



**75TACD2021**

**Between/**

[REDACTED]

**Appellant**

**-and-**

**THE REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

**A. Introduction**

1. This appeal is against an assessment to capital gains tax (hereinafter referred to as “CGT”) for the year 2016 issued by the Respondent on the 11<sup>th</sup> of October 2016 in the sum of €868,388 in respect of alleged chargeable gains of €2,631,479. The core issue in the appeal is whether [REDACTED]

(hereinafter referred to as the “**Appellant**”) as a non-resident company was within the charge to CGT in respect of the chargeable gains assessed. The gains assessed were alleged to arise in relation to the disposal by the Appellant on the [REDACTED] of February 2016 of [REDACTED] shares in [REDACTED] Ltd (hereinafter referred to as “**COMPANY A**”).

***B. Facts relevant to the Appeal***

2. A Statement of Facts was prepared by the Appellant and submitted to the Tax Appeals Commission (hereinafter referred to as the “**Commission**”). It was not formally agreed by the Respondent but there is little dispute between the parties in relation to the facts central to the determination of the appeal.
3. The Statement of Facts prepared by the Appellant records that the Appellant is a [REDACTED] incorporated and tax resident company which, until the [REDACTED] 2016, held beneficially 66% of the shares in **COMPANY A**, an Irish incorporated and tax resident company. The principal activity of **COMPANY A** is that of designing, building, maintaining, operating and financing the [REDACTED] [REDACTED] Motorway (hereinafter referred to as the “**Motorway**”) and operating the toll on behalf of Transport Infrastructure Ireland (hereinafter referred to as “**TII**”). The TII is the body formerly known as the National Roads Authority (hereinafter referred to as the “**NRA**”)
4. On the [REDACTED], **COMPANY A** entered into a contract by way of public-private partnership agreement with TII in respect of the [REDACTED] Road project (hereinafter referred to as the “**PPP Contract**”). The PPP Contract obliged



**COMPANY A** to design, construct, finance, operate and maintain the Motorway. The Appellant submits that the PPP Contract did not confer upon **COMPANY A** any proprietary interest in the Motorway or in the land on which the Motorway is built, and the Respondent accepts that this is correct as a matter of property law. At all times ownership of the land and the Motorway remained with TII. Pursuant to the terms of the PPP Contract, **COMPANY A** was granted a licence to perform its functions under the PPP Contract.

5. **COMPANY A** is a service company which was appointed to perform obligations under the PPP Contract in return for which it received certain milestone payments in respect of the construction and operation of the Motorway, and also had the right to collect the tolls on behalf of TII and retain a portion collected under the Toll Scheme. The term of the concession granted under the PPP Contract was ■ years.
6. **COMPANY A** operated and continues to operate under the supervision of TII and has significant reporting requirements to TII. The PPP Contract set out strict deadlines for delivery of the project and also in respect of the standards of work delivered in respect of the Motorway. TII had and continues to have considerable supervisory duties and powers, and ultimately has rights to step in should **COMPANY A** fail to perform its obligations under the PPP Contract.
7. Pursuant to the powers under the Roads Act 1993, a draft Toll Scheme in respect of the ■ motorway was adopted and was appended at Schedule ■ of the PPP Contract. The final scheme was adopted by TII on the ■ (hereinafter referred to as the "**Toll Scheme**"). The Toll Scheme specifically provided that TII, in accordance with section 63 of the Roads Act, could enter into an agreement with a third party concessionaire in respect of the collection of tolls



on the road, and enabled TII to reach agreement in respect of the application of the proceeds of these tolls.

8. Unless the parties agreed to the contrary (*e.g.*, on presentation by **COMPANY A** of its annual toll plan), the toll increases were to be in accordance with the Consumer Price Index published by the Central Statistics Office.
9. The PPP Contract contained detailed provisions in respect of payment terms and obligations. In return for the many services provided by **COMPANY A**, it was entitled to various different types of payment from TII. These were as follows:-
  - (i) Construction payments were due on the achievement of various milestones throughout the construction phase of the project. Construction payments were based on the agreed value of the works carried out to that point in time and were capped at 60% of the value of the said works. The final construction payment was paid on completion of the works.
  - (ii) Operational payments are payable on specified "Op Dates" as set out in the PPP Contract. These are annual capped payments payable throughout the PPP Contract.
  - (iii) In the context of toll payments, **COMPANY A** is obliged to collect the tolls (the Respondent submits that **COMPANY A** also charges the tolls) and then retains a proportion of the tolls collected from road users in accordance with the Toll Scheme and the terms of the Revenue Sharing Arrangement set out in Schedule Part of the PPP Contract. The Appellant submits that, in essence, **COMPANY A** collects the tolls on



behalf of TII and, in consideration for all the services provided under the PPP Contract, is entitled to retain an amount of these tolls. The amount of tolls which **COMPANY A** may retain is based on complex formulae depending on vehicle classes and traffic volumes. The revenue sharing was and is computed on a monthly basis.

- (iv) The Appellant submits that the fixed payments only reflected partial payment for the works carried out by **COMPANY A**, leaving a large amount of the cost and debt outstanding. The Appellant submits that the toll is a fundamental element of the consideration and is set at levels in recognition of these debt obligations. This is not accepted by the Respondent.
- (v) Once **COMPANY A**'s third party debt is fully repaid after ■ years, the sharing mechanism will substantially change and TII will become entitled to a greater percentage of the revenue. **COMPANY A**'s financial statements for the year ending ■ 2014 show a turnover figure of €■ as toll charges solely earned in the Republic of Ireland, and state that an amount of €■ was paid to the NRA (as the TII was then known) during that year.

**10.** TII is the owner of the lands which were required for the Motorway. **COMPANY A** is conferred with access rights to the Motorway and surrounding areas to enable it to perform its obligations under the PPP Contract. These access rights have been provided under the PPP Contract in which TII as owner of the land granted a non-exclusive licence to **COMPANY A** to access the site and off-site areas, "*for the purposes of the Project*". It is provided under section ■ of the PPP Contract that any access provided to **COMPANY A** "*shall be by way of licence for the particular activity only and shall not grant or be deemed to grant any legal*



*estate or any other interest in land and, for the avoidance of doubt, the PPP Co acknowledges that it shall have no freehold, leasehold or tenancy rights in the Site or the Off-site Areas."* The access rights terminate at the end of the PPP Contract term of ■■■ years.

**11.** The Respondent also emphasised the following provisions of the PPP Contract relating to **COMPANY A**'s rights in relation to the land and the motorway constructed thereon:-

- (i) The PPP Contract was expressed to be binding upon and enuring to the benefit of **COMPANY A**, its successors and permitted assignees during its term.
- (ii) **COMPANY A** was entitled to acquire freehold and/or/leasehold land.
- (iii) **COMPANY A** was responsible for the safety and security of "*all persons affected by the carrying out of the Project*" and for the prevention of trespass.
- (iv) Any rates arising or payable in connection with the use of the land and motorway were payable by **COMPANY A**.
- (v) Indemnities were provided by **COMPANY A** including in respect of users of the motorway.

**12.** At the end of the PPP Contract period, **COMPANY A** 's functions will cease, at which stage the Motorway and the tolling facilities must be at a premium specified standard appropriate to its remaining design life. There will be an



inspection by TII prior to the end of the contract, and **COMPANY A** may be required to carry out additional renewal works.

**13.** The Appellant entered into a contract for the sale of part of its shares in **COMPANY A**. One of the conditions made by the purchaser, [REDACTED] [REDACTED] Ltd (hereinafter referred to as "**COMPANY B**"), was that the Appellant had to provide a CG50 Certificate or a letter from the Respondent confirming that a CG50 Certificate was not required. In order to satisfy the purchaser and to comply with the conditions set out in the contract for sale, a ruling was requested from the Respondent to confirm that the Appellant was not required to apply for and/or obtain a CG50A Certificate. The ruling was sought on the basis that the proposed disposal of shares in **COMPANY A** was not within the scope of section 980 of the Taxes Consolidation Act 1997 (as amended) (hereinafter referred to as "**TCA 1997**").

**14.** The Respondent refused the confirmation sought and expressed the view that the proposed disposal of the relevant shares came within the provisions of section 980(2)(d) of TCA 1997. The Respondent determined that the application of section 980 of TCA 1997 does not require that there be a proprietary interest in the land for the functioning of the provision. The Respondent stated that:-

*"[w]hile it is accepted that the companies do not have a propriety [sic] interest in the above [REDACTED], I do not see that the operation of section 980(2)(d) TCA 1997 requires that there be a proprietary interest in land for the functioning of the provision. While **COMPANY A** [REDACTED] and **COMPANY A** [REDACTED] may not have proprietary rights over the respective [REDACTED], it would certainly seem that the companies have legal rights over the [REDACTED], which were given to them in PPP Contracts. It is through the implementation of those legal rights (construction and*



*operating the [REDACTED]) that the values in the shares would appear to lie, which are inextricably linked to the [REDACTED]."*

15. On the [REDACTED] of February 2016, the Appellant disposed of [REDACTED] shares in **COMPANY A** to **COMPANY B** for €[REDACTED]. Prior to that transaction, **COMPANY B** owned [REDACTED]% of **COMPANY A** and thereafter owned [REDACTED]%, with the Appellant holding the remaining [REDACTED]%. The disposal arose pursuant to a conditional contract of sale dated the [REDACTED] 2015. When the conditions precedent set out in that contract were satisfied, the disposal took place.
16. The Appellant challenged the Respondent's determination that CGT was to be withheld from the proceeds of sale by way of judicial review to the High Court. On the 20<sup>th</sup> of June 2016, the High Court decided that the matter was not amenable to judicial review and in the circumstances did not address the tax issue.
17. On the 11<sup>th</sup> of October 2016, the Respondent raised an assessment to CGT for the year 2016 in the sum of €868,388 in respect of an alleged chargeable gain of €2,631,479.
18. By Notice of Appeal dated the 7<sup>th</sup> of November 2016, the Appellant appealed against the assessment.

***C. Grounds of Appeal***



19. The Notice of Appeal dated the 7<sup>th</sup> of November 2016 identified seven grounds of appeal, namely:-

- a. The Appellant was not resident in Ireland and was not at any material time within the charge to CCT by reason of section 29(2) of TCA 1997.
- b. On 25 February 2016, the Appellant disposed of [REDACTED] shares in **COMPANY A**, a company incorporated and tax resident in Ireland, for € [REDACTED].
- c. The basis for the assessment was that this disposal was of shares deriving their value or greater part of their value directly or indirectly from land in the State, so that as an exception the Appellant was alleged to be within the charge to CGT in respect of that disposal, by reason of sections 29(1A) and 29(3)(a) of TCA 1997. Under section 5(1) of TCA 1997, "*land*" includes "*any interest in land*".
- d. **COMPANY A** was at all material times a service company engaged in designing, building, maintaining and financing of motorways. In particular, it was a party to a public-private partnership contract with TII, formerly the NRA, to design, construct, finance, operate and maintain the [REDACTED] Motorway.
- e. **COMPANY A** at no material time held any land or any interest in land in the State and in particular held no interest in the land upon which the [REDACTED] Motorway was constructed. The value of **COMPANY A** as a company derived from personalty, namely its rights under the contract aforesaid.



f. Accordingly, the shares in **COMPANY A** disposed by the Appellant on ■ February 2016 did not derive their value or the greater part of their value directly or indirectly from land in the State.

g. In the premises, the disposal of those shares was not within the charge to CGT in Ireland so that the Appellant has, by reason of the Assessment, been overcharged and the Assessment should be reduced accordingly.

