TC03992

Appeal number: TC/2013/02713

VAT – mixed bag of benefits to supporters making 'donations' to charity – whether benefits supplied 'for' the 'donations' – yes – whether single or multiple supplies – single – whether element of single supply could be zero rated – no – nature of single supply – standard rated - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE SERPENTINE TRUST LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 11 August 2014

Mr R Vallet, Counsel, instructed by NGM, for the Appellant

Ms R Paveley, HMRC officer, for the Respondents

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DECISION

1. On 9 July 2012 HMRC issued a decision that liability of income received from certain supporters schemes operated by the appellant was standard rated and then raised an assessment for periods 03/09 to 06/12 in the sum of £171,067 on the basis of this decision and on 9 May 2013 reduced the appellant's repayment claim for 09/12 by £165,970.33 on the same basis. The decisions and assessment were upheld on review. The appellant appeals against that review decision.

Background

2. The Serpentine Trust Limited is a company limited by guarantee and a registered charity. It now runs two contemporary art galleries in Kensington Gardens, London: the Serpentine Gallery and the Sackler Gallery. At the time in question it only ran the Serpentine Gallery.

3. Admission to its galleries is normally free in ordinary opening hours.

4. It operates what it describes as supporter schemes. To become a supporter under any of the five supporter schemes, the supporter must pay a stated amount and (the Trust accepts) the supporter then becomes entitled to specified benefits ('the Benefits').

5. One of the five supporter schemes ('the Council Scheme') is not in issue in this appeal as HMRC issued a ruling in respect of it on 22 July 2003. The ruling was:

> "I agree that the amount of £3,000 would cover the benefits enjoyed by contributors to 'The Council of the Serpentine Gallery Donation Scheme' and that this amount is a taxable supply on which output tax should be accounted for.
>
> The balance of the three payments of £16,667 may be considered to be a donation, as there are no benefits attached to it apart from a list of donor's names, displayed as an acknowledgment of their support, at certain exhibitions…."

HMRC do not seek to resile on this.

6. All of the supporter schemes are eligible for Gift Aid. This was agreed with HMRC in 2007.

7. HMRC undertook a VAT inspection of the Trust in 2011 and this led to the assessment and decisions which are the subject of this appeal. It also led the Trust to change in one respect, which I detail below at §§38-42, its practice for the future. HMRC has accepted that under its current practice (which came into force on 1 April 2013) the Trust is only liable to account for VAT on value of the benefits provided to supporters, and not on the full sum paid by the supporters to the Trust. The change in practice has also led to a reduction in the amount of the payment treated as eligible for gift aid.

The issue

8. HMRC consider that (before the change in 2013) the sums paid by the supporters were consideration for the supply to them of the Benefits, and that that supply was standard rated.

9. The Trust does not accept this. It considers that the Benefits provided to supporters were de minimis with the effect that the Benefits were not provided 'for' the payments by the supporters, and that there was therefore no supply.

10. If it is wrong on this, then the Trust considers that part only of the payment by the supporters was 'for' the Benefits and that the payments should be apportioned under s 19(4) Value Added Tax Act 1994 between the 'donation' and 'consideration' elements.

11. Finally, and in the alternative, the Trust's case is that even if the Benefits were provided in return for the full payment by the supporters, the consideration was paid for a package of supplies some of which were zero rated and some exempt and only the remainder subject to VAT; and if they are wrong on this and there was only a single supply, nevertheless following *Talacre* it was a supply at multiple rates and was partly zero rated.

The facts

12. There was no real dispute over the primary facts although I had the benefit of evidence from Mrs McNerney, formerly Chief Operating Office of the Trust. In general I accepted her evidence but as I explain in §§36 and 71, I do not accept her opinion of what supporters thought and I do not accept for the reasons given below at §§71-72 that her estimate of the costs of the Trust were entirely accurate.

The supporter schemes

13. <u>The Benefactors Scheme.</u> To become a benefactor, the supporter had to agree to 'donate' £500 per year for five years (ie £2,500 in total). The Benefactor received:

- Free invitations to an out-of-hours VIP private view of each exhibition (five per year) in the gallery including a talk by the curator;
- Free invitations to five early morning breakfasts per year with the Trust's directors and a curator led tour of the gallery;
- A free monthly, on-line 'Art Tour' which would include information on art exhibitions generally (not just those undertaken by the Trust) as well as views of the Directors on art related matters;
- Advance notice to purchase Serpentine Gallery limited edition prints;
- Priority bookings on events taking place at the Gallery eg artists' talks, film screenings;

- Acknowledgement as a benefactor on a board in the lobby and in the Trust's printed matter and website.

14. The Future Contemporaries Scheme: To become a Future Contemporary, the supporter had to agree to pay £1,000 per annum. The Future Contemporary received the same benefits as a Benefactor (see above) but in addition:

- Four free special events per year – these were such events as studio visits/tours of private and public collections/talks by art professionals
- One free invitation to the 'future contemporaries party' with priority booking for additional tickets;
- Free invitations to auction house contemporary sales preview evenings;
- An opportunity to participate in 'the Collectors' Circle' which was a termly series of 10 tours of galleries and studios in London led by an art historian for which the participant had to pay £300 plus VAT per term;
- Entitlement to purchase tickets to the annual Summer Party.

15. The Patrons Scheme: To become a Patron, the supporter had to agree to pay £2,500 per annum. The Patron received the same benefits as the Benefactors (see above) but in addition:

- A free copy of the exhibition catalogue (five catalogues per year as there are five exhibitions per year)
- An opportunity to participate in 'the Collectors' Circle' on the same terms as a Future Contemporary;
- Entitlement to purchase tickets to the annual Summer Party.
- The 'exclusive' opportunity to book the gallery for a private hire;

16. The Learning Council Scheme: To become a member of the Learning Council, the supporter had to agree to pay £5,000 per annum.

