

**THE HIGH COURT**

[2022] IEHC 253  
**Record No. 2021/7R**

**BETWEEN**

**LISTOWEL RACE COMPANY LTD**

**APPELLANT**

**AND**

**REVENUE COMMISSIONERS**

**RESPONDENT**

**JUDGMENT of Ms. Justice Baker delivered on the 22nd day of April, 2022**

1. A statutory exemption from corporation or income tax is afforded to sporting bodies in respect of some or all of their income, I shall refer to this tax exemption as the sporting exemption in this judgment for convenience. The sporting exemption is undoubtedly of great financial and even community benefit and was first introduced with the aim of fostering national games at the foundation of the State, at a time when those games benefitting from the exemption were operating on a smaller scale than those now operating and earning income in the State. Sport has undoubtedly changed a great deal in many respects in the intervening period, sport is now a profession for some, a business for others, yet remains a purely recreational activity for a great number more. This judgment touches on many of those fundamental ideas about what sport is, but more precisely whether a particular sporting activity falls within the meaning of the legislation that allows for the statutory exemption.
2. This judgment is given in a case stated by the Tax Appeal Commissioner (“the Commissioner”) at the request of the Listowel Race Company Ltd (“the appellant”) on account of his decision that it be refused the sporting exemption.

**History of the legislative exemption**

3. The sporting exemption has a long history rooted, it would seem, in a desire at the foundation of the State to support and foster national games and sport. Section 8 of the Finance Act 1927 (“the Act of 1927”) granted specific exemption from tax of the income of bodies established to promote the games of “Gaelic football, hurling and handball”:  

“Exemption shall be granted from tax under Schedule D of the Income Tax Act, 1918, in respect of so much of the income of any body of persons established for the purpose of promoting the games of Gaelic football, hurling, and handball or any of them as the Revenue Commissioners are satisfied has been or will be applied to such purpose.”
4. Following a submission by sporting groups to the then Commission on Income Taxation in 1959 regarding an extension of this exemption, the Commission recommended an extension of the Act of 1927 and “that the income of all amateur sports bodies which is directly applied to promote sports activities should be exempt from income taxation, so far as not already exempted.” This led to the introduction of relief for a broader range of sports or games by s. 2 of the Finance Act 1963:

“Exemption shall be granted from income tax in respect of so much of the income of any body of persons established for the sole purpose of promoting athletic or amateur games or sports as is shown to the satisfaction of the Revenue Commissioners to be income which has been or will be applied to that purpose.”

The recommendation that the qualifying body be one that promotes amateur sport only was not reflected in the language of the section which used the less clear phrase at the centre of this case stated: “athletic or amateur games or sport”.

### **Current Legislation**

5. The current exempting provisions are in somewhat different terms, but do contain the same phrase, enacted by s. 9 of the Finance Act 1984 and repeated in s. 235 of the Taxes Consolidation Act 1997 (“the TCA”), s. 235(2) of which provides:

“(2) Exemption from income tax or, as the case may be, corporation tax shall be granted in respect of so much of the income of any approved body of persons as is shown to the satisfaction of the Revenue Commissioners to be income which has been or will be applied to the sole purpose specified in subsection (1)(a).”

6. Section 235(1)(a) of the TCA defines for the purpose of that section an “approved body of persons” as

(a) any body of persons established for and existing for the sole purpose of promoting athletic or amateur games or sports, and [...]”

Section 235(1)(b)(ii) provides that the “approved body of persons” does not include

“(b) [...]”

any such body of persons to which the Revenue Commissioners, after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them, give a notice in writing stating that they are satisfied that the body—

- (I) was established for not the sole purpose specified in paragraph (a) or was established wholly or partly for the purpose of securing a tax advantage, or  
(II) being established for the sole purpose specified in paragraph (a), no longer exists for such purpose or commences to exist wholly or partly for the purpose of securing a tax advantage.”

### **Factual backdrop**

7. The appellant provides facilities for horse racing at premises in Listowel, County Kerry. Part of its property is owned, and part held under a long lease, and comprises a racetrack and infrastructure such as stands, parade ring, restaurants and bars etc. The town of Listowel has had a long association with horse racing going back to the mid-nineteenth century, and the appellant, following its incorporation in 1949, took over the organising of races from a local committee. The appellant runs flat and national hunt racing at the “Listowel Races” each year in June and September, events which are run over several

days and can attract crowds of up to 30,000 on a single day. The company's income derives from admission tickets, the sale of media rights, concessionaire receipts (food and drink), race card sale, and race sponsorship by local businesses and others.

8. The memorandum of association of the appellant shows that its primary objective "is to promote and organise horse racing for viewing by the public at Listowel Race Course, Listowel, County Kerry". Certain powers are identified for the "exclusive furtherance" of that primary objective, including at 3(b) of the memorandum, the power to promote the interests of agriculture in all its branches including horse breeding and livestock breeding and for that purpose to hold races, shows, contests and exhibitions of all kinds. It also has as a purpose of its primary objects the power to promote the interests of the inhabitants of Listowel and its surrounding county and for that purpose to promote and encourage "open air sports and games of all kinds" and to hold and carry on "games and sports meetings and to provide accommodation for such purpose". It has the usual power to acquire land, raise security on, invest in and to sell, manage, develop, lease etc. all or any part of its undertaking property and rights.
9. Forty-five per cent of its cash receipts in the year 2012 comprised of prize money contributed by Horse Racing Ireland ("HRI"). The balance came from admission fees, race cards, rental income for rooms catering, bookies, and other income from the sale of media rights. €124,637 of that derived from the activity of facilitating gambling activity on site. Its primary expense was for administration, wages and salaries, the maintenance of enclosure and enclosure buildings, track senses and equipment. Directors' expenses came to €7,600 in that year.
10. The accounts for the ten-month period ended 31 October 2013 show a proportionate increase in income and a somewhat different treatment of prize money which is now shown deducted directly from the figure for income from HRI.
11. The company does not pay a dividend and all of its income is applied towards the maintenance and upkeep of the facilities at Listowel.

