172TACD2020

Between/

[NAME REDACTED]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Introduction

1. This appeal is against an Amended Assessment for the year ending 31 December 2011, issued by the Respondent on 29 December 2016. The core issue in the appeal is whether the grant by Kerry Co-operative Creameries Limited (hereinafter referred to as **"Kerry Co-op"**) to the Appellant of a right to subscribe for shares in Kerry Co-op and/or the exercise of that right by the Appellant gave rise to a liability to income tax on the part of the Appellant.

B. Facts relevant to the Appeal

2. An agreed Statement of Facts was prepared by the parties and submitted to the Tax Appeals Commission in advance of the hearing. It is appropriate at this juncture to put on record the Commission's acknowledgment and appreciation of the co-operative, pragmatic and efficient manner in which both parties and their respective advisors prepared for and conducted the appeal.

3. The facts agreed by the parties were that at all material times the Appellant owned and ran a dairy farm in **[ADDRESS REDACTED]** and traded as a dairy farmer. He was a member of Kerry Co-op and held **[NUMBER OF SHARES REDACTED]** Ordinary Shares in Kerry Co-op as at 31 March 2011.

4. In the Milk Quota Year 1 April 2010 to 31 March 2011, the Appellant supplied **[AMOUNT REDACTED]** litres of milk to Kerry Creameries Ltd, a company nominated by the Board of Kerry Co-op as a nominated purchaser of raw milk from its members. There was no written contract for this supply. Kerry Creameries Ltd is and was a subsidiary of Kerry Group plc. On 1 April 2010 Kerry Co-op held 23.82% of the ordinary share capital of Kerry Group plc, a publicly listed company, but this holding was reduced to 22.83% on 14 March 2011 by the sale of 1.5 million shares.

5. For the milk supplied by the Appellant, the gross amount due to him from Kerry Creameries Ltd was €**[AMOUNT REDACTED]** in the Milk Quota year 2010/11. This was calculated on a total of **[AMOUNT REDACTED]** litres (before butterfat adjustment) supplied by the Appellant in the Milk Quota year 2010/11 to Kerry Creameries Ltd. The price per litre received in each month in the Milk Quota year 2010/11 by the Appellant for his milk was based on a €/Kg Protein and €/Kg Butterfat price. The Kg prices were calculated from the maximum attainable price per litre quoted by Kerry Creameries Ltd at standard constituents of 3.3% Protein and 3.6% Butterfat which included a temperature bonus and a VAT Credit. Milk supplied was subject to any quality penalties and applicable levies. In the Milk Quota year 2010/11, the Appellant received the following net price per litre of milk supplied to Kerry Creameries Ltd:-

Month	**Net Milk Value (cent per litre)**
April 2010	27.92
May 2010	31.33
June 2010	30.28
July 2010	31.09

August 2010	33.05
February 2011	38.24
March 2011	35.13

6. The average attainable monthly milk price paid by Kerry Creameries Ltd in the Milk Quota year 2010/11 was published each month in the Creamery League in the Irish Farmers' Journal. The milk price published each month is based on a return submitted by Kerry Creameries Ltd to the Irish Farmers' Journal. This publication includes a comparison of the price paid by Kerry Creameries Ltd compared to other Co-ops based on a standard 3.6% butterfat and 3.3% protein content to ensure there is a "like for like" comparison of milk prices between Co-ops. A summary of the "like for like" milk prices between co-ops from the monthly Creamery League from the Irish Farmer's Journal for the Milk Year 2010/11 was appended to the agreed Statement of Facts, and this showed that the monthly milk prices paid by Kerry Creameries Ltd were generally in line with those paid by other creameries.

7. Under the Rules of Kerry Co-op, the Appellant, as a milk supplier, had a right to be invited to subscribe at par for one Patronage Share in Kerry Co-op for every 4,546.09 litres of raw milk supplied by him (ignoring quantities supplied exceeding his quota) in the Milk Quota Year 2010/11 to Kerry Creameries Ltd. On this basis, the Appellant subscribed for **[NUMBER OF SHARES REDACTED]** Patronage Shares for which he paid €**[AMOUNT PAID REDACTED]** bringing his total holding of Shares in Kerry Co-op to **[NUMBER OF SHARES REDACTED]** shares.

8. By Notice of Assessment dated 20 November 2012 for the year which ended on 31 December 2011, the Appellant was assessed to income tax on, *inter alia*, the declared profits of his trade as a dairy farmer and he paid that income tax.

9. By a letter to the Appellant dated 18 November 2016, the Revenue District Manager for Kerry claimed that the market value of the Patronage Shares for which the Appellant had subscribed in 2011 needed to be included in the Appellant's accounts as additional trading income subject to income tax, USC and PRSI. Accordingly, a Notice of Amended

Assessment for the year which ended on 31 December 2011 was issued on 29 December 2016. That assessment claimed an additional sum payable to the Collector General of €2,001.64.

10. By Notice of Appeal dated 27 January 2017 the Appellant appealed that assessment.

11. Kerry Co-op is a registered industrial and provident society whose registered office is and was at all material times, at Princes Street, Tralee, Co. Kerry. The Rules of Kerry Co-op in force at all material times were those dated 14 June 2007.

12. The principal object of Kerry Co-op is to *"develop and improve the industry of agriculture in Ireland by the introduction of the most approved methods including manufacture and sale of butter, cheese and other milk and farm products"* (*per* Rule 4(a)). The basis of membership for members having a milk quota under the Milk Quota Regulations (*i.e.*, the European Communities (Milk Quota) Regulations 2008 SI227/2008) and having milk to sell was to sell milk within their quota to Kerry Co-op or to a nominated purchaser at the current price fixed by Kerry Co-op or the nominated purchaser as the case may be from time to time (*per* Rule 69). The activities of Kerry Co-op at the relevant time (2010/2011) are described in the accounts of Kerry Co-op as "*investing in other companies*" and the majority of its income and expenditure in that period was derived from same (*per* its Report and Financial Statements for the year ended 31 December 2011).

13. All members of Kerry Co-op held one or more shares but could not hold shares in excess of a nominal value of more than €125,000 (*per* Rule 5). There were three categories of shares, namely A Ordinary Shares of €1.25 each, B Ordinary Shares of €1.25 each and C Ordinary Shares of €1.25 each (*per* Rule 9.A).

14. All shares ranked *pari passu* save that the B Ordinary Shares did not entitle their holders to be nominated for any election of Kerry Co-op or to vote at any meeting convened to consider any amalgamation, sale or liquidation or on any proposal to amend the object dealing with investment (*per* Rule9.B(i)(a)) and the C Ordinary Shares did not entitle their holders to nominate any Member or to be themselves nominated for any election to any committee or sub-committee or the Board or to requisition any meeting of the Society or

any committee or subcommittee or to attend and vote at any general meeting of the Society (*per* Rule 9.B(i)(b)).

15. The A Ordinary Shares could only be allotted, issued, transferred or transmitted to and be held by persons who were milk suppliers (*per* Rule 9.C(i)). Where a holder of A shares ceased to be eligible to hold them, the Board was required to convert those shares into B Ordinary Shares (*per* Rules 9.C(ii) and 9.C(iii)) or C Ordinary Shares (*per* Rule 9.C(v)) as the case might be. As a consequence, if a milk supplier sold, say, 100 A shares to a non-farmer/milk supplier, they would be converted to B or C Ordinary shares as the case might be.

16. The power of the Board to issue Patronage Shares was contained in Rule 9.C(vii) of the Rules of Kerry Co-op, which provides:-

> *"The Board shall, in every year within six months of the relevant Milk Quota Year, up to and including the Milk Quota Year ending 31st March 2013, invite any milk supplier who has in the immediately preceding Milk Quota Year supplied his Raw Milk or such lessor* [sic] *portion thereof as the Board shall determine to the Society or a Nominated Purchaser to subscribe at par for Patronage Shares. The number of Patronage Shares which each such Milk Supplier shall be invited to subscribe shall be one Patronage Share for every 4,546.09 litres of Raw Milk supplied by him in each such Milk Quota Year to the Society or a Nominated Purchaser. Only Raw Milk supplied which does not exceed each such Milk Supplier's quota inclusive of leased milk quota under the Milk Quota Regulations will be taken into account in computing each such Milk Supplier's entitlement to subscribe for Patronage Shares so however that a Milk Supplier who fails in respect of any Milk Quota Year to supply his Raw Milk to the Society or to a Nominated Purchaser or, transfers leases or otherwise alienates his milk quota to another person who does not or did not supply Raw Milk to the Society or Nominated Purchaser in any relevant Milk Quota year shall not, save with the written approval of the Board whose decisions shall be final and binding, be entitled to subscribe for Patronage Shares. The particular class of share which a Milk Supplier shall be entitled to receive upon him accepting an offer to subscribe for Patronage Shares shall be determined by the Board in accordance with the Rules governing the eligibility of persons to hold the different classes of*

Shares. Any invitation to subscribe for Patronage Shares given by the Board pursuant to this clause shall lapse unless the Shares described in the invitation are accepted and paid for within three months of the date of the invitation. An invitation to subscribe for Patronage Shares shall be personal to the Milk Supplier and shall not be capable of assignment to any third party except in the course of administration of any such milk supplier's estate."

17. The issue of Patronage Shares was first permitted under Kerry Co-op Rules introduced in 1997, which permitted their issue from 2000 until 2008. By a change to the Rules in 2006, Patronage Shares were to be issued up to and including the Milk Quota year which ended on 31 March 2013.

18. As at 31 March 2011, the shares in Kerry Co-op that had been issued were as follows:-

A Ordinary Shares:	2,677,411 held by 4,444 members
B Ordinary Shares:	1,303,091 held by 3,192 members
C Ordinary Shares:	1,843,436 held by 4,908 members.

19. The total number of Patronage Shares issued by Kerry Co-op in relation to the Milk Quota Year which ended on 31 March 2011 was 192,647. Other than Patronage Shares, no other shares were issued by Kerry Co-op between 31 March 2011 and the issue of 192,647 Patronage Shares.

20. [NAME OF APPELLANT REDACTED] received from Kerry Co-op a "Patronage Shares Statement" dated 18 May 2011 in respect of the year ended 31 March 2011. This showed that he had supplied **[AMOUNT OF MILK REDACTED]** qualifying gallons of milk in the Milk Quota Year which ended on 31 March 2011 and was entitled to **[NUMBER OF SHARES REDACTED]** shares at a cost of €**[COST OF SHARES REDACTED]** and stated:-

"Set out below is your Patronage Shares Statement, which shows the number of Patronage Shares earned based on the milk (butterfat adjusted) within quota supplied by you for the milk year outlined above. The Board has allocated to you the number of Patronage Shares set out in Box A on the statement. The cost of your shares at €1.25 per share (shown in Box B below) will be debited to your milk account in May and NO FURTHER PAYMENT is required. Your Patronage Shares

have been allocated to your Share Account and a share certificate in respect of these shares is attached. This should be retained safely. If you do NOT wish to take up the Patronage Shares allocated, you should return the attached Share Certificate to: The Secretary, Kerry Co-operative Creameries Ltd, Princes Street, Tralee, Co. Kerry to arrive not later than 25th May 2011 otherwise you will be assumed to have accepted the Patronage Shares allocated to you. All queries in relation to this letter and the attached Share Certificate should be made to your local or regional manager."

21. The sum of €**[COST OF SHARES REDACTED]**, being the cost of the Patronage Shares, was debited to the Appellant's milk account with Kerry Creameries Ltd in April 2011. The net milk value attributed to the Appellant in April 2011 as set out in his milk statement was €**[AMOUNT A]**. The electronic payment made to the Appellant in respect of April 2011 was €**[AMOUNT A, MINUS THE COST OF THE SHARES]**. The amount brought into account from April 2011 in computing the Appellant's income tax liability for the period in question was €**[AMOUNT A]**. No deduction was taken for the amount of €**[COST OF SHARES REDACTED]**, being the cost of the patronage shares, in the income tax computation of the Appellant for the period in question.

