



TC05165

Appeal number: TC/2015/03844

VAT – whether payments made by supporters of appellant were donations or consideration for supply of magazine and other benefits – (street fund-raisers engaged by appellant charity to sign up passers-by on street to make regular direct debit payments to appellant) – payments were donations not consideration for supply – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Friends of the Earth Trust Limited

Appellant

- and -

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

**TRIBUNAL: JUDGE SWAMI RAGHAVAN
 CAROL DEBELL**

Sitting in public at the Royal Courts of Justice, London on 22 and 23 March 2016

Written reply by appellant submitted on 8 April 2016 as directed at close of hearing

Richard Vallat, counsel, instructed by Saffery Champness, for the Appellant

Nicholas Chapman, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

- 5 1. The appellant, Friends of the Earth Trust (a company limited by guarantee) is a well-known registered charity. Its appeal relates to the issue of whether certain payments made by supporters are donations (which are outside the scope of VAT) or consideration for a supply of the magazine “Earthmatters” and other benefits. The context in which the issue arises is an appeal against a decision that the appellant was not entitled to claim input tax on the training of “street fund-raisers” - persons engaged by the appellant to sign up passers-by on the street to regular direct debit payments to the appellant. The VAT periods covered are 05/09 to 05/14 and the amount of tax at stake is £1,083,952.
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2. The appellant further argues the supply is wholly or overwhelmingly a zero-rated supply of magazine and that there is a direct and immediate link between the various fundraiser costs and the benefits such that the input tax incurred on the fundraiser costs may be claimed.
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Evidence

3. We heard oral evidence from Eilish Kavanagh, who had held various roles at the appellant, as accountant, head of finance, director of operations and Tracey Pritchard, head of fundraising and supporter care at the appellant. Both had provided witness statements in advance, were cross-examined by HMRC and assisted the tribunal with its questions. We found both to be credible witnesses of fact.
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4. In addition we received brief witness statements which were agreed from:
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- (1) Dominic Murphy – he started working for the appellant in 2008 as editor of magazine, Earthmatters, having worked previously as a freelance journalist, and was also responsible for the appellant’s other publications and writing for its website. His statement covered market research which had been conducted with the appellant’s supporters, the role and standard of the magazine, the print runs of it and other publications produced by the appellant.
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- (2) Suzanne Thomas, the manager of the Supporter Care Team whose role included processing the income, communicating with supporters and potential supporters, and answering enquiries.
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- (3) Sandra Wild – Direct Marketing Officer, the manager of the people who trained the fundraisers in 2008-9 and 2009-10. She helped structure the content of the training given to fundraisers and sat in on a number of the training sessions.

(4) Rita Marcangelo – she had worked in various communications and publications role at the appellant from 1999 – 2014 which had also involved managing the advertising for Earthmatters.

5 5. The exhibits to the various witness statements included copies of Earthmatters, and other publications. We also had two ring binders containing correspondence between the parties.

Background and facts

10 6. The appellant is a registered charity and limited company which is registered for VAT. It can broadly be described as a “conservation organisation”. Its activities aim to protect and improve the environment through campaigning, undertaking research, educating and publishing. The evidence and findings of fact we focus on, given the primary issue in the appeal, concern the appellant’s arrangements regarding its street fund-raisers, their engagement with potential supporters on the street, the appellant’s subsequent communications and relations with them and the benefits provided to the supporters who signed up to make regular direct debit payments to the appellant.

Benefits

20 7. Supporters who pay more than three pounds per month receive Earthmatters magazine (discussed in more detail below) and various other benefits. These are 1) a Membership card. 2) A ten percent discount from the appellant’s online shop. (The online shop features products that tie in with members’ broad ethical views and “green” aspirations) 3) One free download track from the appellant’s Fairshare music site; and 4) A discount on organic wine from Vincerasmos.

Earthmatters Magazine

25 8. The appellant has run the magazine which contains articles and features on environmental issues as well as updates on the appellant’s activities since 1994. The magazine is 28-36 pages long and printed on matt paper. Photography and attractive colour imagery are an important part of the magazine and the standard is at least that of a weekend supplement; it is not in dispute that it is a quality product. It has a print run of around 55,000 on average. The appellant received positive feedback from members telling them how much they enjoyed the magazine and commenting on articles or asking questions. In Ms Thomas’ experience of customer service, supporters value the magazine. Her view was that the traditional Friends of the Earth supporter of ages 40 plus probably valued the magazine the most.