### **Horse Racing Ireland**

12. HRI was established by s. 5 of the Horse and Greyhound Racing Act 2001, taking over the function of the Irish Horseracing Authority, and is the governing body for horse racing in Ireland. Its statutory function is to regulate and authorise the running of racecourses and races, promote the breeding of horses, the development of stud farms and ancillary services.
13. Its general functions are described in s. 8 of the Act to include registry office functions (the naming of horses), horse race entries and declarations, racing calendar publications, stake holding of race entry funds and prize money and registration of race horse owners. It also has power to provide and maintain mobile track equipment including starting stalls and photo finish and camera patrol equipment. It represents Irish horse racing internationally, negotiates income from media rights, and provides financial and other support to maintain and improve the health and welfare status of the thoroughbred horse

and assist educational and other institutions and organisations in training and education facilities.

14. HRI therefore determines what races are to be held and fixes the race programme and fixtures. It is also the conduit through which public funds are channelled to inter alia racing clubs. It does not organise the races nor does it always provide the facilities (other than occasionally mobile track equipment) in which the races happen. For the purpose of the present appeal the appellant company provides all of the facilities including the race track, stables, clubhouse, arenas etc. at which the annual race meetings happen in Listowel.

#### **Decision of the Commissioner**

15. The appellant made an application to the Revenue Commissioners ("the respondent") for a sporting tax exemption pursuant to s. 235 of the TCA. The application was refused for the reasons set out in letters dated 27 May 2013 and 15 April 2014: that the appellant was not established for the sole purpose of promoting an athletic or amateur game or sport and that the appellant has not shown to the respondent's satisfaction that its income has been, or will be applied, for the sole purpose of promoting an athletic or amateur game or sport.
16. The appellant appealed this decision to the Revenue Commissioners and that appeal was transferred to the Tax Appeals Commission (TAC) in January 2017 following its establishment in March 2016: see the judgment of Costello J. in *Deane v. The Revenue Commissioners* [2018] IEHC 519 at para. 6, that jurisdiction of the new body is no different from that of the old Revenue Commissioners.
17. The appeal to the TAC was heard on 30 September 2020 by Appeal Commissioner, Mr. Charlie Phelan ("the Commissioner"). The Appeal Commissioner upheld the decision at first instance, and in a written determination dated 24 October 2020 concluded that the appellant was not a body or a body of persons established for and existing for the sole purpose of promoting athletic or amateur games or sports.
18. His primary finding was:

"The appellant provides facilities in which HRI carry on the activity of horse racing, HRI controls every element of the activity of Horse racing from the entries, type of race, weights, jockeys, trainers, prize money, bookmakers, SIS and medical access, Tote Ireland etc."
19. He also found that the appellant has significant income from ancillary activities, including concessionaire receipts for food and drink, rental receipts, catering income, pitch fees and a levy, income from bookies for the entitlement to trade at the venue owned by the appellant, and the Tote Ireland stipend.
20. Submissions were made to the Commissioner on whether he should apply a disjunctive or conjunctive reading to s. 235, however, whilst he made certain observations at para. 116 of his determination in light of the judgment of O'Donnell J. (as he then was) in

*Bookfinders v. Revenue Commissioners* [2020] IESC 60, ultimately, he concluded that, as the appellant did not exist for the sole purpose of promoting athletic or amateur sports or games, it could not qualify for the exemption.

21. The Commissioner took no view on whether horse racing was a sport, amateur or otherwise, but formed the view that the gateway requirement that the body be established for and existing for the sole purpose of games or sports was not met, because the appellant had significant income from other sources and because he found that it is HRI, and not the appellant, that carries out the activities of horse racing at Listowel and controls every element of it.
22. His reasons, and what the appellant argues is an incorrect approach to the statute and to the evidence, forms the basis of this case stated.

### **The Appeal to the High Court**

23. This is the appeal by way of case stated from the decision of the Commissioner pursuant to s. 949 of the TCA:
  - “(1) Any person aggrieved by any determination by the Revenue Commissioners, or such officer of the Revenue Commissioners (including an inspector) as they may have authorised in that behalf, on any claim, matter or question referred to in section 864 may, subject to section 957 and on giving notice in writing to the Revenue Commissioners or the officer within 30 days after notification to the person aggrieved of the determination, appeal to the Appeal Commissioners.
24. On 18 February 2021, the Appeal Commissioner stated the case for the opinion of the High Court on the five questions proposed by the appellant in its notice dated 30 November 2020:
  1. Whether the Commissioner was correct in determining that the appellant does not exist for the sole purpose of promoting athletic games or sports;
  2. Whether the Commissioner was obliged to, firstly, determine the correct legal interpretation of the expression “athletic or amateur games or sports”, and then, secondly, to apply the legal interpretation to the factual situation;
  3. Whether section 235 of the TCA is confined to amateur sports only, to the exclusion of professional sports;
  4. If the answer to Question 3 is “no”, whether horse racing is a “sport”;
  5. If the answer to Question 4 is in the affirmative, whether horse racing is an “athletic” sport.
25. In summary, the appellant submits that the Commissioner erred in determining that the appellant was not established for the “sole purpose of athletic or amateur games and sports” as it was wrong to determine that HRI’s involvement, and the manner by which

the appellant derived its income, was determinative of its purpose. It submits that the findings of fact that led him to such a conclusion were not based on the evidence.

