THE COURT OF APPEAL

Appeal No. 2017/201

Baker J.
McCarthy J.
Kennedy J.

BETWEEN/

BOOKFINDERS LIMITED

APPELLANT

- AND -

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Ms. Justice Kennedy delivered on the 3rd day of April 2019

1. This is an appeal from the judgment of the High Court (Keane J.) of 21 October 2016, *Bookfinders Ltd v. The Revenue Commissioners* [2016] IEHC 569. The matter came before the High Court by way of case stated seeking the opinion of the High Court pursuant to s. 941 of the Taxes Consolidation Act 1997 in respect of a determination issued by the Appeal Commissioner on the 21 February 2011. The determination of the Appeal Commissioner came about as a result of an appeal by Bookfinders Ltd which resulted in a decision favourable to the Revenue Commissioners whereupon Bookfinders Ltd requested that the Appeal Commissioner state a case to the High Court.

Background
2. The appellant is a franchisee of a chain of food outlets and operates from premises in Galway preparing and selling, *inter alia*, hot sandwiches and teas and coffees, the majority of which are taken away but where there are limited facilities to consume food and drink on the premises. In his recitation of the facts, the High Court judge noted that the Appeal Commissioner found that 70-80% of the business is a takeaway business.

3. The appellant's case arises from the fact that in or about December 2006, the appellant revised its calculation of VAT downwards having applied a zero rate on the basis of its belief that the supply of heated sandwiches and hot teas and coffees were subject to the zero rate of VAT rather than 13.5%. The appellant then sought repayment in respect of the period January/ April 2004 to November/December 2005 which the respondent refused. Consequently, the appellant appealed that refusal to the Appeal Commissioner. The issue before the Appeal Commissioner was whether the supply of heated sandwiches and hot teas and coffees were subject to the zero rate or the 13.5% rate as contended by the Revenue Commissioners and the matter, now under appeal, turned on the interpretation of the Value-Added Tax Act 1972 ("the Act").

Questions
4. Six questions were asked of the High Court judge, all of which he answered in the affirmative:

> "1) Was I correct in law in holding that the supply of heated sandwiches and hot tea and coffee was subject to VAT at 13.5% and without prejudice to the generality of the foregoing question;
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> 2) Was I correct in law in holding that the words food and drink contained in paragraph (iv) of the Sixth Schedule should be read disjunctively and not conjunctively with particular regard to the principle against doubtful penalisation?
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> 3) Was I correct in law in holding that the 13.5% VAT rate applies to heated tea and coffee sold in drinkable form having found that these drinks were specified in paragraph (xii) of the Second Schedule?
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> 4) Was I correct in law in holding that paragraph (xii) of the Second Schedule and the exclusions from paragraph (iv) of the Sixth Schedule to the VAT Act 1972, as amended, do not operate to apply the zero rate of VAT to heated sandwiches made with bread as defined in paragraph (xii)(d)(II) of the Second Schedule to the VAT Act?
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> 5) Was I correct in law in holding that the appellant's bread was not bread as defined in paragraph (xii)(d)(II) of the Second Schedule with regard to the ordinary meaning of the word "each" in the first subparagraph of that provision and the principle against doubtful penalisation?
>
> 6) Was I correct in law in holding that the issue of fiscal neutrality did not operate to apply the zero rate to the appellant's sandwiches?"

Legislative Framework
5. The relevant portion of s. 2 of the Act provides that VAT is a tax to be charged, levied and paid:

> "on the supply of goods and services effected within the State for consideration by a taxable person in the furtherance of any business carried on by him ..."

6. Section 3 addresses the rules relating to supply of goods and s. 5 addresses the rules relating to supply of services.

7. Section 11 determines the rate of VAT to be paid and permits alternative rates in certain circumstances. Section 11(1)(a) provides for a VAT rate of 21% as the chargeable tax rate save where otherwise specified in the subsection. Two separate subsections provide for a zero rate on certain goods and services and a 13.5% rate on others.

The Zero Rate
8. Section 11(1)(b) provides for a rate of zero per cent in relation to goods specified in paras. (i) or (ia) of the Second Schedule or of goods or services of a kind specified in paras. (iii) to (xx) of that Schedule.

9. We are concerned with para. (xii) of the Second Schedule which the appellant argues is the paragraph applicable to the goods it supplies.

