingly, given the nature of the business it would be quite surprising if supermarkets did not have available bags suitable for use in respect of different goods or products of a varying type. Equally so, it would make no sense if a customer of a supermarket decided to use or take possession of a bag that was unsuitable to the type of products generally available in that outlet or to those then intended to be purchased”.*



98. The Commissioner accepts that volume may be calculated using a similar formula i.e. “by”, calculating length by width by height. However, the Commissioner is satisfied that on a plain reading of the words in Article 5(a) of the Regulations, in context, nowhere does it suggest a formula or calculation leading to a single dimension.
99. The Commissioner observes the Appellant’s argument that “*a difference of 1mm in the length of a bag makes no functional difference whatsoever to its use as a means of segregating fresh meat, fish or vegetables. It does make sense, however, as part of a calculation of overall dimension for the purposes of describing a bag which is suitable for such use is necessary.*”<sup>24</sup> The Commissioner considered the Appellant’s arguments and illustrations with reference to the samples that if you turn a bag on its side, it may fall foul of the specifications as to dimension if the Appellant’s argument is accepted. Nevertheless, the Commissioner is satisfied that the Appellant’s argument fails having regard to each specific dimension expressly stated in Article 5(a) of the Regulations and the very specific description of each dimension, having regard to handles and a gusset mentioned. The only interpretation that can be attributed to each dimension is as set out above by the Commissioner at paragraphs 90, 91 and 92 of the determination. The Commissioner considers that there is a functional difference certainly in relation to those bags with handles. The suggestion that a bag with handles can be turned on its side is not functionally viable. The Commissioner does not consider it sensible to suggest that a consumer can add for example apples, as referred to above, to a plastic bag which, when turned on its side, results in the handles or opening being on the side or bottom of the plastic bag. The Commissioner finds that there can be no other interpretation but that the length is top to bottom, with or without handles, the width is the horizontal without a gusset and the depth being the gusset.
100. For the reasons set out above, the application of a literal interpretation results in a meaning which the Commissioner considers is entirely in line with the statutory scheme. The Commissioner has considered “the box” that was produced by the Appellant. The Appellant understands the box to be representative of the very large size of a plastic bag if the Respondent’s argument is to be accepted. Further, the Commissioner has considered the evidence of the Appellant’s witness that a flimsy plastic bag could not be produced in line with the dimension prescribed. The Commissioner is satisfied that in specifying the dimension of each side of a plastic bag, with reference to its features such as handles and gusset, the legislature limited exemption from the Levy to plastic bags of a particular dimension on each side, appropriate to the intended and permissible use of

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<sup>24</sup> Outline of Arguments of the Appellant, paragraph 52, Core Book page 76

the bag, as opposed to a calculation, as set out in Article 5(a) to (c) of the Regulations. The Commissioner does not consider the box to be persuasive of the Appellant's argument and is satisfied that Article 5(a) of the Regulations specifies a maximum dimension for length, width and depth of a plastic bag. There is no requirement that a plastic bag is produced to the maximum dimension specified.

101. The Commissioner considers that the approach contended for by the Appellant is not what is contemplated by the 1996 Act or the Regulations and is not what it required on a literal interpretation of the statute. The Commissioner is satisfied that Article 5(a) of the Regulations is prescriptive in terms of description of the requirements of the dimension of a plastic bag and that reading the words in the statute, not in isolation, the singular use of dimension followed by the word "by" does not mandate a calculation.

102. In addition, the Commissioner has considered the dicta of Murray J. in *Heather Hill*, in particular paragraph 108 of his decision, wherein he states that:

*"it is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is not clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed".*

103. The Commissioner is satisfied that Article 5(a) of the Regulations is capable of interpretation using the literal approach and that there is no ambiguity. The Commissioner notes the submission of the Appellant in its outline of arguments, wherein it is stated that "...the Appellant here relies on the plain meaning of the words used. In no sense is it suggested that anything other than a literal interpretation need apply...."<sup>25</sup>

#### **(iv) The purpose of the legislation**

104. Nevertheless, it was urged on the Commissioner by both parties that that the purpose of the legislation should be considered and submissions in that respect were made by both parties. In light of the dicta of Murray J. in *Heather Hill*, as set out above, the Commissioner considers it would be prudent and correct of the Commissioner to give some consideration to the overall purpose of the legislation. Therefore, the Commissioner

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<sup>25</sup> Outline of Arguments of the Appellant, page 10

will proceed to consider the purpose of the legislation and whether the consideration of same causes the Commissioner to amend her views as to the correct interpretation of Article 5(a) of the Regulations.

