TAX APPEALS COMMISSION

27TACD2022

Between/

[redacted]

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

1. Matters under appeal & outline of the issues

1.1. The core issue in this appeal is the Appellant's entitlement to manufacturing relief from corporation tax under section 448 of the Taxes Consolidation Act 1997 (hereinafter "TCA 1997") in respect of its processing of zinc and lead mineral concentrate at [redacted], County [redacted]. In summary, eligibility for

manufacturing relief would entitle the Appellant to be taxed at the reduced rate of 10% on its profits.

1.2. The Appellant appeals against Notices of Amended Assessment of its liability to corporation tax for the accounting periods ended the 31st of December 2006, 2007, 2008, 2009, 2010 and 2011, which were issued by the Respondent on the grounds that the Appellant had obtained but was not entitled to manufacturing relief. In respect of the year 2006, the Notice issued on 1 December 2011. The Notices for all the subsequent years issued on 7 December 2011.

1.3. The additional corporation tax assessed for the aforesaid years was as follows:-

- 2006: €8,656,073;
- 2007: €11,383,506;
- 2008: €3,100,517;
- 2009: €949,376;
- 2010: €5,832,563; and
- 2011: €5,959.441

1.4. There are three main issues for determination in this appeal. The first concerns whether the years 2006 to 2010 inclusive were each a "*relevant accounting period*" eligible for the lower rate under section 448 of TCA 1997. This turns on whether the Appellant's trade was set up or commenced prior to the 23rd of July 1998. If it was, relevant accounting periods ran until the 31st of December 2010 and included all bar the last year in question in this appeal.

If it was not, the last relevant accounting period expired on the 31st of December 2002.

1.5. The second issue concerns whether the Appellant's income from processing zinc and lead concentrate was income referable to the sale of goods derived from mining operations within the meaning of section 444(1)(a) of TCA 1997. Such operations are excluded from manufacturing relief under section 448. Again, this issue is relevant to the five accounting years from 2006 to 2010 inclusive.

1.6. The final issue concerns the year 2011 only. Section 21A of TCA 1997, which was inserted by the Finance Act 1999, introduced a higher rate of tax of 25% in respect of "*excepted operations*". These included operations involving "*working minerals*". Otherwise, a rate of 12.5% was applicable. At the hearing before me, the parties agreed that if the second issue was decided in favour of the Appellant, it would be entitled to be taxed at the lower of the two rates on its profits in 2011. Conversely, they also agreed that if the Appellant's processing for the years up to and including 2010 was found to constitute a "*mining operation*" under section 444(1)(a), it would be similarly excepted under section 21A for the year 2011 and consequently taxed at the higher 25% rate.

1.7. This appeal was heard over a period of 10 days**.** In the course of the hearing, I heard extensive evidence from witnesses for both parties, including expert evidence relating to mining and mineral processing, and was grateful to have the benefit of detailed oral and written submissions of Counsel.

2. ***Facts relevant to the appeal***

2.1. Many of the important facts to this appeal were not in dispute and this determination will seek to focus on the relevant points of difference. Nevertheless, it is necessary to outline certain uncontested facts.

The corporate structure

2.2. The Appellant is a company that was a part of a commercial venture involving the underground mining of ore containing galena (the mineral form of lead) and sphalerite (the mineral form of zinc) and the processing (sometimes described as milling) of those minerals into concentrate suitable for sale to third parties for smelting into lead and zinc metals. Both elements of the venture took place on the same site at [redacted], County [redacted]. The venture as a whole was referred to at hearing as "the [redacted] Project".

2.3. The [redacted] Project grew from the discovery in the early 1990s by two groups involved in licensed prospecting, [redacted] (hereinafter "**Group A**") and [redacted] (hereinafter "**Group B**"), of a large orebody containing substantial deposits of galena and sphalerite. Group B, which was a mining group, decided not to become involved in the mining and processing of their discovery and Group A, which was a prospecting group, therefore looked for an alternative mining partner. It succeeded in this in 1994 when [redacted] (hereinafter "**Group C**") (which was part of the [redacted] mining group, [redacted] (hereinafter "Group D")) acquired Group B's stake in the joint venture.

2.4. The corporate structure of the Project chosen by Group A and Group C reflected the ostensible division between the mining and processing activities. At the top of the structure were two holding companies, [redacted] Limited (hereinafter "**Holding Company C**") (which became [redacted] Limited in May 1999 when Group C and Group D merged) and [redacted] Limited (hereinafter "**Holding Company A**"). They controlled [redacted] Limited (hereinafter "**Finance Company C**") and [redacted] Limited (hereinafter **"Finance Company A"**) respectively, each of which had a 50% shareholding in the Appellant, which operated the processing plant. Likewise, they each had a 50% interest in an entity known as the [redacted] Mine Partnership, which operated the mine and is hereinafter referred to as "**the Mine Partnership**".

2.5. At this stage it is worth recording that in September 2003, Group D acquired Group A's interest in the [redacted] project to become the sole owner. Later on, in February 2011, [redacted] Limited (hereinafter "**Holding Company E**"), a subsidiary of [redacted] Plc (**hereinafter "Group E**"), acquired both the Appellant and the two companies comprising the Mine Partnership, to take control of the [redacted] Project entirely. Both the 2003 and 2011 transactions resulted in some corporate re-structuring; however the Appellant and the Mine Partnership continued in existence and the instances of restructuring had no impact material to the issues arising in this appeal.

2.6. The Appellant was incorporated on the [redacted]th of [redacted] 1997. Under clause 2(b) of its Memorandum of Association, its objects included being:-

> "*…involved in the construction and development of and to engage in the operation of the milling facilities at* [redacted] *Co* [redacted]*.*"

2.7. Pursuant to a shareholders' agreement of the [redacted]rd of [redacted] 1997 between Finance Company C, Finance Company A and the Appellant, "milling" was defined as:-

> "*The handling, milling, floatation, and other processing of ore to produce Concentrates and all activities related thereto from the point that the ore is received from suppliers up to the point of sale to third parties including the disposal of any waste product.*"

2.8. Clause 3(2) of this shareholders' agreement, entitled *"Business of the Company*" provided that the Appellant's business would be:-

> *"(i) the development and operation of the Milling Plant as soon as is reasonably practicable to an optimal level consistent with profitability, technical and environmental considerations having regard to the extent and nature of the available mineral resources and the prevailing commercial environment;*
>
> *(ii) the purchasing of ore from* [the Mine Partnership] *and others;*
>
> *(iii) the production of Concentrate and, subject to Section 8, the Marketing and selling of the Concentrate; and*
>
> *(iv) such other business as may unanimously be agreed by the shareholders"*

2.9. Clause 3(3) of the shareholders' agreement further provided that:-

> *"Unless the shareholders otherwise agree in writing, the Operations shall be limited to the business as described in Section 3.2 and the*

Memorandum and Articles of Association and shall not be construed to enlarge any other such purposes of the objectives."

The set up and commencement of the project

2.10. During 1997, the Appellant acquired the land at [redacted] necessary for establishing the processing operation. On or about the [redacted]th of [redacted] 1997, Group A and Group C subsidiaries transferred the ownership of property to the Appellant for the sum of £423,750. This became the location of the processing plant. At almost the same time, the Appellant bought an area of bog from Bord na Móna for a consideration of £885,000. This became the site of the Appellant's tailings management facility (tailings being the excess or waste material generated from the milling process).

2.11. Prior to this, the [redacted] Project partners, Group C and Group A, had obtained planning permission dated the 5th of June 1997 for the *"mining and processing of minerals at* [redacted], which included permission for the construction of the underground mine, the processing plant, the tailings management facility and roads and project infrastructure. The Environmental Impact Statement relating to the project stated that features of the mine included the processing plant and tailings facility.

2.12. On the [redacted]th of [redacted] 1997, [redacted] Ltd (a predecessor to the Mine Partnership) obtained an Integrated Pollution Control Licence, which was granted by the Environmental Protection Agency. This licence was for both mining and the production of concentrates and was revised in 2001 and 2010. On both occasions, the licence holder was a Mine Partnership company and the activities authorised related to both mining and processing. Mr [redacted]

[redacted] (hereinafter "**Witness A**"), an accountant at [redacted] during its establishment and in later years its [redacted] Director, gave evidence that this was not a sign of the two project activities being fundamentally integrated. He said that it was in reality attributable to two things, namely the design of the Environmental Protection Agency computer system that allowed for only one company ID when making a renewal application and the fact that the addition of the Appellant in 2001 and 2010 would have required making a completely fresh application for a new Integrated Pollution Control Licence.

2.13. To have the right to mine and process minerals, it was necessary also to obtain a mining licence or lease from the State under the Minerals Development Act 1940. Pursuant to a lease agreement dated the [redacted]th of [redacted] 1997 with the Minister for the Marine and Natural Resources, the Appellant and the holding companies comprising the Mine Partnership obtained mineral rights in relation to the [redacted] for a period of thirty years. Recital 2 of the lease granted by the Minister under section 26 of the aforesaid Act provided that the lessees were given permission to "*work*" the minerals in question (*i.e.*, to engage in mining and processing activities).

2.14. To finance the Project, the Appellant's parent companies entered into a syndicated facility on the [redacted]nd of [redacted] 1997, arranged by [redacted] and [redacted] Bank and also involving [redacted] Bank, which comprised an $86,500,000 cash advance facility and a £5,895,000 bond facility. The purpose of the cash facility was to finance project costs, including:-

> "*mine development and equipping, process plant, land measure, tailings management facility, infrastructure and site services, service buildings and equipment, area dewatering and remedial supply, off-site*

infrastructure, pre-production preparation costs, ocean freight/construction indirect and engineering procurement, owner team and fees."

2.15. Mr [redacted] (hereinafter "**Witness B**"), a director of the Appellant at this time and an employee of a Group C company involved in the project, gave evidence that the lending was for the development of the project as a whole. The first drawdown of funds in relation to the project occurred in February 1998. By the middle of 1998, approximately $23 million had been spent on the Appellant's business, including on the acquisition of land and the construction and development of facilities.