10. This states as follows:

"food and drink of a kind used for human consumption, other than the supply thereof specified in paragraph (iv) of the Sixth Schedule, excluding–

> a) beverages chargeable with any duty of excise specifically charged on spirits, beer, wine, cider, perry or Irish wine, and preparations thereof;
>
> b) other beverages, including water and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages, but not including–
>
> I. tea and preparations thereof,
>
> II. cocoa, coffee and chicory and other roasted coffee substitutes, and preparations and extracts thereof,
>
> III. milk and preparations and extracts thereof, or
>
> IV. preparations and extracts of meat, yeast, or egg;
>
> (c) ice cream, ice lollipops, water ices, frozen desserts, frozen yoghurts and similar frozen products, and prepared mixes and powders for making any such product or such similar product;
>
> (d) (I) chocolates, sweets and similar confectionary (including glace or crystallised fruits), biscuits, crackers and wafers of all kinds, and all other confectionary and bakery products whether cooked or uncooked, excluding bread,
>
> (II) in this subparagraph 'bread' means food for human consumption manufactured by baking dough composed exclusively of a mixture of cereal flour and any one or more of the ingredients mentioned in the following subclauses in quantities not exceeding the limitation, if any, specified for each ingredient–
>
> > (1) yeast or other leavening or aerating agent, salt, malt extract, milk, water, gluten,
> >
> > (2) fat, sugar and bread improver, subject to the limitation that the weight of any ingredient specified in this sub clause shall not exceed 2 per cent of the weight of flour included in the dough,
> >
> > (3) dried fruit, subject to the limitation that the weight thereof shall not exceed 10 per cent of the weight of the flour included in the dough, other than food packaged for sale as a unit (not being a unit designated as containing only food specifically for babies) containing two or more slices, segments, sections or other similar pieces, having a crust over substantially the whole of their outside surfaces, being a crust formed in the course of baking, frying or toasting ...".

11. The VAT rate of 13.5% applies to goods and services of a kind specified in the Sixth Schedule of the Act with paragraph (iv) of the Sixth Schedule being relevant for the purposes of this appeal and which recites:

> "the supply of food and drink (other than bread as defined in subparagraph (d), of paragraph (xii) of the Second Schedule) (other than beverages specified in subparagraph (a) or (b) of paragraph (xii) of the Second Schedule) which is, or includes, food and drink which–
>
> > (a) has been heated, enabling it to be consumed at a temperature above the ambient air temperature, or
> >
> > (b) has been retained heated after cooking, enabling it to be consumed at a temperature above the ambient air temperature, or
> >
> > (c) is supplied, while still warm after cooking, enabling it to be consumed at a temperature above the ambient air temperature, and is above the ambient air temperature at the time it is provided to the customer".

12. Lastly, section 11(1A)(b) provides that:

> "Goods or services which are specifically excluded from any paragraph of a schedule shall unless the contrary intention is expressed be regarded as excluded from every other paragraph of that schedule, and shall not be regarded as specified in that schedule".

Grounds of Appeal
13. The appellant has filed three grounds of appeal, with each ground containing a number of different subsets which may be summarised as:

Ground IA

The trial judge erred in law in failing to apply the correct canons of construction applicable to tax statutes and consequently fell into error in his conclusions on each question asked.

Ground IB

Without prejudice to the submissions at A above, the trial judge erred in law in failing properly to construe the provisions of the legislation in question.

Ground II

Whilst this ground contains three subparagraphs, it relates to the principle of fiscal neutrality and the contention that the trial judge erred in finding that evidence was necessary in order to determine whether there had been a breach of the principle of fiscal neutrality.

Ground III

This ground contains four subparagraphs and relates to the principle of legal certainty and that the trial judge erred in finding that the relevant legislation was consistent with this principle. Furthermore, that the trial judge erred in concluding that evidence was necessary to determine whether there had been a breach of the principle of legal certainty, but as such requires an objective assessment of the statutes to be conducted by a court.