105. The Commissioner has considered the Appellant's argument, such that if the Respondent's argument is accepted, a bag conforming to the Respondent's interpretation of the Regulations will use substantially more plastic than the plastic bags in dispute in this appeal. It is argued by the Appellant that the aim of the legislation is ultimately to reduce the amount of plastic in the environment and not a measure purely aimed at raising revenue. Therefore, the Appellant argues that the Respondent's argument is wholly inconsistent with that aim, as the result would be more single use plastic, not less. The Commissioner notes the evidence of the Appellant's witness and the exercise undertaken in relation to weight outlined at paragraph 13 and 14 of the Statement of Evidence<sup>26</sup> of the Appellant's witness, wherein he states that:

*"13. Based on my understanding of the interpretation of the "excepted bags" provision being put forward by the Revenue Commissioners in this case, the maximum permitted size of "excepted bag" would contain more plastic in weight, and would be excepted, whereas the bags at issue in this case, which contain less plastic in weight, would not.*

*14. To illustrate this, I have calculated the differential in weight of plastic as between the maximum permitted size "excepted bag" based on the Revenue Commissioner's interpretation of the provisions and the bags at issue in this case"*

106. The Appellant argues that on the Respondent's interpretation a bag which is 1mm larger on one dimension, smaller by 1mm on another, and equal on a third, and therefore of the same overall size as a bag conforming to each measurement would not be an excepted bag. This does nothing to serve the purpose of the Regulations. The Appellant states that the "*Community acts include inter alia Council Directive 75/442/EEC on waste and Council Directive 91/156/EEC – measures designed to encourage the paramount aim of preventing or reducing waste production and its harmfulness*".<sup>27</sup> The Appellant also relies on the Commission Decision 2000/532/EC (as amended), which the Commissioner has considered.

107. In contrast, the Respondent argues what is relevant is what the Oireachtas decided and were the first in the world to introduce this type of Levy. The Oireachtas wanted to discourage the use of plastic bags, so a Levy on plastic bags was introduced and the

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<sup>26</sup> Core Book of Appeal, page 78

<sup>27</sup> Outline of Arguments of the Appellant, page 6, Core Book page 65

purpose of the legislation was not to reduce plastic, but specifically to reduce the use of plastic bags. This can be seen from both the 2001 Act and Regulations. The Respondent referred to the dicta of McKechnie J in *Dunnes Stores* at paragraph 2 in relation to the introduction of the Levy and the dicta relating to the purpose of the legislative scheme. The Respondent argues that it was not until the 2015 Directive was implemented, that the focus is now on microns and the weight or thickness of a plastic bag.<sup>28</sup> In addition, the Respondent submitted that the Appellant's witness agreed with this proposition.

108. Senior Counsel for the Respondent drew the Commissioner's attention to the decision in *Cronin (Inspector of Taxes) v Cork and County Property Company* [1986] IR 599, wherein the Supreme Court held that a Court cannot construe a statute in the light of amendments that may thereafter have been made to it. Griffin J. in his judgment in the Supreme Court stated at page 572 of the decision that

*"An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be."*

109. The Commissioner is satisfied having regard to the jurisprudence that an amending provision cannot be used to interpret pre-existing statutory provisions and that Regulations and the amendment Act commencing in 2001, cannot be interpreted by reference to a Directive, namely the 2015 Directive, that commenced some 14 years later.