2.16. On the 16th of January 1998, the Appellant entered into an agreement with [redacted] Ltd for the construction of the processing plant at a price of $49 million, which included an advance payment of 10% of the contract price in February 1998. This accounted for the first drawdown of funds from the loan facility. The evidence given suggested that construction commenced in or around March 1998.

2.17. The completion time for the construction of the processing plant was estimated to be 87 to 88 weeks, which proved broadly accurate. The Appellant ordered significant milling equipment between April and June 1998, including a semi-autogenous grinding mill ("SAG mill") and a ball mill that had a delivery and installation lead time of over a year. The company also placed orders during this time for devices known as flotation tanks which were a key part of the processing operation and which also had a significant lead time for delivery.

2.18. The construction above ground at [redacted] also included the tailings management facility. This was carried out by [redacted] Civil Engineering Ltd, which was hired to do the works in mid - to late 1997. This involved the construction of a very large lined dam on the site of the bog along with road infrastructure. The evidence of Mr [redacted] (hereinafter "**Witness C**"), who was at this time a project manager working on both elements of the [redacted] Project, was that it was a complex undertaking and cutting edge for its time. He said that the civil construction began in the winter of 1997 and a substantial portion of the work was done by early 1998.

2.19. The total capital sum ultimately expended by the Appellant in establishing its processing operation was $114 million. The Appellant's balance sheet of the 30th of June 1998 records that just short of $22.8 million had been spent by that point. By the end of that year, this had risen to $41 million.

2.20. An important part of the planning of the [redacted] Project concerned where the concentrate produced at the milling plant would be transported for onward shipping to purchasers. Various options were examined including the ports at [redacted] in [redacted] and [redacted] in [redacted]. However, the ultimate decision was that concentrate would be shipped from [redacted]. To this end, the Appellant obtained planning permission from [redacted] County Council on the [redacted]th [redacted] 1998 for the construction of a zinc and lead handling facility, including structures and systems needed for storage and loading. An agreement, dated the [redacted]th of [redacted] 2003 but which it seems was concluded in 1999, was agreed with the Port of [redacted] Company for the lease of land. The lease agreement ran from the [redacted]th of [redacted] 1999, around when production began at the milling plant, for a period of 21 years.

2.21. I heard evidence from Witness B, who was involved in securing the facility from [redacted] Bank and [redacted], that a condition of the funding made available to Group C and Group A for the [redacted] project was that the Appellant would conclude forward selling agreements with prospective purchasers for 70% of the concentrate produced at the milling plant. In this regard, the Appellant duly concluded four or five year agreements with eight purchasers of galena and sphalerite concentrate, most of whom were smelters who manufactured zinc and lead metals, between July and December of 1997. The terms of these agreements were all similar in nature and Clause 5.1 in each provided, *inter alia*, that "*The Concentrate shall be produced from* [redacted] *Mine…"*.

2.22. A matter of some debate at hearing was whether these forward selling agreements bound the Appellant to deliver and the respective purchasers to purchase galena or sphalerite concentrate produced at the [redacted] processing plant. In answer to this, Witness B stated in examination in chief that he viewed them as "*commercial*" rather than "*legal*" contracts. In cross examination, he said that what he meant by this was that it was not intended that they address the "*nitty gritty*" of the terms of the provision of concentrate. When it was put to him that the agreements were not enforceable by either side, he disagreed. While he believed that the Appellant would not have had binding obligations had production, for whatever reason, never commenced, he was also of the view that once it got underway the company was bound to provide the specified tonnage and grade of concentrate to each purchaser. Ultimately of course, the question of whether binding obligations arose from these agreements is a matter of law to be determined by this tribunal.

2.23. In the event, as the Appellant's accounts for the years 1997, 1998 and 1999 disclose, production operations and the sale of concentrate did not commence until the final quarter of 1999. This was also reflected in the corporation tax returns filed by the Appellant for the years ending 1997 and 1998, which stated that it had "*not yet commenced trading*" and, in relation to the cut-off year of 1998, stated in the final sheet entitled "*Taxation Notes and Computations"* that:

> "*During the year the Company continued the construction of its mills at* [redacted]*. Trading had not commenced by 31 December 1998, but is expected to commence towards the end of 1999."*

Description of the mining and milling processes at [redacted]

2.24. In addition to an extremely informative and helpful visit to the [redacted] facility, I heard extensive evidence on the nature of the processes of mining and milling at [redacted]. In this regard, I heard expert evidence from Dr [redacted] (hereinafter "**Expert Witness A**"), a chartered engineer with an expertise in the processing of minerals, who was called by the Appellant. I also heard from Professor [redacted] (hereinafter "**Expert Witness B**"), Professor of Mineral Processing at [redacted], and Professor [redacted] (hereinafter "**Expert Witness C**"), Emeritus Professor of Mining and Geology, [redacted], who were called by the Respondent. The processes as described by their evidence can be summarised as follows.

2.25. The orebody in the mine was accessed by way of stopes, which were separated by pillars. Blasting was performed to detach pieces of rock from parts of the orebody containing, among other things, the minerals galena and sphalerite.

As these pieces were of a size that it would have been difficult to transport to the surface, they were taken by trucks to an underground crusher where they were reduced to a size that permitted them to be brought above ground by a conveyor. This led directly to a structure known as the teepee where the crushed rock was stored in a mound.

2.26. The next activity at [redacted] was the milling of the crushed rock in the plant with the final object of producing concentrates of galena and sphalerite in a powder form. This first required the "liberation" of these sought-after minerals so that they were physically separated from valueless materials in the ore. This occurred by way of comminution (size reduction) of the ore, the first stage of which was achieved by feeding it into the aforementioned SAG mill and adding water. The SAG mill comprised a drum containing large steel balls. The drum would be rotated and the movement of the balls would begin to crush the ore, turning it into a slurry. This product was then directed to a different ball mill for finer grinding. Ultimately, it all passed by way of further devices designed to remove extraneous debris to vessels known as lead roughers for the next stage in the production of concentrate, the separation of the galena mineral from the sphalerite mineral and other unwanted material.

2.27. Separation was achieved by a carefully managed process known as flotation. This involved adding chemical reagents to the milled slurry, which reacted with the surface of the galena mineral so that it became hydrophobic and developed an affinity for air. The mineral then attached to bubbles generated by compressed air blown into the bottom of the rougher, which rose to the top. A froth developed at the surface of the slurry which contained galena. This was then subjected to "cleaning" in other similar vessels in order to further increase the recovery of the desired mineral. The product of this process was,

firstly, the slurry containing a high concentration of galena and, secondly, a tailings slurry containing other minerals, including sphalerite. The former was directed via a storage tank to a pressure filter where it was mostly "de-watered" so that what remained was the fine powder of galena concentrate.

2.28. The sphalerite flotation process was similar to that performed in respect of the galena, although it contained more floating and cleaning stages because, for technical reasons that do not need to be explained here, it was more difficult to separate and achieve a high grade concentrate. The process began with the aforementioned tailings slurry being mixed with reagents that caused the sphalerite to rise and suppressed other minerals, including pyrite. This occurred in separate zinc roughing vessels. Ultimately, the separated sphalerite produced in wet form was de-watered and passed through filter presses to achieve a powder fit for transportation to [redacted] and eventually smelting into zinc metal.

2.29. One feature noted by Expert Witness A, was that part of the skill of separation, especially as regards sphalerite, was the flotation of as much of the desired mineral as possible while minimising the pulling in of unwanted minerals, in particular pyrite. To achieve this, there was continual analysis of the concentrate in slurry form so that the resulting concentrate met the needs of its users, the manufacturers of lead and zinc metal.

2.30. The process of flotation resulted in waste material called tailings, which was directed to the tailings management facility where it was treated. From there, it was either pumped back down the mine to be used as backfill (tailings mixed with aggregate or cement) to block up stopes that were no longer in use, or was sent to the tailings dam that was also on site. Backfilling was a process that benefitted the mine on the basis that it minimised the risk of subsidence,

allowed for further digging and reduced the underground area needing ventilation.

2.31. In relation to the finished concentrate products of galena and sphalerite, after a short period of storage at [redacted] they were taken by truck to the Port of [redacted], where they were stored in warehouses and sold and shipped to smelters and metal traders and eventually subjected to metallurgical processes in order to extract lead and zinc metals from the galena and sphalerite minerals.

2.32. A point of difference in the evidence of the mineral expert called by the Appellant, Expert Witness A, and those called by the Respondent, Expert Witnesses B and C, concerned the characterisation of the mining and milling processes and the relationship between them. Expert Witnesses B and C took the view that the mining and milling processes were "integral" to and interdependent with one another. It was arbitrary, they said, to draw a line between the two activities in circumstances where the end goal was always to obtain galena and sphalerite. In this respect, Expert Witness B expressed his opinion that blasting underground, which involved the careful selection by the miners of the parts of the orebody containing the greatest mineral content and separating it from the orebody, was part of the liberation process. So too was the underground crushing, which could not in his opinion rationally be distinguished from milling in the plant at surface level.

2.33. Expert Witness A, in contrast, pointed out that the pieces of dolomite rock dislodged by blasting contained among other things ore comprising a variety of minerals including galena and sphalerite. This activity was not liberation; his view was that this took place in the grinding machines in the milling plant where the minerals were physically separated.

2.34. The experts also disagreed on the purpose and characterisation of the underground crushing activity. In Expert Witness A's view, this was performed in order simply to reduce the size of the rock so that it could be fitted onto the conveyor belt and transported to the surface economically. Expert Witness C, on the other hand, viewed it as an extension of the comminution process above ground.

2.35. There was some disagreement between the experts about whether the galena and sphalerite concentrates could be described as an "ore of zinc" and an "ore of lead" respectively from a scientific or factual standpoint. In the view of Expert Witness A, it could not and was, as a consequence of processing, no longer an ore. Expert Witnesses B and C pointed out that the galena and sphalerite minerals mined from the ground as part of the ore had not changed in their chemical composition in any way by the time they had been turned to concentrate fit for sale.