Decision of the High Court

14. In his judgment of 14 October 2016, Keane J. summarises the principles governing the interpretation of VAT legislation at para 21:

> "(i) The general principle is that VAT is to be levied on all goods and services supplied for consideration by a taxable person; see, for example, the judgment of the Supreme Court in *Mac Cárthaigh v Cablelink Ltd* [2003] I.R. 510 at 513.
>
> (ii) Exemptions whereby VAT is to be charged at a reduced rate rather than the standard rate, are to be interpreted strictly, since they constitute an exception to the general principle; see, for example, *Blasi v Finanzamt München I*, Case C-346/95 at para. 18, and the cases cited there.
>
> (iii) The requirement whereby terms used to specify exemptions are to be interpreted strictly, does not mean that they should be construed in such a way as to deprive them of their intended effect; see *Mìsto Žamberk v Finanèní øeditelství v Hradci Králové*, Case C-18/12 at para. 18.
>
> (iii) [sic] An exclusion within an exemption, triggers the reapplication of the general principle, and cannot, therefore, be interpreted strictly; see *Blasi v Finanzamt München I* at para. 19 and, as an illustration of the application of that principle, the United Kingdom VAT Tribunal decision in *Quaker Trading Limited v Her Majesty's Revenue and Customs* (UK VAT Tribunal Decision 20604, 6 March 2008)".

15. The judge went on to summarise the positions of the parties at paras 26 and 27:

> "26. Simply put, the respondent argues that the court should apply the well-established principles for the construction of VAT legislation, including the requirement to strictly construe any exemption from the general principle that VAT at the standard rate should apply to any supply of goods and services for consideration by a taxable person, whereas the appellant contends that the court should instead narrowly construe the general principle and broadly construe any exemption from its application in reliance upon the principle against doubtful penalisation, whereby, where there is ambiguity a taxing statute will be interpreted in favour of the taxpayer.
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> 27. The respondent further submits that, even absent the special considerations that apply to VAT, it is clear that the Irish courts require a party contending for an exemption to show that they fall full square within the statutory provision said to give rise to that result. The respondent emphasises that, in *Texaco Ireland Ltd v S. Murphy (Inspector of Taxes)* 4 ITR 91, the Supreme Court held that exemptions from, as well the imposition of, a tax must be brought within the letter of a taxing statute."

16. Keane J. concluded that the respondent's approach to statutory interpretation was the correct approach for two reasons: Firstly, the approach taken by the appellant did not take account of the distinction between direct and indirect taxation. Secondly, the High Court did not accept the appellant's proposition that national procedural autonomy requires a court to favour domestic canons of construction (as distinct from domestic law) in its application. In considering the judgment of the Supreme Court in *Albatros Feeds Ltd v. Minister for Agriculture [2006] IESC 51*, [2007] 1 IR 221, Keane J. found that the limits of the obligation are marked by the terms of the relevant national law and not by the canons of construction *per se*.

17. The judge went on to consider the specific provisions in contention. In regard to para. (iv) of the Sixth Schedule, he rejected the appellant's contention that the phrase "food and drink" should be read conjunctively and stated that legislative amendment of the word "or" by its replacement with the word "and" as now appears was not proof of an intention that the phrase be read conjunctively, relying on the *dicta* in *Cronin (Inspector of Taxes) v. Cork and County Properties Ltd* [1986] 1 IR 559. He upheld the Appeal Commissioner's finding that a disjunctive reading of the word "and" is allowed depending on the context.

18. The High Court accepted the Appeal Commissioner's finding that on a proper construction of the provisions, para. (iv) of the Sixth Schedule is concerned with teas and coffees supplied to consumers above ambient temperature, whereas para. (xii) of the Second Schedule is concerned with such items in a cold state.

19. The High Court judge affirmed the findings of the Appeal Commissioner that the bread used by the appellant falls outside of the definition of "bread" in the Act due to the sugar content. Furthermore, even if it was bread for the purposes of the Act, the trial judge agreed with the reasoning of the Appeal Commissioner that while the supply of bread is excluded from para. (iv) of the Sixth Schedule, there was no basis to conclude that this would similarly exclude all products containing bread as defined from the scope of that provision.

20. The High Court rejected the appellant's submission that applying a different rate of VAT to the sale of heated sandwiches from that applicable to cold sandwiches resulted in para. (iv) of the Sixth Schedule being in breach of the principle of fiscal neutrality and contrary to EU law. The judge found that there was no finding by the Appeal Commissioner to the effect that heated sandwiches and cold sandwiches have the same characteristics and therefore there was no factual basis from which to present the argument that there had been a breach of the principle of fiscal neutrality.