#### **D. Legislation**

##### TCA 1997

**20.**Section 5 of TCA 1997 provides in relation to “*land*” as follows:-

*“land” includes any interest in land.*

**21.**Section 5 also provides in relation to “*lease*” as follows:-

*“lease” –*

*a. in relation to land, includes an underlease, sublease or any tenancy or licence, and any agreement for a lease, underlease, sublease or tenancy or licence and, in case of land outside the State, any interest corresponding to a lease as so defined...*

**22.**Section 29(2) of TCA 1997 provides that:-

*Subject to any exceptions in the Capital Gains Tax Acts, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing*



*to such person in the year of assessment for which such person is resident or ordinarily resident in the State.*

**23.** The relevant provisions of section 29(3) of TCA 1997 provide:-

*Subject to any exceptions in the Capital Gains Tax Acts, a person who is neither resident nor ordinarily resident in the State shall be chargeable to capital gains tax for a year of assessment in respect of the chargeable gains accruing to such person in that year on the disposal of –*

*a. land in the State...*

**24.** Section 29(1A)(a) of TCA 1997 defines “*relevant assets*” as, *inter alia*, assets mentioned in section 29(3)(a) (*i.e.* land in the State) and section 29(1A)(b) then provides that:-

*A disposal of relevant assets, for the purpose of this section, includes the disposal of shares deriving their value or the greater part of their value directly or indirectly from those assets, other than shares quoted on a stock exchange.*

#### Interpretation Act 2005

**25.** Section 4(1) of the Interpretation Act 2005 (hereinafter referred to as “**IA 2005**”) provides that:-

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

**26.** Section 5(1) states as follows: –



*In construing the provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) —*

- a. that is obscure and ambiguous, or*
- b. that on a literal interpretation would be absurd or would fail to reflect the plain intention of —*
  - i. in the case of an Act to which paragraph (a) of the definition of “Act” in section 2(1) relates, the Oireachtas, or*
  - ii. in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*

*the provision shall be given a construction that reflects the plain meaning of the Oireachtas or parliament concerned, where that intention can be ascertained from the Act as a whole.*

**27.**Section 20(1) provides that:-

*Where an enactment contains a definition or other interpretation provision, the provision shall be read as being applicable except insofar as the contrary intention appears in -*

- a. the enactment itself, or*
- b. the Act under which the enactment is made.*

**28.**Section 21 then provides that:-



*(1) In an enactment, a word or expression to which a particular meaning, construction or effect is assigned in Part 1 of the Schedule has the meaning, construction or effect so assigned to it.*

*(2) In an enactment which comes into operation after the commencement of this Act, a word or expression to which a particular meaning, construction or effect is assigned in Part 2 of the Schedule has the meaning, construction or effect so assigned to it.*

**29.**Part 1 of the Schedule to the 2005 Act provides in relation to “land” as follows:-  
*“land” includes tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land.*

#### Land and Conveyancing Law Reform Act 2009

**30.**Section 9 of the Land and Conveyancing Law Reform Act 2009 (hereinafter referred to as “**LCLRA 2009**”) provides as follows:-

*(1) From the commencement of this Part, ownership of lands comprises the estates and interests specified in this Part.*

*(2) In so far as it survives, feudal tenure is abolished.*

*(3) Subsection (2) does not affect —*

*(a) The position of the State under -*

- (i) the State Property Act 1954,*
- (ii) section 73 of the Act of 1965,*

*(b) the concept of an estate under section 10,*



*(c) any fee farm grant made in derogation of the Statute Quia Emptores 1290,*

*(d) any surviving customary right or franchise.*

*(4) A fee simple remains freely alienable.*

**31.**Section 10 further provides that:-

*(1) The concept of an estate in land is retained and, subject to this Act, continues with interests specified in this Part to denote the nature and extent of land ownership.*

*(2) Such an estate retains its pre-existing characteristics, but without any tenurial incidents.*

*(3) All references in any enactment or any instrument (whether made or executed before or after the commencement of this Part) to tenure or estates or interests in land, or to the holder of any such estate or interest, shall be read accordingly.*

**32.**Section 11 states as follows:

*(1) The only legal estates in land which may be created or disposed of are the freehold and leasehold estates specified by this section.*

*(2) For the purposes of Subsection (1), a 'freehold estate' means a fee simple in possession and includes —*

*(a) a determinable fee,*



*(b) a fee simple subject to a right of entry or re-entry,*

*(c) a fee simple subject only to –*

- (i) a power of revocation,*
- (ii) an annuity or other payment of capital for the advancement, maintenance or other benefit of any person, or*
- (iii) a right of residence which is not an exclusive right over the whole land.*

*(3) For the purposes of Subsection (1), a 'leasehold estate' means, subject to sections 12 and 14, the estate which arises when a tenancy is created for any period of time or any recurring period and irrespective of whether or not the estate —*

*(a) takes effect on immediate possession or in future, or*

*(b) is subject to another legal estate or interest, or*

*(c) is for a term which is uncertain or liable to termination by notice, re-entry or operation of law or by virtue of provision for cessor on redemption or for any other reason.*

*(4) The only legal interests in land which may be created or disposed of are —*

*(a) an easement,*

*(b) a freehold covenant,*

*(c) any incumbrance,*



*(d) rent payable under a tenancy,*

*(e) a possibility of reverter,*

*(f) a profit à prendre, including mining rights,*

*(g) a public or customary right,*

*(h) a rentcharge,*

*(i) a right of entry or re-entry attached to a legal estate,*

*(j) a wayleave, or the right to lay cables, pipes, wires and other conduits,*

*(k) any other legal interest created by any statutory provision.*

*(5) A legal estate or legal interest under this section has, subject to this Act, the same attributes as the corresponding legal estates and interests existing at the commencement of this Part or may exist concurrently with, or subject to, any other legal estate or interest in the same land.*

*(6) Subject to this Act, estates and interests other than those referred to in subsections (1) to (4) take effect as equitable interests only, but this does not prevent the creation of the estates and interests referred to in those subsections as equitable interests.*

*(7) Nothing in this Act affects judicial recognition of equitable interests.*



*(8) Subject to this Act, a power of attorney, a power of appointment or other power to dispose of the legal estate or interest in land operates with the same force and effect as such powers had before the commencement of this Part.*

*(9) All estates and interests in land, whether legal or equitable, may be disposed of.*

### The Roads Act 1993

**33.**Section 17(1) of the Roads Act 1993 provides as follows:-

*Subject to the following provisions of this Part and, in particular, to such directions and guidelines as may be given by the Minister under section 41, it shall be the general duty of the Authority to secure the provision of a safe and sufficient network of national roads for that purpose and it shall have –*

- a. overall responsibility for the planning and supervision of works for the construction and maintenance of national roads, and*
- b. such other functions in relation to the construction or maintenance of national roads as are assigned to it by or under this Act.*

**34.** Section 59 of that Act states that:-



*(1) Subject to the provisions of this Part, a road authority may charge and collect tolls of such amounts as may be specified for the time being in bye-laws made by it under section 61 in respect of the use of the toll road.*

*(2) A road authority may provide and maintain such buildings, structures, works and apparatus as it considers necessary or expedient for or in connection with the charging and collection of tolls on the operation of toll roads.*

*(3) Where an agreement under section 63 provides for the collection of tolls by persons specified in the agreement, that person and his servants and agents may collect the tolls to which the agreement relates.*

**35.**Section 61(1) provides that:-

*A road authority may, after consultation with the Commissioner, make such bye-laws as it considers expedient for the purposes of the operation and management of a toll road.*

**36.**Finally, section 63(1) states as follows:-

*Where a toll scheme is adopted by a road authority, the road authority may enter into an agreement with another person under which, upon such terms and conditions as may be specified in the agreement (including the payment to, or retention by, the person of all or part of the proceeds of the tolls in respect of the toll road the subject of the scheme), the person agrees to do all or one or more of the following:*

- a. to pay some or all of the cost of the construction of the road, to pay some or all of the cost of the maintenance of the road,*



- b. to pay some or all of the cost of the maintenance of the road,*
- c. to construct or join or assist in the construction of the road for or with the authority,*
- d. to maintain or join or assist in the maintenance of the road for or with the authority,*
- e. to operate and manage (including provide, supervise and operate a system of tolls and their collection in respect of the use of the road) the road for or with or the authority,*
- f. such other things connected with or incidental or ancillary to or consequential upon the foregoing as may be specified in the agreement”.*

***E. Submissions of the Appellant***

*Territoriality of the charge to CGT with respect to Residents and to Non-Residents*

**37.** Counsel for the Appellant began by noting that section 29(2) of TCA 1997 provides that, subject to exceptions in that Act, a person shall be chargeable to CGT in respect of chargeable gains accruing to such person in a year of assessment for which such person is resident or ordinarily resident in the State.



**38.** However, a non-resident is chargeable to CGT for a year of assessment in respect of chargeable gains accruing to such person in that year on the disposal of "*land in the State*". By virtue of section 29(1A)(b), a disposal of "*land in the State*" includes the "*disposal of shares deriving their value or the greater part of their value from [land in the State]*".

**39.** Counsel for the Appellant submitted that it is clear from the foregoing that there is a more restricted charge in respect of CGT on non-residents when compared to the extensive charge to CGT imposed on residents.

**40.** Counsel for the Appellant argued that the effect of section 29(1A)(b) in respect of the disposal of certain assets, which would *prima facie* result in a non-resident coming within the charge to CGT, is to extend the charge to a disposal of shares reflecting the value of those assets. He submitted that for the shares to be chargeable to CGT on a disposal, the underlying asset from which the shares derived their value had to itself have the quality of being within the charge to CGT on a disposal.

**41.** Counsel for the Appellant submitted that the effect of section 29(1A)(b) of TCA 1997 is that a non-resident cannot hide behind a corporate structure to avoid paying CGT on the relevant assets, where the chargeable gain reflects the value of that asset, through the realisation of shares. He submitted that the use of the words "*directly or indirectly*" was intended to cover situations where more than one corporate entity stood between the taxpayer and the relevant asset, so that a taxpayer would not, for example, escape liability to CGT if the relevant asset was held by a sub-subsidiary.



42. Counsel for the Appellant further submitted that the disposal of the shares in **COMPANY A** by the Appellant was outside the charge to CGT by reason of section 29(2) of TCA 1997 because the Appellant was not resident in Ireland in 2016, the year of disposal. He pointed out that the Appellant had in fact never been resident in the State and had at all material times been resident in [REDACTED].
43. The core of the Appellant's argument is its submission that the shares in **COMPANY A** did not derive their value, or the greater part of their value, directly or indirectly from land in the State or from an interest in land in the State. Counsel stated that what section 29(3)(a) is concerned with, when referring to "*land in the State*", is what is colloquially referred to as "*real estate*". On this basis, he argued that it is only in respect of certain specified assets, including real estate, that the charge to Irish CGT arises for non-residents.
44. The Appellant's written submissions made reference to the fact that the phrase '*real estate*' was used by Mr Ryan, the then Minister for Finance, at the Second Reading of the CGT Bill 1974 when he stated that "[n]on-residents will be liable in respect of gains on the disposal of real estate, mineral rights and business assets within the State..." (Dail Debates, Vol 277 No. 7, 28th of January 1975). Similarly, paragraph 87 of the White Paper on Capital Taxation dated 28 February 1974 (PrI 3688) referred to "*real estate*" in the State owned by non-residents as being within the charge to the then proposed Capital Gains Tax Act .
45. The Appellant's written submissions also referred me to the Introduction to the Explanatory Memorandum to the Capital Gains Tax Bill 1974, which stated that "[p]ersons who are neither resident nor ordinarily resident in State will be liable in respect of gains on the disposal of real estate, mineral rights and business assets in the State."



46. The written submissions directed me in this regard to the decision in ***DPP -v- McDonagh [1996] 1 IR 565*** where Costello P, giving the decision of the Supreme Court, found that pre-parliamentary or parliamentary material may in appropriate cases be used as an aid to construction as part of the legislative history.

*Meaning of the word "land"*

47. Counsel for the Appellant submitted that, by reason of section 5 of TCA 1997, the word "*land*" in that Act (and formerly in the Capital Gains Tax Act), except where the context otherwise requires, "*includes any interest in land*". He submitted that the use of the word "*includes*" was intended to ensure that not only were the major estates in land (namely freeholds and leaseholds) covered in the definition of land but also the lesser interests in land. He submitted that the legal concepts are well established and have a long-standing, common law meaning which would have been well known to the legislature.

48. Counsel for the Appellant made reference to section 4 of IA 2005 and submitted that it was clear therefrom that the provisions of IA 2005 apply to every enactment except where the contrary intention appears in the 2005 Act or the enactment itself. Section 20 of IA 2005 provides that "[w]here an enactment contains a definition or other interpretation provision, the provision shall be read as being applicable except in so far as the contrary intention appears in ... the enactment itself ...." Accordingly, Counsel submitted that an individual piece of legislation may provide its own '*dictionary*', and he submitted that the definition of "*land*" in section 5 of TCA 1997 was an example of this.



**49.** Pursuant to section 21 of IA 2005, the meaning of words in Part 1 of the Schedule are applied to an enactment. Part 1 of the Schedule provides that the word "*land*" *"includes tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land"*. Counsel for the Appellant submitted that this definition of land ought to be disregarded as TCA 1997 provides its own interpretation section and he relied on section 4 and section 20 of IA 2005 to support his position in this regard. He submitted that section 5 of TCA 1997 demonstrated a "*contrary intention*" within the meaning of section 20 of IA 2005.

**50.** By way of background, Counsel for the Appellant pointed out that IA Act 2005 replaced the Interpretation Act 1937 (hereinafter referred to as "**IA 1937**"). Section 12 of IA 1937 had provided that the meaning of the word "*land*", unless the contrary intention appeared, was that given in the Schedule to that Act, which provided that "[*t*]he word *land* includes messuages, tenements, and hereditaments, houses and buildings, of any tenure."

