VAT focus

Serpentine Trust Ltd: VAT on 'donations'

SPEED READ *The Serpentine Trust Ltd v HMRC* concerned the VAT treatment of 'donations' made by four friends schemes to the Serpentine Gallery, which provided the donors with benefits from the gallery. The First-tier Tribunal decided that the 'donations' were consideration for the standard rated supplies of the benefits. Applying *Tron Theatre*, the full amount paid for the benefits was the taxable amount subject to VAT, irrespective of their value and any 'donative intent'. The tribunal rejected, inter alia, the trust's argument that the supplies were multiple, not composite, and accordingly zero-rated or exempt in part: it is arguable that it is this element of the decision which is most open to challenge.

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The recent case of *The Serpentine Trust Ltd v HMRC* [2014] UKFTT 876 (TC) concerned the correct VAT treatment of 'donations' under friends schemes operated by the Serpentine Trust Ltd in periods 03/09 to 06/12 to support the activities of the Serpentine Gallery in Kensington. Of the five schemes, only four were in issue in the appeal. In the case of the Council scheme (the most expensive), HMRC had ruled in 2003 that only £3,000 of the total payment of £50,000 represented the value of the benefits received in return for consideration, the rest being a donation (for which the only benefit was a mere acknowledgement of support by the friend at certain exhibitions).

The trust's arguments

The main issue in dispute was whether the benefits under the four schemes for the period in question were, as HMRC maintained, liable to output tax at the standard rate. The trust's first counterargument was that the benefits were really de minimis and did not constitute a supply in return for the payments, which were therefore wholly a donation. If this were wrong, it argued that only part of the payments was consideration, and that there should be an apportionment between the donation and consideration under VATA 1994 s 19(4).

In the alternative, the trust argued that there were multiple supplies, some of which were zero rated or exempt. If, in turn, this was wrong, and there was a single supply, the trust argued it should nonetheless be partly zero rated (following *Talacre* (C-251/05) [2006] STC 1671, and presumably the case of *Commission v France* (C-94/09) (the 'French Undertakers' case), though rather oddly this is not mentioned in the decision).

The four schemes involved gave supporters benefits depending on the value of the support given, which ranged from £500 per year for five years to £5,000 per year. Examples of these benefits included free invitations to VIP private views, special breakfasts, art tours, special events, free catalogues, the right to buy tickets for the annual summer party and, for the higher value schemes, a number of free dinners. In no case could supporters receive the benefits appropriate to their scheme without making the full payment stipulated.

The trust had attempted to estimate the 'value' of the benefits on the basis of their cost. In the case of the parties and dinners, however, it was unclear whether this was before or after the sponsorship had been taken into account; and there were other points which the FTT challenged. For example, the cost of the benefits for the future contemporaries scheme was £128 (against a stipulated payment of £1,000); while the cost of the benefits for the Learning Council scheme was £1,175 (against a stipulated payment of £5,000).

New arrangements had been agreed from 1 April 2013, following alternative dispute resolution (ADR) negotiations with HMRC. These were accepted by HMRC to change the VAT position, so that the liability to account for VAT only applied to a separately identified 'donation' element in each of the schemes on the basis of a declaration by the donor; for example, for a payment of £500, £30 was identified as being 'for' the benefit (including VAT) and £470 was a pure donation.

Although ADR settlements are privately agreed with HMRC and not usually published (or aired in court), the FCC chairman, Judge Mosedale, did comment critically on the new arrangement, expressing her surprise that it 'does not appear to be in accordance either with the law or HMRC's own published guidance (in *VAT Notice 701/1: Charities*). This was because no conditions appear to have stipulated that the benefits would be made available for the lesser amount, and the supporter should be made aware of this. Indeed, it appears that the trust wrote expressly to HMRC in 2012 pointing out that 'in all cases the full payment had been paid to receive the benefits'; in other words, admitting that the 2013 changes involved no real change of substance at all.

This is potentially embarrassing for HMRC, though presumably the agreement will stand for the gallery at least. However, it also makes it highly unlikely that other charities will be offered the same concessionary treatment.

The de minimis argument

The FTT fairly quickly dismissed the trust's primary argument that the benefits were de minimis and in mere acknowledgement of donations to support the trust's charitable objectives (as the brochure stated). The FTT had been referred to *Tolsma* (C-16/93) and *Apple and Pear Development Council* [1988] STC 221, where there had been held to be no direct link between the payments made and anything done in return; but it did not find the cases particularly helpful or consider that such a principle applied in the present case, where there were clear benefits and stipulated payment had to be made to obtain them.

The question here was whether there was any validity at all in the argument that, for there to be a direct link between the payment and the benefit received, there had to be proportionality between the value of the two. This ground was covered by the Court of Session in *Tron Theatre* [1994] STC 177.

The section of the FTT decision most open to challenge is the section on composite/multiple supply

However, before considering that case, the FTT first looked at the benefits received by each class of friends. It reached the conclusion that objectively the benefits were 'for' the consideration, i.e. they had real value to the friends and were not accordingly donations, and that their value was likely in most cases to exceed the cost of provision.

The FTT went on to consider the argument for apportionment, which was essentially that VATA 1994 s 19(4) should be used in the case where the benefits received were substantially less valuable than the payment made, to treat the 'excess' as a donation. The Court of Session had explicitly rejected this argument in *Tron Theatre*, because it held that the purpose of s 19(4) was not to 'open up the whole question whether the consideration in money (subjectively agreed by the parties) represents the true value of the supply'. Even if the supply was grossly overvalued by the parties and even if there was 'donative intent', that really made no difference – the actual amount paid for the benefits was the consideration, as that was the bargain struck between the parties. The FTT agreed with this analysis.