17. The Learning Council supporter received the same benefits as a Benefactor (see above) (although I note that there was no mention of right to priority booking on events, but nothing turns on this – see §76). In addition, the Learning Council member received:

- Complimentary membership of the Learning Council kids club;
- Free invitations to two opening celebration dinners (in other words, the gallery had opening celebration dinners for its five annual exhibitions; Learning Council members would receive invites to two of them);

- A free copy of the exhibition catalogue (five catalogues per year as there are five exhibitions per year)
- An opportunity to participate in 'the Collectors' Circle' on the same terms as a Future Contemporary;
- Priority booking for the annual Summer Party.

18. The Council of the Serpentine Gallery Scheme: To become a member of the Council, the supporter had to agree to pay £50,000 over three years, in other words, £16,667 per year for three years. The Council Member received a great number of benefits, including those available to a Benefactor but also including the following:

- Free invitations to all the exhibition opening dinners and previews;
- two free tickets to the summer party;
- free membership of the Collectors Circle;
- free invitations to special tours and to talks organised by the gallery, all followed by dinner;
- free private out of hours tours of the gallery
- right to entertain up to 12 guests for lunch or breakfast at gallery;
- discount on hire of gallery;
- recognition as principal supporter of one exhibition per year;
- 'access' to the Gallery's directors and advisors who would provide introductions to 'key opinion formers' on art to help with collecting, conservation, care, etc.

19. It was no part of the appellant's case that a supporter could receive any of the Benefits outlined above by paying less than the full amount stipulated. Certainly the literature for none of the five schemes suggested that there was an option to pay less than the stated amount and still receive the Benefits. I find as a fact (but only in relation to the four schemes at issue in this appeal and for the period at issue in this appeal) that the Benefits would only be provided if the would-be supporter paid the stipulated amount for the particular scheme he wished to join. There was no option to pay a lesser amount and still receive the Benefits.

20. As mentioned above at §5, HMRC accept that VAT is only due on that part of the payment by a Council member (£3,000 per year) that was allocated in the brochure to the benefits and, as the Trust has always accounted for VAT on that basis, the appeal does not concern the Council scheme.

The value of the benefits

21. Mrs McNerney produced a spreadsheet of the ‘value’ of the Benefits. Some care had to be exercised when looking at this as it applied to the 2013 benefits, which had changed slightly, and not to those at issue in this appeal. For instance, it seems in 2013 Patrons were invited to one opening dinner; but this benefit was not advertised as available in the period at issue in this appeal.

22. I find she had valued the Benefits on the basis of cost to the Trust. For instance, she valued the catalogues at £10 as this was what she said cost to produce them on average. But in reply to a question, her evidence was that they sold on average for about £15-£20.

23. She was also to some extent uncertain whether the cost to the Trust of the social events (dinners and parties) was calculated before or after sponsorship was taken into account. As she explained it, the Trust always sought to get sponsors for entertainment events: the Trust would aim to get an individual or business to sponsor the food, the drink, the entertainment. Sometimes a single sponsor would pay for the entire event.

24. Mrs McNerney’s evidence was that the cost of the opening dinners (five a year held on the opening of each exhibition) was about £25 per head and her evidence was that this was an average taking into account many of the dinners would be wholly or partly sponsored. Tickets for the summer party cost £175 per person, but Mrs McNerney was uncertain whether this price was arrived at before or after sponsorship monies had been taken into account. The same applied in respect of tickets for the ‘future contemporaries party’ which were sold for £75.

25. The brochures for supporters described the summer party as ‘the most sought-after ticket of the social season’. Tickets were exclusively available to patrons, ‘founding benefactors’, the committee and the ‘sponsors’.

26. The private VIP viewings which were available to all supporters (see §§13, 14, 15, 17 & 18) were also available to anyone on Trust’s mailing list and the Trust would invite more than just supporters to opening dinners. As Mrs McNerney said, the Trust would aim to invite a number of potential future and existing sponsors and potential future supporters.

27. Mrs McNerney’s evidence was that the breakfasts cost the Trust £2.50 per person to provide. As two tickets were provided per supporter, and there were five per year, the cost of providing the breakfasts was £25 per supporter per year.

28. Her evidence was that the out of hours tours cost the Trust on average £20 per year per person, as many of the refreshments provided were provided by the hosts free of charge.

29. Mrs McNerney’s assessment was that the monthly online bulletin cost the Trust nothing to produce because it was prepared in-house by the Trust’s directors and in

any event was prepared for the Council of the Trust and therefore sending it to the other supporters had no marginal cost.

30. The cost to the Trust of the Kids Club was £90 per family per session. As there were 10 sessions a year, the cost to the trust of providing this benefit was £900 per member (assuming the member took up the benefit). I was not told how much the Trust would charge to non-Learning Council members who wished to attend.

31. In summary, Mrs McNerney's value of cost to the Trust of acknowledging the 'donation' from a Benefactor was £25 (for breakfasts). Discounting Mrs McNerney's valuation by the later price increase on tickets, it seems her assessment of the value of the Benefits provided to a Future Contemporary was the breakfasts (£25) plus the free party ticket (£75) plus the out of hours tours (£20), making a total of £120 per year. Her valuation of the cost of the Benefits provided to a Patron was £125 but this has to be recalculated as explained above. Her valuation was really breakfasts (£25), plus £50 for the catalogues (£75 in total). (Applying *Naturally Yours Cosmetics,* the subjective valuation of the catalogues – the advertised price of £15-£20 - was of course about double this giving a valuation of £75-£100 on the catalogues alone). Her valuation of the cost of providing the benefits to a member of the Learning Council was £175 plus £900 (£1,175 in total).