21. The High Court similarly found that there was no factual basis on which to conclude there had been a breach of the principle of legal certainty and there was no finding of fact whatsoever to support the appellant's proposition that the distinction between food

and food which had been heated, or retained its heat after cooking, or which was supplied while still warm after cooking, was in any way arbitrary in its application.

22. The High Court judge also accepted the respondent's submission that there was no uncertainty in the imposition of different VAT rates on the basis that the test was of ambient air temperature and that hot food and cold food are two entirely different products and are therefore readily distinguishable from each other.

Arguments on Appeal
Appellant

23. This appeal is exclusively concerned with the correct statutory construction of the Act. The appellant submits that the High Court was incorrect in finding that the rule of "strict construction of exceptions", which is part of EU law, required the Second Schedule to be construed more strictly than the Sixth Schedule and this requirement overrode the domestic principle against doubtful penalisation applicable to tax statutes.

24. The appellant advances the argument that a tax statute is to be construed in accordance with long-standing principles of national law, and that there is a difference in construction which turns upon whether a tax is direct or indirect. The appellant referred to *Gaffney v. The Revenue Commissioners* [2013] IEHC 651 in which Dunne J. states that the Revenue Commissioners agreed that the principles applicable to the construction of tax statutes are those set out in *The Revenue Commissioners v. Doorley* [1933] IR 750 and *Inspector of Taxes v. Kiernan* [1982] ILRM 13. It is submitted that those judgments employ the principle against doubtful penalisation in regard to all taxation statute and not just those relating to direct taxes.

25. The appellant says that the principle against doubtful penalisation has been put on a statutory footing, citing *Dunnes Stores v. The Revenue Commissioners* [2011] IEHC 469 as authority for the proposition that section 5 of the Act preserved the existence of the presumption against doubtful penalisation.

26. The appellant submits that the High Court judge's approach to statutory interpretation led to an incorrect interpretation of the specific provisions under appeal. In relation to para. (xii) of the Second Schedule, the appellant says that the reference to tea and coffee was incorrectly accepted by the High Court to be a reference to tea and coffee in their cold drinkable form. Given the age of this legislation, the appellant suggests that it is questionable that this was the legislative intent, as cold tea and coffee were not common at that time.

27. Moreover, the appellant advances the argument that the exclusion in para. (iv) of the Sixth Schedule of "beverages specified in subparagraph (a) or (b) of paragraph (xii) of the Second Schedule" cannot refer only to those beverages in their cold form as para. (iv) of the Sixth Schedule refers to food and drink that has been heated or is still warm after cooking.

28. Finally, the appellant argues that the phrase "food and drink" contained within para. (iv) of the Sixth Schedule is clearly capable of being read conjunctively. It is the appellant's contention that the history of the legislative amendment is a significant factor in determining the correct reading of the provision and the trial judge erred in finding that *Cronin (Inspector of Taxes) v. Cork and County Properties* was authority for the principle that regard cannot be had to amendments made prior to the period under consideration as it only precludes the court from having regard to the statutory amendment made subsequent to the period during which the legislation under consideration was in force.

Respondent

29. The respondent submits that the arguments of the appellant demonstrate a misunderstanding of the judgment of the High Court regarding statutory interpretation. The respondent says that the conclusions reached by the trial judge were reached on the basis of a straightforward reading of the words used in the Second and Sixth Schedule and there is no evidence of a narrow or broad interpretation of the provisions. It is submitted that the primacy of the words used, given their natural and ordinary meaning, supports the interpretation of the respondent.

30. The respondent submits that, in any event, the appellant's approach to statutory interpretation of taxation statues is incorrect and the principle against doubtful penalisation simply does not apply. The respondent contends that the judgment of O'Donnell J. in *The Revenue Commissioners v. O'Flynn Construction Company Ltd* [2011] IESC 47, [2013] 3 IR 533 put to rest many of the misconceptions surrounding the interpretation of taxing statutes.

31. The respondent submits that the appellant is incorrect in stating that the High Court applied the principle against doubtful penalisation in *Dunnes Stores v. The Revenue Commissioners* and, in fact, the passage in which Hedigan J. considered the legislation in issue, and what it meant, immediately follows his approval of the *dicta* of Denham J. in *D. B. v. Minister for Health and Children* [2003] 3 IR 12 and Blayney J. in *Howard v. Commissioners of Public Works* [1994] 1 IR 101. The respondent submits that the appellant falls into the same error in relying on *Gaffney v. The Revenue Commissioners*, as the appellant has lost sight of the actual approach taken in the cases cited by Dunne J.