**51.** Counsel for the Appellant further submitted that in the event that a provision is found to be ambiguous or obscure or where a literal interpretation would give rise to an absurd result or one which did not reflect the plain intention of the Oireachtas, section 5(1) of IA 2005 provides that, other than in a provision that relates to the imposition of penal or other sanctions, "*the provision shall be given a construction that reflects the plain intention of the Oireachtas ... where that intention can be ascertained from the Act as a whole.*"

**52.** Counsel for the Appellant submitted that the plain meaning of the definition or the interpretation of the word "*land*" in section 5(1) of TCA 1997 is simply that it



applies to both estates and interests in land, and clarifies the position that land means more than estates. He submitted that an interpretation provision is essentially meant to be an aid to discovering what an Act is about. He stated that the CGT provisions in dispute related to the extent of any CGT charge in relation to land, and the relevant charging section was to make it clear that land comprises not just estates but also other interests in land.

53. Counsel for the Appellant submitted that the word “*includes*” is expansive in the sense that it expands the first word by what comes afterwards. He stated that it doesn’t actually expand the words that follow to say an interest in land means anything. In this regard, he said that the Oireachtas was using a deliberately widely drawn phrase to avoid a dispute as to what land was in the event of a challenge to a tax charge

54. Counsel for the Appellant further pointed out that the definition of “*land in the State*”, in accordance with section 5(1), for the purposes of the Capital Gains Tax Acts includes “*any interest in land*” except where the context otherwise requires.

55. Counsel for the Appellant submitted that nothing in the context of section 29 of TCA 1997, or the context of Chapter 3 of Part 2 in which that section appears, requires that the definition of the word “*land*” in section 5(1) should not apply. He submitted that plainly and unambiguously the definition applies and, given that **COMPANY A** had no estate or interest in land, the shares of which the Appellant disposed could not have derived their value or the greater part of their value directly or indirectly from land in the State.

*Statutory Construction Principles*



56. In relation to statutory construction, Counsel for the Appellant referred me to a passage from Maxwell on Statutes, 12<sup>th</sup> edition, p. 29, which was cited with approval by Blaney J in **Howard -v- The Commissioner of Public Works [1994] 1 I.R. 101**. That passage states as follows:-

*“Where by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of the statute is not to be culled from any notion which may be entertained by a court as to what is just and expedient; words are not to be construed contrary to their meaning as embracing or excluding cases merely because no good reason appears why they should be not embraced or excluded. The duty of the court is to expound the law as it stands and “to leave the remedy (if one is to be resolved upon) to others.”*”

57. He submitted that the said canon of construction in the context of tax law was approved by McCarthy J in **Texaco (Ireland) Limited -v- Murphy [1991] 2 I.R. 449** as “[i]t is an established rule of law that a citizen is not to be taxed unless the language of the statute clearly employed imposes the obligation.” Counsel submitted that the decisions in **Inspector of Taxes -v- Kiernan [1931] 1 I.R. 117**, **Revenue Commissioners -v- Doorley [1933] I.R. 750** and **McGrath -v- McDermott [1988] I.R. 258** confirmed the position in this regard.

58. Counsel for the Appellant accepted that the canons of construction applied to tax law do not say that there is a different and especially narrow principle for the construction of tax statutes, but submitted that there was a recognition that an obligation must be clearly imposed. In this regard, he cited the judgment of Geoghegan J in **Harris -v- Quigley [2006] 1 I.R. 165**, where he stated:-



*“While, as far as possible, a taxing statute should be interpreted in the same way as any other statute and should not be interpreted, if at all possible, as to create an absurdity, nevertheless there is a countervailing principle that where there is an ambiguity a taxing statute will be interpreted in favour of the taxpayer. I do not consider that this court would be justified in implying into s. 934(6) words of exception which are not there...”*

59. Counsel for the Appellant submitted that this interpretation of the law was not contrary to the decision of O’Donnell J in ***Revenue Commissioners -v- O’Flynn Construction Company Limited*** [2013] 3 I.R. 533, and noted that both the Appellant and the Respondent had sought to rely upon the same passage in their written submissions. He pointed out that the ***O’Flynn Construction*** case was very specifically considering section 811 of TCA 1997, which was a provision of great complexity, and submitted that O’Donnell J’s decision clarified the decision in ***McGrath -v- McDermott***. Counsel for the Appellant submitted that it was clear from the case law that a tax charge had to be clear, and the Appellant’s interpretation of section 29 made it unambiguously clear what was to be charged and what was not.

*Requirement for a Proprietary Interest in Land*

60. Counsel for the Appellant further referred me to LCLRA 2009, and in particular to sections 10 and 11 thereof. He submitted that section 10(1) reiterates the concept of an estate in land known to the common law and provides that estates in land continue with interests in land, those interests in land being lesser interests than estates. Counsel for the Appellant submitted that these legal concepts of long-standing had been codified in sections 9, 10 and 11 of LCLRA 2009, with the exception of feudal tenure which was abolished.



**61.**Section 11(1) of LCLRA 2009 provides that the only estates in land which may be created or disposed of are freeholds and leaseholds. The only interests in land which may be created or disposed of are those specified in section 11(4) and include easements, freehold covenants, incumbrances, rents payable under a tenancy, profits à prendre, rent charges and so on.

**62.**Counsel for the Appellant submitted that a fundamental principle of Irish land law, which is preserved by LCLRA 2009, is that in relation to real property, what is owned is not the physical entity as such but rather an estate or interest in the land. It is the nature of that estate or interest which defines the extent of ownership.

**63.**Counsel referred me to Wylie's *Irish Land Law* (5th edition, 2013) wherein at paragraph 4.16 that learned author stated as follows:-

*"The main criterion by which to judge whether a particular interest is an interest in land would seem to be whether that interest will bind successors in title of either or both the original parties to the contract or conveyance creating the interest in the first place."*

**64.**Counsel accepted that this could be viewed as an historical comment, given the statutory codification of the law now found in LCLRA 2009. However, he submitted that the passage recognises the major distinction between an interest in land and something like a licence or other contractual right. In this regard, he pointed out that the common law privity rule provides that a simple contract binds the parties to it, and on completion of the contract the privity expires. In contrast, where an interest in land is granted, it enures for successors in title to the interest in the land.



65. Counsel for the Appellant submitted that a licence passes no interest or estate in land; instead it merely permits the licensee to enter onto the relevant land. Without such licence, the entrant on the land would be a trespasser. In support of this, he referred me to *Irish Land Law* at paragraph 22.02, where it states:-

*"So far as land is concerned, a licence is permission to do something in relation to the land which would otherwise be a trespass. At common law, it seems to have been regarded as nothing more than that and certainly was not regarded as capable of creating an interest in land affecting third parties."*

66. Counsel submitted that it was clear in this regard that the licence under the PPP Contract was personal to **COMPANY A**.

67. Counsel for the Appellant also relied upon the decision in ***David Allen & Sons Bill Posting Ltd -v- King [1915] I.R. 448***. That case concerned an agreement, not under seal, between the defendant, therein described as 'licensor', and the plaintiff, described as 'licensee', which allowed the plaintiff permission to affix posters and advertisements to one of the walls of a picture house for a specified period and for a rent.

68. The Court of Appeal determined that the licence did not operate as a demise of any interest in land. Molony LJ stated:-

*"That the parties did not mean to alter or transfer a property is, I think, shown by the whole frame of the instrument, but particularly by the clause in which the licensor bound himself, if required by the licensee, to take proceedings against any person or persons who might, during the continuance of the licence, affix any bill posting or advertisement to the blank wall of the premises."*



**69.** The case made its way to the House of Lords, which again held that the agreement did not create an interest in land. Counsel referred me in particular to the following extract from the judgment of Buckmaster LC, where he stated:-

*“My Lords, I have looked anxiously and carefully through this document to see whether it is possible to derive from its construction anything except the creation of a personal obligation between the appellant and the respondent with regards the use of this wall, and I am unable to find it. There are two circumstances to which attention has been quite properly drawn by the appellant’s counsel, which are no doubt important in considering what the agreement effected. The first is the fact of the rent reserved and the next that there is a term of years granted and that the arrangements are introduced into the agreement to prevent other people having competing rights with Messrs. David Allen & Sons upon this wall. Those considerations do not, in my opinion, necessarily conflict with the view that this is nothing but a licence, a licence for a fixed term of years, but a licence which creates no estate or interest in the land upon which the palace is going to be built, nor an easement to which the land would be thereafter subject.”*

**70.** Counsel for the Appellant submitted that this decision undermined the Respondent’s argument that the PPP Contract was, because of its extensive nature, something more than a mere contractual licence and was *de facto* something else. He said the PPP Contract, when stripped down to its essentials, was a licence to build and operate a road. He submitted that the position was analogous to a builder who doesn’t own land but is granted a licence to build a house on that land; in the instant appeal, the Appellant did not own the land but was granted a licence to access the land for the purpose of building and operating the Motorway.



71. Counsel for the Appellant submitted that the Appellant's position in this regard was confirmed by the decision in ***Street-v- Mountford [1985] AC 809***, wherein Lord Templeman stated that "*a licence in connection with land, while entitling the licensee to use the land for the purposes authorised by the licence, does not create an estate in the land*", and by the decision of the Court of Appeal in ***Ashburn Anstalt -v- Arnold [1989]1 Ch 1***.

*Licence coupled with an Interest in Land*

72. Counsel for the Appellant submitted that that a licence may be coupled with an interest in land, and referred me in this regard to *Irish Land Law* at paragraph 22.04 which states:-

*"Often a licence is included in the grant of proprietary interest in land and, in this sense, it may acquire the characteristics of an interest in land. Thus, such a licence is irrevocable by the licensor so long as the proprietary interest lasts and may be assigned to a third party along with the interest in land. A common example of such a case is where a profit à prendre is granted, e.g., shooting or fishing rights. Such rights in respect of the land cannot be enjoyed unless accompanied by a licence to go onto the land and exercise them. The profit can be passed as an interest in land to successors in title of the grantee and it binds successors in title of the grantor, as does the licence necessarily attached to the profit."*

73. Counsel for the Appellant submitted that an example of a licence coupled with an interest could be seen in ***Woods -v- Donnelly [1982] NI 257***. In that case, an agreement provided that the defendant was to have the right to "*draw sand and*



*gravel... as long as he required it.*” It was also specified that “*James Donnelly only... is hereby authorised*” and that he was to make a full, prompt payment for the sand and gravel each month. The Northern Ireland court held that, *inter alia*, the licence was not was revocable except in accordance with the contract. It held the agreement was a licence coupled with an interest, namely a profit à prendre, which together were valid for the life of the defendant so that they could not be revoked during that life.

**74. *Honiball -v- McGrath* (unreported, Supreme Court, 24 April 2002)** was also referred to in the Appellant’s written submissions. In that case, Fennelly J had to consider the position of a retirement village and, in particular, care contracts which were designed to enable elderly people to enjoy the independence of living in their own home with the security of certain minimum healthcare. Both the High Court and the Supreme Court found that the rights conferred by the care contract were not rights in the land but instead represented merely contractual rights which could be varied. The Supreme Court rejected the idea that the care contracts conferred a proprietary right or that they involved a licence coupled with an interest.

**75.**In the instant appeal, Counsel for the Appellant submitted that the licence under the PPP contract was a bare licence unaccompanied by other rights such as would render it an interest in land, as historically understood by the common law and as now codified in LCLRA 2009. He submitted that the licence was nothing more than permission to carry out the contractual obligations and had no independent life outside the *inter partes* contract from which it derived.

**76.**In summary, Counsel for the Appellant stated that **COMPANY A** did not own the Motorway or the land on which it was built and therefore it could not be suggested



that the shares in **COMPANY A** derived any value from land in the State. What **COMPANY A** did have was a non-exclusive licence to design, construct, finance, operate and maintain the motorway. That licence did not provide **COMPANY A** with an "*interest in land*", whether in respect of the motorway or the lands on which it was constructed, nor was it a licence coupled with an interest in land.

*Specific Statutory Definition of a Lease*

77. Turning to the Respondent's reliance on the meaning given to "*lease*" in section 5(1) of TCA 1997, Counsel for the Appellant rejected the Respondent's contention that a lease is an interest in land (other than in a colloquial sense), and submitted that it is in fact an estate in land. He argued that word "*lease*" was given a specific meaning in section 5(1) for CGT purposes (for example, for the purposes of Schedule 14 of TCA 1997) because there is a specific regime for the taxation of leases of land. He pointed out that the word 'lease' was also used in a number of other sections in the Act.

78. Counsel for the Appellant submitted that the definition of a lease applies to a lease embraced in the natural meaning of the word "*land*". He argued that it would be inappropriate to apply an interpretation provision relating to a specific word ("*lease*") to another word in that interpretation provision ("*land*"), where that other word doesn't mention the first word. Thus, he said the word "*lease*" as defined for CGT purposes should not be insinuated into a concept in land law which was already inherent in the word "*land*."

