Ref: 28TACD2019

NAME REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondents

DETERMINATION

Introduction

1. The Appellant is one of 15 Appellants and it has been agreed between the parties that this Appellant would take the lead appeal.

2. In this regard, while the Appellant paid capital gains tax the on the disposal of shares (Shares) in the Newmarket Cooperative Creameries Ltd (Newmarket), a refund of that tax is now being claimed on the basis that the tax had been paid in error in light of the Appellant's claim for relief from capital gains tax pursuant to Taxes Consolidation Act 1997 (TCA), section 598. The Appellant asserts that the Shares constituted chargeable business assets and were used by him in his farming activities and therefore Retirement Relief (Relief) should be available pursuant to TCA, section 598(2).

3. Therefore, pursuant to TCA, section 865(7), the Appellant has appealed the Respondent's refusal to repay capital gains tax.

Background

4. Newmarket was founded in the 1940`s. At the time of the transaction, Newmarket carried on extensive manufacturing and retail business activities.

5. The objects for which Newmarket was established include many purposes, including purchasing land for commercial, residential and investment purposes, lending money, generating electricity, dealing in wines, beers, the carrying on the business of cafe operators, carrying on the business of retailers, wholesalers, supermarkets, tobacconists, engaging in currency exchange, carrying out manufacturing and freight forwarding services.

6. During the latter part of 2010 the Kerry Group, through its wholly owned subsidiary Kerry Creameries Ltd, (Kerry) acquired all of the Shares in Newmarket in a takeover (Takeover) transaction for a consideration of €421.00 per share.

7. At the time of the Takeover, Newmarket had 677 shareholders of whom 147 were dairy farmers supplying raw milk to Newmarket. Some of the appellants who were supplying milk to Newmarket as "*Active Milk Suppliers*" only became members of Newmarket shortly before the Takeover on 22nd October 2010.

8. As such, the additional share allocation in 2010 was only awarded to "*Active Milk Suppliers*" irrespective of whether they were members of Newmarket prior to the Takeover. Furthermore, the additional shares did not issue to existing members who were not "A*ctive Milk Suppliers*" at time of the Takeover.

9. The Appellant received **€ Amount Redacted** in respect of his disposal of the Shares as a result of Takeover.

10. On the 11th November 2011 a Return was filed on behalf of the Appellant disclosing sale proceeds of **€ Amount Redacted** resulting in a capital gains tax liability of **€ Amount Redacted**. The capital gains tax was paid by the Appellant.

11. Subsequently, on the 28th April 2014, the Appellant's agent wrote seeking repayment of the capital gains tax previously paid on the basis that relief under TCA, section 598 applied to the disposal.

12. Following correspondence between the parties, the Respondent asserted that the Appellant did not submit a valid claim for the purposes of TCA, section 865. The Respondent also determined that shares were not qualifying assets for the purposes of TCA, section 598 and refused the Appellant's claim to repayment.

Legislation

Taxes Consolidation Act

13. A claim for a refund of tax overpaid, subject to a 4-year claim limitation period, is governed by TCA, section 865. The basis upon which a claim can be made is contained in subsection 1(b) and states:

> *"(i) where a person furnishes a statement or return which is required to be delivered by the person in accordance with any provision of the Acts for a chargeable period, such a statement or return shall be treated as a valid claim in relation to a repayment of tax where –*

(I) all the information which the Revenue Commissioners may reasonably require to enable them determine if and to what extent a repayment of tax is due to the person for that chargeable period is contained in the statement or return, and

(II) the repayment treated as claimed, if due—

(A) would arise out of the assessment to tax, made at the time the statement or return was furnished, on foot of the statement or return, or

(B) would have arisen out of the assessment to tax, that would have been made at the time the statement or return was furnished, on foot of the statement or return if an assessment to tax had been made at that time,

(ii) where all information which the Revenue Commissioners may reasonably require, to enable them determine if and to what extent a repayment of tax is due to a person for a chargeable period, is not contained in such a statement or return as is referred to in subparagraph (i), a claim to repayment of tax by that person for that chargeable period shall be treated as a valid claim when that information has been furnished by the person, and

(iii) to the extent that a claim to repayment of tax for a chargeable period arises from a correlative adjustment, the claim shall not be regarded as a valid claim until the quantum of the correlative adjustment is agreed in writing by the competent authorities of the two Contracting States."

14. The right of appeal in respect of the decision by the Respondent to deny a refund is governed by subsection 7 and states:

"*Where any person is aggrieved by a decision of the Revenue Commissioners on a claim to repayment by that person, in so far as that decision is made by reference to any provision of this section, the person may appeal the decision to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of the notice of that decision".*

15. Therefore, if the Appellant has made a "*valid claim*", a consideration of TCA, section 598 is required. That section provides for relief to an individual on the disposal of all or part of the qualifying assets of his or her business, provided the individual is aged 55 years or more at the date of disposal.

16. TCA, section 598(2)(a) sets out the relief and states:

> *"Subject to this section, where an individual who has attained the age of 55 years disposes of the whole or part of his or her qualifying assets, then –*
>
> *(i) if the amount or value of the consideration for the disposal does not exceed €750,000, relief shall be given in respect of the full amount of capital gains tax chargeable on any gain accruing on the disposal…"*

17. *"Chargeable Business Asset*" is defined in subsection 1 to mean:

> "*an asset (including goodwill but not including shares or securities or other assets held as investments) which is, or is an interest in, an asset used for the purposes of farming, or a trade, profession, office or employment, carried on by –*
>
> *(i) the individual,*
> *(ii) individual's family company, or*
> *(iii) a company which is a member of a trading group of which the holding company is the individual's family company, other than an asset on the disposal of which no gain accruing would be a chargeable gain*"

18. The meaning of "*qualifying assets"* is also set out in TCA, section 598(1) to include:

> *"(i) "chargeable business assets of the individual, which, apart from tangible movable property, he or she has owned for a period of not less than 10 years ending with the disposal, and which have been his or her chargeable business assets throughout the period of 10 years ending with that disposal,*
>
> *(ii) (I) the shares or securities, which the individual has owned for a period of not less than 10 years ending with the disposal, being shares or securities of a relevant company that is a company—*
>
> *(A) which has been a trading company, or a farming company, and the individual's family company, or*
>
> *(B) which has been a member of a trading group, of which the holding company is the individual's family company,*
>
> *during a period of not less than 10 years ending with the disposal and the individual has been a working director of the relevant company for a period of not less than 10 years during which period he or she has*

been a fulltime working director of the relevant company for a period of not less than 5 years, and

…..”