Presentation and perception

32. The trust issued five brochures, one for each scheme, setting out the schemes and inviting persons to become supporters. There were in a standard format. The first main section read as follows, in all five brochures:

> "**Why we need your support**
>
> - Your annual gift will help us to continue to achieve our vision for the Serpentine's acclaimed Exhibition, Architecture and Education Programme, as well as our substantial fundraising target.
> - Your generosity will ensure that this Programme continues to reflect the Gallery's international status and that our ambitious plans are realised.
> - Your support will also nurture the ever-expanding Education Programme, which helps the broad range of visitors to understand and enjoy modern and contemporary art.
> - Above all, you will be part of an important group of supporters who ensure the continued vitality of the Gallery in the years to come."

33. The brochure then explained in two paragraphs how to make the payment to become a supporter.

34. The next section was individual to each scheme, although the introductory words reported below were the same for all schemes bar the reference to the type of supporter and the amount paid. For Benefactors, it was headed:

“Benefactors of the Serpentine Gallery

Benefits and acknowledgements.

> We would like to acknowledge the generosity of the Benefactors who donate £500 per annum for five years to the Serpentine Gallery in the following ways:

There followed the list of Benefits which applied to Benefactors, or Patrons, etc, as appropriate, and which I have summarised above.

35. The next page was the declaration form which included the gift aid section; the next page was the same form minus the gift aid form as it was intended for non-UK tax payers; the next page explained ‘tax effective gifting’ setting out in brief the law on gift aid; how companies and trusts could donate; and how American taxpayers could donate tax efficiently. The penultimate page was a direct debit mandate and the last page an American CAF gift form.

36. Mrs McNerney’s evidence was that the Trust saw the benefits provided to its supporters merely as a low cost acknowledgement of their support and said her belief was that the supporters (with the exception of Council members) did not consider themselves as making a purchase from the Trust but rather a donation to it.

37. Mr Vallet’s case was that the accounts showed the payments as donations but he was unable to show this to me. I do not think HMRC challenged the assertion. In any event, it makes no difference to my decision which would be the same whether or not the supporters’ payments were shown as donations in the accounts. The auditors’ view of the law cannot influence my decision.

The new arrangements

38. It is the Trust’s case, which I accept, that there has been no change to the substance of the supporters scheme since 2011. The change introduced in consequence of the assessment, and intended to prevent future assessments, was to introduce new wording into the documentation. In particular, the declaration form (see §35 above) which the supporter signed to promise payment was altered. For instance, the old Benefactor promise, which applied at the time at issue in this appeal, read like this:

> “I [name] herby agree to donate £500 to the Serpentine Trust.”

39. After the changes were introduced, it now reads:

> “I hereby agree to donate £500 to the Serpentine Trust.

Donation	**£470**
Benefit (incl VAT)	**<u>£30</u>**
Total	**£500”**

40. Identical changes, but with the payment appropriate for that supporter scheme, and increases in the amount of benefit, were made for the other supporter schemes at

issue in this appeal. No changes were made to the Council Scheme which was already in this form.

41. HMRC have given written clearance in the form of an ADR settlement that from the date of this change to the documents, the Trust is only liable to VAT on the stated amount of the benefit and that the rest of the 'donation' is free of VAT. The ADR settlement reads:

> "From 1/4/13 where the value of the 'benefits' package for supporter schemes is identified and this is clearly stated (both in the application forms and on the website), this will be treated as the consideration. Any sums paid above the price charged for the benefits package is to be treated as a donation."

42. The effect is that only the historic position pertaining before 1/4/13 before the alteration in wording is in issue in this appeal.

The law

43. Section 5 of the Value Added Tax Act 1994 ('VATA') provides:

> "(2)(a) 'supply' in this Act includes all forms of supply, but not anything done otherwise than for a consideration"

44. In wording this does not precisely replicate anything in the Principle VAT Directive, which VATA must implement, but there was no suggestion that it differed in substance.

45. Both sides accepted that a supply could only take place where something was given 'for' consideration. Fundamentally, the appellant's case was that the supporters' intention was to donate money to the Trust, and the provision of benefits in return was merely an acknowledgement by the Trust of the donation and not 'for' the payment of the money, which was a gift.

46. I was referred to *South African Tourist Board* [2014] UKUT 280 (TCC) at [35]-[48]; *Tolsma* (C-16/93) [1994] STC 509; and *Apple and Pear Development Council* [1988] STC 221 at [15].

47. No comparison can be made with the facts of *Tolsma* where the CJEU held that busking in the hope and expectation of payment was not a supply 'for' consideration. There the amount of money paid was wholly uncertain and the 'benefit' of the music was provided irrespective of payment from any particular person. Here, on the contrary, the amount paid for the Benefits was certain and the Benefits were only provided if the stipulated sum was paid.

48. Comparison also cannot be made with the facts of *Apple and Pear Development Council* where the issue was whether the 'consideration' was *for* the 'supply' when the 'consideration' was a compulsory levy and the level of benefit received (if any) bore no relation to the amount of 'consideration' paid by any individual. The CJEU ruled that there was no direct link, largely because of the mandatory rather than

contractual nature of the levy and the fact that the amount paid did not correlate to the amount of benefit received:

> "[16] It follows that mandatory charges of the kind imposed on the growers in this case do not constitute consideration having a direct link with the benefits accruing to individual growers as a result of the exercise of the Council's functions. …."

There is clearly no obvious comparison to this case where the amount of benefit received entirely depended upon the amount paid, and the arrangements were contractual and not compulsory.

49. I was also referred to *South African Tourist Board* where the question was whether a grant paid to a statutory body to carry out its statutory duties was consideration for a supply. The case turned on the relationship of the state to the appellant and bears no comparison to the facts of this case.

50. Whether there is a direct link between the benefit and the payment is a question of law. For instance, there is no direct link where there is an absence of a legal relationship involving reciprocal performance (see [14] of *Tolsma). Tolsma* does reiterate what the CJEU said elsewhere (such as *Naturally Yours Cosmetics* [1988] STC 879) that consideration is valued *subjectively.* It is what the parties attribute to the supply. A normal application of that principle to the facts of this case is that the parties have attributed to the 'supply' of the package of Benefits provided to a supporter the stipulated sum that the supporter has to pay to receive that package, and that therefore that sum is the consideration for the supply.