2.36. There was also dispute about whether the crushed but un-processed ore mined at [redacted] had value as a saleable product. Expert Witness C posited that the processing of crushed ore in a plant located adjacent to a mine was essentially a ubiquitous arrangement in the industry as the transport of bulk ore to milling stations elsewhere by train or lorry was, in almost all cases, uneconomic because of its size and weight relative to its potential marketable value. This was rejected both by Expert Witness A and by Witness A, who pointed out that [redacted] had acquired ore from the zinc and lead mine at [redacted] for processing on the grounds that [redacted] had spare capacity. In response to this, Expert Witness C said that this was a unique arrangement in circumstances where there was a mine processing precisely the same minerals having the same characteristics contiguous to [redacted]. It was not a process

that could be replicated on other occasions. This arrangement is referred to in greater detail hereunder.

The income of the Appellant and the Mine Partnership

2.37. I heard extensive evidence about how the Appellant and the Mine Partnership generated their income, which can be summarised in the following terms. The Appellant would sell the concentrate produced from the Mine Partnership's ore at a rate tied to the price for lead and zinc metal determined by the London Metal Exchange. After factoring in expenses such as various operational costs and smelter deductions and treatment charges – this was how the smelters made their money –, the profit from the sales would be split between the Appellant and the Mine Partnership on a 40:60 basis. Thus, the income of both entities was influenced to a great degree by the fluctuating price of metal on the market. This arrangement between miner and processor, which it would seem was common in the industry, was known as "*price participation*". The specific percentage split of the profits from the sale of lead and zinc concentrate to smelters and traders was arrived at by a calculation of the capital employed by the Appellant and the Mine Partnership in the set up and commencement of their milling and processing operations.

2.38. Much time was spent in examination-in-chief and cross examination of Witness B and Witness A on the details of this arrangement and its logic. In addition, the Respondent challenged the factual reality of the percentage split of the income from the sale of the concentrate. This challenge was primarily based on the sum of £77.2 million paid by the Group C partner in the Mine Partnership for Group B's share in the mining rights of the orebody at [redacted]. While this was accounted for as capital expenditure in the relevant accounts, it was not regarded by the Appellant or the Mine Partnership as being capital

expenditure relating to the development of the mining project and therefore was not taken into account in the division of the profits. Had it been so regarded, the respective contributions in terms of capital would have been in the order of 26% on the part of the Appellant and 74% on the part of the Mine Partnership. Otherwise, the division was closer to the 60:40 figure.

The [redacted] Arrangement

2.39. As is apparent from the foregoing, the Appellant depended on the provision of ore from the [redacted] mine to produce galena and sphalerite concentrate. However, as mentioned above, from 2009 onwards it also began to source some of its ore from another lead and zinc mine at [redacted], County [redacted] (hereinafter "**Mine B**"), approximately [redacted] kilometres away by road.

2.40. I heard evidence that this arrangement came into being in circumstances when Mine B closed its processing operation 2008. The Appellant, which had considerable spare capacity at its own plant, believed that there was profit to be made in purchasing ore mined at Mine B, processing it and selling the resulting concentrate on the market just as it did the [redacted] ore. A major difference of course was that the ore from Mine B had to be transported on lorries by road, which gave rise to substantial additional cost that was borne ultimately by the Appellant**.** Another difference was that the ore extracted from Mine B was similar but not identical to that from [redacted]. This meant that the Mine B ore had to be stored separately from [redacted] ore. It also meant adjustments had to be made to the processing equipment so as to ensure that the resulting Mine B concentrate was of a sufficient grade and to minimise the danger of adversely affecting the quality of the [redacted] Concentrate as well as damaging the milling and floatation equipment.

2.41. This arrangement was in fact initially reached between the Mine Partnership and the operator of Mine B. However, I heard evidence from Witness A that the former's involvement was solely in fulfilment of its services agreement with the Appellant, pursuant to which it undertook to procure goods and services on its behalf.

2.42. The first year of the MineB arrangement proceeded on a trial basis. This involved the purchase of the relatively small amount of 20,000 tonnes of ore for that year for the price of $3,433,444.00. Thereafter, the Appellant increased its acquisition from MineB to $14,873,512 worth of ore for 2010 and $38,111,337 for 2011, these being the years relevant to this appeal.

2.43. As with the arrangement in respect of the ore sourced at [redacted], the parties entered into a price participation agreement based on the price of zinc and lead metal. On this occasion, however, the split of the profits between the miner and processor was set at 50:50. This was, according to Witness A, reflective of Mine B's and the Appellant's relative contributions to the finished product.

Potential other sources of ore

2.44. I also heard evidence from Witness A that the orebody at [redacted] discovered by Group B and Group A was estimated to be capable of providing ore for processing for 15 years. The Appellant's processing plant, in contrast, had a predicted lifespan of 30 years. It was said that this difference caused those involved in the [redacted] Project to explore possible alternative sources of ore beyond that already supplied by Mine B. To this end, Group D and later Group

E spent roughly €10 million prospecting in the [redacted] area, in the hope of discovering another orebody that would supply the processing plant once the existing mine had run its course. This did not prove fruitful. Witness A also said that consideration was given to entering into an arrangement with [redacted] (herinafer "**Mine C**") for the purchase of excess ore that it might have**.** Moreover, I heard that at one stage consideration was given to buying Mine B on the grounds that there were those involved in the mining side of the [redacted] Project who believed there to be undiscovered or underexploited orebodies on that site. Finally, Witness A stated that the [redacted] mineralised zone in [redacted] was thought of as a potentially viable source of ore containing galena and sphalerite. In all this, it was stressed that the logical option would not be to construct a new processing plant (whether at Mine B or in [redacted]) but rather to truck it to [redacted].

2.45. The viability of these proposals was the subject of extensive cross-examination and was challenged by the experts called by the Respondent, who considered the physical separation of mine and processing plant to be unusual, if not unprecedented. It was pointed out that Mine C was far more distant from [redacted] than Mine B ([redacted]km by road) and that trucking costs would be prohibitive. It was also pointed out that backfilling tailings into mines located in Mine B or [redacted] would be much a much more complicated undertaking than at an adjacent mine.

2.46. Witness A, however, considered the proposals to be viable. In this regard, he cited the profitable sales of the Mine B-derived concentrate and compared what he estimated to be the annual cost of trucking from that source (€27 million over a ten year period) to the capital sum necessary for the creation of a new processing plant (€112 million at [redacted]), which would not have to be

expended. The same held true of [redacted] which was [redacted]km distant by road. While he accepted that the cost of trucking in relation to Mine C would be much higher, he argued that it would still make economic sense. In relation to the backfilling question, he said that this had been addressed by [redacted]'s engineers, who had suggested drying the same and transporting it to Mine B or [redacted] in a paste form.

3. ***Relevant Legislation***

3.1. Part 14 of TCA 1997 concerns, inter alia, the taxation of companies engaged in manufacturing trades.

3.2. Section 448(2), which concerns manufacturing relief, provided at the relevant times as follows:-

> *"Where a company which carries on a trade which consists of or includes the manufacture of goods claims and proves as respects a relevant accounting period that during that period any amount was receivable in respect of the sale in the course of the trade of goods, corporation tax payable by the company for that period, in so far as it is referable to the income from the sale of those goods, shall be reduced—*
>
> > *(a)by eleven-sixteenths, in so far as it is corporation tax charged on profits which under section 26(3) are apportioned to the financial year 1998,*

(b)by nine-fourteenths, in so far as it is corporation tax charged on profits which under section 26(3) are apportioned to the financial year 1999,

(c)by seven-twelfths, in so far as it is corporation tax charged on profits which under section 26(3) are apportioned to the financial year 2000,

(d)by one-half, in so far as it is corporation tax charged on profits which under section 26(3) are apportioned to the financial year 2001,

(e)by three-eighths, in so far as it is corporation tax charged on profits which under section 26(3) are apportioned to the financial year 2002, and

(f)by one-fifth, in so far as it is corporation tax charged on profits which under section 26(3) apportioned to the financial year 2003 or any subsequent financial year,

and the corporation tax referable to the income from the sale of those goods shall be such an amount as bears to the part of the relevant corporation tax charged on profits which under section 26(3) are apportioned to the financial year in question the same proportion as the income from the sale of those goods bears to the total income brought into charge to corporation tax for the relevant accounting period.

3.3. Section 442(1) defined "*relevant accounting period*" for the purposes of section 448. It provided that relevant accounting period:-

"... in relation to a trade carried on by a company which consists of or includes the manufacture of goods, means an accounting period or part of an accounting period of a company ending on or before—

(a)where subsection (11) or (12) of section 443 applies, the 31st day of December, 2000,

(b)in the case of a trade, other than a specified trade, which is set up and commenced on or after the 23rd day of July, 1998, the 31st day of December, 2002, and

(c)in any other case, the 31st day of December, 2010;

3.4. Under section 444(1)(a), mining operations were excluded from manufacturing relief from corporation tax. It provided:-

"For the purposes of relief under this Part, income from the sale of goods shall not include income from—

any mining operations for the purpose of obtaining, whether by underground or surface working, any scheduled mineral, mineral compound or mineral substance (within the meaning of section 2 of the Minerals Development Act 1940)..."

3.5. Section 444(2) provided:-

"Where a company carries on a trade which consists of or includes the manufacture of goods and—

> *(a) in the course of the trade, it carries on any mining operations (within the meaning of subsection (1)(a)) from which it obtains any scheduled mineral, mineral compound or mineral substance of the kind referred to in that subsection, and*
> *(b) any such mineral, mineral compound or mineral substance is not sold by the company in the course of the trade but forms the whole or part of the materials used in the manufacture of such goods or is to any extent incorporated in the goods in the course of their manufacture,*
>
> *then, part of the income which apart from this subsection would be income from the sale of goods for the purposes of section 448 shall be deemed for the purposes of subsection (1) to be income from such mining operations, and that part shall be such amount as appears to the inspector or on appeal to the Appeal Commissioners to be just and reasonable."*

3.6. The Minerals Development Act 1940, the long title of which is "*An Act to make further and better provision for the development and working of the mineral resources of the State*", governs, *inter alia*, the granting of mining leases and licenses. Section 2 thereof, which is referred to in section 444(1)(a) of TCA 1997, provides definitions for the following terms:-

> *"'scheduled mineral' means any substance mentioned in the Schedule to this Act;*

'mineral compound' means any substance formed by the chemical combination of one scheduled mineral with any other such mineral;

'mineral substance' means any substance of a similar nature to any scheduled mineral;

'working', when used in relation to minerals, includes digging, searching for, mining, getting, raising, taking, carrying away, treating, and converting such minerals, and cognate words shall be construed accordingly;

'surface', when used in relation to land, includes any buildings, works, or things erected, constructed or growing on such land"

3.7. The Schedule to the Mineral Development Act 1940 provides a list of minerals, included among which are "ores of zinc" and "ores of lead".