22. Kerry Creameries Ltd. transferred this payment of €**[COST OF SHARES REDACTED]** together with all other subscription payments for the 192,647 Patronage Shares issued in 2011 to Kerry Co-op.

C. Grounds of Appeal

23. The grounds of appeal originally advanced by the Appellant in the Notice of Appeal submitted on his behalf on 27 January 2017 were as follows:-

(a) Neither the receipt of the invitation to subscribe for Patronage Shares nor the acquisition of the Patronage Shares by the Appellant at par was income of the Appellant and specifically not income of the Appellant's trade of supplying raw milk to Kerry Creameries Ltd within the charge to income tax under Case I of Schedule D.

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

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

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

(e) The Amended Assessment is out of time.

(f) The Appellant has, by reason of the Amended Assessment, been overcharged and the Amended Assessment should be reduced to nil accordingly or otherwise appropriately adjusted.

(g) Income has been incorrectly allocated between the Appellant and his wife.

D. Case Management Conference and Netting of Issues

24. At a Case Management Conference held in relation to the instant appeal and a number of other appeals relating to the issue of Patronage Shares by Kerry Co-op, I directed that the instant appeal should be the lead appeal in that group of appeals and would be the first to be heard and determined.

25. At the suggestion and with the agreement of the parties, I further indicated that I would in the first instance hear and determine what was described as the core issue in this appeal, namely:-

> ***"Whether the receipt by the Appellant of Patronage Shares for which he subscribed was a receipt of his trade as a milk supplier, and thus within the charge to income tax, or was instead a capital receipt and outside the charge to income tax."***

26. I further directed that any hearing and determination in relation to the other issues arising in the appeal (namely those issues identified in paragraphs 23(b), 23(d), 23(e) and 23(g) *supra*) would be stayed pursuant to section 949E(2) of the Taxes Consolidation Act 1997 as amended (hereinafter **"TCA 1997"**) until the core issue had been heard and determined, subject to the right of the parties to have the stay set aside, abridged or extended.

E. Legislation

27. The relevant provisions of the tax code which are applicable in the instant appeal can be set forth very briefly. Section 18(2) of the Taxes Consolidation Act, 1997, as amended, provides:-

> *Tax under Schedule D shall be charged under the following Cases:*
> *Case I – Tax in respect of –*
> *(a) Any trade…*

28. Section 65(1) of that Act provides that:-

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

F. Submissions of the Appellant

29. Counsel for the Appellant said that the nub of his case was that the receipt of the Patronage Shares for which the Appellant had subscribed was a capital receipt, and not a receipt in the course of his trade. The charge to income tax in respect of trading income arises under Case I of Schedule D. The charge is "*in respect of any trade*" (*per* section 18(2) of TCA 1997) and "*on the full amount of the profits or gains in the year of assessment*" (*per* section 65(1) of TCA 1997). He submitted that in order for the profits or gains to arise or accrue from a trade, they must be earned out of it as being their source, citing in support the decision of Hanna J in ***Robinson –v- Dolan*** **[1935] IR 509**. What is taxable is the result of the activity.

30. The initial letter from the Respondent dated 18 November 2016 stated:-

> *"As these shares are received by you as a result of being a Kerry Co-op milk supplier and are issued in proportion to the quantity of milk supplied by you, it is Revenue's position that they need to be included in your accounts as additional trading income subject to income tax, USC and PRSI at the appropriate rates, based on their market value when received and not par value."*

31. The letter attributed an estimated market value of €65.00 per Patronage Share in 2011.

32. Counsel for the Appellant pointed out that the summary of the "like for like" milk prices between Co-ops from the Irish Farmer's Journal showed that the average price paid by Kerry Creameries Ltd differed very little from the price paid by competing creameries, with the difference generally being less than 1 cent per litre. The fact that the Appellant had achieved payments higher than the average level was attributable to the fact that his milk was of higher quality than average. It was submitted on behalf of the Appellant that these figures demonstrated that the Appellant had been paid full price for his milk.

33. Counsel for the Appellant then highlighted that Kerry Co-op is a registered industrial and provident society and was therefore subject to the provisions of the Industrial and Provident Societies Act 1893. Section 22 of that Act provides that:-

> *"The rules of a registered society shall bind that society and all members thereof and all persons claiming through them respectively to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules a covenant on the part of such member, his heirs, executors, administrators, and assigns, to conform thereto, subject to the provisions of this Act: Provided that a society registered at the time when this Act comes into operation, or the members thereof, may respectively exercise any power given by this Act, and not made to depend on the provisions of its rules, notwithstanding any provision contained in any rule thereof registered before this Act was passed."*

34. It was submitted that the effect of this section was to give the rules of an industrial and provident society the same status and effect as the articles of association of a company, and meant that the rules of the society had the status of a contract between the members *inter se* and between the society and its members.

35. Counsel for the Appellant then turned to the Rules of Kerry Co-op and highlighted the provisions dealing with the definitions in Rule 1(k) to 1(p) inclusive of Members, Milk Quota Regulations, Milk Quota Year, Milk Supplier, Nominated Purchaser and Raw Milk.

36. He then turned to the three different classes of shares in Kerry Co-op detailed in Rule 9.A and pointed out that Rule 9.C(i) provided that A Ordinary Shares could only be allotted, issued, transferred or transmitted to and held by persons who are Milk Suppliers. Milk Suppliers who ceased to supply milk had their shares converted to a different class; initially to B Ordinary Shares and then, if there was no return to supplying milk, to C Ordinary Shares.

37. He further pointed out that Rule 13 provided that:-

> *"Subject to the provisions of Rule 9 Shares shall be transferable as hereinafter mentioned. A Member may, with the prior consent of the Board, transfer any Shares to any person, society or company upon giving not less than one calendar month's notice in writing to the Secretary. The instrument of transfer shall be in writing and shall be in Form I in the Appendix or in such other form as the Board may approve. In no case shall the consideration of a transfer of Shares exceed the amount standing to the credit of such Shares in the Society's books.*
>
> *The Board may in its sole and absolute discretion refuse to sanction any transfer of Shares and the Board shall not be bound to assign any reason for so refusing. The decision of the Board shall be final and conclusive.*
>
> *No share shall be withdrawable. The Shares referred to in Rule 8 are non-withdrawable but may be repaid to a Member, at the discretion of the Board only in the special circumstances outlined in that Rule.*

The Board may from time to time and for such period as it thinks fit close the Register."

38. Counsel for the Appellant then turned to the wording of Rule 9.C(vii), which is quoted in full at paragraph 16 *supra*. He submitted that what was conferred on a Milk Supplier was a right to subscribe for shares in particular circumstances. This was a mandatory, contractual right and the Board of the Co-op had a very limited discretion which was confined to the question of when, within the 6-month period following each Milk Quota Year, to issue the subscription invitation to Milk Suppliers.

39. He submitted that the contractual right to subscribe for one Patronage Share for each 4,546.09 litres of raw milk supplied was personal to each Milk Supplier and it was not capable of assignment (save as part of the administration of a deceased Milk Supplier's estate).

40. He further argued that it was of significance that the right to subscribe for Patronage Shares would lapse if the Patronage Shares were not accepted and paid for within three months of the date of the invitation.

41. Counsel for the Appellant also pointed out that what each qualifying Milk Supplier received was an opportunity under the Rules to increase his or her shareholding in the Co-op at par value. He argued that a significant feature of the right was that once the right had crystallised, it did not involve any passing of value, either from Kerry Co-op or from anyone else; the right was simply an incident of the farmer's membership of the Co-op as a supplier of milk. He further emphasised that a qualifying Milk Supplier could if necessary compel the provision of an invitation to subscribe but that if he did not accept the invitation to subscribe at par within the three-month window, the invitation would lapse. This, coupled with the fact that the invitation to subscribe could not be assigned, was the foundation for the Appellant's argument that the invitation to subscribe for Patronage Shares was actually of no value, and was a purely personal right.

42. Counsel for the Appellant then turned to the Patronage Share Statement which had been received by the Appellant in respect of the year under appeal. The Statement, which was dated 18 May 2011, read as follows:-

"Dear Milk Supplier

***Patronage Shares: Milk Year Ended** 31st March 2011*

Set out below is your Patronage Shares Statement, which shows the number of Patronage Shares earned, based on the milk (butterfat adjusted) within quota supplied by you for the milk year outlined above.

The Board has allocated to you the number of Patronage Shares set out in Box A on the statement. The cost of your shares, at €1.25 per share (shown in Box B below) ***will be debited to your Milk Account in May and NO FURTHER PAYMENT is required****. Your Patronage Shares have been allocated to your Share Account and a share certificate in respect of these shares is attached.* ***This should be retained safely.***

If you do ***NOT*** *WISH TO TAKE UP THE Patronage Shares allocated, you should return the attached Share Certificate to:* ***The Secretary, Kerry Co-operative Creameries Ltd., Princes Street, Tralee, Co. Kerry to arrive not later than*** *25th May 2011 otherwise you will be assumed to have accepted the Patronage Shares allocated to you.*

All queries in relation to this letter and the attached Share Certificate should be made to your local or regional manager.

Yours faithfully,

_____

Brian Durran

PATRONAGE SHARES STATEMENT

MILK QUOTA YEAR	*GALLONS SUPPLIED (BUTTERFAT ADJUSTED)*	*QUOTA GALLONS*	*QUALIFYING GALLONS*
2010/11	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**
		PATRONAGE SHARES BOX A	***[*REDACTED]**
		(Qualifying Gallons ÷ 1000)	
		AMOUNT TO BE DEBITED TO YOUR MILK ACCOUNT BOX B	
		(Patronage Shares x €1.25)	**[REDACTED]**"

43. Counsel for the Appellant accepted that the Patronage Shares Statement presented a somewhat different sequence of events to that envisaged by the Rules of the Co-op but submitted that this was simply because the Co-op had decided to satisfy its obligations by dealing with the allocation of Patronage Shares in the manner recorded in the Statement. He argued that the object of the Rules dealing with Patronage Shares was to give the Appellant and other Milk Suppliers the opportunity to increase their shareholdings in the Co-op, and the method chosen by the Co-op achieved this end.

44. He also pointed out that the cost of the Patronage Shares was debited to the Appellant's April Milk Statement from Kerry Creameries Limited and was then transferred to Kerry Co-op. The cost of the Patronage Shares was added back to the Appellant's income for the purpose of calculating his income tax liability.

45. Counsel for the Appellant then moved on to the relevant legislation and stated that the basis of the charge to income tax in respect of any trade, including the Appellant's trade as a dairy farmer supplying milk, is found in section 18(2) and section 65(1) of TCA 1997, as outlined above.

46. He submitted that, on a first principles basis, the profits of a trade must be earned out of the trade as their source. In support of this proposition, he cited the decision of the High Court in ***Robinson –v- Dolan*** **[1935] IR 509**. That case concerned a trader who received an *ex gratia* payment of £14,000 from the Irish Grants Committee because he had, on

account of his support for the British government in the period prior to July 1921, suffered hardship and loss when his business was boycotted and his goods looted between 1921 and 1923. The sum received was stated to have been assessed primarily on the grounds of hardship, with regard also to the amount required to re-establish Mr. Robinson's business. The High Court, reversing the decision of the Special Commissioners, held that the grant was not a profit of Mr. Robinson's trade, even though he had suffered an actual trading loss and relied upon that loss when applying to the Irish Grants Committee for compensation.