*Overview of the PPP contract*

79. Turning to the nature of the PPP contract, Counsel for the Appellant first referred me to paragraphs 45 and 46 of the judgement of the European Court of Justice in



the case of ***National Roads Authority -v- Revenue Commissioners C- 344/15***

which state as follows:-

*“In the present case, according to the documents submitted to the Court, the primary function of the NRA is to ensure the availability of a safe and efficient network of national roads. For that purpose, it has overall responsibility for the planning and construction of all national roads and for the supervision of works for the construction and maintenance of those roads. On that basis, only it can prepare a plan for establishing a toll scheme for access to those roads and make the bye-laws it considers necessary for their operation and management, those bye-laws setting the maximum amount of the tolls which may be levied for access to a toll road, whether it is operated by the NRA or a private operator.*

*It also appears from those documents that private operators can enter the market of making road infrastructure available on payment of a toll only if the NRA authorises them to do so. Furthermore, the fact that the management of the national road has been entrusted to a private operator does not in any way alter the fact that the NRA always retains ultimate responsibility for national roads, so that, if the private operators are no longer willing or no longer able to fill his commitments, the NRA is required to ensure the proper functioning of the road.”*

**80.**Counsel for the Appellant submitted that this was a good summary from an objective court of the relevant statutory framework which provided the backdrop to the PPP contract.

**81.**Counsel for the Appellant then directed me to the domestic statutory provisions governing responsibility for the national roads network. He pointed out that



certain provisions of the Roads Act 1993 (as amended) were of relevance to the appeal. In that regard, he made reference to section 17, which provides that TII has an overall general duty to secure the provision of a safe and efficient network of national roads and for that purpose it has:

- a. Overall responsibility for the planning and supervision of works for the construction and maintenance of national roads, and
- b. Such other functions in relation to the construction or maintenance of national roads as are assigned to it by or under the Roads Act 1993.

**82.** In addition, under section 19, TII is empowered to acquire land for the purpose of developing a national road. This includes a power to acquire land by means of a compulsory purchase order. Section 19 also makes clear that TII is entitled to utilise the services of others in respect of the construction and maintenance of a road.

**83.** Section 59(1) of the Roads Act provides that *“a road authority may charge and collect tolls of such amounts as may be specified for the time being in bye-laws made by it under section 61 in respect of the use of a toll road.”* Section 59(3) further provides that *“[w]here an agreement under section 63 provides for the collection of tolls by a person specified in the agreement, that person and his servants and agents may collect the tolls to which the agreement relates.”*

#### *Nature of a PPP Agreement*

**84.** Counsel for the Appellant submitted that the nature of a public-private partnership is a financing method for the State, and the essence of the agreement in the instant appeal was that **COMPANY A** financed the building and maintenance of the Motorway in return for a contractual consideration. He accepted that the consideration included TII effectively assigning to **COMPANY A** a significant part



of the Motorway toll income over the ■-year term of the contract, with income declining at year ■ as the contract term draws to an end. He submitted that **COMPANY A** had in essence committed themselves to financing the PPP project for ■ars, although it was possible that the contract could be terminated before the expiry of the ■ear term.

**85.** Counsel for the Appellant outlined the various obligations imposed on **COMPANY A** for the duration of the PPP project, laying particular emphasis on the fact that **COMPANY A** was obliged to discharge those obligations at its own cost and risk, and without recourse, other than as expressly provided in the PPP agreement, to funds from or the support of the State or the TII.

#### *Access Rights*

**86.** In relation to the access rights afforded by the NRA to the Appellant, Counsel for the Appellant directed me to clauses ■ to ■ inclusive and Clause ■ of Part ■ of the PPP Contract.

**87.** Clause ■, entitled “*Access for PPP Co*”, provided that:-

*“Subject to the provisions of Clauses ■ (Duration), ■ (Limitations), ■ (Failure to Grant Access) and ■ (Protesters and Trespassers), the Authority shall make available to the PPP Co for the purposes of the Project for the periods referred to in Clause ■ (Duration) such access to the Site and the Off-Site Areas as shall be required from time to time for the Project...”*

**88.** Counsel for the Appellant submitted that it would be a commercial nonsense if a comprehensive right of access was not granted to **COMPANY A** over what was and



remained the State's land, subject to limitations on the right of access to protect the State's interests.

89. Clause [REDACTED] of the PPP Contract provides as follows:-

*"The rights of access given under clause [REDACTED] (Access for PPP Co) shall subsist for the purposes of carrying out the Project and for no other purpose. Any access given under Clause [REDACTED] (Access for PPP Co) shall be by way of licence for the particular activity only and shall not grant or be deemed to grant any legal estate or other interest in land and, for the avoidance of doubt, the PPP Co acknowledges that it shall have no freehold, leasehold or tenancy rights in the Site or the Off-Site areas."*

90. Counsel for the Appellant submitted that the first sentence of Clause [REDACTED] was wholly logical as **COMPANY A** did not need the land for any other purpose. Perhaps more fundamentally, he submitted that Clause [REDACTED] was crucial to understanding the nature of the asset that **COMPANY A** actually had. He stated that **COMPANY A** did not need a legal estate or interest in the land to discharge its obligations, and that it would have been manifestly contrary to the State's interests to have someone claiming property rights over the Motorway.

#### *Acquisition of Ancillary Land*

91. Counsel for the Appellant further referred to Clause [REDACTED] of the PPP Contract, entitled "*Acquisition of Land by the PPP Co*", which was relied upon by the Respondent. That Clause provides that:-

*"The freehold and/or leasehold interest in any land and/or any Land Rights acquired by the PPP Co which has been acquired in relation to the Project shall, on request by the Authority, be conveyed to the Authority or to a person nominated by it at the Expiry Date free of charge and*



*without any Encumbrances which impede the Authority's performance of its statutory functions."*

**92.**Counsel for the Appellant submitted that this Clause simply meant that if **COMPANY A** purchased any land ancillary to the project site, *e.g.* for storing vehicles, that land would have to be handed over to the Authority at the end of the contract.

*Potential Assignment of the PPP contract*

**93.**Counsel for the Appellant directed me to Clause [REDACTED] of the PPP Contract, which is entitled "Assignment" and which provides as follows:-

*"Subject to Clause [REDACTED] and clause [REDACTED] (Encumbrances) the PPP Co shall not, and shall procure that no Contracting Associate shall, in any such case, without the prior consent of the Authority, assign, novate, transfer or create or allow or to subsist any Encumbrance, trust or interest in this Agreement, the Design Contract, the Construction Contract, or any other contract entered into by the PPP Co in performing its obligations under this Agreement or any part thereof or any benefit or interest therein or thereunder."*

**94.**Counsel for the Appellant submitted that this Clause meant that the PPP Contract as a whole could be assigned if TII's consent was given. He said that the access rights could not be assigned separately as they were very much subsidiary rights necessary to make the Contract performable.

*Succession Rights to the Contract*



95. Counsel for the Appellant further pointed out that there were no succession rights for assignees of the Appellant at the end of the PPP Contract, Clause [REDACTED] providing that:-

*“This Agreement shall be binding on and shall enure to the benefit of the PPP Co and the Authority and their respective successors and permitted assigns.”*

#### *Rates*

96. Counsel for the Appellant stated that the fact that **COMPANY A** was obliged to pay rates pursuant to Clause [REDACTED] was not necessarily reflective of the fact that the legal obligation to pay the rates is placed on an occupier under the Poor Relief (Ireland) Act 1838; he submitted that it was simply another aspect of a freely negotiated commercial contract. Consequently, he submitted that no weight could be placed thereon when ascertaining whether **COMPANY A** had acquired an interest in the Motorway lands.

#### *Collection of the Tolls*

97. Moving to the collection of tolls by **COMPANY A**, Counsel for the Appellant pointed out that sections 59 and 63 of the Road Act 1993 made it clear that tolls could be collected by a person other than TII. The Toll Scheme prepared by the NRA in relation to the Motorway expressly provided that:-

*“The National Roads Authority may, in accordance with Section 63 of the Roads Act, 1993, as amended by Section 275 of the Planning and Development Act, 2000, enter into an agreement with a third party, hereinafter called “the Concessionaire”, in relation to the collection of tolls on the Proposed Road and the application of the proceeds of such tolls and other matters.”*



- 98.** Counsel for the Appellant submitted that it was clear that the Bye-laws adopted by the NRA in [REDACTED] in respect of the operation and maintenance of the Motorway specified the amount of the tolls to be charged in respect of different classes of road user, as TII considered appropriate. In addition, the Bye-laws also specified who was liable to pay tolls, who was exempt and set out the powers of the NRA or its collection agent in relation to users of that tolled road.
- 99.** Counsel for the Appellant reiterated that where a toll scheme was adopted by the NRA, section 63 of the Roads Act 1993 enabled the Authority to enter into an agreement with another party in respect of the construction, maintenance, operation and management of the toll road under the scheme. This could include payment to or retention by that other party of certain proceeds of the tolls relating to the relevant road.
- 100.** Counsel for the Appellant submitted that it was clear that the statutory framework allowed the NRA to charge tolls and further allowed the Authority to enter into an agreement to have a third party collect the tolls on its behalf. He submitted that the retention of tolls by **COMPANY A** was not on foot of a statutory charging power but was instead a compensating consideration under the PPP Contract for the contractual obligations financed by **COMPANY A**. He submitted that once a toll had been levied on a user of the Motorway, its nature ceased to be of any particular relevance because its ultimate destination was governed by the PPP Contract, and not by statute or bye-law.
- 101.** Counsel for the Appellant said his fundamental submission in this regard was that the toll mechanism was an essential part of the consideration under the PPP Contract because it was the continuing consideration for **COMPANY A**



maintaining and running the Motorway, as well as continuing compensation for the finance that was still owing to **COMPANY A** by the Authority. He accepted that **COMPANY A's** financial statements showed significant income being generated from the Motorway but posited that the income was not the receipt of tolls *per se*; rather, it was the surrender of tolls by the Authority as part of the consideration monies under the PPP Contract.

- 102.** Counsel for the Appellant further observed that the proceeds of the tolls were brought within the charge to corporation tax under Case 1 of Schedule D because **COMPANY A** was a company resident in the State for tax purposes.

*Meaning of the words 'deriving ... directly or indirectly...'*

- 103.** Counsel for the Appellant emphasised in his closing arguments that section 29 of TCA 1997 was specifically enacted to deal with a situation where land disposed of is not owned by an individual but is owned instead by a company. In this regard, he said the purpose of the provision was to pre-empt the disposal of value in Irish land without taxation and the Act was treating the shares as if they were the land.

- 104.** In relation to the meaning of the word "*indirectly*", Counsel for the Appellant stressed that it was important to bear in mind that section 29 deals with shares in a company. He submitted that the purpose of the section was to ensure that where the indirect value attaching to the shares derives from land in State, it is chargeable to CGT, whether that value is traced through a subsidiary or a sub-subsidiary, or so on.

- 105.** Looking at section 29 more generally, Counsel for the Appellant stated that the Respondent's case appeared to be that land was necessary for the road, the road



was necessary for the toll, the toll was retained and somehow this indirectly resulted in **COMPANY A**'s shares deriving their value from land in the State.

**106.** He submitted that it was critical to look at the structure of section 29, which seeks to isolate those assets whose disposal can render a non-resident chargeable to CGT. When looking at the words “*deriving their value or the greater part of their value from [relevant] assets*”, it was necessary to consider those assets, and the relevant asset in the instant appeal is land in the State.

**107.** Having noted that the Respondent had conceded during the hearing that **COMPANY A** did not have a proprietary interest in the land, Counsel for the Appellant submitted that the value of the **COMPANY A** shares had to be inextricably linked to the land; otherwise the relevant statutory provisions would not make sense. He submitted that the Respondent’s approach of suggesting that the income stream from the road was sufficient to establish an indirect value connection with Irish land gave too extensive an interpretation to section 29. He submitted that the purpose of that section was to make sure that Ireland preserved its right to actually tax gains from the alienation or disposal of land in the State, and not to extend the tax charge to assets deriving their value from cash flow streams that have some connection, albeit indirectly, with land.

### *Summary of Arguments*

**108.** In closing, Counsel for the Appellant submitted that the question to be answered in the appeal was whether the shares in **COMPANY A** sold by the Appellant derived their value or the greater part of their value directly or indirectly from land in the State, or from an interest in land in the State.



**109.** In response to this question, Counsel for the Appellant submitted that no land in State was owned by **COMPANY A**, either as freehold or as leasehold. **COMPANY A** did not own the Motorway or the land upon which it was built, and had no legal estate or interest in those lands. He submitted that under the PPP Contract, **COMPANY A** was granted a non-exclusive licence to enter upon the land for specific purposes. This was necessary so that **COMPANY A** could fulfil its obligations under the PPP Contract and it was inseparable from that contract, and was not a distinct asset capable of disposal. Moreover, he submitted that it was not an *"interest in land"*.

**110.** Counsel for the Appellant agreed that the tolls or the proceeds of the tolls generated the value of the shares in **COMPANY A**. However, he submitted that this was an irrelevant consideration as the charge to CGT could only arise if the value of the shares derived from land. He said the value of the tolls was clearly not the value of the land. He submitted that the PPP Contract was an asset in itself but that asset was not within the charge to CGT. He submitted that the purpose of the CGT Acts was to tax capital, and that any attempt to tax shares on a capital tax basis, using what was in essence a price/earnings formula to value the shares, was tantamount to double taxation.