110. The Commissioner notes that the Respondent states that a result that focusses on the volume of the bag, is at odds with the purpose of the legislation, which is to deter the use of plastic bags on the grounds that they pose an environmental hazard. The Respondent submits that *"insofar as there is an exemption, it is an exemption that recognises that in certain instances a plastic bag may necessarily be required, notwithstanding the negative environmental impact, in order to avoid the risks to public health and hygiene that arise from food contamination and, where so necessary, the bag is exempt from the levy. In any other case, the bag is not so exempt."*<sup>29</sup>

111. The Commissioner observes that in respect of the purpose of the legislative scheme, the Respondent relies on paragraph 2 of the Judgment of McKechnie J in *Dunnes Stores*, as set out above, wherein he states that *"As of 4 March 2002, Ireland became the first country in the world to introduce a plastic bag levy with a view to discouraging*

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<sup>28</sup> Recital 4, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0720>

<sup>29</sup> Outline of arguments on behalf of the Respondent, page 22

*unnecessary and excessive use of plastic bags thus reducing their impact on the environment”*

112. The Commissioner is satisfied that the dicta of McKechnie J. at paragraph 2 of his Judgment in *Dunnes Stores* is a correct statement as to the purpose of the legislation. However, the Commissioner notes the Respondent’s submission that the issues herein are essentially determined by that paragraph. The Commissioner does not accept that argument and it is for the Commissioner to determine the issues in the within appeal and should a party to this appeal disagree with the Commissioner’s interpretation of the statutory provision and determination of the Commissioner, then it will then be a matter for the High Court in accordance with the prescribed rules in section 949 TCA 1997.

113. The Commissioner considers that at this remove, and in light of 2015 Directive, the policies in relation to plastic waste have now focused on weight. The Commissioner considers that Recital 4 of the 2015 Directive introduced such a focus, wherein it states that:

*“(4) Plastic carrier bags with a wall thickness below 50 microns (‘lightweight plastic carrier bags’), which represent the vast majority of the total number of plastic carrier bags consumed in the Union, are less frequently reused than thicker plastic carrier bags. Consequently, lightweight plastic carrier bags become waste more quickly and are more prone to littering due to their light weight”.*

114. The Commissioner is satisfied that prior to that, the focus was on plastic packaging generally, and the Commissioner considers that Recital 1 and 2 of the 2015 Directive are illustrative of this, wherein it states that:

*(1) European Parliament and Council Directive 94/62/EC was adopted in order to prevent or reduce the impact of packaging and packaging waste on the environment. Although plastic carrier bags constitute packaging within the meaning of that Directive, it does not contain specific measures on the consumption of such bags.*

*(2) The current consumption levels of plastic carrier bags result in high levels of littering and an inefficient use of resources, and are expected to increase if no action is taken. Littering of plastic carrier bags results in environmental pollution and aggravates the widespread problem of litter in water bodies, threatening aquatic eco-systems worldwide*

115. The Commissioner considers that the correct statement as to the purpose of the legislation is found at paragraphs 77 and 78 of the Judgment of McKechnie J. in *Dunnes Stores*, wherein he states that:

*“[77].....in such circumstances, it is I think permissible in construing the actual wording used to have regard to the purpose and intention of the Act as a whole.*

*[78] The preamble to the 1996 Act indicates that the measures enacted related to the prevention, management and control of waste and that such measures were intended to give effect to Council Directive 75/442/EEC of the 15th July, 1975, as amended by Council Directive 91/156/EEC of 18th March, 1991, on waste. Even disregarding s. 7 and 29 of the 1996 Act, it appears quite evident that by virtue of s. 72, the intention of the Oireachtas was to make provision for the imposition of an environmental levy in respect of plastic bags so defined in the sales outlets as mentioned. The purpose of these provisions was clearly intended to prevent and/or reduce the extent of plastic bag wastage, as at that time such wastage was perceived to be an ever-increasing problem in this jurisdiction. In that context, I agree with what the learned trial judge said at pp. 40 and 41 of this judgment, to the effect “The point of the statutory provision (s. 72) is to reduce as much as possible the presence of discarded plastic bags littering our towns and countryside”. Accordingly, at least at a broad and general level, this cannot be doubted.*

.....