51. But that is no answer to the question which is, irrespective of any valuation of the 'consideration', was the money paid 'for' the benefits, or was it a donation? The appellant does not go so far as to say the Benefits provided were valueless (a difficult case to run where even the Trust accepts that the lowest level of benefits provided involved the Trust in a minimum expenditure of £25). Its case is that the value of the benefits is de minimis compared to the 'donation' and that therefore it is right to say that as a matter of law the 'donation' is not paid 'for' the benefits. The appellant suggests there is a distinction between 'donating' a set sum for benefits which are de minimis (which they see as a true gift) and with charitable intent paying a charity over the odds for a supply (which they accept is a VAT supply).The appellant's case is that 'direct link' imports a notion of proportionality between the consideration given and the supply received.

52. The appellant also relied on the case of *Church of England Children's Society* VTD 18633 (2004). In that case one of the issues was whether a newsletter was given in exchange 'for' the promise to pay donations. That case in turn relied on *Kuwait Petroleum* C-48/97 [1999] STC 488 and *Church Schools Foundation* [2001] EWCA Civ 1745, to say that, while there had to be a legal relationship and reciprocity between the parties (*Tolsma)*, these were not sufficient to found a supply: it was not enough to show legal relationship and reciprocity, the parties had to agree objectively that value given was in consideration for benefit. On the basis that the documents described the payment as a 'gift', a donor could decline the newsletters, and the

accounts treated payments as donations, the Tribunal decided that the donations were not 'for' newsletter. They considered the donations were merely gifts with a counter stipulation and not consideration for a supply.

53. In *Kuwait Petroleum* there was a contract and reciprocal performance under which Kuwait (or an independent petrol supplier) was liable to supply both petrol and 'Q8' vouchers in return for payment, and later to redeem the Q8 vouchers for 'free' gifts. The CJEU said:

> "[26] Goods are supplied 'for consideration' … only if there is a legal relationship between the supplier and the purchaser entailing reciprocal performance, the price received by the supplier constituting the value actually given in return for the goods supplied….."

54. The CJEU went on to say that the national court had to determine:

> "whether, at the time of purchasing the fuel, the customers and Kuwait Petroleum had agreed….that part of the price paid for the fuel, whether identifiable or not, would constitute the value given in return for the Q8 vouchers or the redemption goods….."

55. The CJEU indicated that (a) because the redemption goods were described as free in the contract and (b) because the price of the fuel was not discounted when a person did not take the Q8 vouchers, the court was likely to conclude that the price was only paid for the fuel and not for the vouchers as well.

56. *Church Schools Foundation* was a case in which donations were made by a wholly owned company to its founding charity, which were in part used to improve property occupied by the company. HMRC said the donations to the charity were consideration for a supply of building works to the company. The Court of Appeal ruled against HMRC. As Sir Andrew Moritt VC said, making donations for general or specific purposes of a charity is not payment for a supply. There is no supply even where there is an indirect benefit to the donor. This case has no relevance here where the Benefits were contractual.

57. The appellant's case really rests on *Kuwait* and *Church of England Children's Society*. Its case is that doing something in return for payment does not necessarily mean that the consideration was paid 'for' that something in return. HMRC, they say, accepts this as in its public guidance it states it does not consider agreeing to provide a mere acknowledgement of a gift as a supply for which the gift was consideration. The appellant's view is that, although more than a mere acknowledgment was provided in this case, the Benefits provided were de minimis and do not alter the nature of the payment as a donation. The appellant's case, applying *Kuwait* and *Church of England Children's Society,* is that despite the contract and reciprocity, the Trust and its supporters had not agreed that the 'donation' would constitute the value given in return for the Benefits. They consider this is evidenced by the facts that (a) (on their case) the value of the Benefits was insignificant compared to the payment and (b) the brochure held out the payment as a gift.

58. HMRC do not agree and they rely on the Court of Session decision in *Tron Theatre* [1994] STC 177. The appellant considers that *Tron Theatre* is not good law as it was (in their view) superseded by *Kuwait Petroleum* and *Church Schools Foundation.* In the appellant's view, *Tron Theatre* at first instance at least, was decided on the basis that the contract was the deciding factor in whether there was a supply for consideration, and *Kuwait Petroleum* had shown that there is not necessarily a supply even where there is a contract and reciprocity.

59. In any event, his view is also that the Court of Session in *Tron Theatre* did not rule against a de minimis argument of the type he puts here as it simply relied on the Tribunal's unchallenged finding that the full £150 could not be seen as a donation.

60. I agree with the appellant that the CJEU have never ruled that a legal relationship with reciprocity will always mean that there is a supply 'for' consideration; they have simply said that there is no supply for consideration where a legal relationship with reciprocity does not exist (*Tolsma).* Indeed, it follows from *Kuwait* that a legal relationship with reciprocity is not necessarily sufficient and *Church of England Children's Society* is an application of that principle.

61. I agree with the Tribunal in that case that the question of whether a supply is 'for' consideration in so far as it is a question of fact requires objective rather than subjective consideration.

62. In both *Kuwait* and *Church of England Children Society* there was reliance by the court on how the 'benefit' was described in the contract. The Q8 vouchers (or at least the redemption goods) were described as 'free'. The payment in *Church of England Children's Society* was described as a gift. But there no suggestion the description determines matter. It could not determine the matter as the description the parties apply, deliberately or inadvertently, may not be an accurate one.

63. I accept that here the donation was described (see §32) as a 'gift' and the brochures referred to 'support' and 'generosity'. But the document must be considered as a whole. It is also relevant that the Benefits were given prominence, indeed the text devoted to the Benefits (see §34) exceeded the text (at §32) which stated what the 'donation' would be used for.