19. TCA, section 654(1) provides the following definitions:

> *“farming* “*farming farm land, that is, land in the State wholly or mainly occupied for the purposes of husbandry, other than market garden land*”
>
> …
>
> *“occupation” in relation to any land other than market garden land, means having the use of that land or having the right by virtue of any easement (within the meaning of section 96) to graze livestock on that land*”

Evidence

Mr. Sean Myers expert witness for the Appellant

20. Mr Myers gave evidence as follows:

a) he was employed by the Irish Co-Operative Organisation Society (ICOS) for 40 years as the Munster representative. The ICOS is the central organisation for farming co-operatives in the country. He stated that ICOS was a central organisation which was funded by the co-operatives on an affiliation fee basis. In cross examination he stated that he was not a member of the Newmarket but that as an ICOS representative he would have attended shareholder meetings and some board meetings including those held at the time of the Takeover.

b) His role in ICOS involved advising on rules of procedure and dealing with shareholder disputes. He said that ICOS had assisted in the establishment of creameries throughout the country to establish plants for the manufacture of butter and cheese. He said that co-operatives were formed in the early part of the twentieth century and financed by local farmers who were required to contribute £1 per cow in return for a share in the co-operative.

c) He said that prior to the introduction of the milk quota system in 1983, farmers had to apply for shares in order to sell milk to the co-operative. In cross examination, he confirmed that there was no obligation on a milk supplier to be a shareholder to supply milk to Newmarket. He stated that there could have been a policy of the board not to accept milk from non-members but he could not testify to this effect.

d) He stated that it was very important for farmers to have a guaranteed outlet as milk was perishable product and as such the Shares in Newmarket facilitated a farmer's farming activities. He confirmed that the board of the co-operative controlled the admission of membership and succession to shares.

e) He proceeded to state that between 1983 to 2015 the entitlement to sell milk to Newmarket was linked to the milk quota that a farmer had and not to the famer's shareholding in Newmarket. He said that in 1983, the co-ops had no *"great requirement for funds*". He confirmed that the introduction of the milk quota system in 1983 was a "*game changer*".

f) He confirmed that there was no obligation on Newmarket to buy milk in excess of a farmer's quota. He also confirmed that the milk quota was the licence to supply milk to Newmarket rather than the holding of the shares.

g) He confirmed that Rule 20 made clear that bonus shares could issue to "*active milk suppliers*." He stated that he did not know if the Appellant supplied milk to the Newmarket. He stated that at the time of the Takeover all shareholders received consideration from Kerry regardless of whether they were "*active milk suppliers"*. He confirmed that he did not know the number of shareholders who were farmers at the time of the Takeover.

h) In relation to dividend entitlement, he confirmed that interest could be paid on the shares which was capped at 5% of the nominal value of the shares. In cross-examination he accepted that if paid, the interest would have been a substantial sum. He said that additional shares or bonus shares could issue to members linked to the number of shares the member owned or alternatively the amount of milk supplied in the preceding year or other criteria stipulated. He indicated that such shares ranked *pari-passu* with the existing shares. He confirmed he was not using the term bonus share in a technical tax sense.

The Appellant

21. The Appellant gave evidence as follows:

a) He was involved in beef and dairy farming since the time he inherited the Shares in Newmarket in 1988 following the death of his mother. He accepted that the bonus shares issued at the time of the Takeover were not held by him for 10 years. He also accepted the Shares that he acquired in December 2001 were not held by him for 10 years.

b) He said that the milk quota system introduced in 1983 was linked with the milk yield of 1982. He stated that if there was milk in excess of the quota there was no guarantee that Newmarket would buy the milk. He confirmed there was a fine for milk produced in excess of the quota held by a farmer.

c) It was his understanding that only members of Newmarket could supply milk to the co-operative. However, he conceded that this perception may not have been accurate in light of the evidence of Mr Myers.

Submissions

Appellant

22. The Appellant made the following submissions:

a) At the time of disposal of the Shares, he was aged over 55, had held the Shares as qualifying assets for a period of not less than 10 years and were used for the purposes of farming and were not held as investments. Therefore, the relieving provisions of TCA, section 598(2) applied to the entire proceeds of **€ Amount Redacted**.

b) The number of Shares allocated by Newmarket was connected to the number of animals owned by the Appellant. In this regard, TCA, section 598 requires that the chargeable business asset be, or be an interest in, an asset used for the purposes of *inter alia*, farming. TCA, section 654 defines farming as "*farming, farm land, that is land in the State wholly or mainly occupied for the purposes of husbandry, other than market gardening*". The requirement that the land had to be occupied wholly or mainly for the purposes of husbandry reflects a long standing distinction in tax law between profits resulting from the taxpayer's occupation of the land and profits from an activity in which occupation of the land is merely incidental.

c) Husbandry is an old fashioned term and one which is not defined in the act. In *Keir v Gillespie*, 1920SC 67 at 69, Lord Skerrington stated that:

"the primal and natural meaning of the term "husbandry" as applied to land includes all those acts of it which are commonly described as "farming", the rearing of sheep and cattle and the production of milk are generally recognised as within the province of the husbandman. In Re: Cavan Co Operative Society Ltd Kenny J stated "In common parlance lands devoted to grazing sheep are occupied "for purposes of husbandry" and a sheep farmer is a husbandman in the ordinary acceptance of the term".

d) Land is occupied for the purposes of husbandry if the trade carried on by the occupier *"depends to a material extent on the industrial or commercial use of the fruits (natural or artificial) of the lands so occupied*', Lean & Dickson vs Ball per Lord Clyde LP.

e) The Appellant used the Shares for the purposes of farming to facilitate the sale of milk. The holding of Shares in the Newmarket guaranteed the purchase of milk from the holder.

f) The Appellant argued that the Respondent's submission that "*the shares were not required or necessary at all by reason of any use for the purposes of farming*" goes well beyond the requirement of the legislation. What the legislation requires is that the asset be used for the purposes of farming, not that the Shares be required or were necessary for the purposes of farming. Therefore, it was irrelevant if the Shares had another use.

g) The Respondent's argument that Newmarket is not a company engaged in, or only in matters relating to farming has no bearing in this appeal. Rather the issue is whether the Appellant falls within the provisions of TCA, section 598 and whether the Shares are assets used for the purposes of farming.

h) In applying the relevant caselaw, the words of tax legislation should be given their natural meaning without adding to or deleting. In this regard, the Appellant relied on the following passage from *Cape Brandy Syndicate v IRC* [1921] 1 KB 64 where Rowlatt J said:

> *"In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. Them is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".*

i) When considering the interpretation of tax statues, the starting point is generally the judgement of Kennedy CJ in *Doorley v Revenue Commissioners* [1933] IR 750 at page 765 of the aforesaid judgment, the Chief Justice held that:

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

j) In *Kiernan v Revenue Commissioners* [1981] IR 117 the Supreme Court held that there were three basic rules of interpretation:

> *"First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or an extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning. …. Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language… Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use."*

k) In *Gaffney v Revenue Commissioners* [2013] the High Court stated that the Revenue Commissioners agreed that the principles applicable to the construction of tax statutes are those set out in *Doorley and Kiernan.*

l) Furthermore, in *Minster for Justice, Equality and Law Reform v Devine* [2015] IECA 182 the Court of Appeal held that:

> *"It is well established that such Statutes must be construed strictly in order to give the benefit of the doubt to the individual as against the State. The application of the presumption beyond criminal statutes was emphasised by O'Higgins J in Mullins v Hartnett when he said "penal statutes are not only criminal statutes but only statutes that impose a detriment".*

m) Therefore, when construing a tax statute, one must give effect to the words used, but this does not mean that the court is prohibited from having regard to the context of the words used in order to determine their meaning. The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of such statutory provision, resorting in cases of doubt or ambiguity to a consideration for the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable.

n) In *Mullins v Hartnett* the High Court quoted from Bennion's seminal publication on the interpretation of legislation, where the author notes:

"The true principle has never been that 'a penal statute must be construed strictly' (though it is often stated in such terms). The correct formulation is that a penal statute must be construed with due regard to the principle against doubtful penalization, along with all other relevant criteria."

o) Reference was thereafter made to Maxwell on the Interpretation of Statutes:

> *"The effect of the rule of strict construction might be summed up by saying that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject against the legislature which has failed to explain itself. If there is no ambiguity, and the act or omission in question falls clearly within the mischief of the statute, the construction of the penal statute differs little, if at all, from that of any other."*

p) In *Fingleton v Central Bank* [2016] IEHC 1, Noonan J. stated:

> *"Penal statutes will be construed strictly in favour of the party subject to the penalty. Of course when where penal statutes are concerned, the court's function is to ascertain the meaning of the words used aided, if necessary, by the relevant rules of construction. This is clearly expressed in the words of Plowman J in HPC Productions Ltd. In every case the question is simply what is the meaning of the words which the statute has used to describe the prohibited act or transaction? If these words have a natural meaning, that is their meaning. And such meaning is not to be extended by any reasoning based on the substance of the transaction. If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted."*

q) Therefore if there are two reasonable meanings, the interpretation which will avoid the penalty is the approach to be adopted. Therefore, the natural meaning of "*not including shares or securities or other assets held as investments*" is that the exclusion is limited to assets which are held as investments, shares or securities being itemised as typical examples.

r) Reference was thereafter made to the Respondent's argument that shares of any nature, be they held as investments or otherwise, are excluded based on the UK Special Commissioner decision in *Durrant v Inland Revenue Commissioners* (1995) STC (SCD)145. It was therefore submitted that Special Commissioner decisions are not legally binding decisions in the UK and accordingly are not binding decisions in Ireland.

s) Furthermore, the decision in *Durrant* identified two or even three possible ways of reading the words "*not including shares or securities or other assets held as investment*". Accordingly, applying the rules of construction, and in particular that rule which states that where there are two reasonable meanings, the approach to be adopted is the one that avoids the penalty.

t) As a result of the restrictions contained in the Rules of Newmarket, the Shares were not commercially tradable assets and as such could not have been held for investment purposes. As such, the Shares were not held as investments and are therefore not excluded from the Relief.

u) In relation to the assertion by the Respondent that the guarantee to supply milk was a fringe benefit or a coincidental element of the shareholding was incorrect as the guarantee was a key factor and the main reason why the Shares were held. The Shares were not held as investments and the evidence given in relation to the inability to sell the shares or the restricted consideration for the Shares and the limited dividend could not classify the Shares as investments

Respondent

23. The Respondent made the following submissions:

a) To qualify for the Relief, it is necessary that there is a disposal of "*qualifying assets".* The meaning of "*qualifying assets"* in so far as it relates to "*chargeable business asset"* requires that the asset must have been owned for at least 10 years ending on the date of the disposal and must be actually in use for the entirety of the 10-year period ending on the date of the disposal.

b) Therefore, the definition of *'chargeable business asset'* is both positive/inclusive and negative/excluding. On the positive side, it is necessary that the assets must be "*used for the purposes of farming…"*.

c) Shares are intangible assets and in essence are no more than a bundle of rights relating to a company. There is no manner in which shares could be held in a person's hand, manipulated, used as a tool, operated in any manner so as to operate or be of use on a farm or be consumed in the course of farming. It is not possible to do any more with shares than to be passively held. Therefore, the Shares do not meet the requirements of the Relief.

d) Furthermore, intangible property does falls within the definition of *'chargeable business asset'* such as software used for the purposes of farming by way of a tool for recording livestock or for accounting purposes. Similarly licences to graze, conacre or

agistment constitutes a *'chargeable business asset'* however the same cannot be said in relation to shares.

e) To the extent that anything may be used, it is the rights inherent in the Shares. These are qualities attaching to the shares themselves and therefore too far removed from what is required of an asset for the purposes of the Relief. Furthermore, there was no indication or evidence that any such rights were actually used.

f) The activity of farming must be "*carried on by the individual*" and that it cannot be said that merely because a company is engaged in farming that shares are also used for the purposes of farming. The farming must be carried on by the individual. In addition, there are separate provisions dealing with ownership of shares qualifying for the Relief. It was submitted that it was not sufficient to rely on the farming activities of Newmarket to bring the Shares within the Relief. Therefore, the Appellant had not brought himself within the meaning of '*qualifying asset'* and *'chargeable business asset'* for the purposes of the Relief.

g) On the negative/exclusionary side of the definition of *'chargeable business asset'* it is necessary that the assets must not be "*shares, or securities, or other assets held as investments*". However, it was not possible to suggest that farming could be carried on without the Shares.

h) In this context, the Rules of Newmarket, including the amended rules made clear that it was not necessary to be a shareholder of Newmarket in order for the Appellant to sell milk. While the Rules provided that Newmarket must accept all milk from persons who are members, there was no restriction on accepting the milk of non-members. In particular Rule 6 stated:

> "*Milk Supply*
>
> *(1) The Society, so long as it shall continue in business, shall, subject to the exceptions hereinafter mentioned in this rule, accept from every member having milk to sell all the milk the produce of any cow or cows kept grazed on any lands within the area defined by rule 5, provided such milk shall be delivered fresh and in good condition to the Society at such times as the Committee shall appoint, and the Society shall pay for such milk as the current price or rate fixed by the Committee for milk supplied to the Society by members of the Society. In case of default by the Society it shall pay to every such member in respect of whom the Society has made default the sum of one shilling per cow per day for every cow's milk not so accepted while such default continues.*

(2) (i) Each member of the Society who shall keep or graze a cow or cows upon lands within any area defined by rule 5 shall sell to the Society all milk produced by such cow or cows, save so much thereof and shall be required by such member for the domestic consumption of his household, or for the use of the livestock on his farm."

i) Furthermore, to facilitate the Takeover, a number of amendments to the Rules were passed at a Special General Meeting to include the following additional paragraph to rule 20:

"*In the event of the Offer becoming a binding offer, the Committee of Management of the Society shall be authorised to issue and allot up to 5,694 shares at par to Active Milk Suppliers who have a registered milk quota with the Society. Such shares shall be allocated in proportion to the amount of milk quota registered with the Society by such Active Milk Suppliers. Any person entitled to receive shares pursuant to this paragraph who are not already members of the society shall become members of the Society on the allotment of shares in the Society pursuant to this paragraph. "Active Milk Suppliers" for the purposes of this paragraph means a natural person who supplied milk to the Society in the 2009/10 milk quota year*."

j) Therefore, the amendment to the Rules in 2010 made specific reference to persons who were "*Active Milk Suppliers*" and who supplied milk in accordance with a "*registered milk quota*" to Newmarket. As such, it was not necessary to be a member of Newmarket or to even hold shares in order to supply milk as all the benefits existed to persons who supplied milk as "*Active Milk Suppliers".*

k) Therefore, the Shares were not required or necessary by reason of any use for the purposes of farming, but were merely passively held by persons supplying milk to Newmarket. It was clear therefore that the Shares were not used for the purposes of farming at all.

l) The 2010 amendment also made clear that the persons who acquired the shares at par and in the knowledge that the shares were valued at €421 per share with the view to making a profit from the acquisition and imminent sale of those shares. Those shares were acquired for investment purposes and were not required or used for any other purpose. It was therefore clear that the Shares were not required or necessary at all by reason of any use for the purposes of farming, but were merely passively held by some of the persons supplying milk to Newmarket. Therefore, the Shares were not used for the purposes of farming.

m) In addition, the Shares could not be described as a licence. Post-sale, the Appellant, as the holder of a milk quota continued to supply milk to Newmarket. As such there

was no restriction on the Appellant, other than the existence of the milk quota, to supply milk to Newmarket. In fact, the Appellant continued to supply milk until the quota system was abolished in 2015. As such, since the Shares were sold, the Appellant suffered no adverse effect from not having the benefit of the Shares. In terms of there being some sort of fringe benefit from holding the Shares, it was submitted that was not a use of the shares.

n) There was no evidence that the acquisition of additional shares in 2010 was in the form of a bonus. While 7 of the Appellants who were '*active milk suppliers'* received shares, the other 8 Appellants were not '*active milk suppliers'* and did not receive the additional shares in advance of the Takeover. As such, those 8 Appellants who were not providing milk could not be said to be using the shares for the purposes of farming.

o) There is no provision which allows a dual or multi use of the asset. There is no provision allowing for an apportionment of the use or to otherwise accommodate such an additional use. In other words, if an asset is used for any other purpose other than purely farming, it does not fall within the parameters of the Relief. The Appellant gave no indication as to how the assets were actually used at any time of disposal and there was no indication that the assets were used for the entirety of the 10-year period.

Statutory interpretation

p) In the approach to statutory interpretation, words must be given their ordinary meaning. It was submitted that the clear ordinary meaning of "*not including shares or securities*" is simply that shares are excluded from the meaning of *'chargeable business asset'*.

q) If an expression is used to narrow something in a list, it has to be clear that it is narrowing that thing in the list. Normally when a general item is at the end of a list, the normal cannon of construction, *ejusdem generis*, applies as articulated by the following commentary provided by Dodd in 'Statutory Interpretation in Ireland' at paragraph 5.68:

> *"Where a list or a string of genus describing terms are followed by a wider residuary or sweeping up words the ordinary or wide meaning of the residuary words is presumed to be limited to things of that class or genus. In the Irish Fertilisers case Cross's statement of the rule was quoted with approval:*

> *Where words are found following an enumeration of persons or things, all susceptible to being regarded as specimens of a single genus or category but not exhaustive thereof, their construction should be restricted to things of that class or category unless it is reasonably clear from the context or the general scope and purview of that act that parliament intended that they should be give a broader signification.*

The inclusion of a concluding general phrase is a fail-safe to ensure that any specific member of the intended category that may have been omitted is caught by the provision. As the general words are included to catch unenumerated objects in the category, it follows that they are not intended to be given a meaning broader than that of the category. The maxim, when applied, deviates from the normal rule that words and phrases be given their ordinary and plain meaning.

In People v Farrell an issue in relation to the interpretation of the phrase "a convenient place" in Section 30(3) the Offences Against the State Act, provided that whenever a person is arrested under this section he may be removed to and detained in custody in a garda station, a prison, or some other convenient place. The Applicant had been arrested under the provision of that section and taken to a garda station. Subsequently he had agreed to travel in a garda patrol car with garda officers for the *purpose of pointing out various places which he had mentioned to them. The question arose as to whether the garda car was a convenient place within the meaning of 30(3). O'Higgins CJ applying the ejusdem generis rule held that it was not:*

> *in the court's view it would not be proper to regard a vehicle as a convenient place. The application of the ejusdem generis rule of construction would indicate that the general term "other convenient place" ought to be construed in the same sense as the specifics, a garda station or a prison and at least must mean a convenient building of some kind.*

The ejusdem generis cannon is not a binding rule and will not be applied where there is some contrary indication. In O'Sullivan v The County Council of Leitrim, the High Court applied the rule but noted that 'the rule is one to be applied with caution'. For ejusdem generis to apply a general term must be proceeded by a genus creating a string of terms. Preceding specific words which are too incongruous to constitute a genus will not trigger the maxim. The case of Royal Dublin Society this involved the interpretation of section 7 of the Excise Act 1835 which provided that it shall be lawful for Commissioners and Officers of Excise grant retail licences to any person other

than to sell beers, spirits, et cetera and wine in any theatre established under royal patent or in any theatre or other place of public entertainment.

In the High Court ejusdem generis was applied to narrowly construe the phrase "other place of public entertainment". The Supreme Court, however, found that ejusdem generis had been wrongly applied. Keane J expressly approved the approach adopted in Allen v Emerson in which Asquith J said:

> *In modern times I think greater care has to be taken in the application of the doctrine of ejusdem generis for the doctrine itself as laid down by great judges from time to time has never been varied. It has been one doctrine throughout. The main principle upon which you must proceed is to give all the words their common meaning. You are not justified in taking away from them their common meaning unless you can find something reasonably plain upon the face of the document itself to show that they are not used for that meaning. And the mere fact that the general words follow specific words is certainly not enough.*

Keane J was satisfied that the learned High Court judge had erred in law in applying the ejusdem generis rule to the construction of these words which lead to an unnecessarily restrictive view of the expression 'other place of entertainment'. He stated:

> *Specifically it is quite clear that a place to which the public are admitted on, payment of an appropriate charge, it may even be without charge and where activities are carried on which would be broadly described as entertaining, is entitled to be described as a place of entertainment. To confine it to premises which resemble theatres or having designated seating areas for the accommodation of audiences who view particular spectacles over a limited period of time, usually a few hours, would only be appropriate if one were applying the ejusdem generis rule. Thus exhibitions featuring particular trades or activities, whether it be motor cars, tourism or whatever to which the public are admitted can appropriately be regarded as entertainment. Common sense suggests that they are attended by many members of the public who have no intention of buying any of the products for services on offer, but who find it pleasantly diverting a way of spending a few hours.*

Similarly, in AG v Shribman there was no genus and so the maxima had no application. At issue was whether a watch came within the meaning of

instrument in the statutory phrase 'cutlery, hardware, implements and instruments':

> *Neither the ejusdem generis rule of interpretation or other rule of interpretation by association... can in the opinion of this court be applied here. The group of articles described in the words "cutlery, hardware, implements and instruments" is a heterogenous group. They have no such affinity as would enable the court to say that their association together limits the meaning which is to be given to any one heading in the group.*

Where general words are followed by particular instances, the generality is not normally cut down by the particular instances - ejusdem generis does not apply. Re Court of Justice Act, 1947 (Quinn) concerned the application for public dancing licence:

> *Before the rule can apply the general words must follow specific words. In the present case the general words proceed the specific words".*

s) Therefore, the *ejusdem generis* rule is a form of construction which will apply before the rule against doubtful penalisation. Also the effect of the rule is to narrow the general words. In this case, the definition of a '*chargeable business asset'* applies to "*goodwill not including shares, securities or other assets*". The question is whether the *genus* is established as chargeable business assets. If there is a *genesis*, the effect of *ejusdem generis* is to limit the expression "*other assets held as investments*" and not to limit the words "*shares or securities*". Therefore, e*jusdem generis* as a rule restricts other investments to being other investments of a type that would be in the *genus* before it.

t) The words "*other assets held investment*" cannot be used to narrow the words "s*hares*" or "*securities*". The Appellant's interpretation requires the words to be interpreted as treating *"shares or securities or other assets held as investments"* the same and that shares and securities are only excluded if they are also investments. In other words, the Appellant is using the words "*other assets held as investments*" to try to narrow the words "*shares" or "securities*" into shares or securities which are held as investments. Even the *ejusdem generis* rule which is the closest interpretation that you can get to what the Appellant was suggesting does not do that. It narrows the general words at the end not those words at the beginning.

u) In *Robert Harris v Quigley* [2006] 1 IR 165 Gilligan J made the following observations at page 175:

> "*In Revenue Commissioners v Doorley [1933] IR 750 at p 763 Kennedy CJ cited with approval the speech of Lord Cairns in Partington v Attorney General (1869) LR 4 HL 100 at p 122:-*
>
> *"I am not at all sure that, in a case of this kind – a fiscal case – form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."*
>
> *Kennedy CJ then continued:-*
>
> "*This dictum does not mean, however, that the ordinary rules applied to the interpretation of statues are not to be applied to the interpretation of taxing statutes, as has often been pointed out … In Attorney General v Carlton Bank [1899] 2 QB 158 Lord Russell CJ said (at p 164):- 'In the course of argument reference was made on both sides to supposed special canons of construction applicable to Revenue Acts. For my part I do not accept that suggestion. I see no reason why special canons of construction should be applied to any Act of Parliament and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect of the intention of the Legislature as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed.'"*
>
> *Kennedy CJ concluded at pp 765 to 766:-*
>
> *"I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statue as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting*

the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable."

v) This approach is reflected in the most recent interpretation by the Court of Appeal in the *Bookfinders Ltd. -v- The Revenue Commissioners* [2019] IECA 100, where Kennedy J. said as follows:

35. *The primary issue with which this Court must deal is one of statutory interpretation in relation to the correct construction of the Act. In Gaffney v. Revenue Commissioners, Dunne J. sets out a number of authorities that highlight the principles applicable to the interpretation of taxation statues, beginning with the judgment of Kennedy C.J. in The Revenue Commissioners v. Doorley at p. 765:*

> *"A taxing Act (including of course any other Act or part of an Act incorporated in it by reference), of its own proper character and purpose, stands alone, and is to be read and construed as it stands upon its own actual language. In my opinion, therefore, the argument from the earlier Stamp Acts propounded by Pigot C.B. and adopted here, is not one which may be admitted by the Court in interpreting the Act before us. The duty of the Court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e., within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred."*

36. *She then referred to Inspector of Taxes v. Kiernan, at pp. 121 to 122, in which Henchy P. made the following observations:*

> *"Leaving aside any judicial decision on the point, I would approach the matter by the application of three basic rules of statutory interpretation. First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or*

expression should be given its ordinary or colloquial meaning. As Lord Esher M.R. put it in Unwin v. Hanson at p. 119 of the report:

'If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.'

The statutory provisions we are concerned with are plainly addressed to the public generally, rather than to a selected section thereof who might be expected to use words in a specialised sense. Accordingly, the word 'cattle' should be given the meaning which an ordinary member of the public would intend it to have when using it ordinarily.

Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language: see Lord Esher M.R. in Tuck & Sons v. Priester (at p. 638); Lord Reid in Director of Public Prosecutions v. Ottewell (at p. 649) and Lord Denning M.R. in Farrell v. Alexander (at pp. 650-1). As used in the statutory provisions in question here, the word 'cattle' calls for such a strict construction.

Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed."

……

39. *There is no basis at law for an approach to the interpretation of revenue statutes that differs from that of statutory interpretation generally. This is clear from the Supreme Court in Revenue Commissioners v. O'Flynn Construction, which expressly considered the issue of statutory interpretation of general tax avoidance provisions. In his judgment, O'Donnell J. examined McGrath v.*

McDermott [1988] IR 258, which he concluded to preclude a purposive approach. In particular, he referred to the below passage in McGrath v. McDermott:

> *"The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purposes of making them effective to achieve their expressly avowed objective."*

40. *O'Donnell J. commenting on this passage, stated that:*

> *"the decision in McGrath itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive… if McGrath stands for any principle of statutory interpretation it implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters."*

41. *O'Donnell J. dismisses the notion that McGrath v. McDermott is authority for precluding a purposive approach to taxation statutes:*

> *"Indeed, if McGrath v. McDermott stands for any principle of statutory interpretation it implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters…"*

42. *O'Donnell J. goes on to say at para. 73:*

"In Barclays Finance Ltd. v. Mawson [2004] UKHL 51, [2005] 1 A.C. 684 the House of Lords emphatically reaffirmed that the same principles of statutory interpretation applied to taxation statutes as to other non-criminal statutes. Indeed, it was the realisation in Lord Steyn's words in I.R.C. v. McGuckian[1997] N.I. 157 at p. 166, that "those two features – literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately – [which] allowed tax avoidance schemes to flourish" which led the United Kingdom courts to insist that the same principles of statutory interpretation applied to tax statutes as to other legislation. In Ireland, however, this was something that was acknowledged at least implicitly in McGrath v. McDermott [1988] I.R. 258, and explicitly in the provisions of the Interpretation Act 2005 which embodies a purposive approach to the interpretation of statutes

other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes."