*[80] It would have made very little sense for the Oireachtas, in the knowledge of what it was attempting to do, to put in place legislation which exempted from the levy every and any bag unless such bag was sold at the point of sale. This would have the effect that those in charge of any and all outlets could place such bags anywhere other than the point of sale, and by doing so would disapply the levy. Unless absolutely compelled to adopt such an interpretation, I would have to reject it.*

*[81] In addition, however, such an interpretation would render entirely redundant the excepting provisions contained in article 5 of the Regulations. Whilst I fully accept that primary legislation cannot be interpreted via the Regulations, nonetheless in this particular instance such regulations, at least insofar as the exempted class of bag is concerned, forms part of the statutory definition. So, in my view, article 5 cannot be ignored. Quite evidently in the vast majority of cases, the bags so specified are provided throughout the store...”*

116. Having considered the purpose of the legislation, the Commissioner remains satisfied that the correct interpretation of the legislation is as argued by the Respondent and as the Commissioner has set out above. The Commissioner is satisfied that the meaning of the word “dimension” and the argument advanced by the Appellant, in relation to the use of the word “by”, requires the Commissioner to read the words as a reference to calculation or “volume” in Article 5(a) of the Regulations, and is not the correct interpretation. There is no reference to a calculation or indeed volume, it cannot be inferred and looking at the context of Article 5 of the Regulations, it provides exemption to the Levy for certain bags for a particular use and dimension, of which there are three.

**(v) The Interpretation Act 2005**

117. Finally, reference was made to the use of the word “dimension” both in the singular and plural in Article 5 (a), (b) and (c), of the Regulations by the Respondent. The Respondent suggests that section 18 of the Interpretation Act 2005 is applicable such that it provides that:

*The following provisions apply to the construction of an enactment:*

*(a) Singular and plural. A word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular;*

118. Nevertheless, the Appellant correctly directed the Commissioner to section 4 of the Interpretation Act 2005, which states that:

*(1) A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made.*

*(2) The provisions of this Act which relate to other Acts also apply to this Act unless the contrary intention appears in this Act.*

119. The Appellant states that “it’s presented to you as if singular means plural wherever you find it. It doesn’t. It doesn’t mean anything of the sort, and section 4 is quite clear to that.”<sup>30</sup>

120. The Commissioner has considered Article 5 (a), (b) and (c), of the Regulations wherein it states “provided that such plastic bags are not greater in dimension than the dimensions referred to in paragraph (a)”. It is clear to the Commissioner that both the word dimension and dimensions are used. Nevertheless, the Commissioner is satisfied that the word

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<sup>30</sup> Transcript, page 200 and 201

dimension in (b) and (c) is used and replicated with reference to (a) and that the word dimensions is used to describe the measurements provided for in (a). There is no ambiguity arising. The Commissioner is satisfied that the word “dimension” used in the singular is used deliberately and the word “dimensions” used in the plural is used deliberately. The Commissioner considers it clear and unambiguous as what the meaning of Article 5(a) of the Regulations refer to and is satisfied that the inclusion of references to handles and the gusset are properly included to assist with the description of each dimension, leaving no misunderstanding as to what an expected bag should not be greater in dimension than. The Commissioner is satisfied that the term “by” is a common word used often to describe the dimension of an object, as opposed to the sum of the object. Therefore, in relation to the Appellant’s argument as to the use of section 18 of the Interpretation Act 2005, the Commissioner considers it appropriate to reject the Respondent’s argument and accept the Appellant’s argument as to the meaning of section 4 of the Interpretation Act 2005.

121. In addition, there was reference made in the Appellant’s submissions to varying sizes of the plastic bags due to the manufacturing process, at that time. The Appellant submits that it *“is aware that at the time of manufacture of the bags in issue in this appeal, the potential for physical variations in specific measurements was very real. The width and thickness of a bag could be radically affected by variations in temperature, atmospheric pressure, or even draughts”*. Nevertheless, the Commissioner heard no expert evidence as to the effects of temperature, atmospheric pressure, or even draughts on a plastic bag. Whilst the Commissioner heard some evidence from the Appellant’s witness in terms of quality control procedures, there was no evidence presented in relation to the quality control of the plastic bags at issue in this appeal. In any event, the Commissioner is satisfied that the onus is on the Appellant to ensure that it is in compliance with legislative requirements.