64. *Kuwait* was a very different factual scenario. The Court had to decide, when contractually the supplier supplied A + B in return for the payment, whether the supply was of both A plus B, or only A. On the particular facts of the case, it indicated (bearing in mind it does not decide factual matters) that the national court was likely to (as it did) rule that the parties had agreed the payment was only for A (the petrol). But while as a matter of principle the decision in *Kuwait* indicates that contract and reciprocity is not sufficient, it offers little guidance on how to approach a claim that the entire Benefit provided under the contract was de minimis.

65. Factually, *Church of England* was much more similar to this case, but still significantly different. Objectively, the newsletter in that case was intended to enable donors to check what their donation was used for: there was no *benefit* to them in

receiving the newsletter. Objectively, the newsletter was not 'for' the donation but simply a stipulation of the gift.

66. In this case, however, even the on-line newsletter ('Art Tour' – see §13) was objectively a benefit to the supporter rather than merely a means to check that his donation is being put to good use. As it was described to me, it was rather like 'Time Out' telling the supporters of all the 'must see' art exhibitions in the UK. It also included interesting articles on art by the Trust's directors.

67. Applying *Kuwait* (as I must) and accepting, as I do, that *Church of England's Children Society* was correctly decided on the law so far as relevant to this appeal, I must consider in this case whether objectively the Benefits were 'for' the 'donation'.

Has the appellant made out its case on the facts?

68. In this case, the brochures describe the payments as 'gifts' and stated it would be used to fund the Trust's charitable objectives although it also said 'above all you will be part of an important group of supporters who ensure the continue vitality of the Gallery in the years to come." As I have just said, I do not accept that what the brochures say is determinative. In any event, I do not consider that the brochures give a clear statement that the payment is a gift because, as I have said, the text devoted to a description of the benefits outweighed the statement of what the gift would be used for. Indeed apart from the gift aid/direct debit form, it formed the largest discrete chunk of text.

69. So far as the Learning Council Scheme is concerned, the annual *cost* to the trust per supporter was over £1,000 (see §31) and the supporters paid £5,000 a year for the Benefits they received. Objectively it can not be said that the benefit was de minimis by itself or in comparison to what was paid to receive it. I reject the appellant's case that the payment by Learning Council Scheme supporters was not 'for' the Benefits.

70. Moving on to consider the other three supporters schemes, Ms McNerney's belief reported at §36 above was opinion and not evidence of fact. If she had reported what supporters had said to her, this would have been evidence, albeit heresay. In reality, I have no evidence of what the supporters' valuation of the benefits were, other than they were prepared to pay the full sum demanded by the Trust in order to become supporters (of whatever type). But, I accept, that does not tell me whether they paid it on the basis it was a donation and irrespective of the Benefits offered in exchange or whether they only paid it because they wished to receive the Benefits. It is quite possible in reality that some persons paid only because they wished to make a donation, and others paid because they wished to receive the Benefits. But what they thought is irrelevant as the test is objective – see §61.

71. Ms McNerney's evidence was that the cost of the benefits to the Trust was significantly less than the money received from supporters, but again that does not amount to much as evidence. Firstly, cost does not usually equate with value. For instance, the marginal cost of issuing the monthly on-line bulletin to a new supporter was nil, but that does not mean its actual production cost was low. Employees of the

Trust had to produce the content for this: I had no evidence of how much of their time this took nor how much their salaries were. So I have no idea how much the on-line bulletin actually cost the Trust to produce. Secondly, its value to the recipients (an exclusive sort of Time Out devoted to the arts world) might have been considerably more than the cost of producing it to the Trust. It is normal for perceived value to exceed cost: this is how entrepreneurs make their profits.

72. Mrs McNerney's evidence was that supporters were not the only persons invited to the out-of-hours VIP private viewings and the breakfasts-with-tours, but I had no evidence from which I could conclude that any non-supporter who asked would be put on and remain on the invite list. So I was not satisfied that these invitations, provided to all supporters, were objectively (or subjectively) valueless. These invitations could have been a prime motivator in someone's decision to become a supporter, even though the marginal cost to the Trust of running the events may have been low. But again I do not even know how low the cost of producing them was to the Trust, as the Trust only costed the provision of the breakfast: it ignored the cost of its staff time.

73. Mrs McNerney valued the advance notice to publish limited edition prints as costless and indeed it must have cost the Trust nothing more than posting or emailing advance notifications of sales to supporters. But that does not mean the right was valueless to supporters. I was not given the information to judge this; in particular I was not informed how 'limited' the limited edition prints actually were and whether there was a real risk of the Gallery selling out of them. I was therefore not satisfied that this benefit was objectively (or subjectively) 'de minimis' to the supporters.

74. I can make similar comments about the benefits provided in the more expensive supporters schemes. A Future Contemporary was given the right to attend an exclusive party for free. The Gallery saw it as a fund raising opportunity in so far as it sold tickets, as it hoped that sponsors would largely defray the costs of hosting it: but what little that tells me of the value of the free ticket to the supporter is that the event and/or Gallery was sufficiently well thought of to attract sponsorship. That does not support the conclusion that a ticket (ordinarily costing £75) objectively should be seen as de minimis value to either the Gallery or the supporter. Even the *right* to purchase tickets to the summer party could have had a real value to the supporter bearing in mind the exclusive guest list, and, if the hype in the booklet was right, that this was *the* party of the season.

75. I accept on Ms McNerney's evidence that at least the right to the exclusive opportunity to book the gallery was of no real value to those supporters who got this right as it was her evidence that she did not believe that any supporter had ever taken advantage of this right. I note that she did not suggest any of the other benefits suffered from lack of take up, and in particular that for the breakfast viewings she calculated the cost per head per supporter, suggesting that there was close to full take up.