**111.** Counsel for the Appellant reiterated that the PPP Contract could not in any be considered land or an estate in terms of the law of private property law; instead, it was a chose in action.

**F. Submissions of the Respondent**



### *The Grounds of Appeal*

**112.** The Respondent's written submissions made the preliminary point that only two of the seven grounds contained in the Notice of Appeal, namely those in subparagraphs 18(d) and 18(e) *supra*, addressed the factual basis of the Appellant's contention that it was a service company and that it did not own land in the State or an interest in land in the State.

**113.** The written submissions furthermore made reference to section 949I(6) of TCA 1997, which provides;

*A party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice.*

### *The Interpretation of the Legislation*

**114.** The Respondent began by submitting that section 29(2) of TCA 1997 provides that the charge to CGT applies to chargeable gains accruing to a person who is resident or ordinarily resident in the State.

**115.** Section 29(3) then provides that the charge also applies to disposals of certain assets, to include the sale of land (a "*relevant asset*"), by non-residents. This provision effectively exercises the State's right to tax certain disposals by non-resident persons. One such disposal where a non-resident person is subject to CGT is the disposal of "*shares deriving their value or the greater part of their value directly or indirectly from [land in the State]*" pursuant to section 29(1A)(b), which extends the meaning of "*relevant asset*" to such shares.



- 116.** The Appellant had obviously disposed of shares in **COMPANY A** and the Respondent submitted that the Appellant did not contend that the shares in **COMPANY A** derived their value from any activity other than the use by **COMPANY A** of land in the State (specifically the land under and adjacent to the [REDACTED] motorway) for the construction of the said motorway, the maintenance and operation of the motorway and the collection of tolls from those traversing that land.
- 117.** The Respondent submitted that it was **COMPANY A** that excavated the land, built the motorway and now regulated the use of the land (now covered with a surface capable of bearing vehicles) by motorists. No income stream to **COMPANY A** other than income deriving from its use of this portion of land in the State had been identified by the Appellant.
- 118.** Accordingly, based on the information made available to it, the Respondent formed the view that the shares in **COMPANY A** derived their value, or the greater part of their value, directly or indirectly from land.
- 119.** The Respondent submitted that the Appellant was seeking to circumvent this interpretation of the factual situation by arguing that to be liable to CGT, **COMPANY A** would have to hold a proprietary interest or estate in the land and further arguing that the interest which **COMPANY A** held was not such a proprietary interest or estate.
- 120.** Counsel for the Respondent submitted that there were a number of objections to this line of reasoning, which are set forth hereunder.



- 121.** Firstly, section 29(1A)(b) of TCA 1997 did not rest on a requirement that a person holds a proprietary interest or estate. Instead, the test was whether the shares derived their value or the greater part of their value directly or indirectly from land in the State, and not directly or indirectly from an interest or estate in land in the State.
- 122.** Counsel submitted that that the lack of any requirement for a proprietary interest or estate in land was confirmed by section 5 of TCA 1997, which provides that '[l]and' *includes any interest in land*" [emphasis added]. He submitted that, in effect, there was no exhaustive definition of land in section 5; the choice by the legislature to avoid using a prescriptive or limiting word meant that the word '*land*' was deliberately widely drawn so as to include any interest in land, but not exclude other forms of estate.
- 123.** The Respondent submitted that even if the word "*interest*" was construed narrowly and confined to proprietary interests (which the Respondent did not accept was the appropriate approach), the position taken by the Appellant still did not adequately address the use of the verb "*includes*". Counsel for the Respondent submitted that the use of the word "*includes*" illustrated that the term "*land*" for the purposes of the Tax Acts was wider than an "*interest in land*" and was not confined to proprietary interests or estates. It was, he submitted, implicit in the use of the word "*includes*" that the definition concerned was not exhaustive.
- 124.** Counsel for the Respondent submitted that the meaning of section 5 was clear and unambiguous. He further submitted that the breadth of the definition in section 5 was illustrated by examining other aspects of the section and, in particular, the meaning of "*lease*" in relation to which section 5 states as follows:



*"lease" in relation to land, includes an underlease, sub-lease or any tenancy or licence, and any agreement for a lease, underlease, sub-lease or tenancy or licence and in the case of land outside the State, any interest corresponding to a lease as so defined."*[emphasis added]

**125.** The Respondent submitted that a lease is indubitably an "*interest in land*" and therefore falls within the definition of "*land*" in section 5. It submitted that even if the PPP Contract only granted **COMPANY A** a licence to access the lands, such a licence fell within the definition of "*lease*", which in turn fell within the definition of "*land*". The Respondent noted that the Appellant's submissions stated that "**COMPANY A was granted a limited non-exclusive licence...**". Counsel for the Respondent submitted that it was open to me on the evidence to conclude that the PPP Contract conferred more than a limited non-exclusive licence.

**126.** Counsel for the Respondent further submitted that the fact that even a limited, non-exclusive licence could fall within the ambit of "*land*" for the purposes of section 5 demonstrated that the Oireachtas had intended it to be given a very wide interpretation when enacting the legislation.

**127.** Counsel for the Respondent further submitted that the foregoing broad interpretation of section 5 was supported by section 21 of IA 2005, which provides that the terms referred to in Part I of its Schedule are to bear the meanings assigned in the Schedule. He submitted that the meaning given to "*land*" in the Schedule is, like that in section 5, also open-ended as it provides:

*"land" includes tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land."*  
[emphasis added]



- 128.** Counsel for the Respondent submitted that the PPP Contract conferred rights in or over land on **COMPANY A**. He submitted that the reference to rights in IA 2005 was more than a mere colloquialism and argued that the meaning of “*land*” in IA 2005 could not be disapplied by virtue of section 20 of that Act.
- 129.** Counsel for the Respondent further submitted that sections 5 and 29 of TCA 1997 deliberately refrained from comprehensively defining what was meant by ‘land’. He argued the use of the word “*includes*” is not something which could give rise to a contrary intention, within the meaning of section 20 of IA 2005, appearing in the enactment itself, or the Act under which the enactment is made. He submitted that there could be merit in the Appellant’s arguments in this regard if an all-encompassing definition of the word land had been essayed, but there had been no such attempt. Furthermore, in circumstances where IA 2005 was itself widely drawn, he submitted that any objection to the Respondent’s reliance on IA 2005 fell away.
- 130.** Counsel further submitted that the non-exhaustive definition of land for the purposes of the CGT Act (enacted in 1975) was further illustrated by the definition of “*land*” within the Interpretation Act 1937 which then applied. This definition provided that “*land includes messuages, tenements, and hereditaments, houses and buildings, of any tenure*”. He submitted that this definition was modernised and extended (to include interests in land) with the enactment of IA 2005, but the principle remained the same - the non-exhaustive definition of “*land*” in the CGT provisions within TCA 1997 needed to be read and interpreted in the light of the definition of land in IA 2005.
- 131.** The Respondent’s written submissions noted that this interpretation was entirely consistent with the view held by the Respondent since the introduction



of CGT in 1975. The CGT Manual, issued by the Office of the Chief Inspector of Taxes to the Respondent's staff in 1975, outlined that the definition of land was to be found in the Schedule to the Interpretation Act 1937. The current published position of the Respondent, as outlined in the Part 1.0.3 of the Tax and Duty Manuals now states that that the definition of land is to be found in Schedule 2 [sic] of IA 2005.

**132.** Counsel for the Respondent submitted that the Appellant's reference to LCLRA 2009 was therefore of limited assistance. He submitted that even this Act made it clear that the term "*licence*" may fall within the term "*interest*". He referred me to section 71(3)(ii) by way of example of this, which provides that the section will not "*extend the scope of, or convert into a new interest or right, any licence, privilege or other interest or right existing before the conveyance.*"

**133.** Counsel for the Respondent further submitted that the word "*deriving*" in section 29(1A)(b) of TCA 1997 required emphasis, as did the words "*the greater part of their value*" and, in particular, the words "*directly or indirectly from those assets*". He submitted that the legislation did not require a nexus with land because the words "*directly and indirectly*" were very widely drawn by the legislature. He submitted that, at its most basic level, the appeal concerns a road between two particular points on the map of Ireland and said the road was intimately bound up with the land beneath it.

#### *Statutory Interpretation Principles*

**134.** Counsel for the Respondent argued that a purposive approach should be adopted when interpreting the statutory provisions under consideration in this appeal. He submitted that even if this approach was not taken, and a more literal



or restrictive approach was applied, it would be still possible for me to derive the interpretation for which the Respondent advocated.

**135.** In support of his argument that a purposive approach should be taken to the interpretation issues, Counsel for the Respondent referred me to O'Donnell J's decision in the ***O'Flynn Construction*** case, and in particular the following passage:-

*“The suggestion that the principles in McGrath–v-McDermott ... preclude a “purposive approach” is also perplexing. In the first place the express words of section 86 require the Commissioners to have regard to the “purposes for which it [the relief] was provided. Furthermore, the decision in McGrath v. McDermott itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive. In that decision Finlay C.J. restated at p. 276 the orthodox approach to statutory interpretation at the time when he adverted to the obligation of the courts in cases of doubt or ambiguity to resort to a “consideration of the purpose and intention of the legislature”. 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. As Lord Steyn observed in the Northern Ireland case of IRC–v-McGuckian ... there has been a tendency to treat tax law, almost uniquely in the civil law as continuing to be the subject of strict literalist interpretation...”*

**136.** Counsel for the Respondent also emphasised O'Donnell J's reliance on the decision in ***Barclays Ltd –v- Mawson [2005] 1 A.C. 684***, noting O'Donnell J's view that the House of Lords in that case:-



*“... 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 IRC -v- McGuckian ... “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 ... 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. Accordingly, the Appeals Commissioners’ conclusion that the principles set out in McGrath v. McDermott prohibited the adoption of a purposive approach is incorrect on a number of levels.”*

- 137.** Counsel for the Respondent submitted that the Appellant had overemphasised the earlier case law, and stressed that O’Donnell J in the above paragraphs spoke for the majority in the *O’Flynn* case.

*The Nature of the PPP Contract*

- 138.** Counsel for the Respondent submitted that, while it was not necessary for me to conclude that **COMPANY A** enjoyed something more than a limited, non-exclusive licence in order to find for the Respondent, it was nonetheless open to me to reach such a conclusion on the facts, notwithstanding the fact that in Clause ■ of the PPP Contract the parties described the use of the land as being:-



*"... by way of licence for the particular activity only and shall not grant or be deemed to grant any legal estate or other interest in land and, for the avoidance of doubt, the PPP Co acknowledges that it shall have no freehold, leasehold or tenancy rights in the Site or the Off-Site Areas."*

**139.** Counsel directed me to that portion of the Appellant's written submissions which stated that:-

*"The fundamental principle of Irish land law, preserved by the Land and Conveyancing Law Reform Act 2009, is that in relation to real property what is owned is not the physical entity as such but an estate or interest in the land. It is the nature of that estate or interest which defines the extent of ownership. In that regard, Professor Wylie notes as follows:*

*"The main criterion by which to judge whether a particular interest is an interest in land would seem to be whether that interest will bind successors in title of either or both the original parties to the contract or conveyance creating the interest in the first place."*

**140.** The Respondent submitted that the Appellant's adoption of this criterion was notable because the PPP Contract was, in Clause ■ expressed to be binding upon and enuring to the benefit of **COMPANY A**, its successors and permitted assigns during the term granted to **COMPANY A**.

**141.** Furthermore, the Respondent noted that under Clause ■ of the PPP Contract, **COMPANY A** could acquire freehold or leasehold interests in land in relation to the Motorway project, and any such land or interest acquired was to be conveyed to the NRA, if requested by the NRA, on the expiry of the agreement.



**142.** The Respondent further emphasised that, pursuant to Clause ■ of the PPP Contract, it was **COMPANY A** which was responsible for the safety and security "of all persons affected by the carrying out of the Project" and for the prevention of trespass and, unlike a bare licensee, was entitled to exclude persons from the land. The obligation of **COMPANY A** extended to taking "all measures necessary to secure the health, safety and security of Users of the Project Road".

**143.** The Respondent further directed me to Clause ■ of the PPP Contract, which provided that any rates arising or payable in connection with the use of any property under the PPP Contract, or in connection with compliance with any obligations under the PPP Contract, were payable by **COMPANY A**, subject to savers in respect of increases payable by the NRA. The Respondent submitted that this was in keeping with section 71 of the Poor Relief (Ireland) Act 1838 (as amended by the Local Government Reform Act 2014), which provides that liability for rates is borne, in the first instance, by the occupier of property:-

*"Every rate made under the authority of this Act shall be paid to the person authorized to collect the same by the person in the actual occupation of the rateable property at the time of the rate made..."*

**144.** The Respondent also pointed out that under the PPP Contract, **COMPANY A** entered into wide-ranging indemnities, including in respect of users of the motorway, and referred me to Clauses ■ and ■ in ■'s regard.