32. In relation to the appellant's submissions that the High Court found that para. (xii) of the Second Schedule refers to tea and coffee in their cold drinkable form, it is submitted that the "cold" form of tea and coffee refers to the dry form of such. However, in the course of the appeal, it seems to me that the respondent accepted that as tea and coffee are to be considered as a "beverage" having regard to the context in which the words are used and that the reference could not be just to dry preparations, tea leaves, coffee grounds *etc*., and had to be drinkable or presumably capable of being made drinkable.

33. The respondent says in response to the appellant's submission, that "food and drink" can be read conjunctively, with reference to prior legislative amendments.

34. Finally, it is argued that the exercise of construing a provision by reference to amendments – whether those came before or after the provision under consideration – involves impermissible guesswork.

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

> "A taxing Act (including of course any other Act or part of an Act incorporated in it by reference), of its own proper

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

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

> "Leaving aside any judicial decision on the point, I would approach the matter by the application of three basic rules of statutory interpretation. First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning. As Lord Esher M.R. put it in *Unwin v. Hanson* at p. 119 of the report:
>
> > 'If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.'
>
> The statutory provisions we are concerned with are plainly addressed to the public generally, rather than to a selected section thereof who might be expected to use words in a specialised sense. Accordingly, the word 'cattle' should be given the meaning which an ordinary member of the public would intend it to have when using it ordinarily.
>
> Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language: see Lord Esher M.R. in *Tuck & Sons v. Priester* (at p. 638); Lord Reid in *Director of Public Prosecutions v. Ottewell* (at p. 649) and Lord Denning M.R. in *Farrell v. Alexander* (at pp. 650-1). As used in the statutory provisions in question here, the word 'cattle' calls for such a strict construction.
>
> Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed."

37. As the trial judge observed, both parties seemed to be in agreement as to the fundamental proposition that, in construing the legislation in issue, the words should be given their ordinary and natural meaning. In so saying, the judge pointed to the case of *The Commissioners for Her Majesty's Revenue & Customs v. Procter & Gamble UK* [2009] EWCA Civ 407, [2009] STC 1990 where the Court of Appeal for England and Wales dismissed the notion of any convoluted approach and instead, with admirable clarity said:

> "The response to these points is that it is vital to recall why the tribunal was required in the first place to answer the question whether the goods in question are "made from" the potato. It was not to answer a scientific or technical question about the composition of Regular Pringles, or in response to a request for a recipe. It was for the purpose of deciding whether the goods are entitled to zero-rating. *On this point the VAT legislation uses everyday English words, which ought to be interpreted in a sensible way according to their natural and ordinary meaning. The "made from" question would probably be answered in a more relevant and sensible way by a child consumer of crisps than by a food scientist or culinary pedant"* (My emphasis).

Different Approach to Revenue Statutes?

38. The starting point is the dicta of Denham J. in D. B. v. *Minister for Health* and Blayney J. in *Howard v. Commissioners of Public Works*, where he cited with approval the following passage from S. G. G. Edgar, Craies on Statute Law (7th ed, Sweet & Maxwell, 1971):

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous then no more can be necessary that [sic] to expound those words in their ordinary and natural sense".

39. There is no basis at law for an approach to the interpretation of revenue statutes that differs from that of statutory interpretation generally. This is clear from the Supreme Court in *Revenue Commissioners v. O'Flynn Construction*, which expressly considered the issue of statutory interpretation of general tax avoidance provisions. In his judgment, O'Donnell J. examined *McGrath v. McDermott* [1988] IR 258, which he concluded not to preclude a purposive approach. In particular, he referred to the below passage in *McGrath v. McDermott*:

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

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

> "the decision in *McGrath* itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive… if *McGrath* stands for *any* principle of statutory interpretation it implicitly rejects the

contention that any different and more narrow principle of statutory interpretation applies to taxation matters."