43. *I accept the argument of the respondent that, much like McGrath v. McDermott, many of the cases which are cited as authority for the "strict" approach actually take an approach to statutory interpretation analogous to that contained in s. 5 of the Interpretation Act 2005 and this can be seen in many of the cases relied upon by the appellant. The passage from Inspector of Taxes v. Kiernan which is generally used to support a "strict" reading of taxation statutes reads as follows:*

> *"Secondly if a word or expression is used in a statute creating a penal or taxation liability and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language".*

44. *"Strict" in this instance can be interpreted as precision in the consideration of the ordinary meaning of words used in order to avoid a liability to tax arising in unclear circumstances, and not as a method by which a narrow construction is to be preferred.*

45. *On the topic of the interpretation of taxation statutes, Dodd, in Statutory Interpretation in Ireland (1st ed, Tottel, 2008) also states, at para. 6.51:*

> *"In respect of such statutes, what is typically valued is certainty and allowing those affected to rely on the ordinary and plain meaning."*

46. *As stated with admirable clarity by Blayney J. in Howard v. Commissioners of Public Works in citing with approval from Craies on Statute Law, p. 71:*

> *"If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such cases best declare the intention of the lawgiver."*

47. *I adopt this approach and accordingly, the starting point in the analysis must be the plain language of the Act.*

….

The Principle Against Doubtful Penalisation

74. *Statutes which concern an individual's liberty or property have been construed strictly by the courts so that a person should not be penalised as a result of a provision which is unclear. In the context of a criminal statute that imposes a*

penal sanction, the words in the statute must be plain and unambiguous in order that the conduct in issue is identified as an offence. However, it is important to note that the principle against doubtful penalisation applies only insofar as the provision in an enactment is ambiguous and such ambiguity remains after other canons of interpretation have failed to resolve it.

75. *The principle against doubtful penalisation therefore comes into play only after other tools of interpretation have failed. As I am satisfied that the words in the statute and the schedules thereto bear of their ordinary and plain meaning, the principle against doubtful penalisation can have no application and I accept the submission of the respondent in this respect."*

w) In *Comptroller and Auditor General v Ireland and Attorney General* [1997] 1 IR 248, Laffoy J. noted the decision in *Cork County Council v Whillock,* [1993] 1 I.R. 231 and rejected an interpretation of a provision that would result in some words of the section, which were clear and unambiguous, becoming meaningless. In the present case the definition of '*chargeable business asset'* uses the word "*or*" repeatedly making it clear that the matters referred to are to be interpreted disjunctively/in the alternative, so that they are separate matters for separate consideration. The use of the word "*or*" cannot be ignored and its disjunctive use must be reflected in the interpretation.

x) This is supported by UK Special Commissioners decision which considered the equivalent UK relieving provision. The UK legislation uses the same wording defining "chargeable business asset" as "*an asset (including goodwill but not including shares or securities or other assets held as an investment) which are used…."*. In the context it is not possible to associate the phrase "*held as investments*" to "*shares or securities*". If the requirement that an investment applies to "*shares or securities or other assets"*, it would be expected that the word "*and*" as opposed to "*or*" would be the appropriate word to use. In addition, if the conjunctive interpretation were to apply, it would render the words "*shares or securities*" redundant or superfluous and therefore the words "*shares or securities*" would have no function or purpose in the definition of *'chargeable business asset'*.

y) If one finds that shares or securities are not to be distinguished from other assets then there can be no purpose to their inclusion in the definition. "*Other assets*" is sufficiently broad that it encompasses all assets other than those previously specified in the definition, which would include shares or securities.

z) It is also not permissible to delete or ignore words when interpreting a statute. Accordingly, the only interpretation of the provision which gives meaning to the words "*shares or securities*" is one that distinguishes these assets from "*other assets held as investments*".

aa) This interpretation is consistent with that of "*qualifying assets*" which specifically includes shares or securities in a family trading company, insofar as it implies that the only shares or securities that can qualify are those held in a family trading company.

bb) In *Cork Co Council v Whillock,* O`Flaherty J. stated:

> "*a construction which would leave without effect any part of the language of the statute will normally be rejected*".

cc) This view was endorsed by Egan J. stating:

> "*there is abundant authority for the presumption that words are not used in a statute without meaning and are not tautologous or superfluous, and so effect must be given if possible, to all of the words used, for the legislature must be deemed not to waste words or to say anything in vain*".

dd) The plain ordinary meaning of the word "*or*" is disjunctive in the term "*shares or securities or other assets held as investments*" and is included by the legislature for a reason. The Appellant suggested that there was an ambiguity and thereafter relied on the penal doubtful penalisation rule. However, the argument was inconsistent with the interpretation of a statute as espoused by Kennedy J. in *Bookfinder*s at paragraph 75, in confirming that the principle against doubtful penalisation only applied if there is an ambiguity and if all the others rules have failed. Therefore there was no such ambiguity or failure in the application of the standard rules of interpretation.

ee) This is further supported by the fact that "*shares*" are dealt within the general meaning of "*qualifying assets"* pursuant to TCA, section 598(1) and that there are very significant conditions that must be met in order for shares to qualify for the Relief. It cannot be intended to include such conditions under the general meaning of "*qualifying assets"* while at the same time allowing an unrestrained meaning of the definition of "*chargeable business asset*". It was submitted that this would be an internal contradiction within the provision itself and produce an absurdity.

Use

ff) The Oxford English Dictionary definition of the meaning of the word "*use*" means to "*do something with an object or adopt a method in order to achieve a purpose or consume all of something"*

gg) There was no evidence that there was any use by the Appellant "*for the purposes of farming*". "*Use*" is an active word. There was also no evidence given in relation to the question of investment. There was no evidence that the benefit was inherent in the

shares. The ownership of the shares permitted membership to a club that provided benefits. There was no actual use of the share as it was a passive holding of the share.