3.8. Section 3 of the Minerals Development Act 1940 defines "*minerals*" as follows:-

"In this Act (save where the context otherwise requires) the word "minerals" means all substances (other than the agricultural surface of the ground and other than turf or peat) in, on, or under land, whether obtainable by underground or by surface working, and includes all mines, whether they are or are not already opened or in work, and also includes

the cubic space occupied or formerly occupied by minerals, and, for greater certainty but without prejudice to the generality of the foregoing, the said word includes all scheduled minerals."

3.9. While it does not impact on the issues in this appeal, I note that section 69 of the Minerals Development Act 1979 provided in relation to the above definition of minerals that it:-

"…shall not include stone, gravel, sand or clay except to the extent that any such substance falls within the list of minerals mentioned in the Schedule to the Act of 1940."

4. ***Submissions of the Appellant***

The Relevant Accounting Period

4.1. Manufacturing relief under section 448 is limited to income from the sale of goods manufactured during a "*relevant accounting period*". As noted above, this is defined in section 442(1) as being either (a) in relation to a trade set up and commenced on or after the 23rd of July 1998, the end of 2002 or (b) in any other case, the end of 2010. The Appellant submitted that Revenue's view that its trade was set up and commenced after this deadline, which led to the conclusion that the years at issue in this appeal were not relevant accounting periods, was in error. In this regard, the Appellant submitted first that its trade was both set up *and* commenced prior to the 23rd of July 1998. As a secondary position, it argued that the plain and ordinary meaning of the provision was

that an eligible company which had set up, but which had not commenced trading, before the 23rd of July 1998 was also entitled to manufacturing relief until the end of 2010. It submitted that on the facts it had set up its trade.

4.2. To support this reading of the legislation, the Appellant focused on what it said was the context of section 74 of the Finance Act 1999, which amended TCA 1997 to include the deadline of the 23rd of July 1998 in section 444(1)(a). In this regard, Counsel referred me to a press release by the Department of Jobs, Enterprise and Innovation in relation to the amendment, although he accepted that this could not be used as an interpretive tool. The Appellant submitted that the ending of the 10% relief rate and its replacement with the 12.5% rate had occurred after lengthy discussions between the State and the EU Commission concerning the ending of manufacturing relief. This had resulted in an agreement for its phased, rather than immediate, removal. It was, according to the Appellant, apparent from the wording of the legislation that the Oireachtas had decided that immediate cessation of the relief would have been in breach of the expectations of companies that had relied on its existence when choosing to establish their business in Ireland. This applied equally to companies that had actually commenced their trade and those which had not but which, in the words of Counsel for the Appellant, had "*lengthy lead times to trading*" and had reached "*an advanced stage of organisation*".

4.3. Consequently, the key question in relation to this issue between the parties was, according to the Appellant, whether its trade in galena and sphalerite concentrates had either been set up *or* commenced prior to the 23rd of July 1998. If it had, the years in question could not be excluded from manufacturing relief on the basis of the definition of a "relevant accounting period" in section 442(1).

4.4. In support of both the primary argument that it had set up and commenced, and the secondary argument that it had simply set up, Counsel for the Appellant referred me to the decision of the Special Commissioners in ***Mansell –v- Revenue and Customs Commissioners*** **[2006] STC (SCD) 605.** This English tax appeal concerned whether the taxpayer, who had an expertise in the development of motorway service stations, had set up and commenced his trade consisting of the acquisition of interests in land on or after a date in April 1994, as required by section 218 of the Finance Act 1994. The question arose in circumstances where a new tax regime applied after that date, which treated the taxpayer less favourably.

4.5. Special Commissioner Helliers stated in *Mansell* at page 621 of the decision that:-

> *"I conclude that a trade cannot commence until it has been set up (to the extent that it needs to be set up), and that acts of setting up are not commencing or carrying on a trade. Setting up trade will include setting up a business structure to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision making structures, the management, and the financing. Depending on the trade more or less than this may be required before it is set up."*

4.6. The Appellant also referred me to the conclusion of the Special Commissioner that:-

> *"It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities – and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk: the acquisition of the goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services: the kind of activities which contribute to the gross (rather than the net) profit of the enterprise."*

4.7. In *Mansell,* the Special Commissioner found against the taxpayer on the grounds that he had merely settled heads of agreement with landowners in relation to options to purchase land for his trade. This did not represent the beginning of operations as nothing actually had been acquired, ventured, risked or expended.

4.8. Counsel contrasted this with what the Appellant had done by the 23rd of July 1998. It had purchased the land for the processing plant and tailings facility and had begun construction works. It had placed orders for expensive milling equipment, including the SAG and ball mills and the flotation tanks. It had entered into forward selling agreements with smelters and metal traders for the supply of galena and sphalerite concentrate which, Counsel submitted, bound the Appellant to deliver a given tonnage of a given grade of concentrate upon production. This underlined why commencement could not, in a capital intensive business such as the processing of minerals, be taken simply to be the day of the first exchange of concentrate in return for money. Regard had to

be had to what went before, which in its case was clear evidence of commencement.

4.9. The Appellant also pointed to the financing of the project, which involved loan facilities from [redacted] and [redacted], which entities had required the forward selling of concentrate as a condition for lending. By the 23rd of June 1998, very substantial sums had been drawn down to finance the works. In relation to the Respondent's argument that this represented only a small proportion of the funds available, the Appellant said that the fact that the finance was in place was itself indicative of the advanced stage of organisation.

4.10. Moreover, even if the foregoing was not considered to constitute commencement, the Appellant argued that it was clearly part of the ongoing process that had reached such an advanced stage that the business was "*set up*" within the meaning of the legislation. In *Mansell*, the taxpayer had been determined not to have reached this stage because, as Counsel for the Appellant described it, his business was still at an early conceptual point. This he contrasted to the Appellant's trade, which had an advanced organisational structure and a "*definite concept of business*". The Appellant pointed to Expert Witness C's evidence relating to the relatively rapid pace of construction of the plant, approximately two years, as being supportive of its contention that the set up of such an operation is a laborious and complex process that takes place over a considerable period of time.

Whether it was a mining operation

4.11. A core argument made by the Appellant on this issue concerned the method of interpreting the words:-

"…any mining operations for the purpose of obtaining, whether by underground activity or surface working, any scheduled mineral, mineral compound or mineral substance (within the meaning of section 2 of the Minerals Development Act 1940)".

4.12. The Appellant contended that the provision needed to be read using the natural and ordinary meaning of the words therein and, if necessary, in the context of other provisions in TCA 1997. It also needed to be read by reference to the definitions of *"scheduled mineral, mineral compound or mineral substance"* in section 2 of the Minerals Development Act 1940. The first of these, the other two not being relevant to this appeal, was defined as "*any substance in the Schedule to this Act*". The schedule in question listed a variety of mineral substances, including "*lead, ores of*" and "*zinc, ores of*". It was not disputed that the ore extracted from [redacted] contained such minerals.

4.13. However, the Appellant contended that the other definitions in section 2 of the Minerals Development Act 1940, and in particular, the definitions of "*surface*" *("includes any buildings, works, or things erected, constructed or growing on such land")* and "*working*" *("when used in relation to minerals, includes digging, searching for, mining, getting, raising, taking, carrying away, treating"*) could not inform the proper interpretation of section 444(1)(a). These definitions were not mentioned in section 444(1) and therefore, Counsel submitted, were of no relevance.

4.14. In the Appellant's submission, "*mining operations*" in section 444(1)(a) was a narrow term that was intended by the Oireachtas to exclude only underground and surface (*i.e.*, open pit) mining of minerals. It did not include processing carried out on minerals above ground. To the extent that the definition in the

Minerals Development Act 1940 of the words "*surface*" and "*working*" suggested otherwise, it was argued by the Appellant that these were irrelevant. The Minerals Development Act 1940 and TCA 1997 served entirely different purposes. The former was a statute to regulate the business of extracting minerals and it was not permissible to identify policy in this legislation and import it to tax legislation. Section 444(1)(a) enumerated the precise terms that would bear the same meaning as they did in the Minerals Development Act 1940, and that was the limit of the latter Act's relevance. The Appellant further submitted that it was a basic principle of tax law that different companies within a group are separate taxable entities and submitted that the position should be no different in the case of the companies comprising the [redacted] Project.

4.15. Counsel for the Appellant submitted that a key part of the Respondent's legal argument on this issue was its reliance on ***Tara Mines –v- O'Connell*** **[2002] 3 IR 438** for a broader reading of "*mining operations"* than that contended for by the Appellant. In that case, the Supreme Court found that galena and sphalerite milling, which was in engineering terms essentially the same as that carried out by the Appellant, constituted mining operations. However, the Appellant argued that, properly read, the judgment indicated that its operations or processing did not constitute mining. Both parties relied on many of the same passages from the decision in support of their contrasting interpretations. Consequently, they are set out in full in this section of this determination to avoid repetition.

4.16. In ***Tara Mines****,* the Appellant was refused export relief by Revenue under section 58 of the old Corporation Tax Act 1976 for income referable to its

manufactured goods (*i.e.*, its finished concentrate). Revenue did so on the grounds that section 58(9) of that legislation provided that "a *reduction shall not be made under this section in respect of corporation tax payable on income from any mining operations."* The company succeed in its appeal before the Appeal Commissioners, but on appeal to the High Court R Murphy J held that the totality of the activities had to be regarded as a mining operation. His decision was then appealed to the Supreme Court.