**145.** The Respondent submitted that the foregoing features of the PPP Contract meant that the PPP Contract granted something more than a limited non-exclusive licence. It submitted that the nature of the PPP Contract in question reflected a point made in the User Guide to the Template Project Agreement, published by the National Development Finance Agency in 2007, which stated:-



*"The usual position in an accommodation is that the public sector owns the site and licences it to PPP Co. for the term of the Project Agreement. Granting PPP Co a lease may give rise to problems under the Landlord and Tenant (Amendment) Act 1980 (the "1980 Act") by which PPP Co may acquire statutory rights after five years' continuous occupation and be entitled to a renewal of a lease or to compensation in lieu of a new lease.*

*The 1980 Act does not apply in this way to a true licence although there remains the possibility that even if a licence is granted, the courts might construe the relationship between the local authority and PPP Co. as having the characteristics of a lease and may therefore grant a renewal of the terms of the "lease" to PPP Co. at the end of the operation period. In other words, it is the existence of a particular relationship with certain characteristics that determines the existence of a lease as opposed to any formal grant of a lease or the designation of such relationship as a "license" or "lease".*

*Case law on the lease/licence distinction and the key elements that distinguish a lease is not entirely satisfactory. Irish Shell and B.P. Limited -v- John Costello [1981] ILRM 66 remains the leading Supreme Court case on the lease/licence distinction. Griffin J in the Supreme Court held the agreement to be a lease despite the fact that it was expressly described as a licence agreement. Griffin J stated that:- "Whether the transaction is a licence or a tenancy does not depend on the label which is put on it. It depends on the nature of the transaction itself".*



*However, in subsequent dicta, Griffin J also placed importance on the intention of the parties, quoting from Lord Denning in Shell-Mex -v- Manchester Garages as follows:-*

*"One must look at the transaction as a whole and whether there are any indications that one finds in the terms of the contract between the two parties to find out whether in fact it is intended to create a relationship of landlord and tenant or that of licensor and licensee".*

*Whilst the case law is not entirely satisfactory, it seems that, at least in the High Court, the intention of the parties may be taken into account. The best approach would therefore be to draft a licence omitting as many key elements of a lease as possible e.g. exclusive possession. There is obviously still a residual risk of a business tenancy being created in favour of PPP Co. However, in the absence of legislation this is considered the best option."*

### *The Imposition of Tolls*

**146.** Counsel for the Respondent rejected the Appellant's argument that the PPP Contract was merely a financing agreement. The Respondent's position was that the charging of tolls was an ingredient in the overall suite of rights which **COMPANY A** had been granted over the Motorway. It was this overall suite of rights over the Motorway which was key in determining the issue of whether **COMPANY A**'s shares derived their value from land.

**147.** The Respondent noted that the Appellant had submitted that it was the NRA, and not **COMPANY A**, that enjoyed the right to charge tolls from users of the



Motorway. The Respondent submitted that, while the issue was not determinative of itself, it did not accept the Appellant's contentions in this regard.

**148.** The Respondent directed me to what it submitted were the relevant provisions of the Roads Act 1993, namely:-

**(i)** Section 59, which provides that:-

*"... a road authority may charge and collect tolls of such amounts as may be specified for the time being in bye-laws made by it under section 61 in respect of the use of a toll road."*

**(ii)** Section 61(1), which provides that:

*"a road authority may, after consultation with the Commissioner, make such bye-laws as it considers expedient for the purposes of the operation and maintenance of a toll road.", and*

**(iii)** Section 61(3), which provides that:-

*"Without prejudice to the generality of subsection (1), bye-laws under this section may -.... (e) specify the powers of the road authority and of any person authorised by it to operate and manage the toll road concerned in relation to users of a toll road and vehicles and the persons in charge of them".*

**149.** The Respondent then directed me to section ■ of the relevant Bye-laws made by the NRA in relation to the Motorway which provide that:-

*"The Toll Company may demand, charge, collect and recover tolls as set out herein."*



150. Similarly, section ■ of the Bye-laws, in relation to failures to pay a toll, further provides:

*"If the driver of a vehicle who is liable to pay the Appropriate Toll fails to do so on passing a Toll Collecting Location, the registered owner of the Vehicle concerned may then be required by the Toll Company to pay the amount of the Appropriate Toll."*

151. For the sake of completeness, I should record that "Toll Company" is defined in the Bye-laws as meaning "such person as is party to an agreement with the NRA at such time in relation to, among other things, the collection of tolls on the Toll Road and the application of the proceeds of such tolls being, as of the date of these Bye-laws, ■ Limited."

152. Counsel for the Respondent submitted that it was clear from the foregoing that **COMPANY A** charged, as well as collected, tolls. He further submitted that this was reflected in the PPP Contract, where "toll charging" was defined in Clause ■ as meaning "the charging of a toll by the PPP Co to Toll Users", and in the financial statements for **COMPANY A** filed with Companies Registration Office for 2014, which stated that its turnover derived from toll charges generated in the Republic of Ireland.

### *Summary of Arguments*

153. In closing, Counsel for the Respondent stated that it was not part of his client's submission that **COMPANY A** had a proprietary interest in land, nor was it necessary for me to find that such an interest existed. He submitted that I would require significantly more extensive evidence showing precisely what had happened from a factual perspective to reach a safe conclusion on this issue. He





submitted that it was nonetheless clear that the PPP Contract was much more nuanced than was suggested by the Appellant.

**154.** Counsel for the Respondent further submitted that it was clear that it was tolls paid by users of the Motorway that generated the value that was to be found in the **COMPANY A** shares. He argued that what was at issue was a toll and that, regardless of whether the toll was charged or collected or retained by **COMPANY A**, it was drawing an overly-fine distinction to suggest that the tolls should be viewed as consideration payable under the PPP Contract.

**155.** Counsel for the Respondent submitted that in relation to the collection of the tolls, the land was necessary for a road, the road was necessary for a toll, the toll was collected by **COMPANY A** and **COMPANY A** then retained some 97% of the tolls collected. As such, he contended that the value of the shares in **COMPANY A** derived indirectly from land in the State.

### ***G. Analysis and Findings***

**156.** By way of preliminary observation, I note that the Respondent's written submissions directed me to section 949I(6) of TCA 1997 and suggested that the grounds of appeal advanced by the Appellant in its Notice of Appeal were somewhat narrow in their framing and that the Appellant should be constrained thereby. While this argument was not pursued further in the course of the hearing before me, I will observe for the sake of completeness that I am satisfied that all of the arguments advanced on behalf of the Appellant fall within the scope of the stated grounds of appeal and that I am entitled to consider and determine same.



**157.** Having so found, it seems to me that there are four related issues to be considered in determining this appeal, namely:

- (1) What is the correct interpretation of the phrase “*land in the State*” for the purposes of section 29(3)(a) of TCA 1997?
- (2) What is the true nature of **COMPANY A**’s interest, if any, in the land under and adjacent to the Motorway?
- (3) Is **COMPANY A**’s interest, if any, in the land under and adjacent to the Motorway “*land in the State*” for the purposes of section 29(3)(a) of TCA 1997? and,
- (4) Did **COMPANY A**’s shares derive their value or the greater part thereof directly or indirectly from land in the State?

**158.** Before turning to the first issue, I think it is appropriate to set out what I understand to be the correct approach to the interpretation of taxing statutes. I had the benefit of eloquent and learned submissions from both Counsel on how I should read, understand and apply the various authorities that were opened to me. However, subsequent to the hearing of this appeal, the Supreme Court has delivered itself of two significant judgments concerning the proper interpretation of tax legislation, namely *Dunnes Stores -v- The Revenue Commissioners* [2019] IESC 50 and *Bookfinders Ltd -v- The Revenue Commissioners* [2020] IESC 60.

**159.** While both of these decisions contain thorough, detailed and helpful analyses of the previous caselaw and relevant principles, and while I have carefully considered and applied those analyses in their entirety in reaching the



conclusions I have set forth hereunder, I believe a useful summary or overview is that given by McKechnie J in **Dunnes Stores**, wherein he stated as follows in paragraphs 63 to 65:-

*“As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. “The words themselves alone do in such cases best declare the intention of the lawmaker” (Craies on Statutory Interpretation, 7<sup>th</sup> ed., Sweet & Maxwell, 1971 at pg. 71). In conducting this approach “... it is natural to enquire what is the subject matter with respect to which they are used and the object in view” – Direct United States Cable Company –v- Anglo-American Telegraph Company [1877] 2 App. Cas. 394. Such will inform the meaning of the words, phrases or provisions in question – McCann Limited –v- O’Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy] at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.*

*Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case, one particular rule rather than another has been applied, and why in a similar case the opposite is also occurred. Aside from this however, the aim, even when*



*invoking secondary aids to interpretation, remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.*

*When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker.”*

- 160.** I note that the foregoing passage was cited with approval by O’Donnell J giving the Supreme Court’s decision in ***Bookfinders*** where, having found that section 5 of the Interpretation Act should not be applied in the interpretation of taxation statutes, he went on to state in paragraph 54 as follows:-

*“However, the rest of the extract from the judgement [of McKechnie J] is clearly applicable and provides valuable guidance. It means, in my view, that it is a mistake to come to a statute - even a taxation statute - seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of the statutory provision. It is only if, after the process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.”*



*Issue (1): What is the correct interpretation of the phrase “land in the State” for the purposes of section 29(3)(a) of TCA 1997?*

**161.** I believe it is fair to say that the parties to this appeal had diametrically opposing views as to whether the ownership of a proprietary interest in land is necessary for the chargeability of non-residents pursuant to section 29(3)(a). The Respondent submitted that there was no requirement for such a proprietary interest in land, while the Appellant contended that it was a crucial requirement before any liability could arise under section 29(3)(a).

**162.** In interpreting the phrase “*land in the State*” in section 29(3)(a), I am satisfied that I must have regard to section 5 of TCA 1997, which is entitled “*Interpretation of Capital Gains Tax Acts*” and provides *inter alia* that, except where the context otherwise requires, “*land*” includes any interest in land”. I am satisfied that, even if the reference to land in section 5 is not a definition in the strict sense of the word, it is an “*interpretation provision*” within the meaning of section 20(1) of IA 2005. I am equally satisfied that there is nothing in Chapter 3 of Part 2 of TCA 1997 which amounts to a “*contrary intention*” indicating that the interpretation provision should not apply.

**163.** The Appellant argued that section 5 is a stand-alone section which constitutes in effect a self-contained dictionary or lexicon of different words and phrases for CGT purposes. Counsel for the Appellant submitted that the meaning of ‘*land*’ for CGT purposes is equivalent to the common law meaning of land, now codified in the Land and Conveyancing Law Reform Act 2009, which includes both estates in land, such as freehold and leasehold estates, and lesser interests in land, such as



- easements or freehold covenants. He said the insertion of the word “*includes*” in the definition of land was intended to make clear that the definition of land for CGT charging purposes comprised not only estates in land but also the lesser interests recognised by the common law.
- 164.** The Appellant further argued that the definition of land contained in Part 1 of the Schedule to the Interpretation Act 2005 was not applicable for CGT purposes, calling in aid the provisions of sections 4 and 20 of the 2005 Act.
- 165.** On the other hand, Counsel for the Respondent argued that pursuant to section 21(1) of IA 2005, the meaning of the words in Part 1 of the Schedule are applied to an enactment. Thus, he argued that the meaning of “*land*” in section 5 was, in accordance with the definition in Part 1 of the Schedule to IA 2005, to be read as including “*tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land*”.
- 166.** Counsel for the Respondent further argued that the definition of land contained in section 5 is not exhaustive in the sense that it “*includes any interest in land*”. The Respondent argued that because a lease was an interest in land, the effect of the word “*includes*” was to extend the meaning of “*land*” to include the definition of “*lease*” contained in section 5. As that is unquestionably a broad definition which expressly “*in relation to land, includes ... any agreement for ... licence...*”, the Respondent submitted that this broad definition encompassed the Appellant’s interest in the Motorway lands under and by virtue of the PPP Contract.
- 167.** I do not accept that the meaning of the word “*land*” in Part 1 of the Schedule to IA 2005 should be applied when interpreting that word for the purposes of section



29(3)(a) of TCA 1997. While section 21 would, if considered in isolation, seem at first glance to operate to apply the Schedule meaning for CGT purposes, it must, in my view, be read in the light of section 4. That section provides that section 21 will apply unless a contrary intention appears. I am satisfied that the provision by section 5(1) of a specific meaning for the word “*land*” for the purposes of the Capital Gains Tax Acts constitutes such a contrary intention. Accordingly, section 4, when read in conjunction with section 20(1), means in my view that when interpreting the word “*land*” in section 29(3)(a) of TCA 1997, the word should be given the meaning contained in section 5 of that Act, and not the meaning ascribed to it by the Schedule to IA 2005.