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

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

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

> "In *Barclays Finance Ltd. v. Mawson* [2004] UKHL 51, [2005] 1 A.C. 684 the House of Lords emphatically reaffirmed that the same principles of statutory interpretation applied to taxation statutes as to other non-criminal statutes. Indeed, it was the realisation in Lord Steyn's words in *I.R.C. v. McGuckian* [1997] N.I. 157 at p. 166, that "those two features – literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately – [which] allowed tax avoidance schemes to flourish" which led the United Kingdom courts to insist that the same principles of statutory interpretation applied to tax statutes as to other legislation. In Ireland, however, this was something that was acknowledged at least implicitly in *McGrath v. McDermott* [1988] I.R. 258, and explicitly in the provisions of the Interpretation Act 2005 which embodies a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes."

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

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

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

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

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

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

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

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

How to treat a Schedule to an Act

48. The *crux* of this case rests on the interpretation of the Second and Sixth Schedules. Dodd, in *Statutory Interpretation in Ireland*, at paras. 3.36 to 3.38 explains the correct approach to the construction of a schedule and the legislative purpose of using the device of inserting a schedule to an Act:

> "A schedule is an appendix to the main body of an enactment. Schedules often contain matters which are deemed too detailed and cumbersome to be contained in the main body of an Act… Generally, the same rules of statutory interpretation apply to the schedule of an Act as apply to a main body."

49. Therefore, when addressing statutory interpretation, the guiding principle is that the words of the statute and by extension the words of the schedule to the Act, be given their ordinary and plain meaning.

50. I find the *dicta* of Mummery L.J. in *Commissioners v. Procter & Gamble* persuasive. I am satisfied that absent ambiguity, there is no need to go beyond the fundamental canon of construction that words in a taxation statute should be given their natural and ordinary meaning.

51. The words "tea" and "coffee" as beverages contained within the Act and Schedules thereto are everyday words, they are clear and unambiguous. I reject the appellant's contention that there is any ambiguity to the words used, and while the reading of the Act requires careful attention and focus, this arises from the complexity of the structure adopted by the draughtsperson but does not mean that the wording used is unclear. The Act is awkwardly phrased and is rather cumbersome, but the wording is not ambiguous. It follows that I am satisfied that the approach propounded by the respondent is the correct one. I will now address the specific provisions in issue.

Discussion of the Schedules

Sixth Schedule, para. (iv)

52. In summary, para. (iv) of the Sixth Schedule applies a VAT rate of 13.5% and applies to the supply of food and drink which is, or includes, food and drink which has been heated, enabling it to be consumed above the ambient air temperature. There are excluded beverages specified in subparagraph (a) or (b) of paragraph (xii) of the Second Schedule.

53. The appellant submits that its supply of food and drink do not fall within the terms of para. (iv) for a number of reasons. Firstly, that the word '*and*' means that this must be read conjunctively, such that the rate of 13.5% applies only when food *and* drink are supplied together but does not apply when they are supplied separately. The appellant relies on the amendment to the statute by virtue of s. 197 of the Finance Act 1992, by which the word "and" replaced the word "or" and now reads 'food and drink'. The result is

argued to take the supply of 'drink' without food, out of para. (iv) of the Sixth Schedule, and to apply a zero rating.

Conclusion
54. I do not accept that the words "food and drink" permit only of a conjunctive meaning as advanced by the appellant. The meaning is without any complexity. It seems to me that the appellant's submissions ignore the words '*or includes*' in para. (iv). Therefore, both food and drink are *included* in the schedule by way of a list and are liable to 13.5% VAT rate. The list is created by the linking word "and", a common means by which a list is set out.

55. I disagree with the submission of the appellant that the judge erred in failing to have regard to the prior amendments to the Act. The trial judge was correct in his analysis where he quoted from the decision in *Cronin (Inspector of Taxes) v. Cork and County Properties* as follows:

> "[T]he Court cannot in my view construe a statute in the light of any amendments that may thereafter have been made to it. An amendment to a statute can, at best, only be neutral-it may have been made for any one of a variety of reasons. It is however, for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be."

56. In my view, whether the amendment was made before or after is immaterial because the legislative history of an enactment derives from many complex political, social, and legal considerations. There is no need to look to the legislative history in order to illuminate the meaning of the enactment.