26. The respondent submits that the Commissioner was correct to have regard to the source of the appellant's income and that his findings were based on the evidence.

**Jurisdiction of the High Court on an appeal by case stated**

27. The parties agree that the correct approach to the findings of the Commissioner on a case stated under taxation legislation is set out in *Mara (Inspector of Taxes) v. Hummingbird Ltd.* [1982] ILRM 421 which held that findings of primary fact are not to be set aside on a case stated unless there was no evidence whatsoever to support them, but conclusions drawn from primary facts which are either a result of a wrong view of the law, or an incorrect interpretation of documents, or any other conclusion which is properly speaking a mixed question of fact or law is one that may be set aside by the court.

28. Kenny J. described the jurisdiction of the court on a case stated as follows:

"A Case Stated consists in part of findings on questions of primary fact, e.g. with what intention did the taxpayers purchase the Baggot Street premises. These findings on primary facts should not be set aside by the Courts unless there was no evidence whatever to support them. The Commissioner then goes on in the Case Stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the Court should approach these in a different way. If they are based on the interpretation of documents, the Court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the Commissioner. If the conclusions from the primary facts are ones which no reasonable Commissioner could draw, the Court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable Commissioner could draw. [...]" (at p. 426)

29. This test as further explained by Blayney J. in *Ó'Cuilacháin v. McMullan Brothers Limited* [1995] I.R. 217 at p. 222, cited with approval by the Supreme court in *MacCarthaigh (Inspector of Taxes) v. Cablelink Ltd and Others* [2003] IESC 67, [2003] 4 I.R. 510:

- "1. Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.
2. Inferences from primary facts are mixed questions of fact and law.
3. If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.

4. If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.
5. Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law.”
30. An example of the exercise of the jurisdiction is found in *Belville Holdings v. Cronin* (Unreported, High Court, 14 May 1985) where Carroll J. set aside the decision of an Appeal Commissioner as “there was no evidence at all on which he could base his finding”.
31. The parties both contend that for the purposes of assessing the approach of the Commissioner to the facts it is appropriate that the Court may have regard to the transcript of the hearing: *Byrne v. Revenue Commissioners* [2021] IEHC 262. Twomey J. rejected the argument of the respondent that there was no valid case stated in circumstances where there was no claim by the appellant that the Commissioner applied the wrong legal test, but held that the Commissioner’s determination was to be regarded as a mixed question of fact and law.

**Submissions of the appellant**

32. The appellant submits that the Commissioner erred in law in his determination that, by reason of its sources of income and HRI’s involvement, that the appellant was not established for the “sole purpose of promoting an athletic or amateur game or sport”. The appellant submits that by coming to his conclusion from an analysis of its income the Commissioner erred in failing to have regard to the different purposes of ss. 235(1) and 235(2) of the Act, as counsel argues that s. 235(1) operates as a gateway provision, whereas s. 235(2) operates to permit the ascertainment of that part of the income of a qualifying entity entitled to the exemption.
33. The appellant points out that sports bodies often will seek to generate income by activities not related to sporting activity. Examples given include: the rental of stadiums for concerts, the sale of branded attire, raffles etc., sources which are merely a means to an end, rather than an end in themselves. It is said that all income of the appellant is directly related to the race meetings it organises, unlike that of other sports bodies that qualify for the s. 235 exemption. Further, the HRI receipts are matched by prize money made to the connections of the winning horse and the appellant derives no profit therefrom.
34. The appellant states that there was no evidence to support the Commissioner’s determination that it is HRI that carries out and controls every element of the activities of horse racing at Listowel, as HRI is a regulatory body.

**Submissions of the respondent**

35. The respondent submits that the Commissioner was correct to have regard to the sources of the appellant's income, the manner in which it carried out its activities, HRI's involvement, and the appellant's memorandum of association in making the determination that the appellant was not a body established for the "sole purpose of promoting an athletic or amateur game or sport". Moreover, the findings of the Commissioner on the involvement of HRI and its sources of income were based on the evidence.
36. The respondent rejects the appellant's submission that the Commissioner was confused about the nature of ss. 235(1) and 235(2). Rather the Commissioner had regard to the sources of income, as reflecting the activities being carried on by the appellant and his focus was entirely on s. 235(1). On this basis the respondent says that Commissioner Phelan rightly determined that the purpose of the appellant was to provide facilities for HRI to carry on horse racing at the appellant's premises in Listowel.