4.17. Giving judgment on behalf of the Supreme Court, F Murphy J stated at page 457:-

> *"The main issue in this case is how much of the work carried on by a mining company can be said to constitute "mining operations" within the meaning of the Act. Is it the case that only that which occurs below ground constitutes "mining operations" or does the definition extend to include the process undertaken in relation to the raw materials extracted from the mine? At what point can it be said that the "mining operations" cease?"*
>
> *Two propositions can be advanced without dispute. First, the extraction of minerals from the earth and the bringing of such materials to the surface (including all such works necessary to facilitate this process, such as the sinking of shafts or the building of tunnels) form part of what may be termed "mining operations". Secondly, processes which subject the raw material to change in their physical or chemical properties, commercial characteristics or other characteristics such that the end product has a utility, marketability and quality different from that of the original raw produce, constitute manufacturing.*

It is inconceivable that any definition of "mining operations" could be given which would not include the underground mining activities in which the respondent has engaged. As those activities form a substantial part of the business of the respondent, the first question which arises is whether the respondent derives any income from those operations. At first sight it may seem surprising that this would not be so. Ordinarily one would expect a substantial expenditure by a taxpayer to result in an income to him. However, as the respondent argued in the present case, it is the final link in an integrated business, and not the original or intermediate steps, which provides the income. To suggest that any earlier activity produces an income would in fact involve some concept of apportionment being deemed to have taken place. This proposition is well illustrated by s. 50 of the Finance Act, 1980, which is later in date but in pari materia with the legislation under consideration here."

4.18. In order to answer the factual question of what was a mining operation, the Supreme Court carried out an examination of numerous Australian cases on the parameters of mining operations. These cases were also relied on by the Respondent and opened to me in oral submission. They were ***Federal Commission of Taxation –v- Henderson*** **(1943) 68 C.L.R. 29,** ***Federal Commissioner of Taxation –v- Broken Hill Pty. Ltd.*** **(1967 to 1969) 120 C.L.R. 240,** ***Federal Commission of Taxation –v- Northwest Iron Co.*** **(1986) 64 A.L.R. 456** and ***Reynolds Australia Alumina Ltd. –v- Federal Commissioner of Taxation*** **(Unreported, Federal Court of Australia, 31st March, 1987).** The Supreme Court noted that, while these cases were helpful in understanding what constituted "mining operations" and should not be

ignored, there were obvious dangers in extracting authorities from a foreign jurisdiction without a full understanding of the legal system and jurisprudence that formed them.

4.19. The Appellant submitted that the Supreme Court's finding that the processing at Tara fell within the term "*any mining operations*" was distinguishable from the facts of the instant appeal. Firstly, the wording of the relevant provisions of the two statutes was different. Section 58(9) of the Corporation Tax Act 1976 excluded "*any mining operations*" from export relief, with no further elaboration. This contrasted with section 444(1)(a) of TCA 1997, which added that mining operations thereunder were those done in order to "*obtain*" a mineral by *"underground or surface working"*. According to the Appellant, this was not what it was doing at its milling plant.

4.20. The Appellant also submitted that there were other critical differences in relation to both the legislation and its own circumstances compared to those of the operation at Tara. In that case, there was only one company and the question arose as to which manufacturing process gave it its income. Unlike section 444(2) of TCA 1997, the relevant part of the Corporation Tax Act 1956 made no provision concerning the apportionment of income for taxation purposes derived partly from a manufacturing operation and partly from a mining operation. For this reason, the Supreme Court had been required to decide which of the dual activities was to be taken to be the source of income. As regards the companies involved in the [redacted] project, there was a clear corporate division between operations. The Appellant received its income from the sale of concentrate, while the Mine Partnership received its own income from the sale of ore.

4.21. Moreover, Counsel for the Appellant submitted that the Supreme Court's judgment in ***Tara Mines*** had been heavily influenced by the fact that were it to have decided the case otherwise, the same company would have enjoyed both export relief on the concentrate it manufactured and capital allowances in respect of its mining investment. While the Appellant acknowledged that the Mine Partnership also could avail of such allowances, it argued that this should have no bearing on the determination of this appeal because it was an entirely separate taxable entity.

4.22. The Appellant took issue with a core tenet of the Respondent's case, namely that the "integrated" nature of the activities of the mine and processing plant meant that they both should be regarded as mining operations under section 444(1)(a). The Appellant submitted that, plainly, their physical proximity was down to a desire to reduce operating costs and to facilitate the smooth functioning of the processing operation. It did not follow from the adoption of this standard industry arrangement that the plant should be treated as a mining operation under the tax code.

4.23. Because the issue was one which needed to be determined by reference to the relevant provisions of TCA 1997, the Appellant questioned the relevance of much of the evidence of the Respondent's mining and mineral processing experts relating to the high level of integration of the two activities. Nevertheless, the Appellant highlighted a number of factors which it submitted pointed to the processing being a distinct and independent operation. The ore extracted from the mine was capable of providing a supply of galena and sphalerite for, at most, fifteen years, whereas the predicted lifespan of the milling plant was some thirty years. The Appellant submitted

that this indicated that the processing operation was not intended to be tied forever to the provision of ore from [redacted].

4.24. In this regard, it was submitted that the arrangement with Mine B underlined that the processing plant could and did in fact operate independently of the [redacted] mine. It demonstrated that the mine and the processing plant did not necessarily need to be right beside one another. The transportation of ore by lorry made economic sense in the right circumstances, as demonstrated by the profits made in relation to this activity in the years in question. While it was self-evident that costs were increased by such an arrangement compared to that with the Mine Partnership, they would have been at least partially offset by savings resulting from not having to construct a new processing facility. In short, a profit was there to be made from processing externally sourced ore.

4.25. Because of this, Mine B was part of a wider plan which, although it never came to fruition, was to source ore from elsewhere so as to pursue a processing operation after the lifetime of the mine at [redacted] had expired. The Appellant drew my attention to the aforementioned evidence of Witness A concerning the consideration given to entering into an arrangement for the purchase of ore from Mine C, as well as the plans to locate alternative sources of minerals for the Appellant's processing operation, to be mined elsewhere. In this respect, the Appellant pointed to the ultimately unsuccessful prospecting by Griup D and later Group E for an alternative orebody in the [redacted] area, on which roughly €10 million was expended**.** It also cited Witness A's evidence concerning the consideration given to purchasing the Mine B site in the belief that there were areas that remained unexplored for deposits of lead and zinc, and the investigation of the acquisition of the rights to the relatively proximate [redacted] mineralised zone in [redacted].

4.26. The Appellant also stressed that the corollary of this was that the mine could have functioned without the processing plant. It was submitted that while processing was ultimately discontinued when the mine closed on or about [redacted], this was not an inevitability. Counsel submitted that the evidence of Witness A, to the effect that the Mine C was sufficiently close to have made the transport of ore economically viable, was indicative of this.

4.27. The Appellant relied also on the evidence of its own mineral processing expert, Expert Witness A, to the effect that it was possible to draw a line between the mining activities below ground and the processing above. The aim of the processing was to take ore and manufacture it into a high grade product, which had a value because it could be used by smelters to make zinc and lead metals. Counsel emphasised his disagreement with the view expressed by Expert Witness B, and supported by Expert Witness C, that the blasting and underground crushing processes could be characterised as the "*liberation*" of minerals conducted by miners. What emerged from the mine was rock containing many materials. It was only when the grinding occurred that the minerals therein were physically separated from one another and only at the floatation phase that the sought after minerals of galena and sphalerite were concentrated.

4.28. The Appellant said that it obtained the ore containing the scheduled minerals of galena and sphalerite by purchasing it from the Mine Partnership, and not by working underground or overground. Concentrate was produced by the process of, *inter alia*, separation carried out at the plant. It accepted readily

that the underground blasting carried out in the mine was done with the ultimate goal of selling concentrate but submitted that this did not have an impact on the question of what did and did not constitute a mining operation.

5. Submissions of the Respondent

Whether the trade was set up and commenced

5.1. On this issue, the Respondent pointed firstly to the principle of statutory interpretation described by Supreme Court in ***McGrath v McDermott,*** **[1998] IR 258** that:-

> *"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 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 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."*

5.2. As is well established, no person is to be subject to a tax unless it is imposed expressly and in clear and unambiguous terms (***Texaco (Ireland) Ltd –v- Murphy*** **[1991] 2 IR 449**). Counsel further referred me to the following passage in ***Revenue Commissioners –v- Doorley*** **[1933] IR 750** at p756, concerning the interpretation of exemptions or reliefs from tax:-

> *"I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable."*

5.3. The Respondent argued that the meaning of section 444(1)(a) of TCA 1997, read by reference to section 442(1), is that in order for a company to benefit from manufacturing relief its trade must have been both set up and commenced by the 23rd of July 1998**.** It rejected the Appellant's contention that set up and commencement were separable and that the fulfilment of the

former alone would have been enough to permit a company to avail of manufacturing relief until the later end date of the 31st of December 2010.

5.4. However, the Respondent further submitted that even if it was found to be wrong in this respect, "set up" was not, as the Appellant suggested, a continuing state of affairs. The words used in the legislation, namely *"...is set up*", implied something that had to have occurred by the date in question; it could not be something that was ongoing at that point.

5.5. The Respondent submitted that in accordance with the decision in ***Crilly –v- Farrington*** **[2001] 3 IR 251,** the Departmental press release that the Appellant referred to in its arguments was not something that could be taken into account when deciding on the true meaning of a relevant accounting period under section 442(1). While the Respondent took issue with the meaning given to the press release by the Appellant, it stressed that the true interpretation of the provision had to be gleaned from its words, where necessary looking for context in the legislation as a whole.