**(vi) Conclusion**

122. The Appellant suggests that the only thing to be considered is the dimension of the plastic bags. The Commissioner is satisfied that this is not correct and the use of the plastic bag must also be considered, [REDACTED]. The Commissioner is satisfied that there would be no need to differentiate between the different sub-categories in Article 5(a) to (c) as any one bag measuring the multiplied dimensions prescribed, and taking no consideration of the use, would satisfy the legislative conditions for excepted bags, if the Appellant’s argument were to be accepted. Thus, use is relevant. Clearly, plastic bags are different



and the legislation intends plastic bags to be different, in that it is specific as to the height being the vertical with reference to the handles, width being the horizontal with reference to an exclusion of the gusset and depth being the gusset. There can be no ambiguity as to the meaning of height, width and depth and what the intention of the legislative was, in that regard. Moreover, the Commissioner is satisfied that the purpose of the legislation was to reduce as much as possible the presence of discarded plastic bags in the environment.

123. The Commissioner considers that the words in Article 5(a) of the Regulations are plain and their meaning self-evident, capable of interpretation using the literal approach. The principles of statutory interpretation provide that if the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. As can be seen from Article 5(a) to (c), three of the five classes of plastic bags that are excepted from the Levy, are so excepted by reference to specified use and specified dimension. If the bags do not fit within each of these exceptions, the exceptions for permitted use and dimension, then they are not excepted bags and are subject to the Levy. As stated above, on a plain reading of the words in Article 5(a) of the Regulations, there is no requirement that an advanced mathematical equation is undertaken as to volume, but a plain and ordinary calculation as to three measurements of each side of a plastic bag.

124. The Commissioner observes the principle arising from the jurisprudence on statutory interpretation, such that if after the application of the general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words should be construed strictly. The Commissioner is satisfied there is no doubt or ambiguity as to the words in Article 5(a) of the Regulations.

125. The Appellant states that there is no way to recoup the amount at issue now if the Appellant is unsuccessful in its appeal. The Commissioner is satisfied that the Levy is operated in such a way that the liability for the amount of the Levy specified, should always be that of the customer. Nevertheless, it is the case that the direct liability obligation remains on the Appellant to pay the Levy to the Respondent. As the Appellant is no doubt aware, the Commissioner does not have jurisdiction to deal with any arguments relating to unfairness or legitimate expectation. The Commissioner's jurisdiction is limited to considering "the assessment and the charge", as stated by Murray J. at paragraph 64 of the Court of Appeal's decision in *Kenny Lee v Revenue*

*Commissioners* [2021] IECA 18. The Commissioner is confined to considering whether the liability imposed by the Respondent was correct in law, and has no equitable jurisdiction or broader power to consider circumstances not directly pertaining to the imposition of the charge. Had the Appellant placed its orders for plastic bags within the dimension specified in the legislative scheme and conducted its business cautiously and plainly, having regard to the ordinary and natural meaning of the words when reading the legislative scheme, it would not have found itself in ██████████ for over 15 years, in relation to the Levy.

126. The Commissioner is satisfied that the Appellant, ██████████ ██████████ would have been aware of the introduction of the legislative scheme and its requirements. From open source information, the Commissioner observes that the introduction of the Levy in relation to plastic bags was debated throughout the 1990's and that there was a clear awareness of the environmental impact of plastic shopping bags.<sup>31</sup> Further, from open source material, it is clear to the Commissioner that in the design and implementation of the scheme, there was extensive consultation with the main industry representative body and the leading retailers.<sup>32</sup> At the time of the design and implementation of the legislative scheme, the Commissioner is satisfied that the Appellant would have been described as a ██████████ in this jurisdiction and one of only a ██████████ ██████████, thus operating in a different environment than today, where there exists ██████████ European and International food and textile retailers. There was an operational imperative on the Appellant to order the plastic bags in accordance with the legislative requirements. Moreover, what is clear from the open source information is that the Levy was designed to change consumer behaviour, to reduce the presence of plastic bags in the rural landscape and to increase public awareness of littering.