**Finding of fact**

37. The Commissioner made several findings of fact many of which are not contentious and some of which have been recited earlier in this judgment. Of note for the purposes of this case stated are the findings that jockey racing in professional horse racing is an "elite" activity more akin to an industry than to a sport, that the timing and schedules of racing are regulated by HRI, and that the purpose of the appellant is to create a structure to allow professional horse racing at its premises. The primary finding of the Commissioner is that the control of and responsibility for race programmes and race fixtures at Listowel lies entirely with HRI. Two witnesses gave evidence for the appellant.
38. The first witness was Dr. Adrian McGoldrick, the Senior Medical Officer of the Irish Horseracing Regulatory Board (IHRB), who has acted as medical officer for 35 years with the racing committee at the Curragh and then at the Turf Club with the role of overseeing the welfare of riders and protocols for the future health and safety of racing.
39. He gave evidence that the jockeys who ride at Listowel function at the "very upper limits of the physical requirements of an elite athlete" (p. 16 transcript) and that he considered professional jockeys to be elite athletes although he accepted that the horse did "a significant amount of the work".
40. With regard to the operation of the Listowel Racecourse his evidence was that HRI is the governing body for racing in the country, and that the Listowel Festival is one of the most important festivals in the year (p. 18). He accepted that the horse racing industry is a large one employing 35,000 people involving the breeding, exporting, transportation of race horses and the logistics around the racing activity. HRI regulates the schedules, the timing of race meetings, and the safeguards in respect of gambling or betting.
41. It was put to him in cross-examination that the purpose of the appellant company is to create a structure to allow professional horse racing to occur on its racecourse and he accepted that that was the case. That answer would seem to be the evidential basis on which the Commissioner came to his view that Listowel was not a promoter of sports

activities but that it created the structure to allow professional horse racing but that all aspects of the racing were regulated and fully controlled by HRI. He accepted too that the purpose of HRI was to enhance the industry and that racing is the "showcase" for the industry.

42. In re-examination, his evidence was that the local body governing the racecourse had responsibility for getting the track ready for the day, overseeing the maintenance of the track, getting the facilities ready for guests, up to the point where it hands over responsibility to HRI. He said also that the actual development and promotion of the racecourse and race meeting would be done by the local committee (p. 30).
43. The evidence of Mr. John Galvin, former chairman and current director of the appellant company was that HRI was established to control racecourses and licensed meetings and that it was not open to the appellant of its own volition to decide what races it is going to have, without permission of HRI, that the appellant did not hold race meetings at which betting did not occur and that one of the purposes of the appellant was to provide structure to the gambling aspect of the race meetings.
44. He explained that HRI in the relevant financial year gave the sum of €750,000 to the appellant all of which was applied to prize money. His evidence was that the company channelled the money from HRI but that the money did not remain in its accounts and as he put it the company "would never see any of that money". It has no impact on the profit. His evidence was that any surplus at the end of a financial year is applied to the business of the company which he described as the promotion of horse race meetings in Listowel and towards the betterment and improvement of the facilities there. No dividend is ever paid. The directors are not paid a salary.
45. With regard to the involvement of HRI he too accepted that the appellant company could not of its own volition decide what races it was going to have and had to organise the races in conjunction with HRI (p. 42). He disagreed with a proposition put in cross-examination that the purpose of the appellant company was "an extension of the activities of HRI" and his answer was that the activities "relate to the provision of facilities and to enhance the sport that we're there to enable" (p. 45). The appellant is not involved in the training of jockeys although they have local trainers and local jockeys who attend the Listowel Races. In answer to the question as to whether the appellant company had any junior members who were involved at a young age, he accepted that the company did not operate on that basis but that local people were encouraged to get involved in the sport by reason of the fact that the racecourse exists and that the races are held there annually. He accepted that the actual purpose of the company is to "provide a structure for races". He also accepted that the races took place at Listowel were not amateur races.
46. In response to a question of whether the company was in fact promoting professional jockeys his answer was the function of the company was to "enhance the sport" and that all the expenditure of the company went into enhancing and developing the facilities. When pressed on this his answer was: "we are about promoting a sport. It is an elite

sport". (p. 50). He suggested a comparison with the Irish Open Golf Championship which did not encourage children to play and which was equally an elite sport.

### **Gambling activity**

47. HRI also provides structures to support gambling at race meetings and it is useful to pause here and discuss the gambling aspect of horse racing, an aspect which is well known and somewhat notorious. The appellant does not benefit from betting on its races or at the racecourse although it may charge a licence fee to bookies who operate from its premises. Betting can and does happen on any sport but it also takes place on the likelihood of a whole range of possible events, from whether there will be snow at Christmas to who is to be the next Taoiseach.
48. The racecourse has its own tote and the respondent suggest that this means that the appellant facilitates and provides structures and facilities for persons to place bets at the races. Betting is undoubtedly an industry, but the betting around race meetings is not the activity carried out by the appellant company which organises and facilitates the race meetings, the result of which may be the subject of a bet but may equally simply be for the enjoyment of the persons watching.

### **Treatment of the evidence**

49. Commissioner Phelan made no determination on whether horse racing is a sport within the meaning of the Act, and therefore he did not come to consider whether a qualifying sport had to be amateur. He also did not determine whether a disjunctive or conjunctive interpretation of s. 235(1)(a) was correct for the purpose of the appeal. He found against the appellant on the much narrower ground that the appellant was in receipt of certain income which meant as a matter of fact that it did not exist for the sole purpose of promoting athletic or amateur games or sports. He did this in the light of his analysis of the income of the appellant and the role of HRI.
50. At para. 119 the Commissioner made a finding that the appellant "cannot be said to exist for the sole purpose of promoting" horse racing primarily because he found that it was HRI that carried out the activity of horse racing at Listowel and controlled every element of it, and also that the appellant had sufficient income from secondary activities.
51. With regard to HRI, the Commissioner found as a matter of fact that the racing programme is set by HRI which is a conduit through which public funds are channelled pursuant to the Act of 2001. HRI regulates the schedules and timing of all race meetings and regulates the turf accountants or bookies and the purpose of HRI is to supervise some activities of and to enhance the industry of horse breeding and sales.
52. He also accepted that sponsorship income had no bearing on the profit and loss account, that sponsorship for races was paid directly to HRI which pays out the prize money to the owners, and that any surplus made by the company is solely applied to its business which he considers not to be the promotion of a sport but of horse racing meetings in Listowel.
53. He expressly made no finding as to the meaning of the phrase "amateur or athletic games or sports".