35 9. The appellant had carried out market research to find out what members actually read and what they valued. This revealed that supporters wanted the magazine to discuss general environmental issues over and above the charity’s own projects and to be kept up to date with the latest developments. The market research results confirmed that “lifestyle” content including advertising and wider environmental issues were popular amongst the readers. The aspiration to provide a combination of both updates on the appellant’s activities and more general environmental issues was

reflected in practice as was evident from the magazines we had the opportunity to examine and in an analysis performed by Mr Murphy. The magazine also provides the reader with offers from third parties advertising in the magazine. The offers and products are selected according to what the appellant thought its members wanted.

5 The appellant has strict criteria e.g. if they were looking for an advertising space to fill and considering energy suppliers they would seek out those independently ranked as the “greenest”.

10 10. There were also regular competitions in the magazines (offering larger quantities of relatively low value prizes such as books) which had been found from the appellant’s experience to encourage greater participation and engagement from supporters.

15 11. As regards the mail out of the magazine, around two weeks beforehand an analysis was run to check which of the supporters were paying the required minimum amount of money. The appellant produced the right number of magazines to match those members. Mr Murphy was not aware that an overrun was printed for promotional purposes and taking surplus magazines out of the building was discouraged. Occasionally back copies of the magazine were sent to previous donors to encourage them to give again. They were also used when people requested membership for someone else as a present to show what someone would get for a payment of £3 per month.

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25 12. *Budget:* The cost to the organisation was comprised of internal staff time spent writing articles, editorial time, payments for picture royalties, printing and distribution. (As well as Mr Murphy there was an in-house photographer, and a picture editor. In an effort to keep costs down top writers (Mr Murphy referred to George Monbiot) were persuaded to write pieces for a greatly reduced fee. There was also some income which came in from advertising sold in the magazine.

30 13. *Customer care:* Of the 500 or so supporter care related communications which the customer care team dealt with a week, on average around 20 related to Earthmatters. These were often about changing the amounts people gave on direct debit. Sometimes they were more in depth enquiries about articles that had appeared in Earthmatters. When the magazine was sent out there was a spike in enquiries, for example a number of people wrote in to change their addresses or to query why they have not yet received their copy of the magazine. There were normally a few hundred editions returned usually because of changes of address, duplicate mailing or delivery error.

35 The appellant then tried to contact people via their bank details to ask them for their new addresses. Sometimes members asked to cancel their membership or reduce the amounts they were giving. The team then explained that if they could no longer pay the £3 minimum then they would not receive Earthmatters anymore.

40 14. Ms Thomas’ evidence was that she would use the magazine as a tool to retain supporters who were trying to reduce their subscription below £3 – in her view the magazine could play a part in persuading them to stay. The view that the magazine had a value in recruiting and retaining supporters was also echoed in Ms Pritchard’s answers in cross-examination. The appellant was, as might be expected given its

remit, alive to the concerns about not wasting the valuable commodity of paper. Ms Pritchard explained that, nonetheless, her view was that subscribers valued having a physical product to get hold of and it also had to be acknowledged that many supporters were not on-line.

5 *Payments in practice / costs*

15. From Ms Kavanagh's answers given in cross-examination we find that for the year 2013/14, of the 10,500 who were signed up through street recruitment to give regularly, 23 gave less than £3, and of those seven were now active supporters. The figures for the earlier years covering the periods under appeal were in the same sort of order.

16. Figures given by the appellant in correspondence suggest that in the 05/13 accounting period, the income attributable to street recruiters was made up of one single donation of £30, eight regular payments of exactly £3 per month and 1632 regular payments of more than £3 per month. There were no regular payments of less than £3 per month.

17. Supporters who paid less than £3 would not get Earthmatters or any of the other benefits (set out at [7] above).

18. Ms Kavanagh's view was that the minimum payment level was held at £3 per month because it was both the economic level of the cost of recruiting supporters and the cost of benefits. She had not performed a calculation so that the costs balanced but in her view it was the level the appellant was "economically satisfied with". She looked at retention costs over the longer term. She did not have information on the proportion of costs made up by the advertising revenue – but it did not cover the majority of costs. It was a "welcome extra." She confirmed there were print and postage costs but did not know what these were. The staff (e.g. photo, editor) were part of a creative team which did other things. She did not know the budget allocation to Earthmatters although there was a separate cost centre for it. The appellant was not interested in making a profit, but just looking to cover costs. As regards the other benefits she did not have information on how many people used the various discounts, how many downloaded i-tunes tracks, details of the agreements. The 10% discount at the appellant's on-line shop would have resulted in a cost to the appellant but the arrangements with third parties would not have cost anything.