**168.** I am also not persuaded by the Respondent’s argument that the meaning ascribed to “*land*” by section 5 is sufficiently broad or extensive to bring within it the meaning given to the word “*lease*” by that section. If the Respondent was correct, this would mean that “*land*” included *inter alia* agreements for licences. I accept the Respondent’s submission in this regard that a lease is undeniably an estate in land, and could (at least colloquially) be referred to as an interest in land.

**169.** However, I believe that the Appellant is correct in its submission that there is a requirement for a specific definition of lease for the purposes of the Capital Gains Tax Acts, given that there is a particular regime for the taxing of capital gains in relation to leases. Thus, the word “*lease*” is used in a very specific context in Schedule 14 of TCA 1997 and in other provisions within the CGT Act. There is, in my view, nothing in the legislation which shows or suggests an intention that the meaning ascribed to the word “*lease*” was intended to give rise to a wider construction or application of the word “*land*.”



170. In reaching this conclusion, I note that Finlay C.J. stated in **McGrath -v- McDermott** as follows:-

*“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 of other statutes expressed to be construed with it. The courts have not got a function to add to or to 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 purpose of making them effective to achieve their expressly avowed objective.”*

171. I believe that the Respondent is, by its argument in this regard, effectively asking me to imply into the meaning of “land” in section 5 the particular meaning given to “lease” by that section. I do not believe that such implication is necessary to make the statutory provisions effective.

172. Accordingly, I am satisfied that when construing the word “land” for the purposes of section 29(3)(a), I should confine myself to considering the meaning given to it by section 5 of TCA 1997, and I would be incorrect in law to have regard to the meaning given to the word by the Schedule to IA 2005, and incorrect in law to imply into its meaning the meaning given to the word “lease” by section 5 of TCA 1997.

173. In considering the meaning of the word “land” given by section 5, I believe it is clear from the passages from **Dunnes Stores** and **Bookfinders** quoted above that



I should first consider the plain, ordinary, basic and natural meaning of the words to be interpreted, having regard to the subject matter and object of the legislation and to the statutory context in which they are used.

174. I am satisfied that I may still have regard to the purpose of the legislative provisions under consideration. Notwithstanding that O'Donnell J decided in **Bookfinders** that section 5 of the Interpretation Act 2005 does not apply to taxation statutes, he went on to state in paragraphs 47 and 48:-

*“However, this should not be understood to mean that the interpretation of tax statutes cannot have regard to the purpose of the provision in particular, or that the manner in which the court must approach taxation statutes is to look solely at the words, with or without the aid of a dictionary, and on the basis of that conclude that, if another meaningless interpretation is capable of being wrenched from the words taken alone, the provision must be treated as ambiguous, and the taxpayer given the benefit of the more beneficial reading. Such an approach can only greatly enhance the prospects of an interpretation which defeats the statutory objective, which is, generally speaking, the antithesis of statutory interpretation.*

*It is noteworthy from the outset, and even during a period associated with the strictest construction of revenue law, that the courts have recognised that the purpose of the provision, if discernible, is a helpful guide towards its interpretation, and indeed that the ordinary tools of statutory interpretation do apply to taxation statutes.”*

175. In evaluating the arguments made by the parties, I note that there is no complete statutory definition of “land” in any of the legislation to which I was



referred. Section 5 of TCA 1997 provides that land includes any interest in land. Part 1 of the Schedule to IA 2005 provides that land includes tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land. Its statutory predecessor, IA 1937, provided in its Schedule that land includes messuages, tenements, and hereditaments, houses and buildings, of any tenure. LCLRA 2009 provides in section 3 that land includes any estate or interest in or over land, whether corporeal or incorporeal, as well as the other items listed in that provision.

**176.** Each of the foregoing provisions is clearly an interpretation provision but none can be said to be a complete, exhaustive or self-contained definition of “*land*” itself.

**177.** Having carefully considered the wording of section 29 in the context of Chapter 3 of Part 2 of TCA 1997, and having regard to the interpretation provision relating to land contained in section 5 of that Act, I find that “*land*” for the purposes of section 29(3)(a) means a freehold or leasehold estate in land or one of the lesser interests in land formerly recognised by the common law and now codified in section 11(4) of LCLRA 2009.

**178.** I believe that this finding accords with the plain and long-standing meaning of the word “*land*.” I accept as correct the submission made by the Appellant that the interpretation provision relating to land contained in section 5 was included in the legislation to ensure, for the avoidance of any doubt, that not only the major estates of freehold and leasehold were captured by the charging provisions but also the lesser interests recognised at common law.

**179.** I further believe that this finding accurately reflects the intention of the legislature in enacting section 29(3), which was to preserve the State’s right to tax



capital gains from the alienation or disposal of land in the State even if the disponent was a non-resident.

**180.** I further believe that this finding is consistent with the provisions of section 10(3) of LCLRA 2009.

**181.** I am further satisfied that the meaning of the word “*land*” in section 29 is neither imprecise nor ambiguous and therefore it is not necessary to have recourse to subsidiary rules and canons of construction. I have therefore not had regard to the secondary materials to which I was directed by Counsel for the Appellant. For the sake of completeness, I would observe that had it been necessary for me to do so, I would have significant hesitation about placing any reliance upon the ministerial statement cited to me. Notwithstanding the decision of Costello P in *DPP –v- McDonagh*, I respectfully agree with the doubts and concerns voiced by the Supreme Court in *Crilly –v- T&J Farrington [2002] 1 I.L.R.M. 161*.

*Issue (2): What is the true nature of COMPANY A’s interest, if any, in the land under and adjacent to the Motorway?*

**182.** The Appellant submitted that **COMPANY A** acquired pursuant to the PPP Contract a “*limited, non-exclusive licence*” to use lands for the purpose of the Motorway project.

**183.** Naturally, the starting point for any consideration of what was acquired by **COMPANY A** under the PPP Contract is the contract itself, and I note that Clause **■** thereof provides that:-



*“Subject to the provisions of Clauses [REDACTED] (Duration), [REDACTED] (Limitations), [REDACTED] (Failure to Grant Access) and [REDACTED] (Protesters and Trespassers), the Authority shall make available to the PPP Co for the purposes of the Project for the periods referred to in Clause [REDACTED] (Duration) such access to the Site and the Off-Site Areas as shall be required from time to time for the Project...”*

184. Clause [REDACTED] then provides as follows:-

*“The rights of access given under clause [REDACTED] (Access for PPP Co) shall subsist for the purposes of carrying out the Project and for no other purpose. Any access given under Clause [REDACTED] (Access for PPP Co) shall be by way of licence for the particular activity only and shall not grant or be deemed to grant any legal estate or other interest in land and, for the avoidance of doubt, the PPP Co acknowledges that it shall have no freehold, leasehold or tenancy rights in the Site or the Off-Site areas.”*

185. It is well-established in Irish law since the decision in ***Irish Shell and B.P. Limited -v- John Costello* [1981] ILRM 66** that although a document may be described as a licence, it does not necessarily follow that, merely on that account, it is to be regarded as amounting only to a licence in law. Griffin J, giving the majority judgment of the Supreme Court in that case, quoted with approval the decision of Lord Denning MR in ***Shell-Mex -v- Manchester Garages* [1971] 1 WLR 612** that whether the transaction is a licence or a tenancy:-

*“... does not depend on the label which is put on it. It depends on the nature of the transaction itself: see *Addiscombe Garden Estates Ltd v Crabbe* (1958 1 QB 513). Broadly speaking, we have to see whether it is a personal privilege given to a person (in which case it is a licence), or whether it grants an interest in land (in which case it is a tenancy). At one*



*time it used to be thought that exclusive possession was a decisive factor. But that is not so. It depends on broader considerations altogether. Primarily on whether it is personal in its nature or not.”*

**186.** Griffin J further cited the decision of Buckley LJ in that case and the decision in ***Gatien Motor Co -v- Continental Oil [1979] IR 406*** as authority for the proposition that one must look at the transaction as a whole and at any indications that one finds in the terms of the contract between the two parties to find whether in fact it is intended to create a relationship of landlord and tenant or that of licensor and licensee.

**187.** It is clear from the wording of the PPP Contract that **COMPANY A** and the NRA themselves termed what was being conferred on **COMPANY A** a licence, and **COMPANY A** expressly acknowledged that it was not acquiring any freehold, leasehold or tenancy rights. It is also clear from Clauses ■ and ■ that **COMPANY A** did not enjoy a right to exclusive possession of lands used for the Motorway project. However, while these are relevant factors, they are not determinative. I must also consider whether the agreement was personal in nature or not.

**188.** Both parties referred me in this regard to Clause ■ of the PPP Contract, headed “Assignment”. Clause ■ provides that:-

*“This Agreement shall be binding on and shall enure to the benefit of the PPP Co and the Authority and their respective successors and permitted assigns.”*

**189.** Clause ■ then provides that:-



*“Subject to Clause [REDACTED] and clause [REDACTED] (Encumbrances) the PPP Co shall not, and shall procure that no Contracting Associate shall, in any such case, without the prior consent of the Authority, assign, novate, transfer or create or allow or to subsist any Encumbrance, trust or interest in this Agreement, the Design Contract, the Construction Contract, or any other contract entered into by the PPP Co in performing its obligations under this Agreement or any part thereof or any benefit or interest therein or thereunder.”*

**190.** I do not accept the submission made by the Respondent that the foregoing provisions indicate or suggest that the land access rights conferred upon **COMPANY A** by the PPP Contract were not personal to that company because it had a right to assign those rights. I believe it is clear from the wording of the agreement as a whole that the access rights were conferred solely to enable **COMPANY A** to discharge its contractual obligations in relation to the construction, maintenance and operation of the Motorway, and were not rights capable of assignment in themselves. I accept as correct the submission by the Appellant that the access rights could not be assigned separately as they were very much subsidiary rights necessary to make the PPP Contract performable.

**191.** Counsel for the Respondent further directed me to other provisions of the PPP Contract which, the Respondent submitted, indicated that something more than a bare licence had been granted to **COMPANY A**. Clause [REDACTED] for example, deals with the obligation on **COMPANY A** to convey to the NRA any freehold or leasehold interest in lands which it acquired in relation to the Motorway project; the Respondent submitted that this showed that the parties clearly envisaged at least the possibility of **COMPANY A** acquiring rights in or to land pursuant to the PPP Contract.



- 192.** I do not accept this interpretation of Clause ■. While it does clearly envisage **COMPANY A** becoming the owner of a freehold or leasehold estate in land for the purposes of building or maintaining or operating the Motorway, it does not necessarily follow that such ownership would flow from the PPP Contract. I agree with the Appellant that this Clause was inserted to cover a situation where, for example, **COMPANY A** purchased land adjacent to the Motorway for the purpose of parking construction vehicles or equipment.
- 193.** The Respondent also placed some emphasis on Clause ■ of the PPP Contract, pursuant to which any rates arising or payable in connection with the use of property under the PPP Contract were payable by **COMPANY A**. The Respondent submitted that this was consistent with section 71 of the Poor Relief (Ireland) Act 1838, as amended, and indicated that that **COMPANY A** was as a matter of fact the occupier of the lands used for the Motorway, and not simply a third party with access rights.
- 194.** While this is certainly one possible interpretation, it does not, in my view, rest happily with the other provisions of the Contract which go to some length to ensure that **COMPANY A** was a mere licensee and acknowledged its status as such. I therefore accept the submission made on behalf of the Appellant that the liability to pay rates was simply a contractual obligation assumed by **COMPANY A** as one aspect of the complex commercial agreement it entered into with the NRA. Even if I was to accept that **COMPANY A** was or is the occupier of some or all of the Motorway lands (and I do not believe that I can reach a conclusion on this issue on the evidence before me), it would not necessarily follow that its status as such indicated that it was something more than a licensee. I therefore find that the payment of rates by **COMPANY A** is not inconsistent with it having no more than a licence to use the lands.



**195.** The Respondent further directed me to Clause ■■■ of the PPP Contract (dealing with excavation and disposal of materials), Clause ■■■ (pursuant to which **COMPANY A** was responsible for the safety and security of the works and the Motorway), Clause ■■■ (pursuant to which **COMPANY A** was obliged to take measures to prevent trespassers entering on the Motorway lands) and Clauses ■■■ and ■■■ (pursuant to which **COMPANY A** granted wide-ranging indemnities to the NRA). Again, I accept the Appellant's submission that these were simply contractual obligations assumed by **COMPANY A** as part of its overall agreement with the NRA and they do not constitute evidence that **COMPANY A** had some estate or rights or interest greater than those of a licensee in the Motorway lands.

**196.** Overall, looking at the PPP Contract as a whole, I believe it is manifestly clear therefrom that the parties intended that **COMPANY A** would acquire no more than a limited non-exclusive licence to use the lands for the duration of the agreement to enable **COMPANY A** to discharge its contractual obligations under the agreement. This was both logical and necessary; the NRA would obviously have to grant **COMPANY A** access to the lands in order for the contract to be performed, but it would have been anxious to ensure that **COMPANY A** was not granted and would not acquire any estate or rights or interest in the State lands on which the Motorway was built. I further believe that the PPP Contract gave effect to the intentions of the parties thereto and I can find nothing therein which is manifestly inconsistent with the grant of nothing more than a licence. Even if I was to look beyond the parameters of the PPP Contract, there was no extrinsic evidence before me which would cause me to find that **COMPANY A** was granted or had acquired anything greater than the rights of a licensee.