### **Discussion on conclusions of Commissioner**

54. The first point to be addressed is that approach taken by the Commissioner to the income of the appellant. The evidence overwhelmingly was that all income of the company was applied to the maintenance of its horse riding facilities.
55. In the case of the appellant, its income is entirely derived from race meetings, although some of that income comes to it by way of funding from HRI. The income of the appellant is derived from admission payments, rental receipts, catering income, pitch fees and a levy, income from bookies who trade at the racecourse, stipend from Tote Ireland and receipts from HRI. The receipts from HRI augment prize monies at race meetings.
56. Counsel on behalf of the appellant argues that income is relevant only to the application of s. 235(2) but I consider that the Commissioner was correct that in seeking to ascertain the purpose for which the appellant was established and for which it continues to exist the evidence of the sources of its income must be a relevant, and in many cases a highly relevant, indicia of its purpose and function. Income is mentioned in s. 235(2) for the purposes of identifying that part of the income of a related body which is to be afforded the exemption. It is not directly, at least, to be treated as an indication of whether the activity carried out by the body is a sporting activity. A body may have income from other sources and it may have sporting income which is not applied to the promotion of a sport. But the income of a body and how it applies it must be an indication of the activity it performs, and of the purpose for which it exists, but is no more than an indicator or evidence as to that purpose.
57. That view is enforced by the fact, that I noted above, that certain bodies which are regarded as exempt are known generally to derive income from sales of merchandise, raffles etc. Income may be one of the indicia of purpose, but is not determinative.
58. The source of a body's funds, be it income, grants or other sources must be seen as part of the evidence of its purpose, but the Act does not envisage a narrow interpretation that exempts only those sporting bodies who derive all of their income from sporting activity. In that regard the argument of the appellant as to whether income for this purpose is gross or net income does not arise for consideration. Most, if not all, sporting bodies, or at least those in the wider public eye, derive income from the sale of merchandise, the rental of stadium space for concerts (Croke Park, the Aviva Stadium, and Páirc Uí Chaoimh being examples in public knowledge) and it may be that considerable income is derived from those activities which are not in any sense a sport.
59. Income is not the sole factor in the ascertainment of the purpose for which an entity was established and exists. In the case of a body corporate its objects clause must be a critical factor and the memorandum of association of the appellant company clearly identifies the promotion of horse racing as its primary object. The other objects in the memorandum are clearly expressed as powers ancillary to and to be engaged for the purposes of that primary purpose or object. The evidence before the Commissioner was that the company reinvested all profits back into the maintenance and development of its facilities.

60. The Commissioner did note the contents of the memorandum of association but made no findings linked to the objects clause.
61. The evidence did not bear out the conclusion of the Commissioner. The Commissioner made no finding with regard to the constitution of the company or its history. Whilst in the case stated he did make reference to the memorandum of association, in his determination he did not explain the connection that he drew between sources of income of the appellant company and its purpose as identified in its constitution, and as borne out by the evidence of 150 years of operating the races at Listowel. Whilst I do not consider he was incorrect to take account of the income of the appellant company, it seems to me that the analysis of the role of HRI is legally flawed. He accepted on the one hand that HRI is a regulatory body, that its regulatory function involved it regulating races and gambling activities on the racecourse, but conducted no analysis of the relationship between the regulatory body and the appellant company, and no analysis of the statutory function of HRI whose functions are wholly controlled by the provisions of the Act of 2001.
62. While there was ample evidence on which he could conclude that HRI controlled and regulated the race meeting, he failed to make the connection between the regulator of the activity and the body who performed or conducted that activity. It is the nature of regulation that the regulator be independent of the body or activity it regulates. The evidence was HRI regulates, and it "controls" the activity of racing in that sense, but does not carry out that activity. Were it to be the body that carried out the activity one would assume that a different body would be the regulator.
63. Furthermore, the Commissioner failed to conduct an analysis of what it means to "promote" a sport. The gateway provision under the Act is that a body be established and exist for the promotion of a sport. While he was entitled not to accept without demur the evidence of the two witnesses as to fact, that the company was established and existed to promote horse racing in Listowel, as a matter of law he was required to consider whether the evidence and the factual findings he made regarding the role of HRI, the sources of income of the appellant company and how it applied that income meant that its activity was the "promotion" of a sport. He did not make any determination as to whether the appellant company promoted horse racing at Listowel.
64. It seems to me that he fell into a fundamental error in basing his conclusion on the role of HRI, a regulatory body, when he ought to have had regard to the nature of the activity performed by the body that was regulated.
65. He also fell into error in failing to have regard to the use to which the appellant made of its income, and to come to a determination as to whether the fact that the uncontested evidence was that the company did not pay a dividend and applied all of its income to the development and maintenance of its facilities at Listowel meant as a matter of fact and law that it was a "promoter" of the activity conducted at its venue.