5.6. It was on this basis that the Respondent argued I should address the question of whether the Appellant's trade of the sale of galena and sphalerite concentrates had set up and commenced on or after the 23rd of July 1998. Counsel submitted that this meant asking whether it had started to trade. In seeking to demonstrate that it had not, the Respondent referred me firstly to the accounts of the Appellant, which showed that production and sale did not begin until the final quarter of 1999. Greater emphasis, however, was placed on the Appellant's corporation tax returns for the years 1997 and 1998, both of which contained the statement by the Appellant that it had "*not yet commenced trading*" and those for 1999, which said "*Manufacturing operations*

commenced on 1st November 1999". This, according to the Respondent, was an effective admission by the Appellant that it had set up and commenced on or after the 23rd of July 1998 and consequently could not, if it was eligible, claim manufacturing relief after the end of 2002.

5.7. Addressing the argument of the Appellant that it had spent large capital sums in 1997 and 1998, it was submitted by the Respondent that this could not equate to being set up. Even if it could, it was pointed out that the unaudited balance sheet from this period indicated that by the relevant date only some €22.8 million of its total capital expenditure on the project of €114 million (21%) had been spent.

5.8. While the Respondent pointed out that *Mansell* was a decision of a foreign tribunal that could only be of limited assistance, it also challenged the Appellant's fundamental assertion that the contracts for sale entered into with the various smelters and traders prior to the start of the production of concentrate constituted the kind of operational activity giving rise to risk or obligation that denoted set up. In *Mansell,* it was the absence of these factors that persuaded the Special Commissioner to find that the taxpayer had not set up and commenced his trade. In this regard, the Respondent referred to the evidence given by Witness B in cross-examination that they were more commercial than legal agreements and that if, for whatever reason, production had never occurred, there would have been no binding requirement on the Appellant to deliver the tonnage amounts specified in each instance.

5.9. The Respondent argued that this submission was supported by the decision of the English High Court in ***Birmingham & District Cattle By-Products*** **12 Tax**

Case 92, which was cited with approval in the judgment of Kenny J in ***Spa Estates –v- O hArgain*** **(Unreported, High Court, 20th June, 1975*)***.

5.10. In ***Birmingham & District Cattle By-Products***, the question arose as to when the business, which produced sausages, commenced its trade for the purposes of calculating Excess Profits Duty. Rowlatt J found that acts such as the purchase and installation of plant machinery and the erection of works were preparatory in nature and did not amount to commencement. In the Respondent's submission, the steps taken by the Appellant were, despite their greater cost and scale, of the same kind. Counsel submitted that, as with the advance purchase agreements and capital expenditure, the contracts for construction, agreed in January 1998, and the commissioning of the SAG Mill (which took about twenty months) were not acts of set up and commencement of trade, but were instead steps in preparation which were, at most, part of a process of setting up that did not meet the requirements of section 442(1).

Whether it was a mining operation

5.11. On this question, the Respondent first submitted that the words "*any mining operations for the purpose of obtaining, whether by underground or surface working any scheduled mineral…"* in section 444(1)(a) were broad enough on their own to exclude from relief the activity of processing which occurred in the [redacted] plant.

5.12. The Respondent further challenged the Appellant's argument that the only parts of the Minerals Development Act 1940 relevant to the interpretation of section 442 were the definitions of the words *"scheduled mineral, mineral compound or mineral substance"* in section 2 and the Schedule to the Act listing

types of minerals. Section 442, the Respondent submitted, referred to section 2 of the 1940 Act without exclusion and, consequently, the definition of "*working*" minerals (*i.e.*, *"digging, searching for, mining, getting, raising, taking, carrying away, treating, and converting such minerals…")* in the 1940 Act had to inform the meaning of a mining operation for the purposes of manufacturing relief.

5.13. The Respondent also submitted that the provisions of the Minerals Development Act 1940 were relevant to the interpretation of what constituted *"…any mining operation…"* under section 444(1)(a), in circumstances where the lease with the Minister for the Marine and Natural Resources, which governed the terms and conditions upon which the companies involved in the [redacted] project, including the Appellant, could conduct milling and mining activities, was granted pursuant to section 26 of that legislation. Counsel submitted that its relevance could not be confined to the three definitions contained in section 2, as contended for by the Appellant.

5.14. That being so, Counsel argued that there was no room for doubting that the Appellant's processing, whereby the ore was extracted by blasting and then was ground and separated at surface level to leave a galena and sphalerite concentrate capable of sale for smelting, amounted to the "*treating*" of minerals extracted from underground mining in a building erected on the land at [redacted].

5.15. The Respondent stressed, however, that it should succeed in this appeal even if this point in relation to the relevance of the provisions of the Minerals Development Act 1940 was decided against it. Counsel submitted that, based on the words of section 444(1)(a) on their own, the activity carried on by the

Appellant still fell well within the boundaries of what should be considered a mining operation excluded from manufacturing relief.

5.16. The Respondent argued that the Supreme Court's decision in ***Tara Mines*** underlined that the question of whether the Appellant's operation was a mining operation under section 444(1)(a) was to be judged by the objective reality of the activity that took place at [redacted]. What was especially relevant was the relationship between the milling activity and the activity in the mine, which plainly did fall within the definition.

5.17. The Respondent opened all of the aforementioned Australian cases to me. Counsel drew my attention to, *inter alia*, the judgment of Beaumont J in ***Reynolds Australia Alumina Ltd. –v- Federal Commissioner of Taxation*** **(1987) 77 A.L.R. 543**, in which he held that "*mining operations*" is a flexible term and has the broad meaning "*…operations pertaining to mining…"* (which he contrasted with narrower terms such as "*the working of a mining property"*). Counsel for the Respondent placed particular emphasis on the decision in ***Federal Commission of Taxation –v- Henderson*** **(1943) 68 C.L.R. 29,** in which it was decided that a third party that sought to extract gold from "slum dumps" of excavated material deposited by a mine overground was engaged in a mining activity, despite a considerable lapse in time between the deposit of the material and the subsequent extraction, and despite the lack of any corporate connection between the mining company and the third party. This, it was submitted by the Respondent, was a strong indicator that the Appellant's activity was mining even though it was not the company that operated the mine. The Respondent further submitted that the corporate structure of the [redacted] Project did not amount to a factual distinction from ***Tara Mines*** that could have an impact on my analysis of what occurred on the ground.

5.18. The case of ***Federal Commissioner of Taxation –v- Northwest Iron Co Ltd,*** **(Unreported, Federal Court of Australia, 27th March, 1986)** concerned an iron ore mining operation on the Savage River in Tasmania. After mining the ore at that location, it was transformed into a slurry and transported by pipeline over a distance of 85 kilometres to Port Latta, where it was de-watered and turned into pellets suitable for shipping as bulk. The issue that arose was whether the transportation of the slurry was a mining operation which would entitle the company to claim a deduction for the construction of the pipeline. It should be noted that deductions were restricted to transportation facilities located wholly within the prescribed site of the mining operations. Despite this, the Court found that the transportation over such a significant distance was, in this case, within the mining site. It did so on the grounds that the pelletisation process was key to the ore having any value. In the words of Lockhart J:-

> *"Until pelletisation takes place the concentrates are of no use to anybody and the slurry in which they are contained is similarly of no use. Only the pellets are useful…"*

5.19. While the judge in that case emphasised that the question of whether an activity is a mining operation is a matter of fact to be determined in each individual instance, the Respondent submitted that ***Northwest Iron Co*** was a clear indication that the production of the concentrate at [redacted] was part of the mining activity. It submitted that the ore transported to the teepee had no value until such time as it was processed and turned into concentrate capable of being transported and smelted into metal.

5.20. The Respondent submitted that from this it was clear that that the milling at [redacted] could not be regarded as a separate operation simply on the basis that the Appellant and the companies making up the Mine Partnership were separate entities. The crucial issue was the reality of the connection of the relationship between the milling operation and the extraction of galena and sphalerite underground.

5.21. The Respondent further submitted that the suggestion by the Appellant that the definition of *"any mining operations"* in section 444(1)(a) was narrower than the provision considered by the Supreme Court in ***Tara Mines***, because of the added words "*for the purpose of obtaining, whether by underground or surface working any scheduled mineral…"*, was misconceived. Counsel pointed to the use of the words "*any*" and the plural "*operations*" in both section 444(1)(a) and in section 58 of the Corporation Tax 1976, and argued that the Oireachtas intended to give a wide and flexible definition of mining in both provisions.

5.22. In support of the contention that the Appellant's activities constituted a mining operation, the Respondent relied on the expert evidence of Expert Witnesses B and C that the processes were integral to one another. The various stages, namely the liberation of ore by blasting, the crushing underground, the grinding in the SAG mill and the flotation, had all been performed with the one goal in mind: to obtain the minerals galena and sphalerite. In this context, drawing a line between what occurred above ground in the mill and underground in the mine was arbitrary. While at the end of the process the minerals ended up as a powder which did not resemble the crushed rock that made its way up the conveyor belt to be deposited in the teepee, this was a

consequence of the refining process and the need to transport the minerals by lorry to [redacted] and thence onwards to purchasers as bulk cargo. The sphalerite and galena that arrived at the milling plant intermingled with rock and other minerals were chemically identical to the final product that had been physically separated.

5.23. In support of the contention that the concentrate constituted a scheduled mineral, the Appellant made reference to, *inter alia*, section 4 of the Minerals Development Act 1940 governing the granting of mining leases by the State, including the Appellant's own lease, which gives the right to "*work*" scheduled minerals. Counsel also referred me to the terms of the Appellant's lease, and the Environmental Report and Planning Permissions all of which, in the Respondent's submission, envisaged overground operations.

5.24. In relation to the interdependence of the mine and the mill, the Respondent did not accept that the processing of ore from Mine B was a sign that the process was not integral. Mine B was a specific and particular arrangement that arose because of the closure of its own milling plant and because of the very close similarity of the galena and sphalerite deposits at both locations, without which processing in [redacted]'s concentrator would have been impossible.

5.25. In the Respondent's submission, the fact that the broken ore was transported by road from a different entity and location did not have a bearing on the fact that what was occurring at [redacted] was a stage in the mining process begun at Mine B. Even if I found it not to be the case that the Mine B processing was integral, the Respondent emphasised that even then the legislation made clear that the refining process was still mining, in circumstances where the aim of

the process was obtaining scheduled minerals of galena and sphalerite from the ore.