47. Hanna J, giving one of the decisions of the High Court, noted that the charging provision under consideration provided that "*Tax under this Schedule shall be charged in respect of … the annual profits or gains arising or accruing … to any person residing in Saorstat Eireann from any trade*", and went on to say:-

> *"One would think there was no mystery about any of the terms used in that rule. It has been said more than once that the language of the taxing statutes and rules has to be given its plain meaning as ordinary language and that hair splitting, refinement or ingenuity in the interpretation of the words is to be avoided. No argument has been addressed on the effect in this case of the word "*annual*", so I pass it by. The question is whether these two sums of money, amounting to £14,000, being money received by a taxpayer from the British government as gratuitous compensation for special hardship or loss suffered by him in consequence of support of the British government, are profits or gains arising or accruing from his trade. In the case of* Arthur Guinness Son & Co Ltd v Commissioners of Inland Revenue *1 ITC 1, the amount of profit made on the compulsory sale of the barley was admitted to be a profit, but the question was whether it was a trade profit. The decision of the King's Bench Division was reversed by the Court of Appeal, but the word "*trade*" was given the same interpretation in both courts. In the King's Bench Division, Moloney L C J, in giving judgment at page 190, cites the judgment of Chief Baron Palles in* Mullingar RDC v Rowles *6 TC 85, [1913] 2 IR 44, where he says "*the essence of trade in this sense is buying and selling*". Then, at page 191, the Lord Chief Justice expresses his own view:*

> "Annual profits may I think, be defined as the amount of gain made by a business in the year and are to be ascertained for the purposes of assessment by setting against the income earned the cost of earning it."

He then cites the definition given by Lord Buckmaster (Lord Chancellor) in the case of the Glenboig Union Fire Clay Co Ltd v Commissioners of Inland Revenue *12 TC 427, [1922] Sess Cas p 112) where the learned Lord Chancellor said:*

> "It therefore only remains to consider whether the sum of £15,316 was properly included as a profit in the appellant's balance sheet for the year ending 31 August 1913. The argument in support of its inclusion can only be well founded if the sum be regarded as profits or a sum in the nature of profits earned in the course of their trade or business."

*The Lord Chief Justice then accepts these two expressions, but applies them adversely to Messrs Guinness. Dodd J, agreed with the conclusion of the Lord Chief Justice, and takes the illustration of a tradesman selling goods over the counter and then says "*each sale results in a profit or a loss*". The net profits are ascertained in his annual stocktaking .... "*profits are the reward of capital as wages are the reward of labour*".*

On appeal the court held that the sale of the barley was not a sale by Messrs. Guinness in the course of their trade or business and reversed the decision of the King's Bench Division. At page 202 O'Connor (Master of the Rolls) says:

> "In effect the government said to appellants, "No doubt you have purchased this barley for the purpose of your trade, but you shall not trade with it", and the appellants were bound to submit. Surely that was not in the course of their trade or business. Nor could it be, because, so far from trading in their barley, they were warned under penalties not to do so. Looking at the transaction in this way, which seems to be the only true way, I fail to see how any subsequent dealing in the barley in question could have produced a profit in the trade or business of the appellants. The barley had in fact been subtracted from their stock in trade the moment the request was made."

Ronan L J, at page 206, says:

> "Let us take the words "from any trade". What does "trade" mean? Speaking generally, trade or rather traders may be divided into two classes, distributors and manufacturers. The distributor buys, and he subsequently sells. The excess of the selling over the buying price, minus the cost of carrying the article is the profit, and the profit is derived from the seller's act of selling."

At page 207 he says:

> "If a person, be he distributor or manufacturer, purchases an article and it is taken from him in the case of the manufacturer, before he manufactures it into the finished product, or in the case of the distributor before he sells it, the trading is stopped. Profit, the part of Hamlet, is out of it. What makes profit is the subsequent sale by him, and when that is taken from him it entirely or *pro tanto* stops the trading and prevents any profit being made."

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

In Wing's Case *1 ITC 170, reported in [1927] IR 84, which was under Sch D rule 1, we are given further help as to the meaning to be attributed to the words "*arising or accruing from*". The Chief Justice, at page 102, in distinguishing between a mere present and a profit, said:*

> "Now the sum in question was either a profit of Mr Wing's vocation or it was a mere gift or present, not a subject matter of taxation. By "*a mere*

present" I mean something given without consideration, something not earned by professional services, something not paid for on Mr Wing's part by professional work,"

and on page 103 he says:

"I am therefore of the opinion that the sum of £400 in question in this case was not paid to or received by Mr Wing as a pure gift or present, but that it was given to him for, that is to say, in consideration of, professional work done and vocational services rendered."

Fitzgibbon J, at page 112, said:

"I do not decide that every reward given to a jockey, even though his being a jockey affords him an opportunity of winning it, must be treated as an earning of his vocation. To make it liable to taxation he must, in my opinion, earn it by the exercise of his vocation by riding a horse in a race."

It seems therefore clear to me on these opinions that profits or gains to arise to or accrue from a trade must be earned out of it as being their source. This goes much deeper than being a mere method of calculation as a basis of computation. Applying the principles above referred to, it seems to me that we come to the legal bedrock of this case when we ask and answer what seems a simple question: "were these two sums of money, making £14,000 earned by the appellant in the exercise of his trade of buying and selling as a general merchant? One would think that the facts obviously answer this question in the negative."

48. Counsel for the Appellant further relied upon the decision of O'Byrne J in the ***Robinson*** case who stated:-

The main facts of this case are very simple and are not in controversy. It is not suggested that the grant was not properly made (or recommended) by the Irish Grants Committee, and, accordingly, I must assume that that committee acted within the scope of its authority and that the grant was made in accordance with and in pursuance of the terms of reference. The qualifications for such a grant (as found by the committee) must have been that the appellant had been carrying on business in the area of the Irish Free State, that he had supported His Majesty's government prior to 11 July 1921, and that, on account of such support, he had suffered special hardship and loss. It seems to me that the real object of the grant

*was to alleviate the hardship and loss which the appellant had sustained by reason of his support of His Majesty's government. It is true that the extent of that hardship and loss was measured by the extent of his loss as a trader. That seems to me to be the only way in which his trade enters into the matter. If the same acts had been committed and had resulted, not in a loss of profits but in mental perturbation and distress on the part of the appellant, I see no reason why a grant should not have been made to him, though no doubt a different criterion would have had to be applied for the purpose of ascertaining the extent of his hardship. In such an event it could hardly be contended that the grant should be taken into account for the purpose of the Income Tax Acts. When the Special Commissioners state that the payment was made "*for the purposes of the appellant's trade*", it seems to me that they can merely mean that the particular hardship and loss which the appellant suffered was a loss in his trade and that it was that particular hardship and loss which qualified him for a grant. If it was intended to convey that the grant was made to him for the purposes of his trade in the sense that it was to be applied by him for that purpose there seems to have been no evidence before the Commissioners which would justify them in so holding.*

…

*In the present case it may be that the appellant's trade gave the appellant an opportunity of qualifying for a grant, but I do not think the matter can be pushed any further. The appellant's trade consisted in buying and selling as a wholesale and retail merchant, and his profits arose from the proceeds of the sales over and above the cost of purchase and the other costs and expenses of the business, and I am of opinion that the grant received by him from the British government, following on the recommendation of the Irish Grants Committee, can in no real sense be said to be a "*profit or gain*" of his trade within the meaning of the Income Tax Act or "*an income or revenue receipt of his trade*", to use the words of the Special Commissioners in the case stated.*

For these reasons I am of opinion that no portion of the said grant should be treated as an income or revenue receipt of appellant's trade for the purpose of the Income

Tax Act and that the question submitted to us by the Special Commissioners should be answered accordingly."

49. It was argued by Counsel for the Appellant that what the Appellant received, in accordance with his legal entitlement under the Rules of the Co-op, was the personal and unassignable right to subscribe for Patronage Shares, and not the Patronage Shares themselves.

50. It was further submitted that the Appellant received this right to subscribe as a right of membership of the Co-op, and not as a trading receipt. His trading record gave him the opportunity of exercising that right but it did not of itself confer the right. It was argued that neither the right to subscribe nor the subscription for the Patronage Shares were for the purposes of the Appellant's trade, in the sense of being income of the trade or payment for the milk supplied by the Appellant. It was argued for the Appellant that his exercise of the right to subscribe was a decision to make a capital investment in a corporate body, and not a trading decision, and the receipt of the Patronage Shares was a capital receipt and not the receipt of income.

51. Counsel for the Appellant cited the decision of in ***Chibbett –v- Joseph Robinson & Sons* (1924) 9 TC 48**, which concerned the voluntary payment of compensation to a firm of ship managers for their removal from that role. Rowlatt J stated:-

"I think everyone is agreed, and has been agreed for a long time, that in cases of this kind the circumstance that the payment in question is a voluntary one does not matter. As Sir Richard Henn Collins said, you must not look at the point of view of the person who pays and see whether he is compellable to pay or not; you have to look at the point of view of the person who receives, to see whether he receives it in respect of his services, if it is a question of an office, and in respect of his trade, if it is a question of trade, and so on. You have to look at his point of view to see whether he receives it in respect of those considerations. That is perfectly true. But when you look at that question from what is described as the point of view of the recipient, that sends you back again, looking, for that purpose, to the point of view of the payer: not from the point of view of compellability or liability, but from the point of view of a

person inquiring what is this payment for; and you have to see whether the maker of the payment makes it for the services and the receiver receives it for the services."

52. It was submitted that this decision reinforced the position that what is taxed under Case I of Schedule D are the results of an activity, and a taxpayer cannot be liable thereunder merely because of their status as a trader.

53. In support of this submission, Counsel for the Appellant relied upon the judgment of Walton J in the Court of Appeal decision in ***Simpson –v- John Reynolds & Co.*** **(1965-1975) 49 TC 693**, where he stated:-

"Beyond his six indicia, [Counsel for Revenue] *cited basically two streams of authority. The first was a stream of authority dealing with payments which were taxable under Schedule E, stemming from* Herbert v. McQuade *4 TC 489, the Clergy Sustentation Fund case. I regret that I personally find them of no assistance for present purposes whatsoever. Whilst of course many features are common to Schedule D and Schedule E cases, it is to be observed that in a Schedule E case liability to tax depends basically upon status – the status of being an employee or holder of an office; the statutory language is that the emoluments must arise "*therefrom*",* i.e. *from the office or employment. In the case of Schedule D, however, what is taxable are the results of an activity – the carrying on of a trade or profession. The differences may work both for and against the taxpayer in any battle with the Revenue. Once the office or employment has gone, then, in general, liability to tax under Schedule E has gone, apart from special statutory intervention. On the other hand, every kind of receipt, voluntary or otherwise, received by the taxpayer who is the holder of an office or an employee "*as such*", if I may use a well-understood conventional shorthand, is taxable. The trader under Schedule D, however, generally does not cease carrying on his trade merely because he loses some particular customer, however large his trade with that customer may be, nor is there anything in the nature of a partial cessation available to him, so that cessation in part of his activity is not generally a short answer to the Revenue's claim as far as he is concerned. But, equally, it is not his status as a trader but his activity "*as such*" which governs his liability to tax, so that it cannot be said that every sum he receives*

*simply because he is or has been a trader is necessarily to be brought into account for tax. The receipt, to be taxable, must arise "*from*" the trade."*

54. Counsel for the Appellant further submitted that there had been no payment made when the right to subscribe for Patronage Shares had crystallised, nor would there have been any payment even if a formal invitation to subscribe had been issued by Kerry Co-op. There had been no depletion of the assets of Kerry Co-op, and Counsel argued that this was inconsistent with the nature of a trading activity, where there was a supply by one party and a payment from the other.

55. Counsel said that the Patronage Share Statement showed that there had been an allocation of shares to the Appellant by the Board and, because a share certificate was attached, there had to have been a formal allotment of those Patronage Shares. However, there was no transfer of value from the Co-op to the Appellant; he received a share entitlement and the Share Certificate and the cost of the Patronage Shares was debited from his milk account. It was submitted that the only transfer of value was the payment of the subscription price for the Patronage Shares, which flowed from the Appellant to the Co-op.