66. Whether betting is part of the promotion of games or sports is a contentious issue, but leaving aside any questions of morality or whether it is an addictive activity that can cause economic catastrophe for individuals and families, betting occurs on many if not all sporting activities and sports with a very large following in the country. For instance, GAA matches will be avidly watched by gamblers or people wishing to place a bet occasionally who could not be called gamblers, that does not mean that what is played is not a sport. It may be that the existence of betting has raised the profile of the sport of horse racing, as it has in regard to international soccer, golf etc., where the punters are anxious for broad media coverage which in turn encourages media companies to play large sums for broadcasting rights. However, it is not, in my view, obvious that the presence of facilities for gambling or betting activity on the racecourse is enough to make the racing and the organising of the racing not a sport.
67. Finally, I am not convinced that the fact that large prize monies are paid at the race meetings is suggestive that horse racing operates as an industry, although it is probably the case that much of the prize money is used to support breeding and training of horses. It is common knowledge that top-tier professional footballers earn very large salaries and those salaries could broadly be equated to the prizes paid to the owners and riders of horses. The giving of prizes for a race is part of what makes it a competitive sport. It does not make the activity an "industry".
68. The Commissioner's reasoning which led him to the conclusion that the appellant had not been established, and does not exist, for the purposes of the sporting exemption on account of the monies received from non-sporting sources, is an error of law and the true test is how and for what purpose those monies are applied.
69. I consider that the answer to Question 1 is that the Commissioner's conclusion that the appellant company did not exist for the sole purpose of promoting athletic games or sports was based on an inadequate and incorrect analysis of the gateway provisions in s. 235(2). The conclusions the Commissioner drew from the primary facts arose from a mistake in reasoning regarding the relationship between the regulatory body and the body it regulated, and that he misdirected himself in law in failing to have any consideration to what the promotion of a particular activity might entail.
70. The inference he drew is a mixed question of fact and law and it seems to me that it was incorrect.

**The second question**

71. The appellant argues that the Commissioner took a wholly wrong approach and that he should have first determined whether horse racing is a sport and then made a determination on the contentious question of whether only amateur sport is included in the definition.
72. The respondent argues that the approach adopted by the Commissioner was correct, and when he took the view that the sole purpose of the appellant was not the promotion of

sports or games, whether they be athletic or amateur or otherwise, he did not need to consider the interpretative question.

73. Because of the view I take as to the Commissioner's approach to the evidence, I do not think this question arises. If the Commissioner decided as he did, albeit wrongly, that the activity of the appellant company could not be a sport, he did not need to go further and make a distinction between amateur and professional sport.

74. However, in general it should be noted that the operative subsection, which creates the exemption, is s. 235(2) which exempts from corporation tax the income of any approved body which has been or will be applied for the sole purposes identified in s. 235(1)(a). To qualify a body must be an "approved body" as defined in s. 235(1) which identifies the class of approved body to whom the exemption applies, the relevant one being s. 235(1)(a):

"Any body of persons established for and existing for the sole purpose of promoting athletic or amateur games or sports."

75. The balance of s. 235(1) identifies those bodies excluded from the definition and has no relevance to this judgment.

76. Thus, the legislation envisages a two-stage process: first, a determination if a body is an "approved body" within the meaning of the legislation; and then the ascertainment of what part, if any, of the income of that body is applied towards the relevant sporting activities.

77. A decision-maker is obliged to first ask the question whether a body qualifies for the exemption, whether it is a body "established for" and "existing for" the sole purpose of promoting athletic or amateur games or sports, and to then assess whether if it is such, what part of its income has been or will be applied for the purposes of promoting games or sports.

78. That process is the logical approach to assessing whether an applicant satisfies the legislative test, but individual facts may present that mean Revenue never get to ask the second question. No *a priori* methodology of interpretation exists for the purpose of the determination of an application of the exemption. A body may fail at the first hurdle, and in those circumstances, Revenue does not have to adopt what could become a formulaic exercise of ascertaining whether the activity engaged is a sport. But to come to the answer by reference only to the question of whether an entity has more than one purpose or function may fail to have regard to the fact that some of those purposes or functions may be supportive or ancillary to a primary or indeed sole purpose. In all cases it is matter of fact.

### **The third, fourth and fifth questions**

79. The third question asks whether s. 235 of the TCA is confined to amateur sports only, to the exclusion of professional sports. The fourth question is premised on a negative answer to the third question and asks whether horse racing can be considered a sport.

The fifth question is premised on an affirmative answer to the fourth question and asks whether horse racing is an athletic sport. There is significant overlap between these questions and so it is useful to deal with them together.

80. The difference between the parties may be summarised as this: the appellant argues that a plain reading of the definition s. 235(1)(a) must read "or" as disjunctive in effect and meaning, such that, provided a body establishes to the satisfaction of the respondent that it is engaged in the activity of promoting athletic or amateur games or sports and provided its income is applied in accordance with the exempting provisions, it must succeed in obtaining the exemption. The appellant argues that a proper reading of the phrase would mean that an athletic game or an athletic sport which is amateur or not amateur (professional) can qualify provided the other qualifying conditions are met. The appellant points to four possible permutations which would qualify a body for an exemption under the TCA: the activity may be the promotion of an athletic game, the promotion of an amateur game, the promotion of an athletic sport, and finally the promotion of an amateur sport. There being no suggestion that horse racing could be called a "game", the argument is that horse racing is a sport, one capable of being conducted on an amateur or professional basis and is more properly to be treated as an athletic sport engaged by highly trained and skilled jockeys and their amateur status is irrelevant to the description of the activity. The appellant rejects the proposition advanced by the respondent that horse racing is an industry and not a sport at all.
81. The respondent argues that the correct interpretative approach is to read the legislation as imposing a conjunctive requirement that the body have the sole purpose of promoting athletic and amateur games or sports. On that reading, a body does not qualify unless it can show that it promotes games or sports which are athletic and in either case the game or sport must be amateur. The respondent argues that as the appellant is engaged in the professional role of providing facilities for professional horse racing at its premises it cannot be said to promote amateur sports.