**197.** I am therefore satisfied, and find as a material fact, that **COMPANY A** has a limited and non-exclusive contractual licence to use the lands which will last for the duration of the PPP Contract.

*Issue (3):- Is **COMPANY A's** interest, if any, in the land under and adjacent to the Motorway "land in the State" for the purposes of section 29(3)(a) of TCA 1997?*

**198.** Having found that **COMPANY A** had a licence to use the Motorway lands to enable it to perform its obligations pursuant to the PPP Contract, I must now consider whether that licence could constitute "*land in the State*" for the purposes of section 29(3)(a).

**199.** I note and agree with the quotation from Prof. Wylie's *Irish Land Law* that:-

*"The main criterion by which to judge whether a particular interest is an interest in land would seem to be whether that interest will bind successors in title of either or both the original parties to the contract or conveyance creating the interest in the first place."*

**200.** It is clear to me that the access rights granted to **COMPANY A** by the NRA pursuant to the PPP Contract are personal to **COMPANY A**. It is equally clear that those rights are intended to come to a complete end once the PPP Contract has expired by effluxion of time. The Respondent sought to argue that this was not the case by virtue of the right of assignment contained in Clause [REDACTED], and the provision therein that the agreement shall enure to the benefit of the successors and assigns of the NRA and **COMPANY A**.



**201.** I agree, however, with the submission by the Appellant that this right of assignment can only be exercised as part of an assignment of the PPP Contract as a whole, with the consent of the NRA. I accept that the access rights could not be assigned separately as they were very much subsidiary rights necessary to make the Contract performable.

**202.** I also believe it is relevant to note the second passage from *Irish Land Law* opened to me by the Appellant, where Prof. Wylie stated:-

*"So far as land is concerned, a licence is permission to do something in relation to the land which would otherwise be a trespass. At common law, it seems to have been regarded as nothing more than that and certainly was not regarded as capable of creating an interest in land affecting third parties."*

**203.** I accept this is a correct statement of the law and note that it is supported by the decisions in *David Allen & Sons -v- King*, *Street-v- Mountford* and *Ashburn Anstalt -v- Arnold*.

**204.** It is, of course, correct to say that where a licence is included in a grant of a proprietary interest in land it may acquire the characteristics of an interest in land, and I note and accept the decisions in *Woods -v- Donnelly* and *Honiball -v- McGrath*. However, having carefully reviewed the provisions of the PPP Contract, I find that nothing therein could conceivably be said to amount to the grant of a proprietary estate or interest in land. Accordingly, I am satisfied, and find as a material fact, that the contractual licence granted to **COMPANY A** by the PPP Contract was not coupled with the grant of a proprietary interest.

**205.** The Respondent submitted that, notwithstanding the traditional common law understanding of the nature of a licence, a licence could still constitute an *"interest*



*in land*", and its submissions directed me to section 71(3)(a)(ii) of LCLRA 2009 in this regard. That provision states that:-

*"This section ... does not on a conveyance of land ... extend the scope of, or convert into a new interest or right, any licence, privilege or other interest or right existing before the conveyance."*

**206.** I do not accept that this provision has the meaning contended for by the Respondent. It clearly is not a deeming provision and, on my reading, is equally consistent with a licence being seen as a right rather than an interest.

**207.** Having considered all of the foregoing, I am satisfied that the contractual licence granted to **COMPANY A** under the PPP Contract was not an estate in land and was not an interest in land.

**208.** Accordingly, I find that the contractual licence was not "*land*" within the meaning of section 5 of TCA 1997 and therefore was not "*land in the State*" for the purposes of section 29(3)(a) of that Act.

*Issue (4):- Did **COMPANY A**'s shares derive their value or the greater part thereof directly or indirectly from land in the State?*

**209.** The foregoing findings are not necessarily determinative of this appeal. While Counsel for the Respondent did invite me to find that what was conferred on **COMPANY A** was more than the limited, non-exclusive licence contended for by the Appellant, he emphasised that it was not necessary for me to find that **COMPANY A** had a proprietary interest in land in order to find that the disposal of the shares fell within the charge to CGT. Even if **COMPANY A** did not have a



proprietary interest in land in the State, the Respondent submitted that it was still possible for **COMPANY A**'s shares to derive their value from such land.

**210.** Part of the arguments I heard in relation to this issue related to the tolls paid by users of the Motorway. The Appellant submitted that, pursuant to the PPP Contract, the NRA charged the tolls, which were collected by **COMPANY A** on the Authority's behalf. **COMPANY A** then has a contractual right to retain a portion of the tolls collected as payment for the services rendered under the PPP Contract. The Respondent submits that this is incorrect, and that it is **COMPANY A** that charges the tolls, as well as collecting them and retaining a portion thereof. The Respondent further submits that the value of **COMPANY A**'s shares derives from its turnover, the vast majority of which is generated by its receipt of tolls from users of the Motorway. As the Motorway is unquestionably situated on land in the State and generates the tolls ultimately received by **COMPANY A**, the Respondent submits that the value of **COMPANY A**'s shares is indirectly attributable to land in the State.

**211.** Looking at the legislative provisions underpinning the toll scheme, section 59(1) of the Roads Act 1993 confers the power to "*charge and collect tolls*" on a road authority, being the NRA in the instant appeal. Section 59(3) provides that where an agreement under section 63 "*provides for the collection of tolls by a person specified in the agreement, that person ... may collect the tolls to which the agreement relates.*" Section 61 empowers a road authority to make bye-laws which, *inter alia*, specify the amounts of tolls that shall be charged.

**212.** In turn, section 63 provides that:-

*"Where a toll scheme is adopted by a road authority, the road authority may enter into an agreement with another person under which, upon*



*such terms and conditions as may be specified in the agreement (including the payment to, or retention by, the person of all or part of the proceeds of tolls in respect of the toll road the subject of the scheme), the person agrees to do all or one or more of the following:*

...

*(e) to operate and manage (including provide, supervise and operate a system of tolls and their collection in respect of the use of the road) the road for or with the authority..."*

**213.** It seems clear to me from the foregoing that the legislation empowers a road authority to charge and collect tolls, and empowers such an authority to delegate the right to collect tolls to a third party.

**214.** However, I agree with the Respondent that this statutory position is rendered somewhat less clear by the Bye-laws made in relation to the Motorway. The definition of "Toll Company" in the Bye-laws does suggest that **COMPANY A** is responsible for "the collection of tolls." However, Bye-law ■ provides that **COMPANY A** "may demand, charge, collect and recover tolls...". The Respondent also directed me to Bye-law ■ in this regard, which allows **COMPANY A** to pursue for payment users of the Motorway who have not paid the toll; however, I find this to be more consistent with a right to collect than with a right to charge. Finally, I note that the PPP Contract defines "Toll Charging" as "the charging of a toll by the PPP Co to Toll Users."

**215.** However, the question of whether **COMPANY A** charges and collects tolls, or merely collects them, seems to me to be of little if any relevance to the issues in this appeal. It is not in dispute, and I find as material facts, that **COMPANY A** collects significant amounts of tolls from users of the Motorway and retains a high



percentage of the amount collected. The toll charges retained by **COMPANY A** represent [REDACTED] turnover in the years 2013 to 2016 inclusive.

**216.** These findings would be of relevance if I accepted that the phrase “*directly or indirectly*” in section 29(1A)(b) has the meaning contended for by the Respondent.

**217.** However, I agree with the Appellant that accepting the construction contended for by the Respondent would be to give that phrase an overly-broad meaning, and would not reflect the true intention and will of the Oireachtas in enacting the legislation.

**218.** Considering section 29(1A) in the round, I am satisfied that it was intended to ensure that a non-resident could not hide behind a corporate structure to avoid paying CGT on a disposal or alienation of relevant assets by the realisation of shares, where the chargeable gain reflected the value of those relevant assets.

**219.** Given that the effect of section 29(1A)(b) in respect of the disposal of certain assets, which would *prima facie* result in a non-resident coming within the charge to CGT, is to extend the charge to a disposal of shares reflecting the value of those assets, I agree with the Appellant that the underlying asset from which the shares derived their value must itself have the quality of being within the charge to CGT on a disposal.

**220.** I also agree with the Appellant that the use of the words “*directly or indirectly*” in section 29(1A)(b) was intended to cover situations where more than one corporate entity stood between the taxpayer and the relevant asset, so that a taxpayer could not escape liability to CGT if the relevant asset was held by one or more sub-subsidiaries. Put more simply, I am satisfied that the words “*directly and indirectly*” were chosen by the Oireachtas to ensure that the State’s right to



tax Irish real estate or minerals or other “*relevant assets*” was preserved, even if those assets were held by a company owned by the taxpayer, or a subsidiary or a sub-sub-subsidiary of that company.

**221.** I have also taken into consideration the fact that the interpretation contended for by the Respondent could, in my view, lead to significant uncertainty for non-resident taxpayers, who might unwittingly be brought within the charge to Irish CGT by virtue of their sale of shares which could be said to indirectly derive all or the greater part of their value from relevant assets. I note in this regard the classic statement in ***Revenue Commissioners –v- Doorley*** 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, and the alleged subject of taxation, for no personal property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e., within the letter the statute is interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament so far as they can be applied without violating the proper character of the taxing Act to which I have referred”.*

**222.** I believe that the above interpretation of the phrase “*directly or indirectly*” reflects the plain meaning of those words in the context in which they are used in section 29 and gives effect to the purpose of that statutory provision. In that context, I do not find any imprecision or ambiguity in their interpretation.

**223.** For the sake of completeness, I will record that if I had found such imprecision or ambiguity, I would have had regard to that portion of O’Donnell J’s decision in ***Bookfinders*** where he stated:-



*“The general principles of statutory interpretation are tools used to achieve a clear understanding of statutory provision. It is only if, after that process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.”*

**224.** I believe that a strong argument could be made that if there was sufficient ambiguity or imprecision in the phrase “*directly or indirectly*” to make the interpretation contended for by the Respondent as plausible as that which I have found above, then the principle against doubtful penalisation would operate to preclude the Respondent’s interpretation being accepted. However, given my findings above, it is not necessary for me to reach any settled conclusion on this question.

**225.** The final question of fact which remains, therefore, is from what asset or assets did the shares in **COMPANY A** derive all or the greater part of their value? Having considered all of the evidence before me, I accept as correct the Appellant’s submission that its retention of a significant portion of the tolls it collected from users of the Motorway was a contractual entitlement pursuant to the PPP Contract. I further accept that the right to collect the tolls and to retain a proportion thereof was part of the consideration received and receivable by **COMPANY A** in exchange for its financing, construction, maintenance and operation of the Motorway.

**226.** By reason of the foregoing, I cannot accept the Respondent’s contention that the value or the greater part of the value of **COMPANY A**’s shares was derived



from land in the State. Instead, I accept as correct the Appellant's submission, and find as a material fact, that the value of the **COMPANY A** shares sold by the Appellant derived their value or the greater part thereof from **COMPANY A**'s rights under the PPP Contract between **COMPANY A** and the NRA. That Contract is, as submitted by the Appellant, personalty and a *chose in action*; it is not a "relevant asset" within the meaning of section 29(1A)(a).

**227.** I therefore find that **COMPANY A**'s shares did not derive their value or the greater part thereof directly or indirectly from land in the State.

#### ***H. Determination***

**228.** My findings can be summarised as follows; –

- a. "Land" for the purposes of section 29(3)(a) of TCA 1997 means a freehold or leasehold estate in land or one of the lesser interests in land formerly recognised by the common law and now codified in section 11(4) of LCLRA 2009;
- b. **COMPANY A** has a limited and non-exclusive contractual licence to use the lands which will last for the duration of the PPP Contract;
- c. The said contractual licence was not "land" within the meaning of section 5 of TCA 1997 and therefore was not "land in the State" for the purposes of section 29(3)(a) of that Act; and,
- d. The value of the **COMPANY A** shares sold by the Appellant derived their value or the greater part thereof from **COMPANY A**'s rights under the PPP Contract between **COMPANY A** and the NRA; and,





e. **COMPANY A**'s shares did not derive their value or the greater part thereof directly or indirectly from land in the State.

**229.** By reason of the foregoing findings, the Appellant does not come within the charge to Irish CGT by virtue of its disposal of its shares in **COMPANY A** and I will therefore allow the appeal.

**230.** I consider that the Appellant has, by reason of the assessment dated the 11<sup>th</sup> of October 2016 been overcharged to Capital Gains Tax and determine in accordance with section 949AK(1) of the Taxes Consolidation Act 1997 that the assessment should be reduced accordingly.

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**MARK O'MAHONY**  
**Appeal Commissioner**

**18<sup>th</sup> February 2021**

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