56. Counsel for the Appellant said that, because there were three classes of shares in the Co-op, those who subscribed for Patronage Shares diluted the other shareholdings, because they were acquiring more shares than those members who did not acquire shares. Those members who supplied greater amounts of milk would have diluted the shareholdings of those members who supplied lesser quantities. Any value, if there was value, would only have arisen by a value shift from those members whose shareholdings remained the same and from those members who supplied less milk and whose shareholdings consequently did not grow proportionately. Counsel submitted that it was this transfer in value which was sought to be taxed by the Respondent, but he argued that it was wrong in principle to regard those other shareholders as giving the Appellant a receipt in his trade as a supplier of milk to Kerry Creameries Limited.

57. Counsel for the Appellant then referred to the decision in ***Gold Coast Selection Trust –v-Humphrey*** **[1948] 30 TC 209** which, he noted, had been cited in the Respondent's

Outline Written Submission. That case concerned the sale of land concessions for fully paid shares, and the main question for the consideration of the General Commissioners was whether the company, in parting with the concessions in exchange for shares, thereby had a realisation of the concession giving rise to an immediate profit to be included in the computation of the profits of the trade.

58. The Respondent's Outline Written Submission quoted the following passage from the judgment of Viscount Simon:-

> *"In my view the principle to be applied is the following. In cases such as this, when a trader in the course of his trade received a new and valuable asset, not being money, as a result of sale or exchange, that asset for the purpose of computing the annual profits or gains arising or accruing to him from his trade, should be valued as at the end of the accounting period in which it was received, even though it is neither realised nor realisable till later. The fact that it cannot be realised at once may reduce its present value, but that is no reason for treating it, for the purposes of Income Tax, as though it had no value until it could be realised."*

59. Counsel for the Appellant cited a passage from the judgment delivered by Lords Justice Somerville and Scott, where they stated:-

> *"We have come to the conclusion that when there has been, as is now admitted here, a realisation of a trading asset and the receipt of another asset, and when that latter asset is marketable in its nature and not merely some personal advantage which by its nature cannot be turned into money, the profits and gains must be arrived at for the year in which the transaction took place by putting a fair value on the asset received."*

60. He pointed out that this passage had been expressly adopted by Viscount Simon in his judgment, and submitted that the passage was apposite in circumstances where the Appellant's only right under the Rules of the Co-op, even if it was a right derived from his supply of milk, was a personal advantage which by its very nature could not have been turned into money and which could not be assigned.

61. Counsel for the Appellant submitted that it followed as a matter of logic from the Respondent's citation of the ***Gold Coast Selection Trust*** decision that they were arguing that there had been a realisation at the point of the issue of the shares. In contrast, the position of the Appellant was that if there was a realisation at all (which the Appellant did not accept), it had to have occurred when the right crystallised, and not when the entitlement to which the right gave rise was actually exercised.

62. Counsel for the Appellant further submitted that Kerry Co-op had made the allotment of shares to the Appellant to satisfy their contractual obligation to the Appellant, and accordingly the allotment was not made for the reasons of the trade; it was a by-product of the trade and not an operation in the carrying out of the trade. Equally, he submitted that the Appellant did not carry out an operation in the trade in acquiring the shares, and the other shareholders whose shareholdings had been diminished, were not carrying out an operation in the trade.

63. In conclusion, Counsel for the Appellant submitted that payments made for reasons other than a trade will not be trading receipts as they will not have been earned from the trade; their source will not have been from the trade. He argued that the subscription for Patronage Shares by the Appellant resulted from the invitation to subscribe to which he was entitled under the Rules of the Co-op. Neither that right nor the exercise of that right was an operation by the Appellant in the carrying out of his trade as a dairy farmer and his receipt of the shares for which he had subscribed was not a supplement to his trading income.

64. Counsel for the Appellant further submitted that the Appellant's right to subscribe for shares in Kerry Co-op was on the basis of a formula determined by the amount of the milk which he had supplied to Kerry Creameries Limited; this was simply the measure used to determine the number of shares to be allocated to the Appellant for his subscription.

65. He further submitted that the shares which the Appellant already held represented his membership interest in Kerry Co-op, and that as a mater of principle a bonus issue of unissued shares by the Co-op would have been a capital transaction and not an income

transaction. He argued that where a shareholder subscribes for further shares, whether by right of an invitation to do so or otherwise, that would also be a capital transaction. The fact that the terms of the subscription which bound all the members of the Co-op might result in value passing out of the shares of some members into the new shares allotted did not transform the transaction from one of capital into one of income.

66. In closing, Counsel for the Appellant submitted that if, contrary to the Appellant's submissions, the Patronage Shares (as distinct from the right to subscribe) needed to be included in the Appellant's accounts as additional trading income, the issue then arose as to what was "*the full amount of the profits or gains.*" He submitted that this was governed by the decision of the Supreme Court in ***Cronin -v- Cork and County Property Co Ltd.*** **III ITR 198**, where Griffin J expressly adopted as a correct statement of principle the passage from Lord President Clyde's judgment in ***Whimster & Co -v- The Commissioners of Inland Revenue*** **12 TC 813** that:-

> *"In computing the balance of profits and gains for the purposes of income tax … two general and fundamental commonplaces have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating excess profits duty, as the case may be."*

G. <u>Submissions of the Respondent</u>

67. Counsel for the Respondent submitted that the receipt of the Patronage Shares was quite clearly a trade receipt; the shares were received by the Appellant in his capacity as a milk supplier as a consequence of and in proportion to the milk he supplied the Co-op.

68. She argued that the receipt of shares by the Appellant was not a receipt by a member of the Co-op *qua* member. Not every A shareholder obtained an entitlement to subscribe for shares; only those shareholders who supplied milk in the previous quota year were entitled to subscribe, and that entitlement was in direct proportion to the amount of milk they supplied. She submitted that a member who was a B or a C shareholder, and who had not been an A shareholder previously, could, by supplying milk, become entitled to subscribe for A shares. That entitlement would not be by virtue of an existing membership as an A shareholder, and Counsel for the Respondent argued that it was therefore simply incorrect to describe the entitlement to subscribe for shares as an incident of membership.

69. Counsel for the Respondent attached some significance to the agreed fact that there was no written agreement governing the supply of milk by the Appellant to Kerry Creameries Limited, and said it followed that there was no written agreement governing the price, or the calculation of the price, to be paid to the Appellant.

70. Counsel for the Respondent then addressed the argument made by the Appellant that, because the Co-op had issued the shares at par value, the Co-op did not receive anything for the share, and therefore there could not be said to have been a trade. She submitted that this was not correct, as the Co-op could have issued the shares at a premium pursuant to its Rules, and it had therefore foregone its entitlement to receive market value for the shares.

71. Turning to the argument made by the Appellant that a distinction had to be drawn between the entitlement to subscribe and the actual subscription, Counsel for the Respondent argued that, on the facts of the case, there was in reality no distinction to be drawn. In support of this contention, she pointed out that the Patronage Share Statement made reference to the Appellant's Milk Supplier Number, as distinct from a shareholder number, and was addressed "*Dear Milk Supplier*". She further laid emphasis on the fact that the Statement detailed "*… the number of Patronage Shares earned* [which word she stressed], *based on the milk (butterfat adjusted) within quota supplied by you for the milk year outlined above.*" She submitted that this wording reflected the understanding of the

Co-op as to what transpired when it gave a supplier the entitlement to subscribe for shares based on an earned entitlement.

72. Counsel for the Respondent further pointed out that the Statement showed that the shares were allocated at par value, and that the cost of the shares had been debited to the Appellant's Milk Account; she submitted that this again showed a link between the Milk Account and the payment for shares.

73. Counsel for the Respondent further emphasised the fact that by the time the Patronage Shares Statement was issued by the Co-op on the 18th of May 2011, the shares had already been allocated to the Appellant. She pointed out that while it was technically possible for the Appellant to decline to take up the shares, there was no evidence that such a right of refusal had ever been exercised. She further pointed out that the Patronage Share Statement only allowed a period of 7 days within which an exercise of the right of refusal had to be communicated to the Co-op, and submitted that this was reflective of the fact that the shares were 'part and parcel' of the trade relationship and were part of the trade price for the milk supplied by the Appellant.

74. Counsel for the Respondent argued that this view was fortified by an analysis of the Milk Statement issued to the Appellant for April 2011 which showed the cost of the Patronage Shares of €**[COST OF SHARES REDACTED]** being deducted from the electronic payment made to the Appellant for the net value of the milk supplied by him. She submitted that this demonstrated clearly that the Patronage Shares formed part of the payment received by the Appellant for the milk supplied.

75. Counsel for the Respondent further submitted that there was no requirement that a trade receipt be in cash, and that there would be no difficulty in establishing through evidence the taxable value of a right to subscribe for shares or of the shares themselves. She further submitted that evidence could, if necessary, be adduced to show that there was a 'grey market' on which shares in the Co-op could be traded as between the members.

76. Turning to the Rules of Kerry Co-op, Counsel for the Respondent referred to subparagraphs (i), (iii) and (v) of Rule 9.C and said that they showed that a member could only receive Patronage Shares if they were supplying milk, and that a member who had not supplied milk for a period of 5 years would have any A shares converted to B shares.

77. Counsel for the Respondent then made reference to the provisions of subparagraph 9.C (vii). She pointed out that it began "*The Board shall…*", showing that the provisions were mandatory and compellable as against the Board of Kerry Co-op. She further pointed out that the subparagraph required the Board to issue the subscription invitation to any qualifying "*milk supplier*." She submitted that the Rule, which governed the relationship between Kerry Co-op and its members, showed that the invitation was issued to individuals *qua* their position as milk suppliers, and not because they were members of the Co-op. She argued that this, coupled with the wording of the Patronage Share Statement and the fact that in practice shares were automatically allocated to qualifying milk suppliers, showed that any right of subscription and shares received were something which, if they had a value over par, had to be taken into account in the Appellant's trading accounts.

78. Turning to the issue of the compellability of the right to be invited to subscribe, Counsel for the Respondent pointed out that an individual seeking to enforce that right by litigation would have to prove that he or she was a member of Kerry Co-op but would also have to prove that they were a milk supplier and the amount of the milk supplied. In other words, such a person would have to prove that a trading relationship existed and the right to receive an invitation to subscribe is a consequence of the supply of milk pursuant to that relationship.

79. Counsel for the Respondent then referred to the ***Robinson -v- Dolan*** decision and to the recital of the facts contained in the headnote, which stated:-

> *"*[The appellant] *stated that from 1921 his business was boycotted, his goods looted, his employees held up, and his business practically ruined. The appellant had claimed (1) £14,454 for actual trading loss in the five years to 31 January 1928, (2) £15,015, for loss of trading profits for the same period, and (3) £11,437 for loss of*

goodwill. Upon the recommendation of the committee the appellant received from the British government a sum of £14,000, which was stated to have been assessed primarily on grounds of hardship, with regard also to the amount required for the appellant's re-establishment."

80. Counsel for the Respondent pointed out that the grounds on which compensation had been awarded made no reference to trade, and submitted that the compensation was clearly a capital payment.

81. Counsel then turned to the following dictum of Hanna J:-

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

82. She submitted that in the instant appeal, the result of the sale of milk by the Appellant was his receiving a cash payment and Patronage Shares. The result was shown on his Milk Statement and the result was linked to his milk supply in the Patronage Share Statement. She further pointed out that the alternative meaning, "*something earned*", was reflected in the Patronage Share Statement, which referred to the Appellant having earned Patronage Shares. She further submitted that the phrase "*arising or accruing from*" was a wide term, and that irrespective of which of the tests was applied, the conclusion had to be that the Appellant had received Patronage Shares as a result of carrying on his trade.

83. Counsel for the Respondent then referred to the passage from Fitzgibbon J in ***Wing -v- O'Connell***, cited with approval by Hanna J, stating:-

"I do not decide that every reward given to a jockey, even though his being a jockey affords him an opportunity of winning it, must be treated as an earning of his

vocation. To make it liable to taxation he must, in my opinion, earn it by the exercise of his vocation by riding a horse in a race."

84. Counsel submitted that the Appellant had earned his Patronage Shares by the exercise of his trade as a milk supplier, and this was clearly reflected by the wording of the Patronage Share Statement. Without the supply of milk, he would never have received the shares; the supply of milk was both the *causa causans* and the *sine qua non*.