UK Jurisprudence

hh) In *Durrant v Inland Revenue Commissioners* (1995) STC (SCD)145, the Appellant on retiring from a firm of accountants of which he was a partner claimed retirement relief on, *inter alia*, the disposal of shares, held by the partnership in a service company the main activity of which was the provision of bookkeeping and accountancy services to the partnership. The claim to retirement relief on the disposal of the shares was refused. On appeal the taxpayer argued that the shares were assets of the partnership and the disposal was a disposal of the whole or part of a business qualifying for relief. He submitted that the shares were "*chargeable business assets*" in respect of which relief was available on the gains accruing on their disposal. The taxpayer contended that only shares held as investments were excluded from the category of chargeable business assets.

ii) The headnote reflects that the Special Commissioners held, *inter alia*:

> "*The words in the parentheses in para 12(2) should be read disjunctively. On that basis an asset which was a share was excluded as a chargeable business asset, as was an asset which was a security and as were other assets which were held as investments. Accordingly, all shares were excluded from being chargeable business assets within para 12(2). Moreover, the shares were a business investment which were not used for the purposes of the taxpayer's profession. The taxpayer's appeal would therefore be dismissed".*

jj) The decision itself contains the compelling logic which is consistent with the Irish manner of construction where at page 149 the FTT concluded:

> "*It seems to me that there are two or perhaps three possible ways of reading the words in parentheses in paragraph 12 (2). An asset which is a "share" is excluded as a chargeable business asset. So is an asset which is a security. So are other assets which are held as investments. That reflects the Crown submission. Any share or security is excluded, irrespective of whether it is held as an investment or a business asset. Another reading is to restrict the exclusion to assets which are held as investments, shares or securities being itemised as typical examples. A slightly different approach is to suppose that the draftsman had in mind that shares or securities are commonly categorised as investments and he added "other assets" having the same characteristics, i.e. "held as investments".*
>
> *However, I reject the reading of the exclusion which the taxpayer advances. I do not think that the draftsman would have referred specifically to "shares or securities"*

unless they were meant to be excluded even if it could be argued that they were not held as investments. The use of the disjunctive "or" is a compelling obstacle to the reading for which the taxpayer contends. Indeed, if the taxpayer was right one might wonder why the draftsman did not define "chargeable business asset" as "an asset (including goodwill but excluding assets held as investments)". The fact that the draughtsman did not so define "chargeable business asset" lends support to the Crowns first submission, which I accept. I hold that the taxpayers shares in the service company are not "chargeable business assets"."

kk) The statutory definition requiring interpretation in this appeal is identical to the wording to the definition considered in *Durrant*. The interpretation of "*chargeable business asset"* as set out in *Durrant* is the only logical interpretation that can apply, given the construction of the definition.

Reorganisation

ll) In the UK case of *Dunstan v Young Austen Limited* (1989) STC 69 it was held that the an increase in share capital could be a reorganisation, even if it did not come within the precise wording of s584(1), provided that the new shares are acquired by the existing shareholders because they are existing shareholders and in proportion to their existing beneficial holdings. In that case Balcombe LJ said at page 73:

"We repeat that reorganisation of a company's share capital is not a term of art. It derives colour from its context…We are left with a clear intention that the policy behind (the relevant legislation) is that, for the purposes of capital gains taxation, there shall not be a disposal of the original holding, or the acquisition of a new holding (or any deemed disposal or acquisition) where the shareholders remain the same and they hold their shares in the same proportions, notwithstanding that the number of shares increases (a reorganisation or conversion) or decreases (a reduction) within the same company, or the old shares are replaced by new shares in the company which effectively replaces or represents the old one (takeover, reconstruction or amalgamation)".

mm) The judge clearly identified the continuity of the proportions in which shares are held by the same shareholders, before and after. They may hold more, or fewer shares, or they may end up holding shares in a different entity, but their proportionate ownership of the underlying undertaking remains substantially unchanged.

nn) Therefore, it was necessary that the shareholders remain the same and that they hold their shares in the same proportions, notwithstanding that there is an increase in the number of shares and that is not what happened in this case. The evidence of of Mr Myers was that the new shares were given to people who held milk quotas and who may not necessarily have previously held shares. The additional share allocation was

done in relation to the milk quota. Therefore, the allocation was not in proportion to existing shares held and therefore not a reorganisation.

oo) Therefore the rule change in 2010 that facilitated the issuing of the new shares was not done in proportion to the existing shareholdings, but based on other criteria relating to whether the persons were "*Active Milk Suppliers*" and therefore the Takeover was not a reorganisation within the meaning of TCA, section 584 and therefore the new shares were not deemed to be acquired as part of the original holding.

Analysis

Legislative context

24. Pursuant to TCA, section 598(2), full relief from capital gains tax is available to an individual who has attained the age of 55 years but has not attained the age of 66 years where that individual disposes of the whole or part of his or her "*chargeable business assets*" constituting "*qualifying assets"* for a consideration that does not exceed €750,000. Both italicised terms are defined by TCA, section 598(1) as follows:

> *"chargeable business asset means an asset (including goodwill but not including shares or securities or other assets held as investments) which is, or is an interest in, an asset used for the purposes of farming, or a trade, profession, office or employment, carried on by –*
>
> *(i) the individual,*
> *(ii) individual's family company, or*
> *(iii) a company which is a member of a trading group of which the holding company is the individual's family company, other than an asset on the disposal of which no gain accruing would be a chargeable gain*"
>
> "*qualifying assets" in relation to a disposal, includes*
>
> *(i) chargeable business assets of the individual, which, apart from tangible movable property, he or she has owned for a period of not less than 10 years ending with the disposal, and which have been his or her chargeable business assets throughout the period of 10 years ending with that disposal,"*
>
> *(ii) (I) the shares or securities, which the individual has owned for a period of not less than 10 years ending with the disposal, being shares or securities of a relevant company that is a company—*

> *(A) which has been a trading company, or a farming company, and the individual's family company, or*
>
> *(B) which has been a member of a trading group, of which the holding company is the individual's family company,*
>
> *during a period of not less than 10 years ending with the disposal and the individual has been a working director of the relevant company for a period of not less than 10 years during which period he or she has been a fulltime working director of the relevant company for a period of not less than 5 years, and*
>
> *….."*

25. In this context, the substantive issue in this appeal is whether the Shares were "*qualifying assets*" thereby entitling the Appellant to full relief on the disposal proceeds of **€ Amount Redacted**.

Overview

26. The evidence of of Mr Myers confirmed that the introduction of the milk quota system in 1983 was a "*game changer*". As such, the Appellant inherited the Shares in **Year Redacted** when the milk quota was in force. Therefore, since the Appellant's ownership of the Shares, the undertaking to purchase milk was governed by the milk quota system and not by virtue of any entitlement attributable to the Shares. As a consequence, the holding of the Shares did not provide any guarantee of a market for the Appellant's milk supplies.

27. It is also relevant that while Rule 6 of the Amended Consolidated Rules required Newmarket to "*accept from every member having milk to sell all the milk the produce of any cow or cows kept grazed on any lands within the area defined",* there was no rule preventing Newmarket from accepting milk of non-members.

28. It is clear from the factual background and the evidence adduced that some Members were supplying milk to Newmarket as "*Active Milk Suppliers*" and only became members of Newmarket after the amendment to the Rules and in advance of the Takeover on 22nd October 2010. It is also clear that in 2010, no additional shares issued to members who were not supplying milk to Newmarket as "*Active Milk Suppliers*". Therefore, the additional share allocation in 2010 was only made to "*Active Milk Suppliers*" irrespective of whether they were members of Newmarket.