57. The amendment to the schedule by virtue of the Finance Act 1992 was an express amendment to the legislation by the substitution of the Sixth Schedule, which, of course, included the substitution of the word 'and' for the word 'or'. So, the Act was expressly amended by the substitution of a different word. I therefore reject the submission that this legislative history supports an argument that the Oireachtas intended the disjunctive to have the exclusionary and limiting meaning for which the appellant contends.

Heated Teas and Coffees: The Sixth Schedule
58. The appellant argues that the tea and coffee saver in the Second Schedule, para. (xii), means that all teas and coffees are exempt from the 13.5% VAT rate. This however, ignores the fact that para. (iv) of the Sixth Schedule specifically includes heated drinks which, when giving the words their ordinary meaning, includes the supply of heated teas and coffees in a drinkable form. I turn now to examine the Sixth Schedule.

59. Paragraph (xii) of the Second Schedule applies a zero rate of VAT to "food and drink of a kind used for human consumption, other that the supply thereof specified in paragraph (iv) of the Sixth Schedule". The Second Schedule excludes such heated food and drink as specified in para. (iv) of the Sixth Schedule and then proceeds to exclude what are clearly alcoholic beverages and certain other beverages including water and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages.

60. It expressly does not include the following:

> "tea and preparations thereof, cocoa, coffee and chicory and other roasted coffee substitutes, and preparations and extracts thereof…"

61. Thus, the Second Schedule applies a zero rate of VAT to beverages except those expressly excluded in the Second Schedule itself *and the supply of* those listed in the Sixth Schedule, those relevant drinks supplied in a heated form. That includes the hot teas and coffees served in the appellant's restaurant.

Conclusion
62. In giving the words their ordinary and colloquial meaning on the facts of this case, heated teas and coffees are subject to the 13.5% rate under para. (iv) of the Sixth Schedule and on a construction of the ordinary meaning of the words used in para. (xii) of the Second Schedule, unheated beverages or preparations thereof come within the zero rate of VAT. It seems to me that this is the plain meaning of the words in the Schedules. Therefore, the supply of heated teas and coffees are subject to a vat rate of 13.5% whereas food and drink (under the Second Schedule) of a kind used for human consumption which includes tea and coffee and preparation thereof are subject to the zero rate of VAT. The distinction in the schedules is twofold; firstly, the supply of heated food and drink in the Sixth Schedule and secondly, the supply of food and drink of a kind used for human consumption including tea and coffee and preparation thereof, (but unheated) under the Second Schedule. That is the correct construction giving the words their ordinary and colloquial meaning.

63. Beverage, for the purposes of the Second Schedule, must, in the normal meaning of the word "beverage", be in drinkable form. So, teas and coffees in the Second Schedule are not confined to simply dry goods; such as leaf tea or tea bags or coffee beans. The Second Schedule, para. (xii), is concerned with supply, which includes the supply of drinks which in turn includes those drinks which are called teas and coffees. The section requires a careful reading because of its complexity caused not by the ordinary words but by the numbering and structure of the subsections.

Bread
64. The Sixth Schedule, para. (iv), sets a 13.5% VAT rate on the supply of food and drink including items of food and drink at sub-paras. (a) (b) and (c) but excludes bread as defined in the Second Schedule, para. (xii)(d).

65. Bread is defined in the Second Schedule para. (xii)(d)(II) as:

> "food for human consumption manufactured by baking dough composed exclusively of a mixture of cereal flour and any one or more of the ingredients mentioned in the following sub-clauses in quantities not exceeding the limitation, if any, specified for each ingredient" (Emphasis added).

66. The relevant sub-para. is sub-para. 2 which states:

> "fat, sugar and bread improver, subject to the limitation that the weight of any ingredients specified in this sub-clause shall not exceed 2% of the weight of flour included in the dough".

67. The respondent submits that the plain meaning of the words above is as follows: bread is composed of a mixture of cereal flour and any one or more of a number of ingredients. If the permitted limit for any one or more of those ingredients is exceeded, the

product is not bread as defined. I accept the respondent's submissions. The bread in question is, in fact, a sweet dough and the trial judge did not fall into error in so concluding.

68. The appellant argues that the relevant ingredients must all be present in the stated percentages before a dough may be excluded from the word "bread". But on a plain reading of the section, the use of the word "any" must mean "any one of" as the word "any" precedes a list.

Conclusion

69. The bread used by the appellant does not come within the definition of "bread" in para. (xii)(d)(II) and is therefore excluded from the zero rate of VAT.