Other publications

19. The appellant also produces an annual report to a high production standard with colour photos and good quality graphic design. It goes out to between 500 and 2,200 people mostly made up of the appellant's high value donors and associated trusts. It tells people what has been done within the organisation and how the appellant has spent supporters' money.

20. As well as the report it also produces, both in print and in a digital version, a publication called "Earthed". This contains selected and abridged content from

Earthmatters. Mr Murphy's evidence was that this was deliberately designed as a lesser product when compared with Earthmatters. Supporters were still entitled to receive the publication Earthed even if they paid less than £3 per month.

21. The appellant also produced a monthly e-newsletter which went out to all of the supporters who had signed up on the website. It contained a short update, a few colour features, some content from the website and might include a request for funding. It was different in look and content to Earthmatters and gave an update on what the appellant was doing with links to its website.

Presentation and perception

10 *Training to street fund raisers – mention of Earth Matters?*

22. The appellant used street fundraising as its main means of recruiting members up until May 2015 using a company who provided a dedicated team who only recruited for Friends of the Earth. The fundraisers were given the freedom to come up with a pitch and develop their own individual approaches. They were trained internally with different members of the appellant's staff explaining the organisation to them and what it stood for.

23. Both Ms Pritchard's and Ms Wild's evidence was to the effect that the fundraisers would have been aware of the membership and the magazine because they were told about them as part of the fundraisers' training. Ms Wild's evidence was that as far as the membership benefits were concerned the street fundraisers were told to explain that when a person signed up for £3 or more per month, they would be entitled to Earthmatters magazine. It was one of the tools that they had and which they could use in their own personal pitches when recruiting. Between 2009 and 2012 the appellant told the fundraisers to aim for a minimum of £8. Ms Wild's evidence was that where people were deciding whether to give say £2 or £4 the fundraisers were trained to use the magazine as a means to encourage them to give over the £3 mark. Ms Pritchard did not think however that the fundraisers would have copies of the magazine on them – one of the tried and tested techniques was not to hand out literature on the street. (The controls over dissemination of the magazine (see [11]) suggest to us it was unlikely that the fund-raisers had copies of the magazine with them and we find as fact that they did not.) The technique encouraged was a short sharp pitch adapted to the fundraiser's style presenting someone with a single urgent environmental issue and asking them to get involved. Once someone has been engaged for the first time they were then guided towards committing a certain minimum amount of money with certain regularity. Fundraisers would home in on one thing that the person was responding too. There was not the same depth of conversation as there might be in door to door recruiting.

24. We accept the above evidence and find as fact that the street fund-raisers were told about Earthmatters in the training. But, the extent to which supporters were told about Earthmatters and whether material mentioning the benefits was handed out to them is a disputed issue of fact; this is considered further in the discussion section of our decision below.

Materials received afterwards

31. The welcome letter sent after the person had signed up on the street stated:

“Your decision to become a member of Friends of the Earth and support us with a regular gift by direct debit is great news...”

5 32. It refers to a booklet and the fact that contains information about:

“...some of the great member benefits you can now look forward to, for example receiving Earthed magazine, which is full of insight about environmental issues and ways to take action...”

33. Another example states:

10 “Your donation entitles you to some amazing member benefits – look out for your first supporter magazine bringing you more insight about environmental issues.”

34. There then follows a form which asked the recipient to check their direct debit instruction (including the amount to be debited) and an invitation to phone if any
15 details were incorrect. It then stated “Thank you for supporting Friends of the Earth with a regular gift”.

35. There was no evidence that if a confirmation was not received that the payment would not be processed. We infer from the evidence we heard that if no contact was received before the payment date then the appellant would proceed to collect the
20 payment.