76. In conclusion, the appellant has failed to satisfy me that the benefits it provided to its supporters in exchange for the specified payments were objectively (or

subjectively) de minimis by themselves or measured against the price paid by the relevant supporter, and further and for the same reasons I am not satisfied objectively (or subjectively) that the price was not paid 'for' the benefits.

77. Objectively (and subjectively) I find that the benefits had very real value to the supporters, and the value was likely to exceed the cost of providing the benefits. Unlike *Church of England Children's Society*, this was not a gift with a stipulation which permitted donors to check what their donation was used for; this was a payment in return for very real benefits to the 'donors'. The appellant has not satisfied me that the payments were not 'for' the Benefits. That conclusion ends the appellant's first case.

Second case – apportionment?

78. Mr Vallet considers that s 19(4) VATA ought to be applied to apportion the payment received from supporters between that part that was attributable (in his view) to the Benefits and that part that was in excess, and was a donation. S 19(4) provides:

> "Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it."

79. The Court of Session in *Tron Theatre* rejected Tron's case, like Mr Vallet's here, that s 19(4) permitted an apportionment on a payment to a charity, where the Benefits were said to be of much less value than the payment. Mr Vallet considered that the Court of Session decided the case wrongly, although he indicated that, as the decision, if not technically binding on the First Tier Tribunal sitting in England, was nevertheless extremely influential, he would not press the point in this Tribunal but would do so if this decision goes on appeal.

80. As *Tron Theatre* is not binding, I do have to consider Mr Vallet's case on this. My view is that *Tron* was rightly decided on this point. The Court of Session ruled:

> "[Section 19(4)] enables an apportionment to be made so as to attribute a supply which is attributable only to a part of the consideration to that part of the consideration in money which has been given for it. This is done so that the remainder of the consideration in money may be attributed to the other supply or supplies to which it is attributable. The subsection does not, however, enable a 'payment of money' to be divided up… It is not the function of that subsection to separate out a payment of money into one part which is a consideration in money an another part which is not a consideration in money at all. If that were the purpose of the exercise, it would open up the whole question whether the consideration in money represents the true value of the supply.."

81. In a nutshell, what the Court of Session meant in *Tron Theatre*, was that the intention of s 19(4) was not to reverse, or go behind, the rule on the valuation of consideration set out in the Sixth VAT Directive and as explained in cases such as *Naturally Yours Cosmetics.* Applying those principles the entire amount paid for the

benefits was the consideration as that was the price that the parties had subjectively attributed to the supply. Once it was established that the payment was 'for' the benefits, even if the supply was grossly overvalued by the parties, and even if the paying party had donative intent, that made no difference.

5 82. And in any event, as a practical matter, I was unable to determine that any part of the payment was clearly a donation. Apart from the evidence about the cost to the Trust of providing some of the benefits, I had no evidence on the value the parties subjectively did, or objectively could be said to, apply to the Benefits, other than the fact that the supporters were prepared to pay the stated sum to receive them.

10 83. I consider the appellant's case on s 19(4) runs totally contrary to the settled case law of the CJEU. If the Trust had offered benefits for a fixed price and specified anything additional was a donation, then clearly the element of donation would not be paid 'for' the benefits. But here the Trust required the **full** amount to be paid in return for Benefits. There is nothing for s 19(4) to apportion.

15 84. The appellant's case on s 19(4) fails on both the law and facts.

Third case – multiple supplies?

85. I must therefore move on to consider the third aspect of the appellant's case which is that the consideration which I have found was paid 'for' the benefits, was paid in consideration of multiple supplies rather than a single supply. This only
20 matters to the extent that, if they were multiple supplies, the rates would vary.

86. However, I am not asked to resolve what rates would apply to which supplies as the parties believe that, if I determine that there are multiple supplies, they can settle the matter between themselves. I note in passing that the parties consider that the exemption for cultural services, the exemption for fund raising events by charities and
25 the zero rating of publications may be relevant.

87. The question for the Tribunal is whether there was a single supply. The appellant's case was that there were multiple supplies; rightly it did not suggest that there was a single zero rated supply (of printed matter) nor a single exempt supply (of either cultural services or fund raising events).

30 88. The parties accepted that there would be a single supply where either:

(1) One or more elements of the supply comprised a principle element and the other elements were ancillary to it in the sense that they were not an end in themselves but a means of better enjoying the principle element (as per *CPP* C-349/96 [1999] STC 270 at [30]); or

35 (2) Two or more elements of the supply were so closely linked that objectively they formed a single indivisible supply which it would be artificial to split (as per *Levob* C-41/04 [2006] STC 766.

89. The appellant's case was that the Benefits comprised a number of supplies and the consideration had to be apportioned between them. Mr Vallet said it was

obviously not a *CPP*–type single supply as no one element predominated and none of the elements were ancillary to any of the other elements. He also said it was not a *Levob*–type of indivisible supply on the grounds that any of the elements could have been split from the others and still remain useful.

5 90. HMRC appeared to agree that this was not a *CPP*-type supply of a principal supply with ancillary matters. I find as a matter of law that if these supplies of the four supporter schemes were each a single supply, they were of the *Levob* 'table top' variety. The only exception to this was where a free exhibition catalogue was provided as this was clearly a better means of enjoying the supply of the out-of-hours 10 VIP views of the exhibitions.

91. The benefits were all provided for a single price, and all related to the gallery to a greater or lesser extent, but other than with respect to the catalogues, they were not interdependent. How to determine whether it was a single or multiple supply?