Burden of Proof

29. In *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, Charleton J. confirmed that the burden of proof in relation to a tax appeal where at paragraph 22 he said:

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

30. However contrary to that obligation, the Appellant failed to provide any evidence that the Shares constituted a licence to sell milk or indeed that the Shares provided a guarantee for the sale of his milk to Newmarket. Furthermore, the Appellant gave no evidence that the Shares were used by him "*for the purposes of farming*".

Shares

31. In accordance with settled law, a share in a company comprises a bundle of rights that includes the right to notice, attendance and vote at general meetings, the right to dividends and the right to the distribution on a winding up. Other than such rights, there was no evidence that the Shares were a licence to sell or indeed that there was a guarantee of a market for milk inherent in the Shares from the time the Appellant became a member of Newmarket in 1988.

Chargeable Business Asset

32. A '*chargeable business asset*' is an asset that includes "*goodwill"* but excludes "*shares or securities or other assets held as investments*." In accordance with settled law, specifically the view espoused by Egan J. in *Cork Co Council v Whillock* [1993] 1 I.R. 231 at page 239, it is not permissible to delete or ignore words when interpreting a statute. It is therefore clear from the definition of '*chargeable business asset'* that the word "*or*" is used repeatedly as a disjunctive, so that each classification of asset comprising "*shares or securities or other assets held as investments*" must be considered separately.

33. Therefore, contrary to the Appellant's submission, the exclusion of "*shares*" as a "*chargeable business asset*" is not limited to assets which are held as investments to the extent that "*shares or securities"* are itemised examples. Therefore, the asset classification *"shares"* is specifically excluded as a category of asset and falls outside the definition of "*chargeable business asset".*

34. My view is also confirmed by *Durant* when the FTT, in considering the equivalent relief in the UK Capital Gains Tax Act, concluded that the phrase "*shares or securities or other assets held as investments*" should be read disjunctively and concluded at page 149:

> *"The use of the disjunctive 'or' is a compelling obstacle to the reading for which the taxpayer contends. Indeed, if the taxpayer were right one might wonder why the draftsman did not define 'chargeable business asset' as 'an asset (including goodwill but excluding assets held as investments)'. The fact that the draftsman did not so define 'chargeable business asset' lends support to the Crown's first submission which I accept. I hold that the taxpayer's shares in the service company are not 'chargeable business assets'."*

35. Furthermore while "*shares*" do not fall within the definition of "*chargeable business asset*", the Relief may still be available under the category of "*qualifying assets"*. For the Relief to apply to the disposal of shares as "*qualifying assets*", it is necessary that the shares be held in a trading or farming company comprising the individual's family company, during a period of not less than 10 years ending on the date of disposal. Moreover, in any such case, the individual must have been a working director of the company for a period of not less than 10 years during which he/she has been a full-time working director for not less than 5 years.

36. Therefore, in light of the specifically prescribed statutory classifications and distinctions between "*chargeable business asset"* and "*qualifying assets"*, I am of the view that it could not be the intention of the Oireachtas to allow an unrestrained meaning of the definition of "*chargeable business asset*" while at the same time imposing very prescriptive conditions on the type of shares to be classified as "*qualifying assets*".

37. Finally, the interpretation of a statute as espoused by Kennedy J. in *Bookfinder*s at paragraph 75, confirmed that the principle against doubtful penalisation only applies if there is an ambiguity and if all the other statutory rules of interpretation have failed. However, recourse to such a principle does not apply in this appeal as there is no ambiguity in the interpretation of the wording "*shares or securities or other assets held as investments*".

Use

38. The entitlement to the Relief requires that the Shares be "*used for the purposes of farming".* The Oxford English Dictionary definition of the meaning of the word "*use*" means to "*do something with an object or adopt a method in order to achieve a purpose or consume all of something".*

39. As noted above, there was no evidence that there was any use of the Shares by the Appellant "*for the purposes of farming*". Furthermore, no evidence was given in relation to the question of investment or that there was any benefit inherent in the Shares. As can be discerned from the definition above, "*use*" is an active word and therefore the holding of the Shares was a passive activity.

Reorganisation

40. In the UK case of *Dunstan v Young Austen Limited* (1989) STC 69 it was held that for the purposes of the reorganisation relief pursuant to TCA, section 584(1), it is necessary that new shares be issued to existing shareholders and in proportion to their existing holdings. However, in this appeal, it is clear from the evidence adduced that prior to the Takeover by Kerry, some of the exiting members of Newmarket did not receive any shares whereas other individuals acquired shares in their capacity as "*Active Milk Suppliers*" notwithstanding that they had not previously held shares in Newmarket. It is therefore clear that the acquisition of **Amount Redacted** shares in October 2010 was not part of a reorganisation in accordance with the principles espoused by Balcombe J. in *Dunstan*.

Determination

41. Based on a consideration of the evidence and the submissions, I have found that the Appellant is not entitled to the refund of capital gains tax paid in 2010 on the basis that:

    a) A '*chargeable business asset*' used for the purposes of farming includes "*goodwill"* but excludes "*shares or securities or other assets held as investments*." In accordance with settled law, it is not permissible to delete or ignore words when interpreting a statute. It is therefore clear from the definition of '*chargeable business asset'* that the word "*or*" is used repeatedly as a disjunctive, so that each classification of asset is a separate matter requiring separate consideration. As such a disjunctive cannot be ignored, its use must be reflected in the interpretation. Accordingly, the only interpretation of the provision which gives meaning and context to the word "*shares"* is one that distinguishes "*shares*" from the meaning of "*or other assets held as investments*" irrespective of whether the "*shares*" were held as investment or otherwise. Therefore, the asset classification *"shares"* is specifically excluded as a category of asset and falls outside the definition of "*chargeable business asset".*

    b) While the disposal of shares qualifies for the Relief as "*qualifying assets*" in certain statutorily prescribed situations, none of those conditions have been satisfied by the Appellant.

c) The Appellant acquired the Shares in **Year Redacted** when the undertaking to purchase milk by Newmarket was governed by the milk quota system and not by virtue of any entitlement attributable to the Shares and therefore the holding of the Shares did not provide a guaranteed market of the Appellant's milk supplies and as a consequence could not be regarded as a "*chargeable business asset*".

d) Similarly, as there was no evidence that the Shares constituted a licence or "*used for the purposes of farming*", the Relief cannot apply.

42. As I have determined that the Appellant is not entitled to the Relief and as a consequence not entitled to a refund of the capital gains tax paid, there is no requirement to consider whether the Appellant made a "*valid claim*" for a refund of tax for the purposes of TCA, section 865(1)(b).

43. This appeal is therefore determined in accordance with Taxes Consolidation Act 1997, section 949AK and the assessment to the capital gains tax in respect of the year 2010 stands.

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Conor Kennedy
Appeal Commissioner
31st July 2019

No request was made to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.