Once it was satisfied that the benefits were 'for' the payment made, it decided there was nothing for s 19(4) to apportion. It observed that if the trust had offered the benefits for a fixed price and specified that anything additional was a donation, that would be different. That was not the case, however, as the full payment had to be made to receive the benefits as a common feature of all the four schemes.

The multiple/single supply question

The FTT then considered the multiple/single supply question. It noted that the appellant's case was that the benefits constituted multiple supplies, and consideration had to be apportioned between them (some of the elements being zero rated, like the catalogue, or exempt).

The HMRC position on this was that it was not a *CPP* type case (*Card Protection Plan* (C-349/96)), where there was a principal element, together with ancillary elements which facilitated its enjoyment. Rather, it was *Levob* type case ((C-41/04) [2006] STC 766), where the elements formed a tabletop of offerings for a single price which it would be artificial to split as there was a single indivisible economic supply. The FTT held that the single price was indicative but not determinative, and that the benefits were not really interdependent (unlike the software and customisation in *Levob*). Nor was it possible to say that the elements could be divided between principal and ancillary: they were a package of related services. In summary, this was held to be 'the opportunity together with other interested parties, to partake at exclusive events at and offers by the gallery'. As such, the package in each of the schemes, in the FTT's view, amounted to a single supply.

The final question was whether, if there was a single supply, part of it – the supply of the catalogue – should nonetheless be liable at the zero rate. Both parties had asked the tribunal to stay judgment on this point until the outcome of the appeal to the Upper Tribunal in *Colaingrove (Verandahs)* [2013] UKFTT 343 TC. The question at issue was whether the verandah, an ancillary but standard rated item, could benefit from the zero rate for caravans when part of a single supply of a caravan. The FTT interpreted *Talacre* as finding that the benefit of a zero rate cannot extend to standard rated parts, even if the predominant element of the supply is zero rated. The case here was even less compelling, as it concerned whether the zero rating of the catalogue should be allowed as a zero rated separate element, not whether the entire supply should be zero rated.

The FTT concluded that there was no principle to require the single supply rule to be overridden to preserve the benefit of zero rating for a particular element which was ancillary to a single standard rated supply. It argued that the zero rated element, as part of a single standard rated supply, loses it zero rated status (as with the charcoal in the disposable barbecue in *WM Morrison Supermarkets PLC* [2013] UKUT 0247 (TCC)).

As noted above, the FTT did not appear to consider at all the case of *Commission v France* in reaching this decision. In that case, the CJEU had decided that a reduced rate for transport elements of a single standard rated supply of the funeral service could enjoy relief, because the clear intention of the legislator had been to provide that relief. So far, the courts are struggling to find a really satisfactory reason for restricting the potential impact of this decision (however inconvenient for tax authorities).

Where does this leave us?

The FTT's key finding was that, in the four friends schemes that were considered, the payments were consideration for the standard rated supplies of the benefits. This is unlikely to be challenged successfully and gives support to HMRC's argument that *Tron Theatre* is still good law. This outcome is in line with recent CJEU case law, and in particular with *Commission v Finland* (C-246/08), on what constitutes an economic activity carried out in return for consideration.

On the apportionment issue, the FTT's decision that the relative value of the benefits is irrelevant –

even if the payments are manifestly much greater than their objective value or what would be indicated commercially – is also unlikely to be successfully challenged. This indicates that probably the best way forward for charitable bodies operating similar friends schemes will be to seek an apportionment by 'agreement and declaration' similar to the post 1 April 2013 'new arrangements' reached following the ADR negotiations in this case, i.e. for the parties to agree and declare that so much (X) is 'for' the benefits and so much (Y) is the donation. But this is now only likely to be agreed by HMRC if it is clear that the benefits can be secured by making only the lower payment, and this is made known to the supporter.

If this route is followed (the long accepted 'split ticket' arrangement used by theatres taken more widely to cover friends' benefits), the charity would be taking some commercial risk (i.e. the 'blue meanies' who opt to take the benefits for the lower amount without making the suggested donation).

The commercial issue for them will be whether it is worth taking this risk to secure much lower overall VAT payments (and therefore tolerating the odd case where a friend refuses to pay the full amount). The commercial question will be how likely it is that friends who have a general wish to support the organisation in its wider cultural and social objectives will choose to be 'blue meanies' in practice – and the possible social stigma which might go with this if it became known. Would friends really want to attend a dinner or other social events when they had refused to make the expected donation, even if they had paid the amount needed to give them the legal right to do so? It seems counterintuitive that this would be a widespread problem in practice.

The section of the FTT decision most open to challenge is the section on composite/multiple supply. If this really is a *Levob*-type case, would one not expect to find more economic interdependence and relationship between the different elements of the single supply than actually exists here? Why is it artificial in this case to split the elements into different supplies, given that the single price is not meant to be determinative and quite a large proportion of what is paid has a 'donative' intent. Has the FTT erred in giving a 'false label' to a number of loosely connected benefits, as in *Bophuthatswana National Commercial Corporation Ltd v Customs & Excise* [1993] STC 702, concerning a group of disparate and unconnected services held (wrongly) to be a composite supply of 'diplomatic services'?

The benefits are of course all linked in some way to the work of the gallery, because that is what it was in a position to offer as benefits to supporters. It does not seem to be at all obvious that splitting the benefits up as separate supplies would be an artificial dissection of economically linked elements, contrary to the principle in *Levob*. ■

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