70. The bread supplied by the appellant therefore falls within the Sixth Schedule paragraph (iv) as it is not "bread" as defined in para. (xii)(d)(II) and as the bread is supplied as heated sandwiches, the supply of which falls within the Sixth Schedule para. (iv)(b) or (c).

Section 11 (1A)(b) of the Act
71. The appellant submits that section 11 of the Act means that, in effect, the goods and services "specified" in any paragraph of any schedule refers to the provisions of that particular schedule and to no other provision of any other schedule. This does not appear to me to be a proper construction of the words of that section, or indeed a sensible or logical construction and I conclude that the trial judge was correct in rejecting this submission.

72. The appellants offered no authority to support that proposition and it seems to me that the argument fails to respect the principle that the words of a statute are to be read in the light of the Act as a whole.

73. It follows, therefore, that the trial judge was also correct in rejecting the appellant's contention that the exclusion of beverages specified in the Second Schedule para. (xii) sub-para. (b), from the class of heated drinks under the Sixth Schedule, para. (iv), means that heated drinks are excluded from the Sixth Schedule entirely.

The Principle Against Doubtful Penalisation
74. Statutes which concern an individual's liberty or property have been construed strictly by the courts so that a person should not be penalised as a result of a provision which is unclear. In the context of a criminal statute that imposes a penal sanction, the words in the statute must be plain and unambiguous in order that the conduct in issue is identified as an offence. However, it is important to note that the principle against doubtful penalisation applies only insofar as the provision in an enactment is ambiguous and such ambiguity remains after other canons of interpretation have failed to resolve it.

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

76. Moreover, as the appellant is seeking to avail of a special rate of VAT, the onus is on it to bring itself within one of the special headings in certain schedules to the Act, as described by Fennelly J. in *MacCarthaigh (Inspector of Taxes) v. Cablelink Ltd* [2004] 1 ILRM 359 wherein he determined at p.362:

> "where tax is applied at the full standard rate, there is no need for special headings. The schedules to the act of 1972 have been amended on many occasions. It is necessary to mention briefly the statutory headings which have been debated in the course of the present repayment claim. Unless they could be brought within one of the special headings specified in certain schedules to the VAT act, the connection and reconnection services supplied by the taxpayer, were to be taxable at the standard rate."

77. By seeking to rely on the principle, the appellant ignores this authoritative dictum of Fennelly J.

78. I am not satisfied that the appellant has brought itself within a specified heading under the schedules to the Act. Accordingly, it follows that there was no error in the trial judge's finding.

Fiscal Neutrality and Legal Certainty
79. The trial judge stated that there was no factual basis on which to make the argument that there had been a breach of the principle of fiscal neutrality. Keane J cited K Oy, Case C-219/13 [2015] STC 433, where Advocate General Mengozzi summarised the principle of fiscal neutrality and it bears repetition as follows:

> "37. According to the case law the principle of fiscal neutrality, which is inherent in the common system of that, precludes treating similar goods or services, which are those in competition with each other, differently for VAT purposes. This is therefore an expression of the general principle of equal treatment in matters relating to that."

80. The judge quoted further from the judgment as follows:

> "To determine whether goods or services are similar, account must be taken primarily of the point of view of a typical consumer. Goods or services are similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one or other of those goods or services."

81. The trial judge therefore concluded that there was no basis upon which he could or should indeed interfere with the Appeal Commissioner's finding that the principle of fiscal neutrality did not operate to apply the zero rate as argued by the appellant and this was, in my view a proper finding by the judge.

82. The principles of fiscal neutrality require like goods to be treated in a similar fashion but do not preclude the distinction made in the Schedule between, for example, bread and sweet dough or between the supply of heated drinks and other drinks.

83. Similarly, the trial judge rejected the appellant's argument concerning legal certainty and the distinction between heated sandwiches and cold sandwiches and relied upon the decision of *Commissioners v. Procter & Gamble*, when Jacobs J. observed succinctly that:

> "putting the point another way: you do not have to know where the precise line is to decide whether something is on one side or the other."

84. I am satisfied that the judge was correct in this respect.

Conclusion

85. Accordingly, I am satisfied that the High Court judge did not err in answering the six questions of the case stated in the affirmative and the appeal is dismissed.