### **Interpreting the statute**

82. The methodology for the interpretation of Revenue statutes was recently considered by the Supreme Court in *Bookfinders v. Revenue Commissioners*, cited supra, where the general principle was clarified that Revenue statutes are, like all legislation, to be given their plain and ordinary meaning with a view to ascertaining the intention of the Oireachtas. That judgment concerned the interpretation of the words "food and drink" in the VAT Act, which in their context were held by the Supreme Court to be properly interpreted as disjunctive words. He said:

"As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "The words themselves alone do in such cases best declare the intention of the law maker" (Craies on Statutory Interpretation (7th Ed.) Sweet & Maxwell, 1971 at pg. 71)." (para. 63)

83. *Bookfinders v. Revenue Commissioners* cannot be read as authority for the proposition that a court is free to interpret the statutory use of the word "or" as either conjunctive or disjunctive, or equally that the word "and" is not always a conjunctive. The precise example in *Bookfinders v. Revenue Commissioners* does not offer much by way of assistance to the interpretation of the expression "athletic or amateur game or sport" at issue in the present case stated. The question is not whether the word "or", used twice in the phrase, must in both instances be interpreted as disjunctive, but rather to ascertain the meaning of the phrase taken as a whole in the context of the legislation, and specifically the exempting provisions.

**Discussion on the third, fourth and fifth questions**

84. The question for determination therefore is whether if the activity of horse racing is a sport it may qualify for the exemption even if the activity is not amateur or athletic.
85. The apparent anomaly between the fact that a body qualifies only if its sole purpose is sporting but which permits exemption only in respect of that part of income derived from that purpose which is applied to that activity was explained by McWilliam J. in *Revenue Commissioners v. O'Reilly* [1983] ILRM 34 as follows:
- "Section 349 [the predecessor to s. 235] is, in one respect, somewhat anomalous, in that it provides that only so much of the income of a body of persons established for the sole purpose of promoting amateur sports as is shown to be income which has been or will be applied to such purpose is exempt. If the sole purpose of the body is to promote amateur games or sports it is difficult to understand a provision which indicated that income might lawfully be applied for a different purpose unless it is merely intended to insure that returns will be made to the Revenue Commissioners; if the sole purpose is not to promote amateur games or sports, it would seem that no exemption at all should be granted even though a large proportion of the income was applied to the purpose of promoting amateur games or sports."
86. The conundrum resolves by treating s. 235(2) as making provision for a partial exemption in that it is to exclude that part of income which is reserved or accumulated in cash rather than reinvested or applied to a sporting activity.
87. Revenue has published bodies it regards as exempt for the purposes of s. 235 and they include well known, and less well known, sports and gaming bodies including: the Olympic Federation of Ireland; the Irish Sailing Association; the Irish Rugby Football Union (IRFU); the Football Association of Ireland; as well as various Gaelic Athletic Association bodies; school rugby clubs; yacht clubs; bridge clubs; angling clubs; rifle and pistol clubs; cycling clubs etc. The list is extensive, contains some 4,000 bodies and no distinction is made between bodies that are at least prima facie wholly amateur and those which promote a sport played by professional players and with large income from ticket or merchandise sales. For example, the IRFU is the governing body for Irish rugby, and many of the players of rugby are professionals and it seems that Revenue accepts that the IRFU is entitled to the exemption in respect of its income even when that derives from the sale of

tickets at games played by professional players. This suggests that the amateur nature of the sport, or whether the persons engaged in the sport are professionals or amateurs, is not a guiding factor for Revenue in the assessment of whether a body is an "approved body" under the provisions.

88. One body, the Tourism Related Equestrian Competitions Ireland Limited seems to have as its function the promotion of equestrian competition with a view to improving tourism in that niche area which could include racing or dressage or show jumping. I give these examples not to confirm the correctness or otherwise of the inclusion of those bodies on the Revenue exemption list, but to illustrate the broad range of activities which have been accepted by Revenue as exempt, some of which include horse riding at competitive level which again in ordinary language must be seen as "horse racing".
89. The respondent submits bodies are also involved in amateur sports, which the appellant is not. There was no evidence at the hearing to support that proposition. The list of exempted bodies does offer useful illustrations of the type of activity that is regarded as included within the definition and offers support for the proposition advanced by the appellant that non amateur or professional bodies may qualify.
90. The list prepared by Revenue has no official status and is not therefore properly speaking an interpretative tool. However, the presence of certain of the bodies I have identified on that list does make it difficult to understand how the Commissioner came to his view that horse racing was not a sport when dressage, show jumping, polo, horse hunting and horse trials are all treated as sports for the purposes of s. 235. The fact that it is played or can be played on a professional as well as amateur basis does not seem to be an excluding factor. That skill, physical endurance and fitness are required would seem to be a factor.
91. The primary argument of the respondent however is somewhat more nuanced: it is suggested that the phrase "athletic or amateur" is an interchangeable description used to broaden the scope of those bodies entitled to exemption beyond the national sports exempted in the legislation at the foundation of the State. In my view that stretches the meaning too far and the substitution of "and" for "or" imposes an additional element to the test which is not found in the plain language and is not necessary to avoid an absurdity.
92. In my view the appellant is correct that the exemption is not to be restricted to bodies which promote only amateur sports. The conjunctive interpretation advocated by the respondent is both grammatically meritless and deprives the word "athletic" of any meaning. Horse racing must be considered to be a sport, and the fact that the related industry of breeding horses exists, should not impact the interpretation of the appellant's activity which is exclusively horse racing. If it was the intention of the Oireachtas to create a disjunctively read provision, one would expect the phrase to read as follows "athletic or amateur games, or sports", the comma to reflect that the adjectives were not intended to apply to the words found after the comma.