92. The CJEU in *CPP* said:

15 > "[30] There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does 20 not constitute for customers an aim in itself, but a means of better enjoying the principal service….
>
> [31] In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customer consists of several elements for a single price, the single price may suggest that 25 there is a single service. However, notwithstanding the single price, if circumstances such as those described [above] indicated that the customers intended to purchase two distinct services, ….then it would be necessary to identify the part of the single price which related to the [exempt] supply……

30 93. Later in *Levob* the CJEU referred to [30] in *CPP* (above) and said:

> "[22] The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical customer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split….
>
> 35 [23]…it is not possible , without entering the realms of the artificial, to take the view that such a consumer has purchased, form the same supplier, first, pre-existing software which, as it stood, was nevertheless of no use for the purposes of its economic activity, and only subsequently the customisation, which alone made that software 40 useful to it.
>
> [24] The fact…that separate prices were contractually stipulated for the supply of the basic software, on the one hand, and for its customisation, on the other, is not of itself decisive. Such a fact cannot affect the objective close link which has just been shown with regard to

> that supply and that customisation nor the fact that they form part of a single economic transaction…."

94. My conclusion from this is that a single price, as much with a table-top-*Levob* type supply as with a *CPP*-type supply, is relevant but not decisive. So the single price in this case indicates this is likely to be a single supply unless circumstances indicate that the supporters intended to buy distinct services. It is also clear, as Warren J said in *Byrom* [2006] EWHC 11 (Ch) at [51] that "it does not necessarily follow that there cannot be a single supply just because that supply comprises elements, none of which is ancillary to another, and each of which, if taken in isolation, would constitute a separate supply…"

95. Warren J also commented in *Hanbidge* [2014] UKUT 336 (TCC) at [24] that the question of whether there is a single composite supply is closely related to the question of the nature of that supply. This suggests that if the single supply cannot be described, then there isn't a single supply, but a collection of individual supplies.

96. Here I find that the benefits provided, while not inter-dependant (unlike software and customisation in *Levob* or medical services and drugs in *Beynon)* were related. None were principal and none ancillary to others (with the exception of the catalogue as stated above), but were as a whole a package of related services. I consider it fair to summarise what was offered as the opportunity, together with other interested persons, to partake of exclusive events at, and offers by, the Gallery. A single price was charged. My finding based on the facts is that this amounted to a single supply.

97. The parties accepted if the supply was a single supply it would be standard rated. It was not the appellant's case that if there was a single supply it would be exempt or zero rated. I find the supply was standard rated for the reasons set out at §108.

Fourth case – single supply at multiple rates?

98. The last part of the appellant's case was that if I found there was a single supply, then a part of that supply was at the zero rate. Both parties requested the Tribunal stay its decision on this aspect (if it proved relevant) pending the outcome of the Upper Tribunal decision in the appeal in *Colaingrove (Verandahs).*

99. However, the issue to be decided by the Upper Tribunal in *Colaingrove* could not, in my view, affect the outcome of this decision. In that appeal, the Upper Tribunal must decide whether zero rating only extends to items, standard rated by themselves, but which would have been an ancillary part of a single supply of a zero rated principal, on the basis of the law on multiple supplies as understood at the time the zero rating was introduced (a narrower test), or on the basis of the law on multiple supplies as explained later by the CJEU in *CPP* and *Levob* (a wider test). Put simply, the question the FTT in *Colaingrove (Verandahs)* [2013] UKFTT 343 TC was attempting to answer was the extent of *Talacre* C-251/05 [2006] STC 1671 and whether and when items, individually standard rated, and neither expressly included

within, nor expressly excluded from, the zero rate, could benefit from zero rating when a part of a single supply with a principal zero rated item.

100. As I have decided that the single supply is the opportunity, together with other interested persons, to partake of exclusive events at, and offers by, the Gallery, it follows that the single supply is standard rated. *Colaingrove (Verandahs)* is, in my view, simply irrelevant to this case. In *Colaingrove (Verandahs),* the single supply was of a caravan which was zero rated. The question was whether the ancillary verandah could benefit from that zero rate. Here the zero rate could only apply to an ancillary part of the supply, the catalogue, so there is no question of the zero rated nature of the catalogue resulting in the entire single supply being zero rated.

101. So I do not consider it appropriate to stay this appeal pending the outcome of the Upper Tribunal decision in *Colaingrove (Verandahs)* which I do not consider likely to affect the outcome of this case.

102. However, that does not answer the question whether, irrespective of the supply of each supporter's scheme being a single supply, whether that single supply is at different rates.

103. So far as the catalogue is concerned, I mentioned to Mr Vallet at the hearing that I was not certain that *Talacre* could be relied on to increase the scope of a zero rate. Mr Vallet referred me to *Morrisons* [2013] UKUT 247 (TCC), which seemed to support my view.

104. I find that what *Talacre* decided was that the benefit of a zero rate would not extend to parts, standard rated if supplied by themselves, of a single supply, even if the predominant element of that single supply was zero rated. The rationale of that decision was that zero rating was subject to strict limits, and supplies expressly excluded from the zero rate, could not achieve zero rating simply by being part of a single supply the predominant element of which attracted zero rating in its own right. See [18]-[23] of the CJEU's decision. It concluded in [24] as follows:

> "…The case law on the taxation of single supplies, relied on by Talacre and referred to in para 15 of this judgment, does not relate to the exemptions with refund of the tax paid [ie zero rating] with which art 28 of the Sixth VAT directive is concerned. While it follows, admittedly, from that case law that a single supply is, as a rule, subject to a single rate of VAT, the case law does not preclude some elements of that supply being taxed separately where only such taxation complies with the conditions imposed by art 28(2)(a) of the Sixth Directive ….."

In other words, the single supply rules cannot result in zero rating contrary to the restrictions in art 28(2)(a). But there is nothing in the *Talacre* decision which suggests that the single supply rules would be overridden to *preserve* the benefit of zero rating; on the contrary, the same reasoning (that zero rates must be narrowly construed) would mean that the single supply rules *can* result in the loss of zero rated status.