85. Counsel for the Respondent then addressed the statement approved by Rowlatt J in ***Chibbett -v- Joseph Robinson & Sons*** that:-

"As Sir Richard Henn Collins said, you must not look at the point of view of the person who pays and see whether he is compellable to pay or not; you have to look at the point of view of the person who receives, to see whether he receives it in respect of his services, if it is a question of an office, and in respect of his trade, if it is a question of trade, and so on."

86. Counsel submitted that, applying that test, it was clear that the Appellant had received Patronage Shares as a result of his trade and as a result of his trading relationship with Kerry Co-op. She submitted that the status of the Appellant was irrelevant to the question in issue; he did not receive the Patronage Shares by virtue of his membership of Kerry Co-op but by virtue of his activity as a milk supplier. Accordingly, Counsel submitted, the distinction made by Walton J in ***Simpson -v- Reynolds*** between receipt on the grounds of status and receipt on the grounds of activity was not relevant on the facts of the instant appeal.

87. In response to the Appellant's reliance on the decision in ***Gold Coast Selection Trust –v- Humphrey***, and the reference therein to a "*personal advantage which by its nature cannot be turned into money*", Counsel for the Respondent submitted that it was an artificial parsing to suggest that the Appellant received a personal right which crystallised at the end of the milk supply year. She contended that the Appellant's entitlement arose on the supply of milk during the year and crystallised on the allocation of shares which were sent to the Appellant with the Patronage Share Statement. In essence, the Respondent

contended that the crystallisation of the right to subscribe for shares and the allocation of shares effectively occurred at the same time and there was no time lapse between the two.

88. Counsel for the Respondent then referred to the decision in ***Pope -v- Beaumont* 24 TC 78**. There, the respondent was a restaurateur who purchased most of his meat supplies from a co-operative society of which he was a member. He did not receive any discount on the purchases he made, and the full amount he paid was charged as expense in his accounts. The society paid a dividend to its members calculated by reference to their transactions with the society and during the year in question the respondent received a dividend of £51 solely in respect of the meat purchases he had made for the purposes of his business. The question for determination was whether that £51 should have been included in his trading account for the year as a rebate or discount in respect of the amount he had paid.

89. McNaghten J stated as follows:-

> *"The question is, was it a rebate or discount? It seems to me plain that it was. It is described in the rule as "*a division, or return, to or among members of the society.*" The words "*dividend*" and "*return*" are both, as it seems to me, appropriate to describe it. Looked at from the point of view of the Society, it was a dividend: it was part of a sum which the Society was dividing. Looked at from the point of view of the purchaser of the meat, it was a "*return*" to him of part of the price that he had paid."*

90. Counsel for the Respondent submitted that the decision was authority for the proposition that the correct approach is to look at what actually happened, from the perspective of both the purchaser and of the Society. She submitted that applying that test in the instant case, it was clear that the Appellant had supplied milk and in return he had received both the cash payment and the Patronage Shares.

91. Counsel then referred me to ***Staffordshire Egg Producers Ltd -v- Spencer* 41 TC 131**, where the appellant was an Industrial and Provident Society which purchased eggs from its members and paid its profits out to members calculated solely on the value of the individual members' trading transactions with the Society. The directors of the Society

were authorised to allocate part of any such bonus to the purchase on behalf of the member of fully paid-up shares in the Society. Additional assessments to income tax were made on the Society on the basis that sums applied in this manner had been incorrectly allowed as deductions in computing the Society's profits for the purposes of the first assessments in those years, and the Society appealed the additional assessments.

92. Buckley J, giving his decision in the High Court, set out the rationale for the introduction of the legislative provision under consideration in the case and stated:-

> *"Originally, societies of this character were not taxable on the profits of their business, but in the year 1933 they were first made taxable upon their profits. At that time, a Section of this kind first found its way on to the Statute Book, and that is a Section now represented by the Section I have to consider. The policy of the Section appears to be to allow such a society to treat as an expense incurred in earning its profits certain outgoings or obligations which it incurs or assumes of the kinds described in the Sub-section, which, were it not for the Sub-section, it might be difficult for the society to justify as expenses incurred in earning its profits. The thing all works perfectly intelligibly and satisfactorily so long as one is dealing with payments in cash. If, after it has completed it's year's trading, such a society chooses to grant retrospectively discounts or rebates or to declare a dividend or bonus distributable amongst those with whom it has traded – distributable on the basis of the trade which it has done – it may be voluntarily giving those persons an additional profit or advantage in connection with the trade which they have done with the society, and because the society is of a mutual character it would be a matter which the Legislature would be inclined to treat differently from something of the same kind done by an ordinary trading company."*

93. Counsel for the Respondent submitted that this passage showed that where a society paid out something in the manner described, it was giving the recipient "*an additional profit or advantage in connection with the trade they have done with the society*". This was the position even where, as in the ***Staffordshire Egg*** case the payment was made voluntarily by the society, and the principle applied *a fortiori* where, as in the instant appeal, the profit or advantage was receivable as of right.

94. Counsel for the Respondent then referred me to the House of Lords decision in ***Lincolnshire Sugar Company Ltd -v- Smart*** **[1937] A.C. 697**, which she submitted was authority for the proposition that many different types of receipt could be trade receipts, and that when determining if a receipt was a trade receipt, the correct test was to look at the nature or the character of the receipt and the context of the payment.

95. In that case, the appellant company manufactured beet sugar in England. By a 1925 Act of Parliament, a subsidy was granted in respect of every hundredweight of sugar manufactured in Great Britain for a 10-year period beginning in 1924 from beet grown in Great Britain. The appellant company received this subsidy in respect of the sugar it manufactured, and treated the sums received as trading receipts. In 1931, new legislation was passed which provided for "*... the making of advances to certain companies in respect of sugar manufactured by them in Great Britain during a period of one year beginning on October 1, 1931, from beet grown in Great Britain: to provide for the recovery in certain events of the whole or some part of the advances so made, and for the remission of any balance thereof not so recovered.*" The appellant company received an advance under the new legislation, and the question in issue was whether that advance should be treated as a trading receipt. Counsel for the Respondent pointed out that it was a feature of the legislation that an advance made thereunder could, in certain circumstances, be recalled, but had not been recalled from the appellant company.

96. Lord Macmillan, giving the judgment of the House, stated as follows:-

> *"My Lords, it is scarcely surprising that payments of so anomalous a character should have occasioned diversity of opinion as to the legal category to which they should properly be referred. The Commissioners came to the conclusion that they "were in their nature loans and were not trading receipts." Finlay J. did not think it necessary to use the word "loan," but dwelt on the feature that the payments "were not sums paid and paid irrevocably to the company. They were not subsidies or grants to assist the company in their business; they were sums advanced and sums which were in some contingencies at all events repayable." So he held that they were "rather in the nature of loans" and affirmed the decision of the Commissioners. The Court of Appeal took a different view. The learned Master of the Rolls (Lord Wright) was definitely of opinion that the payments "were in their inception and in their*

character not loans at all, but were payments made in cash out and out, subject only to the contingent liabilities which I have indicated." Both Romer L.J. and Greene L.J. were of opinion that the payments were in truth subsidies, notwithstanding the contingencies of repayment. And the Master of the Rolls and Green L.J. both emphasized the fact that before the question came to judgment the contingencies had ceased to operate and the payments had become irrevocable.

If the nature of the payments were to be determined solely by the terminology of the statute there might be much to be said for the view adopted by the Commissioners and by Finlay J., for the draftsman has done his best to persuade us that the payments were loans. He has not used that word but he calls them "advances," and he speaks of their "recovery" in whole or in part and of the "remission" of any balance not recovered. I agree that the word "advances" is ambiguous and may either refer to prepayments of what will become due in future or be a polite euphemism for loans; but when "advances" are declared to be "repayable" (though only conditionally) they certainly lean to the side of loans.

But in my view the question ought not to be decided on merely verbal arguments. What to my mind is decisive is that these payments were made to the company in order that the money might be used in their business. Here I definitely part company from Finlay J. who thought that "they were not subsidies or grants to assist the company in their business." We are told in the stated case that it was because of an apprehension that the companies might not be able to pay to the growers of beet the prices they had contracted to pay that this further assistance was given by the Government. It is true that the appellants apparently did not actually require to have recourse to the "advances" they received, for in their accounts for the relevant years which have been produced the advances are not carried into profit and loss but are entered as liabilities in the balance sheet, and the profit and loss accounts show a balance of trading profit without taking the "advances" into account. But if the Company had not happened to be able to pay for its raw material otherwise it could properly have used the "advances" for this purpose. It was with the very object of enabling them to meet their trading obligations that the "advances" were made; they were intended artificially to supplement their trading receipts so as to enable them to maintain their trading solvency. If the "advances" had in any year been

carried to the credit of the Company's trading account, as might properly have been done, and the trading account had in consequence shown a profit instead of a loss, can it be doubted that the credit balance would rightly have entered into the computation of the Company's profits or gains for tax purposes?"

97. Counsel for the Respondent submitted that the judgment, and in particular the final paragraph of the excerpt quoted above, was clear authority for the proposition that in order to ascertain the proper tax treatment of a particular receipt, the decision-maker must look at how the payment arises and its character. Applying that test to the instant appeal, she submitted that the allocation of shares to a milk supplier was based on the supplier having supplied milk. She argued that on any analysis of the character and context of the allocation of shares, it was clear that the allocation was made by virtue of the trading relationship the supplier had with the Co-op and pursuant to which the milk was supplied.

98. Counsel for the Respondent then referred to ***IRC -V- Falkirk*** **[1975] STC 434**, which she said illustrated the broad range of what can properly be treated as trading receipts. In that case, the taxpayer company owned and operated an ice rink on a commercial basis. It provided facilities for curling to members of the public on payment of certain charges; these charges were, however, not sufficient to cover the costs incurred in provision of these facilities. Among the customers of the taxpayer company was a club which used the curling facilities regularly. The club's management committee became aware of the loss the taxpayer company had incurred in providing curling facilities at the ice rink and therefore resolved to donate the sum of £1,500 to the taxpayer company to cover the additional cost of curling for a particular season. The Inland Revenue contended that the payment of £1,500 constituted trading receipt chargeable to tax under Schedule D. The taxpayer company appealed, contending that the payment was purely and simply a gift, and accordingly did not fall to be treated as a trading receipt.

99. The Inner House of the Court of Session found that the payment was taxable under Schedule D, holding that the payment was made in order that the taxpayer company might use it in its business. In substance and in form it was a payment made to a trading company artificially to supplement its trading revenue from curling and to preserve, in

the interests of the curling club and its members, the taxpayer company's ability to continue to provide curling facilities in the future. In its quality and nature the payment was of a business nature, and was accordingly a trading receipt in the hands of the taxpayer company.

100. Counsel for the Respondent submitted that the following analysis of the authorities given by Lord President Emslie in the judgment gave a useful overview of the various tests applied by different courts:-

> *"In the words of Lord Reid in* Inland Revenue Comrs v City of London Corpn *(*as Conservators of Epping Forest*) 'Trading receipts are generally received in return for something done or provided by the recipient for the payer ...' This is, of course, a statement of the general position but it is plain that the question of consideration or conditions or counter stipulation is not conclusive of the matter (*British Commonwealth International Newsfilm Agency Ltd v Mahany—*in the speech of Lord Cohen). For a payment to be a trading receipt the recipient must in the first instance be a trader. Not every receipt by a trader in the course of his business is a trading receipt in the income tax sense and whether a particular payment to a trader is to be regarded as a trading receipt is one which must be answered in each case in which the question arises in light of all the relevant circumstances. As Evershed MR said in* British Commonwealth Newsfilm Agency Ltd*:*
>
> > *'In my opinion the question for the court is whether in reality, after regarding the whole of the relevant facts, the sum in question is a business payment, part of the trading receipts in this case of an admittedly trading company.'"*

Counsel for the Respondent submitted that the application of the foregoing test made it impossible for the Appellant to successfully argue that he did not receive the share value over par as anything other than a business payment, linked to, connected with and in proportion to the milk he had supplied.