5.26. The Respondent also challenged the overall significance of Mine B to the determination of this issue. It was pointed out that the arrangement was only begun on a trial basis in 2009 and fully commenced for 2010 and 2011. During this period the amount of ore processed was a very small percentage of the overall amount processed by the Appellant.

5.27. The Respondent further submitted that the advance sales agreements themselves suggested that the processing of the ore was a mining operation, as clause 5.1 thereof provided that: "*The buyer and seller recognise the Concentrate will be the product of a new mine…".*

5.28. The Respondent also addressed the point made by the Appellant in relation to apportionment pursuant to section 444(2) of TCA 1997. It submitted that the provision's existence did not, as the Appellant suggested, give rise to the inference that processing and mining activities in a company should be treated as being distinct operations. According to the Respondent, what the provision intended was to ensure that smelting, not processing of the kind carried on by the Appellant, was not regarded as a mining activity.

6. ***Analysis and Findings***

Set up and commencement

6.1. Under section 448 of TCA 1997, a company engaged in a trade which consisted of the manufacture of goods was able to claim relief from corporation tax that was referable to income from the sale of those goods. This relief resulted in a reduced tax rate of 10% and was limited to "*relevant accounting periods*" as defined by section 442(1). The initial question I must determine is whether the years at issue in this appeal were such periods. If they are not, this appeal must fail.

6.2. Section 442(1) provides that if a business was set up and commenced on or after the 23rd of July 2018, no time after the end of 2002 can be a relevant accounting period. In all other cases, the final such period is the end of 2010.

6.3. I agree with the Appellant's argument that the set up and the commencement of a trade are separate and distinct concepts which, logically, can occur at different times. This is apparent from the use of the two terms that are not synonymous and the rule of interpretation that legislators do not include words in statutes that are superfluous. I therefore do not agree with the submission of the Respondent that "*set up and commenced*" means, in effect, "*commenced*".

6.4. The consequence of this as regards the proper interpretation of section 442(1) is that a trade which had set up prior to the 23rd of July 1998, but which had yet to commence trading, was not restricted to claiming manufacturing relief until the end of 2002. Rather, it would fall into the category of "*any other case*" to which the later expiry date of the 31st of December 1998 would apply.

6.5. For the avoidance of doubt, I should record that I have reached the above finding on the basis of the plain wording of the statute, and not by reference to

extraneous material such as the press release advertising the phasing out of manufacturing relief which was opened to me by the Appellant and the explanatory note that was opened by the Respondent. As the Respondent correctly submitted, resort to such extraneous material is not permitted in aid of the construction of legislation.

6.6. The question that flows from this finding is how to define when a trade has reached the point of being set up for the purposes of availing of manufacturing relief. To begin with, I agree with the Respondent's submission that the trade in question must be, for the purposes of this issue, taken to be the sale of concentrates. Reference in the Memorandum and Articles of Association of the Appellant to part of its activity being the construction and development of a milling facility do not alter the nature of its trade.

6.7. The parties were in agreement that commencement could not simply be taken to be the date of establishment, which in my view is correct. The primary case cited by the Respondent in relation to this issue was ***Birmingham & District Cattle By-Products***, which was approved in ***Spa Estates v O'Hargain***. In it, Rowlatt J found that various preparatory measures for a sausage skin making business, such as entering into agreements to purchase machinery, searching for premises and hiring staff, did not amount to the commencement of trade. What is clear, however, is that did not address the question of whether it was set up.

6.8. In considering the question of when a trade is "*set up*", I have reached a similar conclusion to that reached by the Special Commissioners in ***Mansell***. This is that the act of setting up includes:

> "*setting up a business structure,* [undertaking] *the essential preliminaries, getting ready to face your customers, purchasing plant and organising the decision making structure, the management and the financing…".*

6.9. The foregoing, as that Tribunal noted, would involve operational activities in the form of dealings with third parties related to the supply of the goods to be manufactured. At the heart of the analysis is the idea that something must already have been risked in the form of the acquiring of rights and the incurring of obligations. When this is done, the trade can be said to have been set up, even though it is not yet in a position to commence.

6.10. The Appellant's primary stance, of course, was that it had not only set up but also commenced by the 23rd of July 1998. In his submissions, Counsel for the Appellant said that the Respondent's position that trading must actually have started (*i.e.*, the first sale resulting in income must have occurred or be on the cusp of occurring) for commencement to have taken place was excessively strict and not in conformance with the reality of how many businesses begin their trade. I am not convinced that this submission is correct, taking into account the ordinary meaning of the word and in circumstances where the legislation makes express provision for set up as a stage before commencement.

6.11. However, I find that even if the commencement of a business is not necessarily tied to production and sale, the Appellant's business could not reasonably be said to have commenced by the relevant date. There was, most obviously, no processing facility in existence at that time. I heard evidence from Witness B that some construction had begun; however, it is quite clear on the evidence

that it was in its early stages. I also heard that the SAG mill, ball mill and flotation tanks, among other essential items, had been purchased but not had been delivered, installed and made operational. This is not, in my view, reflective of a business that has begun its trade, something which is borne out by the fact that production at the plant did not begin until the last quarter of 1999. Moreover, the Appellant in its own company accounts and corporation tax returns for the period stated that it had "*not yet commenced trading".* I therefore find as a material fact that the Appellant's trade had not commenced prior to the 23rd of July 1998.

6.12. This leaves the question of whether the business was set up in time for the years at issue in this appeal to be considered relevant accounting periods.

6.13. In my view, the evidence shows that by the 23rd of July 1998 the Appellant had completed a number of operational steps that were indicative of the business being at an advanced stage of organisation and that commencement was imminent in the future. The land on which the processing plant was built was acquired in 1997. All of the relevant regulatory licences relating to mining and processing at [redacted] had been obtained, including planning permission for the mine and processing plant, the mining lease and the environmental control licence. Finance had been secured from [redacted] and [redacted] Bank**.** Critically, the Appellant had taken steps that involved the accrual of obligations and liabilities. By the relevant date, the Appellant had expended more than $20 million on establishing the business, albeit that a further $44 million was expended thereafter. This expenditure included the purchase of the SAG and ball mills and the flotation tanks, which were designed specifically for processing the ore at [redacted].

6.14. There was considerable debate about the forward contracts for the sale of concentrate, and whether these were legally binding. While I accept the evidence and submissions that the Appellant would not have been obliged to deliver the concentrate to the purchasers had production never begun, the contracts do show that the business had made precise plans about what it would have to produce in terms of quantity and quality. Moreover, I accept as correct the evidence of Witness B that failure to produce would have had significant negative commercial implications for the Appellant.

6.15. Having carefully considered all of the evidence and submissions, I am satisfied and find as a material fact that the Appellant's trade had been set up, within the meaning of section 442(1), prior to the 23rd of July 1998.

6.16. In reaching the conclusion that the Appellant's business was set up prior to the relevant date, I have taken into account that this is an appeal relating to an exemption, and therefore the Appellant must show clearly that it falls within the parameters of the provision. This is in contrast to the rule whereby a tax burden will not be imposed unless the legislation does so unambiguously. In my opinion, however, the Appellant has clearly shown that it has met this element of the test for manufacturing relief.

6.17. By reason of the aforesaid findings, I am satisfied and find that the years 2006 to 2010 were "*relevant accounting periods*" within the meaning of section 442(1).

Whether the Appellant carried on a mining operation

6.18. Having made the above findings, I must next determine whether the income earned by the Appellant during the relevant years was income from any

mining operation within the meaning of section 444(1)(a). Any mining operation under this provision must be one *"…for the purpose of obtaining, whether by underground or overground working, any scheduled mineral, mineral compound or mineral substance (within the meaning of s.2 of the Minerals Development Act 1940).*

6.19. In considering this provision, my initial finding of fact is that the minerals galena and sphalerite constitute the scheduled minerals *"ores of zinc"* and "*ores of lead".* The evidence before me was clear that these are the primary minerals contained in the ores of those metals.

6.20. Beyond this, a key issue was the extent to which the Minerals Development Act 1940 informs the interpretation of section 444(1)(a). If, as the Respondent contended, all of the definitions set out in section 2 of the 1940 Act were imported into section 444, there would be no doubt but that the Appellant's processing would have constituted a mining operation excluded from manufacturing relief. This is clear from the definition therein of "*surface*" (" *…includes any buildings, works, or things erected, constructed or growing on such land"*) and "*working*" (*"…when used in relation to minerals, includes digging, searching for, mining, getting, raising, taking, carrying away, treating, and converting such minerals"*).

6.21. However, I agree with the Appellant that it is only the terms referred to expressly in section 444(1(a) that should have their meaning determined by their definition in section 2 of the 1940 Act. I do so in part because of the clear difference in the purposes of the two pieces of legislation – the former is to set the appropriate rates of taxation, while the latter is to regulate the extraction

and exploitation of the State's finite mineral resources. More significantly, I find that given its plain and ordinary meaning, section 444(1)(a) expressly describes the three items ("*scheduled mineral, mineral compound or mineral substance*") that are to be defined in accordance with section 2 of the Minerals Development Act 1940. In my view it is implicit from this that this was as far as the Oireachtas wished to go in importing meaning from the 1940 Act. Had the Oireachtas intended that, for the purposes of section 444(1)(a), the words "*surface*" and "*working*" should have the meaning given to them by the 1940 Act, it could have so provided in section 444(1), or elsewhere in TCA 1997. On my reading of the legislation, the Oireachtas did not so provide.

6.22. What then is the proper interpretation of section 444(1)(a)? The Appellant argued that the additional words meant that the correct interpretation of *"…any mining operations…"* under section 444(1)(a) was that it was narrower in scope than the same phrase used in section 58 of the Corporation Tax Act 1976, considered by the Supreme Court in ***Tara Mines***. Counsel for the Appellant submitted that the qualification in section 444(1)(a) that such operations must be carried out "*for the purpose of obtaining, whether by underground or overground surface working, any scheduled mineral…*" limited its application to open cast or closed cast mining only, and did not extend to processing activities.