105. This analysis is in line with the Upper Tribunal's decisions on reduced rates on fuel in *Wm Morrison Supermarkets plc* where Vos J held that a single supply of a disposal barbecue was entirely standard rated, irrespective that one element of that supply (the charcoal) would attract a reduced rate if supplied by itself:

5 > "[71] Whilst it is true that *Talacre* held that the scope of reduced rate could not be extended by the use of a *CPP* analysis…, it does not follow that reduced rate that a member state has made applicable to one type of supply must be respected, even if it has been decided upon for socio-economic reasons, whether or not that supply is to be 10 properly regarded as only a constituent part of a single supply for VAT purposes on a *CPP* analysis…."

106. In conclusion, *Talacre* is inapplicable here. Although the single supply includes an element (a catalogue) that would be zero rated if supplied individually, as part of an overall standard supply, it loses its zero rated status.

15 107. That disposes of the issue on zero rating. What about the question of exemption? *Talacre* only applies to zero rating and reduced rating: it is inapplicable to exemptions. So even where individual items would be exempt if supplied individually, as part of an overall single supply, their VAT treatment follows the treatment of the supply as a whole.

20 108. I have determined that there was a single supply of the opportunity, together with other interested persons, to partake of exclusive events at, and offers by, the Trust. I consider that that supply was entirely standard rated. While elements of that supply may have been exempt if supplied individually, the packages (Benefactor, Future Contemporary, Patron and Learning Council) were standard rated. I do not 25 consider that there is any applicable exemption, as such supplies cannot be properly described as a subscription to a public interest body (Group 9), a fund raising event by a charity (group 12) or a supply of a right of admission to a gallery (Group 13 – cultural services), although it appears to include elements of at least the last two of these.

30 109. That concludes the appeal against the appellant.

Legitimate expectation

110. Rather surprisingly in view of the fact that *Oxfam* [2009] EWHC 3078 (Ch) and *Noor* [2013] UKUT 71 (TCC) are of equivalent authority, Mr Vallet indicated that the Trust accepted, following *Noor,* that it could not rely in this Tribunal on any 35 legitimate expectation which it might have.

111. Whether it can rely on legitimate expectations in this Tribunal is of course a different question to the question of whether it has any legitimate expectations. It seems unlikely to me that for the years in issue it has any. Its gift aid treatment agreed in 2007 could not legitimately found an expectation as to the VAT treatment of 40 the payments by supporters; its VAT clearance in 2003 on the treatment of payments by the Council of the Gallery members is unlikely to give rise to a legitimate

expectation that this could be relied on for the VAT treatment of its other supporter schemes, when, unlike the Council scheme, no attempt was made to identify the value of the Benefits. But I am not asked to rule on this and indeed neither party considers I have the jurisdiction to do so.

112. Mr Vallet also said that the Trust did not rely on HMRC's concession ESC 3.35 in the Tribunal as it did not consider that this Tribunal had jurisdiction to determine the issue. That concession permits certain non-profit making bodies to treat a single supply as a supply of its constituent elements, and therefore benefit from a reduced VAT liability to the extent any of the constituent elements are exempt or zero rated.

113. As the appellant has chosen not to rely on the concession in this Tribunal, I will respect its choice and not determine whether I consider whether (to the extent the decisions do depart from each other) I prefer *Oxfam* or *Noor*. I also make no determination whether the supplies at issue in this appeal fall within the terms of the concession. I understand that HMRC do not consider that the Trust can rely on ESC 3.35 because it is limited to "membership bodies". In view of my ruling in this case, the Trust may wish to rely on ESC 3.35: whether it can do so will therefore be left to judicial review action.

114. I express the view that if this decision is appealed, it may make practical sense to seek to have any such judicial review action transferred to the Upper Tribunal to join with the appeal hearing.

Footnote – the new arrangements

115. The Trust may well be surprised, as indeed I was, that HMRC apparently considered the addition of the extra words in the supporters' brochure, as set out at §§38-39 above, was all that was required in HMRC's view to convert a VAT liability on £500 to a VAT liability on only £30.

116. The Trust may be surprised because such a small change appears to result in an enormous VAT saving; I am surprised because HMRC's view expressed at §§41 above does not appear to be in accordance with either the law or HMRC's own published guidance. The same criticism can be made of the 2003 clearance at §5 that was given to the Trust in respect of the Council scheme.

117. This is an extract from VAT Notice 701/1 Charities:

> "5.14 Many cultural organisations operate patron or supporter schemes, which offer benefits in return for a minimum payment. Benefits may include free admission to special exhibitions, the right to receive regular publications, discounts on shop purchases, etc. The minimum payment is business income and is standard rated. However, if one of the benefits to patrons or supporters is the right to receive publications you may be able to treat part of the payment as zero-rated….
>
> **If a patron or supporter pays more than the minimum amount you can treat the excess as a donation and outside the scope of VAT as**

long as the patron or supporter is aware that the scheme benefits are available for a given amount, and that anything in excess of that amount is a voluntary donation. This should be explicit in the patron or supporter scheme literature."

118. At the hearing, HMRC defended their position by suggesting that the person who negotiated the ADR for HMRC believed that under the new arrangements the Benefits were available for the lesser amount (eg the £30 stated to be their value in the new Benefactors scheme). This did not appear to be a correct reflection of the views of the officers concerned with the 2003 letter or the ADR settlement as neither expressly required it to be a condition that a supporter could pay the lower amount and still receive the Benefits, and indeed their rulings seemed quite clearly to be based only on the *value* of the benefits.

119. I make no findings of fact in relation to the position after 1 April 2013 but I note a letter from the Trust to HMRC in 2012 had expressly drawn to HMRC's attention that in all cases the full amount had to be paid to receive the Benefits, and that the Trust's position at the hearing was that the 2013 changes involved no change in substance.

120. The Trust is of course entitled to rely on the clearances it has been given by HMRC, even when they are, as they appear to be in this case, wrong in law. I express the view that it is inappropriate for HMRC to give private rulings inconsistent with their published position.

121. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 8 September 2014