101. Lord President Elmslie then continued:-

> *"Upjohn LJ spoke to the same effect as did Pennycuick J in* Walker *(*Inspector of Taxes*)* v Carnaby, Harrower, Barham & Pykett. *Since this is the correct approach to the solution of the problem the decisions to which we were referred afford no more*

than useful illustrations and indications of considerations which may relevantly be borne in mind.

In Lincolnshire Sugar Co Ltd v Smart *(*Inspector of Taxes*), the question arose as to the treatment of advances to the company made under the British Sugar Industry (Assistance) Act 1931. The company was already in receipt of subsidy paid under the British Sugar (Subsidy) Act 1925 and the subsidy was treated by the company as part of its trading receipts. The decision was that the advances were also trading receipts and in course of his speech Lord Macmillan said:*

> *'But in my view, the question ought not to be decided on merely verbal arguments. What, to my mind, is decisive, is that these payments were made to the company in order that the money might be used in its business ... We are told, in the stated case, that it was because of an apprehension that the companies might not be able to pay to the growers of beet the prices they had contracted to pay that this further assistance was given by the Government ... It was with the very object of enabling them to meet their trading obligations that the "advances" were made; they were intended artificially to supplement the company's trading receipts ...'*

Lord Macmillan went on to say that he preferred to rest his judgment on his view of the business nature of the sums in question and added:

> *'I think that they were supplementary trade receipts, bestowed upon the company by the Government, and proper to be taken into computation in arriving at the balance of the company's profits and gains for the year in which they were received.'*

In the same case in the Court of Appeal Romer LJ contrasted the position with that in Seaham Harbour Dock Co v Crook (Inspector of Taxes) thus:

> *'The moneys in that case were paid by the Government in pursuance of a scheme for diminishing unemployment in this country, and they were paid to the Seaham Harbour Dock Company not for the purposes of enabling the company to trade to greater advantage, but in order that the company*

might build a new dock, and, by employing a number of men in so doing, reduce the number of unemployed in this country.'"

Counsel for the Respondent submitted that the ***Seaham Harbour Dock Co.*** decision was consistent with that in ***Robinson –v- Dolan***, where the High Court held that the grant of money to enable the proprietors of a loyalist company to rebuild the business was not in the nature of a trading receipt.

102. The judgment of Lord President Elmslie then continues:-

"In British Commonwealth International Newsfilm Agency Ltd payments by the promoters of the company to the company under a deed of covenant were held on the facts to be trading receipts of the company. The payments were for the express purpose of making up the trading deficit of the company and Lord MacDermott said [1963] 1 All ER at 90, [1963] 1 WLR at 72, 40 Tax Cas at 578:

'Although the payment in question may have had the recurrent quality of a payment within Case III of Sch D to the Income Tax Act, 1952, it is clear that, both in substance and in form, it was a payment to a trading company (the appellant) as a supplement to its trading revenue and in order to preserve its trading stability.'

Cases such as Simpson (Inspector of Taxes) v John Reynolds & Co (Insurances) Ltd deal with wholly unsolicited and unexpected gifts to a trading company by former clients after the cessation of the business connection. In Simpson the Court of Appeal had no difficulty in holding that the payment to the company was not a trading receipt and the considerations which led to this conclusion are to be found in the opinion of Russell LJ:

'The facts, as it seems to me, on which that question is to be answered are these. First, this was a wholly unexpected and unsolicited gift. Second, it was made after the business connection had ceased. Third, the gift was in recognition of past services rendered by the client company over a long period, though not because those past services were considered to have been inadequately remunerated. Fourthly, the gift was made as a consolation for the fact that those remunerative services were no longer to be performed by the client company for the donor; and, fifthly, there is

no suggestion that at a future date the business connection might be renewed.'"

Counsel for the Respondent submitted that this showed that the ***Simpson -v- John Reynolds & Co.*** decision was clearly distinguishable from the facts of the instant appeal, as there was no suggestion that the allocation of shares was an unsolicited or unexpected gift; rather, it was a compellable payment and, furthermore, was automatically made with a right of refusal, rather than the Appellant having to call for it.

103. Counsel for the Respondent further relied upon the judgment of Lord Cameron in the ***Falkirk Ice Rink*** case, where he stated:-

"In my opinion the Crown are clearly right in their submissions. The phrase 'trading receipts' is not one which has received statutory definition, but obviously it implies that there is a trader carrying on a trade or profession and that the payment is received in the course of his trade or profession. There is nothing in the words themselves which by implication requires that the payment should be made by one who is, at the time of the payment, in the course of trading with the trader or that the payment should have to be made in respect of or return for the provision of any particular service or article of commerce. On the other hand, it is obviously more easy to determine that a receipt is a 'trading receipt' if the payment is received for such service or article. As was observed by Rowlatt J in Chibbett *(*Inspector of Taxes*)* v Joseph Robinson*, it is a question of looking at the 'point of view' of the person who receives and not at the 'point of view' of the payer."*

104. The final authority opened by Counsel for the Respondent was ***Kennedy -v- Rattoo Cooperative Dairy Society*** **1 ITR 315**, where the court had to consider the tax treatment of surpluses retained by an Industrial and Provident Society. Members supplied milk to the Society from which butter was made and the price of the milk was not fixed. Instead, each month, after the current expenses and a sum was retained for contingencies, the balance was distributed to the members in proportion to the quantity and quality of milk they had supplied. The Society contended that the surplus paid out at the year-end did not arise from trading or, if it did, that it arose from trading with its

own members (which was not taxable under the legislation in force at the time). Both the Circuit Court and the High Court found that the end of year profits arose from the Society trading with its own members. The President, giving the (laudably brief) judgment of the High Court, stated:-

> *"We are of opinion that in ascertaining under FA 1921 s 53, "*the profits or surplus arising from the trading with its own members of a society registered under the Industrial Societies Act"*, there should be taken into account not only the sales to members of the article manufactured, but also the purchases from members of the raw material from which the manufactured article is made."*

105. Counsel submitted that every co-operative is established for a particular purpose or purposes; in the instant appeal, Kerry Co-op was established to ensure a market for milk and milk products. The rules of a co-operative invariably make references to trade and the terms on which the co-operative will trade with its members. She submitted that Rule 9 of the Rules of Kerry Co-op gives an entitlement to milk suppliers to receive Patronage Shares as part of the terms on which it carries on a trade with those suppliers. As the right to receive Patronage Shares was one of the trading terms between the Co-op and its suppliers, she submitted that it had to follow that the receipt of shares was a trading receipt.

106. Counsel for the Respondent further submitted that the Appellant was incorrect in arguing that the source of the Patronage Shares was nothing to do with his trade with Kerry Co-op; she submitted that without the supply of milk, there could never be any receipt of Patronage Shares. Only members who traded with the Co-op were entitled to receive Patronage Shares, and their very entitlement was not just in consequence of the supply of milk but was also in direct proportion to the quantity of milk supplied. The right to receive Patronage Shares was not a product of membership, save in so far as only members could supply milk to Kerry Co-op. Counsel pointed out that the phrase "*Milk Supplier*" was used 8 times in Rule 9.C(vii), which governs the entitlement to receive Patronage Shares. She submitted that it followed that any value in the Patronage Shares in excess of par value had to form part of the recipient milk supplier's trading receipts.

107. Counsel for the Respondent further submitted that the provisions of Rule 11 of Kerry Co-op's Rules empowered the Board to issue shares at a premium to par value. The second paragraph of Rule 11 provides "*The Board may also issue Shares at a premium whether for cash or otherwise and a sum equal to the aggregate amount or value of the premiums on such shares shall be transferred to an account, to be called "the Share Premium Account" and the provisions of this Rule shall apply to such Share Premium Account.*"

108. Counsel pointed out that each share issued by the Co-op carried with it the right to receive share interest on an annual basis, and that for the years 2011 to 215 inclusive, the share interest paid per share was in excess of the par value of that share. She submitted that it had to follow as a matter of logic that Patronage Shares had a market value in excess of their par value, and that Kerry Co-op had foregone the difference between par value and market value when issuing Patronage Shares to the Appellant and other milk suppliers. The difference in values formed part of the consideration received by the Appellant for the milk he supplied to Kerry Co-op in accordance with their trading relationship.

H. Replying Submissions of the Appellant

109. In reply, Counsel for the Appellant firstly reiterated that there was in effect a tripartite relationship between the Appellant, Kerry Co-op and Kerry Creameries Limited. Kerry Creameries Limited was the nominated purchaser of milk from the Appellant and Kerry Co-op was the entity that issued the Patronage Shares. The payments for the milk supplied by the Appellant were made by Kerry Creameries Limited as the purchaser thereof, and administratively the Appellant's payment for the Patronage Shares was deducted from the cash payment he received from Kerry Creameries Limited and was then transmitted to Kerry Co-op. He submitted that the only payment changing hands in relation to the Patronage Shares was the credit to Kerry Co-op in respect of the payments to share capital, which were equal to the par value of the shares.

110. Counsel for the Appellant then submitted that the provisions of Rule 11 were irrelevant to the instant appeal. While those provisions did confer a general power on the Board to issue shares at a premium, the issue of Patronage Shares was governed by Rule 9.C(vii), which required the Board to invite qualifying members to "s*ubscribe at par for Patronage Shares.*" He submitted that it was consequently incorrect to contend that Kerry Co-op had foregone a premium representing the excess of any market value of the shares over their par value.

111. He further submitted that it was incorrect to treat the allotment of the Patronage Shares as a receipt. While the Patronage Share Statement might have done so as a matter of administrative convenience, he submitted that the proper approach was to have regard to the legal or contractual entitlements pursuant to the Rules. He submitted that the manner in which Kerry Co-op allocated Patronage Shares to the Appellant may have been structured in a particular fashion to ease their administrative burden, but it was still carried out in order to discharge their contractual obligations to the Appellant. As a matter of law, it was essential to recognise that the right to subscribe and the allocation of shares were two separate matters. Furthermore, he submitted that the requirement for the Appellant to pay for the shares constituted a *novus actus interveniens* between the pure right to subscribe and the subsequent allotment of the Patronage Shares.

112. Counsel further stressed that the only contractual entitlement which the Appellant enjoyed pursuant to the Rule 9.C (vii) was the right to receive an invitation to subscribe for A shares, and to subscribe for them at par value. This right was personal to the Appellant, was unassignable and had to be exercised within a limited time-frame. He further submitted that even if I was to find that there had been a receipt or realisation in the instant appeal, it was the receipt of a personal advantage which could not be converted to money or money's worth. Accordingly, it could not go into an account and could not properly be treated as a receipt for the Case I of Schedule D.

113. Counsel further disputed that it was possible as a matter of logic for the Appellant's trading activity to be both the *causa causans* and the *causa sine qua non*. He

reiterated that it was the Appellant's position that it was his trading activity that was the *causa sine qua non* and his status as a member of Kerry Co-op that was the *causa causans*. He submitted that it was important to recall that what was being taxed was the results of trading activity, and relied upon the decision of Walton J in ***Simpson -v- John Reynolds (Insurance) Ltd.*** In this regard.

114. In closing, Counsel for the Respondent further reiterated that the purchase by the Appellant of the Patronage Shares was not done as part of his trade as a milk supplier; it was instead an investment of a capital nature.

I. Analysis and Findings

115. It seems to me that in deciding the agreed core issue in this appeal, there are three distinct issues to be considered and three questions to be answered, namely:-

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

(ii) If the benefits received by the Appellant were a consequence of his trading activities, what precisely were those benefits? and,

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

116. Looking at the first of these questions, it is appropriate to initially set out my understanding of the legal principles which determine how it is to be answered. There was very little difference between the parties on the tests which should be applied, although there was naturally some difference in the emphasis they placed on aspects of the decisions opened to me.