127. The Commissioner notes the Respondent's submission in its outline of Arguments that:

*“For the detailed reasons set out in this Outline of Arguments, the Revenue Commissioners submit that the ██████████ bags are not “excepted bags” within the meaning of Article 5 of the 2001 Regulations. If the Appeal Commissioner agrees with this contention, then it follows, based on Revenue’s revised calculations, and indeed the Appellant’s own*

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<sup>31</sup> [https://www.marlisco.eu/The\\_plastic\\_bag\\_levy.en.html?articles=the-plastic-bag-levy-ireland](https://www.marlisco.eu/The_plastic_bag_levy.en.html?articles=the-plastic-bag-levy-ireland)

<sup>32</sup> [https://www.researchgate.net/publication/5146973\\_The\\_Most\\_Popular\\_Tax\\_in\\_Europe\\_Lessons\\_from\\_the\\_Irish\\_Plastic\\_Bags\\_Levy](https://www.researchgate.net/publication/5146973_The_Most_Popular_Tax_in_Europe_Lessons_from_the_Irish_Plastic_Bags_Levy)

*written outline of arguments, that the amount of the E-levy due is €8,535,638 and that the assessments should be confirmed at the reduced figure of €8,535,638”.*<sup>33</sup>

128. Accordingly, having carefully considered all of the evidence, case law and legal submissions advanced by Counsel for both parties, in addition to the written submissions of the parties including, both parties Statement of Case and Outline of Arguments, the Commissioner has taken her decision on the basis of clear and convincing evidence and submissions in this appeal. The Commissioner determines that the plastic bags at issue are **not excepted bags** within the meaning of Article 5 of the Regulations, as each of the plastic bags at issue exceed the maximum width (225mm) requirement in Article 5(a) of the Regulations, as set out in the table at paragraph 43 of this determination. Consequently, the Commissioner is satisfied that the Notices of Assessment dated 12 November 2009, in the agreed sum of **€8,535,638** shall stand.

**(vii) Burden of Proof**

129. For the sake of completeness, the Commissioner notes that the Appellant submits that it is incorrect to suggest that the burden is on the Appellant to prove that its interpretation of Article 5(a) of the Regulations is correct. The Appellant states that “*the task of statutory interpretation is not weighted against the Appellant; to the contrary, the presumption against doubtful penalisation operates to ensure that a charge to tax (including one that is part-defined by an exception or exemption) is not levied unless the words used are sufficiently clear*”<sup>34</sup>. The Commissioner, in reaching her determination, has considered **both arguments** in relation to the interpretation of Article 5(a) of the Regulations and has **applied the well-established rules of statutory interpretation** in coming to her conclusion. The Commissioner does not consider that the burden lies on the Appellant in terms of statutory interpretation, but that the burden lies on the Appellant to show that the tax is not payable.

**Determination**

130. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in its appeal and has not succeeded in showing that the tax is not payable. Therefore, the Notices of Assessment dated **12 November 2009** in the agreed amended sum of **€8,535,638** shall **stand**.

131. The Commissioner is charged with ensuring that the Appellant pays the correct tax and duties. The Commissioner is satisfied that she has done so and has reviewed all of the

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<sup>33</sup> Outline of arguments on behalf of the Respondent, page 28

<sup>34</sup> Outline of Argument of the Appellant, page 10

evidence, legal submissions, in addition to the written submissions of the parties and statutory interpretations in coming to this determination.

132. This appeal is hereby determined in accordance with Part 40A TCA 1997 and in particular, section 949 thereof. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.



Claire Millrine  
Appeal Commissioner  
6 September 2023

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.