93. Maguire on *Irish Income Tax* (Bloombury Professional, 1st ed., 2020 states at para. 18.206:

“The sporting body may be a particular club (e.g. a rugby football club or a basketball club, or it may be an association representing some or all of the clubs participating in a certain sport e.g. the Dundrum and District Croquet Club Association). Further where the word “amateur” appears it is linked only with the word “games” and does not prevent a body of persons with the sole purpose of promoting athletic games or other sports which may have some element of professional participation. However, if the making of profits is a primary purpose of the sporting body, this is likely to disqualify it from the exemption. On the other hand, a club or association which might make a profit on its activities is not debarred from the exemption, provided that its rules make it clear that any such profit can only be applied for the purposes of promoting the sports, games, etc.”

94. I consider that the Commissioner was wrong to take the view that horse racing is not a sport and if it is a sport it seems to me it must be an athletic sport, although to an extent the expression “athletic sport” is something of a tautology.
95. The respondent contends for a reading of the phrase as excluding horse racing entirely and argues that horse racing is an activity that involves the breeding and training of horses. That approach to interpretation fails to have regard to the fact that horse riding is a sport or physical activity engaged in by hundreds, if not thousands, of people in the country, young and old, and any of them would, if asked, identify their activity as a sport. Horse riding is a sport, as is horse racing – the riding of horses in competition, often but not always for prizes. I cannot accept the argument made by the respondent that horse racing, riding horses at speed in competition, is not an athletic activity if by that description it is intended to exclude from the definition a sport played professionally.
96. I consider it wrong to say that horse racing is the activity of breeding and training horses for competition. The breeding and training of the horses is ancillary to the activity of riding those horses at competitive speed. True, the race may be a place to display the skills of a horse or stables where the horse was bred or trained, but that does not mean that horse racing is itself the activity of breeding and training stock no more than the manufacture of rugby balls or footballs is a sport.
97. Finally, I do not accept the argument of the respondent that an athletic sport must be understood as one where the player has no prop or equipment, and that definition immediately excludes cycling which suggests an absurdity.
98. The purpose of the exemption created at the foundation of the State can readily be seen as one to encourage physical activity in the population generally but also to foster the love of, and the playing of, our national games. The exemption was broadened, presumably because certain obviously meritorious entities, such as camogie, which is played by women, were not included in the original exemption, but at all times it would seem that the purpose of the legislation is to promote activity from which the public or

individual cohorts benefit because the activity is athletic or involves intellectual or tactical skills such as chess or bridge. It is not apparent that only amateur sports were to be exempted. The professional sports person will not of course be entitled to seek the exemption, which is provided to those bodies which promote the sport and whose is not a profit for distribution to shareholders, members or owners.

99. The Commissioner took the view that horse racing is an industry and not a sport and leaving aside entirely the question of whether it is amateur or athletic, I consider that he was incorrect in this view and that this was an error of law as it involved an interpretation of the statute. Further, he seemed to proceed on an erroneous assumption that the activity is either an industry or a sport, and this is an error of principle as the question was not how to characterise the activity of horse racing in general or to examine its links with the industry of breeding and showing horses, but the purpose of the appellant. He took too narrow an approach to the distinction by treating the categories as mutually exclusive. A large football club may be an economic enterprise but may involve also the playing of a sport.
100. The horse breeding industry is undoubtedly of substantial economic depth, but the appellant does not breed or train horses. HRI likewise is not involved in horse breeding, although it must be the case that horses that run at the very high profile Listowel Races might showcase the skills of their breeders or trainers. To an extent it might, perhaps cynically, be said that a sport such as soccer is an industry, but that statement would be more a criticism of the money involved and the value of, for example, Champions League clubs, and to the huge amounts paid for the transfer or "purchase" of players, the highest transfer fee stands at a staggering €222 million for the transfer of Brazilian soccer player Neymar from Barcelona to Paris Saint-Germain. Indeed, football clubs themselves are bought and sold for vast sums of money, but regardless it is unlikely that the spectators at a soccer game would ever say that they were watching an industry, except perhaps in anger or cynicism.
101. But the Commissioner in my view fell into error in deciding that if horse racing is an industry, which he considered it was, that this fact could be wholly dispositive of the question of whether the appellant promotes the sport of horse racing. The activity could be both an industry, in the broad sense, and a sport.
102. This application was not brought by way of judicial review and I do not propose considering the case in the light of the judgment of Power J. in *JSS v. Tax Appeals Commission* [2020] IECA 73, or of Clarke J. (as he then was) in *AP v. Minister for Justice and Equality* [2019] IESC 47, [2019] 3 I.R. 317, which were judicial reviews arising from an alleged failure of the decision-maker to set out the reasons for a decision. The questions asked in the case stated do not require or permit me to consider the matter from that point of view.

**Answers to case stated**

103. Accordingly, I would answer to the questions raised in the case stated as follows:

1. No
2. Does not arise
3. No
4. Yes
5. Yes