117. I am bound by, and would not in any event seek to differ from, the judgment of the High Court in ***Robinson -v- Dolan***. Of particular relevance, in my opinion, is the dictum of

Hanna J where, having considered the earlier High Court of Appeal decision in the ***Guinness*** case, he stated:-

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

118. I must also have regard to Hanna J's consideration of the judgment of Fitzgibbon J in ***Wing's*** case, and the conclusion he derived therefrom:-

Fitzgibbon J, at page 112, said:

> "I do not decide that every reward given to a jockey, even though his being a jockey affords him an opportunity of winning it, must be treated as an earning of his vocation. To make it liable to taxation he must, in my opinion, earn it by the exercise of his vocation by riding a horse in a race."

It seems therefore clear to me on these opinions that profits or gains to arise to or accrue from a trade must be earned out of it as being their source. This goes much deeper than being a mere method of calculation as a basis of computation."

119. I further accept as correct the argument made by Counsel for the Appellant that the immediately foregoing passage and the decision of O'Byrne J in ***Robinson -v- Dolan*** are good authority for the proposition that the fact that a formula relating to trade is used to calculate the amount of a benefit to be received does not automatically make the benefit received a trading receipt.

120. I believe that the passages cited above are consistent with the decision of Rowlatt J in ***Chibbett –v- Joseph Robinson & Sons***, where he stated:-

> *"I think everyone is agreed, and has been agreed for a long time, that in cases of this kind the circumstance that the payment in question is a voluntary one does not*

matter. As Sir Richard Henn Collins said, you must not look at the point of view of the person who pays and see whether he is compellable to pay or not; you have to look at the point of view of the person who receives, to see whether he receives it in respect of his services, if it is a question of an office, and in respect of his trade, if it is a question of trade, and so on. You have to look at his point of view to see whether he receives it in respect of those considerations. That is perfectly true. But when you look at that question from what is described as the point of view of the recipient, that sends you back again, looking, for that purpose, to the point of view of the payer: not from the point of view of compellability or liability, but from the point of view of a person inquiring what is this payment for; and you have to see whether the maker of the payment makes it for the services and the receiver receives it for the services."

121. I also believe that the following passage from the decision of Walton J in ***Simpson -v- John Reynolds (Insurance) Ltd.*** is of assistance in deciding this first question, notwithstanding that it *prima facie* concerns the difference in approach to liability under Schedule E and liability under Schedule D:-

*"Whilst of course many features are common to Schedule D and Schedule E cases, it is to be observed that in a Schedule E case liability to tax depends basically upon status – the status of being an employee or holder of an office; the statutory language is that the emoluments must arise "*therefrom*", i.e. from the office or employment. <u>In the case of Schedule D, however, what is taxable are the results of an activity – the carrying on of a trade or profession.</u> The differences may work both for and against the taxpayer in any battle with the Revenue. Once the office or employment has gone, then, in general, liability to tax under Schedule E has gone, apart from special statutory intervention. On the other hand, every kind of receipt, voluntary or otherwise, received by the taxpayer who is the holder of an office or an employee "*as such*", if I may use a well-understood conventional shorthand, is taxable. The trader under Schedule D, however, generally does not cease carrying on his trade merely because he loses some particular customer, however large his trade with that customer may be, nor is there anything in the nature of a partial cessation available to him, so that cessation in part of his activity is not generally a short answer to the Revenue's claim as far as he is concerned. <u>But, equally, it is not his status as a trader but his activity "*as such*" which governs his liability to tax, so</u>*

*that it cannot be said that every sum he receives simply because he is or has been a trader is necessarily to be brought into account for tax. The receipt, to be taxable, must arise "*from*" the trade."* [Emphasis added]

122. I further accept as a correct statement of the law the judgment of the Lord President in ***IRC -v- Falkirk Ice Rink***, where he stated:-

> *"In the words of Lord Reid in* Inland Revenue Comrs v City of London Corpn *(*as Conservators of Epping Forest*) 'Trading receipts are generally received in return for something done or provided by the recipient for the payer ...' This is, of course, a statement of the general position but it is plain that the question of consideration or conditions or counter stipulation is not conclusive of the matter (*British Commonwealth International Newsfilm Agency Ltd v Mahany—*in the speech of Lord Cohen). For a payment to be a trading receipt the recipient must in the first instancebe a trader. Not every receipt by a trader in the course of his business is a trading receipt in the income tax sense and whether a particular payment to a trader is to be regarded as a trading receipt is one which must be answered in each case in which the question arises in light of all the relevant circumstances. As Evershed MR said in* British Commonwealth Newsfilm Agency Ltd*:*
>
> > *'In my opinion the question for the court is whether in reality, after regarding the whole of the relevant facts, the sum in question is a business payment, part of the trading receipts in this case of an admittedly trading company.'"* [emphasis added]

123. Applying the foregoing statements of principle, I believe it is clear that any benefits received by the Appellant pursuant to Rule 9.C(vii) were received by him as a result of his carrying on the trade of a dairy farmer supplying milk if they are the result of his buying and selling; or if they are something earned; or if they are the reward of capital; or if they are earned out of the Appellant's trade as being their source; or if they were a business payment received in return for something done or provided by the Appellant. The benefits must also have resulted from the Appellant's activity as a trader, and not merely from his status as a trader. In considering this question, I must look at it from the perspective of the Appellant, which entails a consideration of the view of Kerry Co-op, to see whether he received the benefits as a result of his trading relationship with the Co-op.

124. I have carefully considered what I might collectively refer to as 'the co-operative cases' which were opened to me by Counsel for the Respondent, namely ***Pope -v- Beaumont***, ***Staffordshire Egg Producers***, and ***Kennedy -v- Rattoo Co-op***. I believe that they are of little assistance in deciding this first question. The facts of each case are manifestly distinguishable from the facts of the present appeal and in so far as they contain statements of general principle, I do not believe that they go beyond, or are in any material way inconsistent with, the legal principles enunciated in ***Robinson -v- Dolan***, ***Chibbett –v- Joseph Robinson & Sons*** and ***Simpson -v- John Reynolds (Insurance) Ltd*** which I have summarised above.

125. I accept as correct the submission made by Counsel for the Respondent that the decision of Lord Macmillan in the ***Lincolnshire Sugar Company*** case is good authority for the proposition that many different types of receipt can be a trade receipt, and that in deciding whether a receipt is a trading receipt, one must consider the nature and character of the receipt and the context in which it is made. I believe that this is consistent with the approach adopted by Rowlatt J in ***Chibbett –v- Joseph Robinson & Sons***.

126. Counsel for the Appellant argued that whatever benefits were received by the Appellant pursuant to Rule 9.C(vii) were not a trading receipt, but were instead received as a right of membership. He submitted that the trade between the Appellant and Kerry Co-op gave the Appellant the opportunity to exercise that right, but that this was not sufficient to make it a trading receipt; put another way, that it was a by-product of the trade, and not an operation in the carrying out of the trade. In this regard, he relied upon the passage from O'Byrne J's judgment in ***Robinson -v- Dolan***, where he stated "*... it may be that the appellant's trade gave the appellant an opportunity of qualifying for a grant, but I do not think the matter can be pushed any further.*"

127. Counsel for the Appellant further submitted that the Respondent's position that the allocation of shares was a trading receipt was premised on the Appellant's status as a trader; such an approach would obviously be contrary to the views expressed by Walton J in ***Simpson -v- John Reynolds (Insurance) Ltd.*** However, I believe this characterisation

of the Respondent's position does an injustice to the arguments actually advanced on its behalf; it is clear therefrom that the Respondent points to the Appellant's trading activities with Kerry Co-op as the ground for their view that the allocation of shares was a trading receipt.

128. Applying the principles detailed above to the agreed facts in the instant appeal, I am satisfied that it was the Appellant's trading activities with Kerry Co-op which gave rise to his entitlement to receive a benefit or benefits under Rule 9.C(vii). All of the evidence, in my view, points inexorably to such a finding.

129. The starting point for my consideration of this question must be the Rules of Kerry Co-op which, as was agreed by the parties, governed the relationship between the Appellant and the Co-op and their rights *inter* se. Rule 9.C(vii) itself provides in its first sentence that it is applicable to "*any milk supplier who has in the immediately preceding Milk Quota Year supplied his Raw Milk or such lessor* [sic] *portion thereof as the Board shall determine to the Society or a Nominated Purchaser…*" It is absolutely clear therefrom that it is the supply of milk which triggers the entitlement to receive a benefit under Rule 9.C(vii). I also note in this regard, as pointed out by Counsel for the Respondent, that Rule 9.C(vii) makes some 8 separate references to a "*Milk Supplier*".

130. I believe that this view is supported by the points made by Counsel for the Respondent in relation to the operation of the Rule. She noted that an A shareholder who did not supply milk to Kerry Co-op or to a nominated purchaser during the preceding year would not be entitled to an invitation to subscribe for Patronage Shares, notwithstanding that he would remain an A shareholder. She further pointed out that a B shareholder could become entitled to an invitation to subscribe for Patronage Shares under Rule 9.C(vii) by supplying milk to Kerry Co-op or a nominated purchaser, notwithstanding that they were not an A shareholder at the time of the supply or the time the entitlement to receive an invitation crystallised. She further pointed out that someone seeking to enforce their rights under Rule 9.C(vii) as against Kerry Co-op would have to prove not only that they were a member, but also that they had supplied raw milk to the Co-op or its nominee during the preceding milk quota year, and also the quantity of milk supplied.

I believe that these three points are well made, and demonstrate that a right to benefit under Rule 9.C(vii) requires more than mere membership of Kerry Co-op; rather, it is trading activity which gives rise to the entitlement. Only a member of Kerry Co-op could become entitled to a benefit under Rule 9.C(vii), but membership in and of itself would not suffice; a member would also have had to supply milk in order to trigger the entitlement. I am therefore satisfied that the Appellant became entitled to a benefit under Rule 9.C(vii) *qua* milk supplier, and not *qua* member.

131. In reaching this conclusion, I have also had regard to the wording of the Patronage Share Statement which, as set out above, makes reference in its heading to the Appellant's Milk Supplier Number, and not his membership number; is addressed "*Dear Milk Supplier*"; and, perhaps most significantly, states in the opening sentence "*Set out below is your Patronage Shares Statement, which shows the number of Patronage Shares earned, based on the milk (butterfat adjusted) within quota supplied by you for the milk year outlined above.*" While the wording used could not of itself be determinative of this question, I believe that it does illustrate the understanding of Kerry Co-op and of the Appellant as to why the latter was entitled to a benefit pursuant to Rule 9.C(vii). I further believe that it shows that any benefits received by the Appellant pursuant to Rule 9.C(vii) were part of the consideration he received from Kerry Co-op in exchange for supplying its nominated purchaser with raw milk; the fact that the cash payments received by the Appellant for his supplies of milk were competitive when compared to those paid by other co-operatives does not, in my view, preclude such a finding.

132. Having regard to the foregoing, I am satisfied, and find as a material fact, that the benefits received by the Appellant pursuant to Rule 9.C(vii) were not merely calculated by reference to his trading activities with Kerry Co-op or its nominee, but were a direct result of those trading activities. Put another way, the Appellant's trade with Kerry Co-op did more than give him the opportunity to exercise his rights under Rule 9.C(vii); it was instead the *causa causans* of his entitlement to benefit thereunder.

133. Having considered the nature and character of the benefits received by the Appellant pursuant to Rule 9.C(vii) (which are further discussed in the next section of this determination), the context in which it was received, and the understanding of the parties

in relation thereto, I am satisfied that any benefits received by him were received as a result of his carrying on the trade of a dairy farmer supplying milk; they were the result of his selling milk to Kerry Co-op's nominee and were earned in consequence thereof; they were earned out of the Appellant's trade as a dairy farmer; and they were part of the business payment received by the Appellant in return for his supplying milk. Furthermore, the benefits resulted from the Appellant's activity as a trader, and not merely from his status as a trader.