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## Appendix A

TAX APPEALS COMMISSION

[REDACTED]

BETWEEN

[REDACTED]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

STATEMENT OF FACTS AND ISSUES

A. FACTS ON WHICH THE PARTIES AGREE

[REDACTED]

1. The assessments to the environmental levy (the "Levy") were each made on 12 November 2009 (the "2009 Assessments").

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

5. [REDACTED]

### The amount(s) of the Levy remaining in issue

6. By letters dated 30 November 2021 from Revenue to [REDACTED] and to the Tax Appeals Commission, enclosing Revenue's Outline of Arguments, Revenue indicated that the total amount of the Levy at issue was now €8,535,638 (previously, €36,573,727). The relevant information is set out in the table below.

Date of Notice of Assessment	Accounting period	Levy claimed to be due per Revenue calculations	Levy already paid by [REDACTED]	Balance claimed to be due
12 November 2009	1 July 2004 to 30 June 2005	€7,659,772	€3,012,434	€4,647,338
12 November 2009	1 July 2005 to 30 June 2006	€7,266,342	€3,378,042	€3,888,300
12 November 2009	1 July 2006 to 30 June 2007	€3,701,451	€3,701,451	€0
12 November 2009	1 July 2007 to 30 June 2008	€5,219,689	€5,219,689	€0
			<b>Total:</b>	<b>€8,535,638</b>

7. The amounts claimed in the 2009 Notices of Assessment relate to different types of [REDACTED] bags", each with a different code. [REDACTED] bags" which are commonly referred to as "bag-on-roll" or "flimsy" bags and are the plastic bags (often without handles) that are generally made available to customers at appropriate points throughout a supermarket for food hygiene and safety purposes to contain products such as fish, meat, poultry, and fruit and vegetables.



8. The codes and quantities of [REDACTED] bags that remain in issue are as follows:

Bag code	Quantity of bags after agreed deductions on which Levy is claimed by Revenue	Quantity of bags no longer being pursued by Revenue	Quantity of bags remaining at issue in the appeal
[REDACTED]	[REDACTED]	1	[REDACTED]
[REDACTED]	[REDACTED]	1	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	1
[REDACTED]	[REDACTED]	1	[REDACTED]
[REDACTED]	[REDACTED]	1	[REDACTED]
[REDACTED]	[REDACTED]	1	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	1
Total:	83,961,800	27,057,550	56,904,250
Levy claimed by Revenue (@15c per bag)	<b>€12,594,270</b>	<b>€4,058,632</b>	<b>€8,535,638</b>

9. For the avoidance of doubt, the agreement above in relation to the codes and quantities of bags remaining in issue is strictly without prejudice to [REDACTED] contention that all of the bags remaining in issue are “excepted bags” within the meaning of Article 5 of the Regulations.

10. Neither the Appellant nor Revenue has samples of any of the plastic bags at issue.

(a) Pursuant to the directions made by the Appeal Commissioner on 17 June 2022 on consent of the parties, Revenue wrote to the Department of the Environment, Climate and Communications (the “Department”) by letter dated 22 June 2022 seeking confirmation as to whether the Department had a sample of the [REDACTED] plastic bags or any plastic bags and if so, requesting that the samples be provided to Revenue as soon as possible. By letter dated 18 July 2022, the Department confirmed that it has been unable to locate any samples of the [REDACTED] plastic bags at issue in the appeal, or any other such plastic bags.

(b) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

**B. ISSUE ON WHICH THE PARTIES DISAGREE**

11. The parties disagree on the proper interpretation of the Regulations, including the interpretation of Article 5 of the Regulations and the dimensions set out therein, and, therefore, that any amounts are due in respect of the Levy on the plastic bags that remain in issue.
12. ██████████ contends that the plastic bags that remain in issue are “excepted bags” within the meaning of Article 5 of the Regulations and that no amounts are therefore due in respect of the Levy in respect of those plastic bags.
13. Revenue contends that the plastic bags that remain in issue are not “excepted bags” within the meaning of Article 5 of the Regulations and that the amounts set out in the 2009 Notices of Assessment, as reduced by Revenue pursuant to its letters and Outline of Arguments dated 30 November 2021, are due in respect of the Levy in respect of those plastic bags.
14. The proper interpretation of the Regulations is a matter for legal submission.

**MASON HAYES & CURRAN LLP**  
**THE REVENUE SOLICITOR**  
**13 March 2023**