6.23. In ***Tara Mines***, the Supreme Court stated that "*any mining operations*" is a broad term. The Australian cases referred to above containing factual analyses of what constitutes mining underline this point. ***Federal Commissioner of Taxation –v- Henderson***, which was considered by the Supreme Court, suggests that overground working can go beyond the breaking and extraction of ore. ***Federal Commissioner of Taxation –v- Northwest Iron Co Ltd.,*** which

was also considered, suggests that processing in the form of the de-watering and pelletising of slurry many miles away from a mine can be a mining operation in certain circumstances. This, coupled with the legislative background concerning the interplay between export tax relief and capital allowances reserved specifically for mining operations, led the Supreme Court to find that the processing at Tara, which was very similar, if not the same, to that which occurred at [redacted], was excluded from export tax relief.

6.24. In my view, however, the addition of the word "*obtain*" does make a mining operation for the purposes of section 444(1)(a) a narrower concept than that encompassed by section 58(9) of the Corporation Tax Act 1976. One dictionary definition of this word is "*to gain or attain, usually by planned action or effort*". While I think that the operations and activity relating to the slum dumps considered in ***Henderson*** might well constitute obtaining a mineral, I do not see how the same could be true of an activity such as that which was performed on the iron ore slurry at Port Latta, which had already been extracted, subjected to processing and only then transported by pipeline to that destination. The use of this word, it seems to me, also means that the following term "*working*" has to be understood as not extending to "*treating*" operations, which by the natural and ordinary meaning of that term means the improvement or alteration of a mined substance as opposed to its acquisition.

6.25. Before considering whether the Appellant's activity at [redacted] amounted to mining for the purpose of obtaining sphalerite and galena concentrate, it is necessary to address the Respondent's contention that the facts show that the mining and mineral processing constituted in fact a single integrated process,

throughout which the goal was always the production of saleable concentrates.

6.26. The Respondent says that this is demonstrated, *inter alia*, by the fact that the state permissions, such as planning and pollution control, necessary for commencing the project were for both mining and processing activities. I do not think that this necessarily follows. Planning permission was granted in respect of both mining and processing and it is true that at points therein processing is described as being a mining activity. I think, however, that this was probably not a description given with the precise nature of the relationship between the activities in mind. It has never been disputed that there is a close link between the mine which provides the ore and the processing plant which produces the concentrate. Similarly, I accept the evidence of Witness A that the fact that the Integrated Pollution Control Licence, which related to the processing and mining activities, was in the name of the Mine Partnership was attributable initially to the system permitting only one applicant. Thereafter, the renewals in 2001 and 2010 in the name of the Mine Partnership were a consequence of the desire to avoid having to make a fresh applications because of the inclusion of a new applicant. The Respondent argued that this at a minimum showed a slackness on the part of those involved in the project as to the dividing line between the activities of the entities. This may be so, but I do not think, in light of the explanation proffered, that it evidences integrated operations.

6.27. Similarly, I am not persuaded that the financing of the project (which was for both the mine and the processing facilities) or the fact that there was a services agreement whereby the Mine Partnership agreed to procure services for the Appellant are indicative of integration. In relation to the latter, both parties

agreed that it is not unusual for companies that form part of the same group to enter into services arrangements of this kind and it is not in my view evidence that they are part of an integrated operation in practice. In relation to the former, it is not surprising that the project was presented to the lenders as a whole in circumstances where both companies' revenues were going to be determined by the sale of the concentrate by the Appellant.

6.28. There was a significant dispute between the parties as to whether the method of paying the Mine Partnership for the mined ore was indicative of a single integrated operation. On the face of it, the division of the net profits from the sales of the finished product would suggest they were. However, I heard evidence, which I accept, that such arrangements were not uncommon practice in the industry, and that the arrangement was to the benefit of the Partnership.

6.29. The Respondent further suggested that the arrangement was devoid of reality. This was because, firstly, the ore produced by the mine could not be sold to anyone but the Appellant as it would be uneconomic to transport prior to being subjected to the process of comminution above ground. The Respondent submitted that the only viable purchaser of the ore produced at [redacted] was the Appellant. I find, however, that this cannot be said with absolute certainty, notwithstanding that there would be very significant extra costs in producing concentrate from ores sourced from a mine distant from the processing facility. I do so because the Appellant had its own arrangement with Mine B for the purchase of ore used in the production of concentrate from 2009 onwards. This was only ever a small portion of the Appellant's operations and it was, it must be said, to its good fortune that Mine B was only a short distance from [redacted]. However, it shows that the plant did in fact have a business

independent of the Mine Partnership. Moreover, I accept that the evidence that the Appellant looked for other sources of ore to fill its spare plant capacity and prepare for life after the [redacted] Mine ceased production or reduced its output indicates that the two operations were not so integrated as to constitute a single operation.

6.30. The arrangement was also challenged by the Respondent on the grounds that the 60/40 split of profits between the Mine Partnership and the Appellant was arbitrary and did not represent the reality of their respective capital contributions to the development of the project. I heard evidence from Witness A concerning the manner in which the division was arrived at. He said it was done by calculating the cost of developing the mining and processing assets – primarily the mine, the processing plant and the tailings facility. I am satisfied that on the whole this was a logical basis for the arrangement. The method of calculation did not include the cost to one of the partners, Group D/Group C, of their acquisition of Group B's interest in the land on which the mine was built at a cost of €77.2 million. It is certainly arguable that it could have, which would have had the effect tilting the split 74/26 in favour of the Mine Partnership. However, the view seems to have been taken that this sum was to be regarded as Group D's price to be paid for buying in to the project – Group A had to expend the much lesser sum of €26 million for its interest in the project's early stage. Consequently, as Counsel for the Appellant submitted, this was actually to be viewed as an asset of the partner ([**Group C**] Mining Ltd) rather than an asset contributed to the Partnership.

6.31. In my view, using the respective capital contributions to the development of the facilities that permitted the production of the concentrates was a valid basis on which to assess the division of the profits from their sale. I would add

to this that the division of the profits from the sale of the Mine B concentrate resulted in a 50/50 division. I heard evidence that this was the result of hard negotiation on the part of the Appellant, which covered the considerable cost of the transportation of the ore. While the deal is substantially more favourable from the point of view of the processor, it does not seem to be fundamentally out of step with that concluded with the Mine Partnership in relation to the provision of its ore.

6.32. The parties also disputed whether the operations were integrated from an engineering perspective. In the view of Expert Witness A, there was a clear distinction between blasting and crushing underground followed by transportation to the surface for storage and the subsequent activities of milling and flotation. The opposite view was taken by Expert Witness C, who opined that there was no difference in principle between blasting and crushing and the comminution in the SAG and ball mills in the Appellant's plant – both were activities directed toward "liberating" minerals from material that was not sought after.

6.33. I am satisfied on the evidence before me that from an engineering standpoint the division of the activity carried out by the Appellant and that carried out by the Mine Partnership was not artificial. The underground blasting work was done in order to detach ore from the orebody. The detached ore was then made smaller so that it could be taken to the surface on a conveyor belt and was then stored in the teepee for a period. This was clearly a process of extraction. The subsequent steps, performed by the Appellant in the plant, were carried out for the purpose of separating the desired minerals contained in the previously extracted material and thereafter manufactured into concentrate. While it is true that a portion of the tailings was turned into

backfill that was used to re-fill excavated cavities in the mine, I do not find this sufficient to overcome the division of activities.

6.34. For the foregoing reasons, I am satisfied and find as a material fact that the activities of the Appellant and the Mine Partnership were not so integrated as to constitute a single operation. I must therefore consider whether the processing operations carried out by the Appellant constituted a mining operation for the purposes of section 444(1)(a).

6.35. As already noted, it is certainly the case that the separation of the ore from the orebody underground and its crushing and transportation to the tepee amounted to *obtaining* the mineral by underground working, and was therefore a mining operation. However, I do not think the same can be said of the processes of grinding and flotation employed in the plant at [redacted]. The evidence was that their purpose was to isolate the desired minerals contained in the ore and refine them to a valuable concentrate of a sufficient grade. I note that when the ore arrived for milling, the minerals were intermingled and the processes were designed to isolate them from unwanted waste and other minerals such as pyrite. However, in my view they had by that point been "*obtained"* in a physical sense and within the ordinary meaning of that word. This stage was completed when the ore was separated from the orebody underground, crushed to a manageable size and brought to the surface. The purpose of the plant-based operations conducted by the Appellant, in contrast, was to turn the extracted minerals into as high-grade a product as possible so as to achieve the best possible return for the Appellant and the mine. This undoubtedly constituted treating, but as I have already found, the term "working" does not go that far.

6.36. For this reason, I find that while the processes at issue in this appeal and in ***Tara Mines*** are essentially the same, the outcome must be different. Unlike that case, the instant appeal concerns two separate companies that carry out separate activities. This is not to say that were the project comprised only of one corporate entity the activities at the plant would be taxed as a mining operation; section 444(2) permits the apportionment of profits for the purposes of taxation. However, in my view the separation of activities between the Appellant and the Mine Partnership is not artificial or arbitrary; rather, it is reflective of a genuine division of activities between those which are not a mining activity within the meaning of section 444(1)(a) and those which are.

6.37. Accordingly, for the reasons outlined above, I am satisfied and find that the income of the Appellant for the years 2006 to 2010 inclusive was not income from a mining operation within the meaning of section 444(1)(a), and the Appellant was therefore entitled to avail of manufacturing relief pursuant to Part 14 of TCA 1997.

6.38. As was agreed by both parties, the foregoing finding also determines the outcome of the Appellant's appeal for the 2011 accounting period. Accordingly, I find that the Appellant was liable to corporation tax at the 12.5% rate rather than the 25% rate for the last year under appeal.

7. Conclusion

7.1 Having made the findings detailed above, I am satisfied that the Appellant is entitled to succeed in this appeal. I find that the Appellant has been overcharged to Corporation Tax by

reason of the amended assessments dated the 1st and the 7th of December 2011 and therefore determine pursuant to section 949AK(1)(a) of the Taxes Consolidation Act 1997 as amended that those amended assessments be reduced accordingly.

Dated the 21st of January 2022

MARK O'MAHONY
APPEAL COMMISSIONER