134. It follows that the benefits received by the Appellant pursuant to Rule 9.C(vii) potentially fall to be treated as a trading receipt in the hands of the Appellant. It is therefore necessary to turn to the second question identified in paragraph 115 above, namely what precisely were the benefits received by the Appellant pursuant to Rule 9.C(vii)?

135. In answering this question, the starting point must again be the wording of Rule 9.C(vii) itself. In this regard, I accept the submission made by Counsel for the Appellant that section 22 of the Industrial and Provident Societies Act, 1893 is applicable and relevant in the instant appeal. Accordingly, the Rules of Kerry Co-op effectively have the status of a contract between the Co-op and its members, and govern their relationship.

136. Turning to Rule 9.C(vii), it provides that:-

> *"The Board shall, in every year within six months of the relevant Milk Quota Year, up to and including the Milk Quota Year ending 31st March 2013, invite any milk supplier who has in the immediately preceding Milk Quota Year supplied his Raw Milk or such lessor* [sic] *portion thereof as the Board shall determine to the Society or a Nominated Purchaser to subscribe at par for Patronage Shares. The number of Patronage Shares which each such Milk Supplier shall be invited to subscribe shall be one Patronage Share for every 4,546.09 litres of Raw Milk supplied by him in each such Milk Quota Year to the Society or a Nominated Purchaser."*

137. The wording of the Rule is quite clear; what a qualifying milk supplier is entitled to receive thereunder is an invitation to subscribe at par value for one Patronage Share

for every 4,546.09 litres of raw milk he has supplied during the relevant period. The end of Rule 9.C(vii) further provides that the invitation to subscribe will lapse unless it has been accepted, and payment for the shares received, within three months of the invitation. It further provides that the invitation to subscribe is to be personal to the milk supplier, and cannot be assigned to any third party except in the course of the administration of the milk supplier's estate.

138. Counsel for the Appellant submits that it is clear from the provisions of the Rule that what the Appellant received thereunder was solely an invitation to subscribe for shares. The right to accept that invitation was personal, was not capable of assignment and would lapse if not accepted within a three-month period. In essence, he submitted, all the Appellant received was an opportunity to increase his shareholding in Kerry Co-op, which he might or might not take up. He submitted that the Appellant's acceptance of the invitation to subscribe, his making payment for the shares, and the allocation of the shares constituted a separate and distinct transaction. He submitted that any realisation of a benefit under Rule 9.C(vii) occurred when the right to be invited to subscribe crystallised at the end of the milk quota year, and not when the entitlement to which the right gave rise was actually seen through to its logical consequence by the purchase and allocation of shares.

139. Counsel for the Respondent submitted that it would be inappropriate to look at the wording of Rule 9.C(vii) in isolation, and that instead one had to consider what actually transpired as between the Appellant and Kerry Co-op, as evidenced by the Patronage Share Statement issued on the 18th of May 2011. As is apparent therefrom, rather than extending an invitation to subscribe, the Appellant was informed that he had earned **[NUMBER OF SHARES REDACTED]** Patronage Shares, that the Board had allocated those shares to the Appellant and that the cost of those shares would be debited to the Appellant's milk account in May. A Share Certificate was enclosed with the Statement. If the Appellant did not wish to take up the Patronage Shares allocated, he was to return the enclosed Share Certificate to the Secretary of Kerry Co-op by not later than the 25th of May.

140. Counsel for the Respondent submitted that it was clear therefrom that there was no distinction made by the parties between the entitlement to subscribe and the actual subscription. There was an automatic allocation by the Board of Patronage Shares to qualifying milk suppliers and the shares had evidently been allocated by the time the Appellant was informed of his entitlement. She submitted that the distinction drawn by Counsel for the Appellant between the crystallisation of the right to subscribe and the subsequent exercise of that right amounted to an "*artificial parsing*" of what actually occurred. She submitted that not merely was there a crystallisation of the entitlement, the Patronage Shares were "*almost foisted upon*" the Appellant and that the crystallisation of the right and the exercise of that right were in reality one and the same, with no intervening time lapse. She submitted that the right to return the Patronage Shares did not affect this view, and noted that there was no evidence before me that the Appellant or any other milk supplier had ever declined to accept the Patronage Shares allocated.

141. Counsel for the Appellant submitted in reply that in considering this issue, I had to have regard to the Rules and the contractual entitlements conferred thereunder; the Appellant's entitlement had to be analysed as a pure matter of law, and not analysed on the basis of the how the right was given effect administratively. The fact that the Board had elected to automatically allocate shares subject to a right of refusal did not, he submitted, detract in any way from the fact that as a matter of law the only benefit conferred upon the Appellant by Rule 9.C(vii) was the right to subscribe for the Patronage Shares at par value.

142. He further submitted that the Appellant's making payment for the shares constituted a *novus actus interveniens* between the crystallisation of the right to subscribe and the actual allocation of the shares. He said it followed therefrom that the allocation of the shares resulted from a two-step transaction and accordingly, even if the benefit received under Rule 9.C(vii) was a trade receipt, all that was received was the right to subscribe. The subsequent payment for and receipt of the allocated shares was not carried out by the Appellant as part of his trading activity but was instead carried out by him as a purchaser of shares.

143. I am satisfied that the position of the Appellant is correct on this issue. The nature and extent of the benefits received by the Appellant under Rule 9.C(vii) can only be determined by reference to that provision. The fact that Kerry Co-op elected to give effect to those benefits in a particular fashion, and that the Appellant evidently acquiesced in it doing so, does not alter the benefits received by the Appellant under the Rule; that is, as Counsel for the Appellant submitted, a pure matter of law. I believe that the Respondent is incorrect in law in conflating the crystallisation of the right to subscribe and the subsequent allocation of the Patronage Shares.

144. Looking at this finding from another perspective, the Rules of Kerry Co-op were, by virtue of the 1893 Act, analogous to a contract between the Co-op and the Appellant. The Appellant's rights and entitlement under that contract are governed by the Rules and must be determined in accordance with same; the conduct of the parties subsequent to the Appellant becoming a member of the Co-op cannot be used to interpret the Rules. Thus, as Finlay CJ accepted in ***Re Wogans Ltd.*** **[1993] 1 IR 157**:-

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

145. In summary on this issue, I am satisfied that the question of what benefits the Appellant received under Rule 9.C(vii) is primarily a question of law. I find that the only benefit received by the Appellant was the personal, non-assignable right to subscribe for Patronage Shares at par value. I accept the argument advanced on behalf of the Appellant that the allocation of Patronage Shares to the Appellant was the outcome of a separate or distinct transaction and did not flow directly or inevitably from Rule 9.C(vii). I further accept that his decision to exercise his right to subscribe for Patronage Shares was an investment decision, and not a trading decision.

146. Having so found, I turn to the third and final question, namely whether the benefits received by the Appellant pursuant to the Rules had a value which falls to be taken into account when calculating the full amount of his profits or gains in the year of assessment.

147. At the risk of unnecessary repetition, I believe it should again be reiterated that Rule 9.C(vii) expressly provided that the right to subscribe for Patronage Shares was personal to the recipient milk supplier and could not be assigned (save in the case of the death of the recipient).

148. Counsel for the Appellant submitted that the crystallisation of the right to subscribe did not involve the passing of any value, whether from Kerry Co-op or from any other party. The assets of Kerry Co-op were in no way depleted by the Appellant acquiring the right to subscribe. He submitted that, as a non-assignable and personal right, the right to subscribe had no actual value.

149. I did not understand Counsel for the Respondent to contend that the right to subscribe for shares had a value in itself; rather, the position of the Respondent was that the benefit received by the Appellant under Rule 9.C(vii) was, or included, the allocation of the Patronage Shares, and that these shares had a value over and above the par value actually paid by the Appellant.

150. I am satisfied and find as a material fact that the right to subscribe for Patronage Shares received by the Appellant under Rule 9.C(vii) was a personal and non-assignable right and, as such, did not have any value. It was not marketable and was, to use the words of Lords Justice Somerville and Scott in ***Gold Coast Selection Trust -v- Humphrey***, a "*merely personal advantage which by its nature cannot be turned into money.*"

151. Accordingly, I find that the right to subscribe for shares received by the Appellant pursuant to Rule 9.C(vii) did not have a value which constitutes a trading receipt to be taken into account when calculating the full amount of his profits or gains in the year of assessment.

152. For the sake of completeness, I should also consider the position if I am incorrect in my finding on the second question; if the benefits received by the Appellant under Rule

9.C(vii) included the allocation of the Patronage Shares, and not merely the right to subscribe, would there have been a transfer of value to the Appellant which might fall to be treated as a trading receipt to be taken into account?

153. Counsel for the Appellant submitted that there was no transfer of value. He submitted that on the formal allotment of the shares, "*nothing of value drained from Kerry Co-op into the coffers of* [the Appellant]"; the only transfer of value was transfer of the subscription monies paid by the Appellant. He accepted that those members who subscribed for Patronage Shares might dilute the shareholdings of other members who did not acquire Patronage Shares, or who acquired a smaller number of Patronage Shares by reason of their having supplied a lesser amount of milk. Any movement of value, he submitted, would only have arisen by a value shift from those members whose shareholdings remained the same and from those members who supplied less milk and whose shareholdings did not grow proportionately.

154. In response to this argument, Counsel for the Respondent submitted that value had flowed from Kerry Co-op to the Appellant because the Co-op had the right pursuant to its Rules to issue shares at a premium, and referred to Rule 11 in this regard. She submitted that the value which had flowed to the Appellant was the difference between the par value of the Patronage Shares and their market value, which Kerry Co-op had foregone.

155. I believe that the Respondent was incorrect in this submission. While Rule 11 does confer a general right to issue shares at a premium, the issue of Patronage Shares is governed by Rule 9.C(vii), which expressly states that the invitation to subscribe is to be at par value. This specific provision supersedes, in my view, the general right conferred by Rule 11. Accordingly, I do not believe that it is correct as a matter of law to say that Kerry Co-op had foregone value by issuing the Patronage Shares at a price which the Respondent contends was less than their actual value.

156. Accordingly, even if I had found that the Respondent was correct in its submission that the benefits received by the Appellant pursuant to Rule 9.C(vii) included the

allocation of the Patronage Shares, I believe that there would still have been no value passing from Kerry Co-op to the Appellant which would require to be taken into account when calculating the full amount of his profits or gains in the year of assessment.

J. Determination

157. My findings can be summarised as follows:-

(a) The benefits received by the Appellant pursuant to Rule 9.C(vii) were not merely calculated by reference to his trading activities with Kerry Co-op or its nominee, but were a direct result of those trading activities.

(b) The only benefit received by the Appellant pursuant to Rule 9.C(vii) was the personal, non-assignable right to subscribe for Patronage Shares at par value.

(c) The allocation of Patronage Shares to the Appellant by Kerry Co-op was the result of a separate and distinct transaction and did not flow directly or inevitably from Rule 9.C(vii).

(d) The right to subscribe for Patronage Shares received by the Appellant under Rule 9.C(vii) was a personal and non-assignable right and, as such, did not have any value which constituted a trading receipt to be taken into account when calculating the full amount of his profits or gains in the year of assessment.

158. As I indicated in paragraph 25 above, the parties agreed that the core issue for determination in this appeal was whether the receipt by the Appellant of Patronage Shares for which he subscribed was a receipt of his trade as a milk supplier, and thus within the charge to income tax, or was instead a capital receipt and outside the charge to income tax. For the reasons outlined above, I find that the receipt by the Appellant of the Patronage Shares was a capital receipt and outside the charge to income tax.

159. I will therefore allow the appeal. I consider that the Appellant has, by reason of the Amended Assessment dated the 29th of December 2016, been overcharged and determine, in accordance with section 949AK(1), that the Amended Assessment should be reduced accordingly.

Dated the 17th day of July 2020

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MARK O'MAHONY
Appeal Commissioner

The parties have by notices in writing requested that the Appeal Commissioner state and sign a case for the opinion of the High Court.