36. One sample letter we were referred to mentioned that the supporter would get a copy of Earthed rather than Earth Matters. We did not receive any satisfactory explanation for the function of this letter. We were shown examples of membership renewal letters thanking the supporter and stating:

25 “Over the last year your donation has made an incredible contribution to our work to protect the environment...to continue your support...please fill out the renewal form. As a member you’ll also continue to receive our supporter magazine “Earthmatters” three times a year and be kept up to date on all our campaigns and environmental
30 issues.”

37. We were shown two examples of the direct debit online forms. The first set out in bold type:

“Support us

The simple and secure way to give online

35 The best way to support Friends of the Earth is through a regular gift because it provides the dependable income we need to mount long-term campaigns to protect our environment.

I wish to start a direct debit of £ per month...”

38. On the right hand side of the form the following words appeared:

“To receive your complimentary subscription to Earthmatters magazine you will need to give a minimum of £3 a month.”

39. The form finished:

5 “By completing this form you are supporting Friends of the Earth Limited.”

40. The other type of online form was headed:

“Ways to Donate

Make a regular donation

10 In the history of humankind, there has never been a more urgent time to become a Friend of the Earth.

Your regular gift will help us to plan for the future and make a real difference in the critical years to come.

15 If you sign up to a direct debit of £3 or more a month, we’ll send you a complimentary copy of Earthmatters, our award-winning magazine, three times a year.

Yes, I would like to give a regular gift to protect our world.”

Treatment in the accounts

41. The Voluntary income section set out a table with the following row headings in respect of 2014 and 2013: 1) “Gifts & Donations”, 2) “Legacies” 3) “Membership subscriptions that are, in substance, donations rather than payments for goods”, 4) “restricted donations”, 5) “Donated services and goods (Gifts in kind)”. In cross-examination, Ms Kavanagh confirmed the £3 plus regular payments went under the heading “Membership subscriptions that are, in substance donations, rather than payments for goods” and that this was due to the Charities SORP (Statement of Recommended Practice). As to the inconsistency between the accounts and how the payments were treated for VAT she commented that accounting standards do not often reflect tax accounts.

Law

30 42. The primary issue in this appeal is whether the payments made by the supporters to the appellant were consideration for a supply.

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”

Discussion

Issue

Was the supporter payment a donation or consideration for a subscription to Earthmatters and/or other benefits?

- 5 44. As far as the relevant legal test to be applied is concerned both parties agree that for there to be a supply for consideration there must be a legal relationship of reciprocity between the service provider and the recipient. They also agree as is confirmed in the case law that the question of whether a payment is consideration for a supply is to be approached objectively.
- 10 45. As highlighted by the appellant, the FTT’s decision in *The Serpentine Trust Ltd v The Commrs for Revenue and Customs* [2014] UKFTT 876 (TC) (Judge Mosedale), while not binding helpfully sets out the relevant authorities and legal principles.
- 15 46. The facts of that case also concerned the issue of whether a payment made to a charitable trust was a donation, or whether it was consideration for the supply of various benefits. The appellant, a contemporary art gallery which ran various supporter schemes ranging from £500 per year to £50,000 over three years providing different packages of benefits, sought to argue that the benefits provided were de minimis and that the payments made by the supporter were donations, rather than payments for consideration resulting in a standard rated supply as HMRC were arguing. The judge recorded that both sides accepted that a supply could only take place where something was given “for” consideration. Having referred earlier to the ECJ / CJEU cases of *Tolsma* (C-16/93), *Kuwait Petroleum* (C-48/97), *Naturally Yours* (C-230/87) and *Apple and Pear Development Council* (C-102/86) the judge set out the view at [60] that the CJEU had never ruled that a legal relationship with reciprocity always meant there was a supply “for” consideration. Such a relationship was a necessary but not sufficient condition for there to be a supply for consideration.
- 20 47. It was noted that both in *Kuwait* and *Church of England Children’s Society* (which is discussed further below) that although there was reliance on how the benefit was described in the contract there was no suggestion that that the description was determinative. Judge Mosedale explained that the description “could not determine the matter as the description the parties apply, deliberately or inadvertently, may not be an accurate one.” At [63], while accepting that the relevant brochures referred to terms such as “gift”, “support” and “generosity” the judge emphasised that the document had to be considered as a whole and noted the relevance of the fact that the text devoted to the benefits in question exceeded the text which stated what the donation would be used for.
- 25 48. The judge conducted an analysis at [68] to [75] so far as she was able to on the evidence before her of the actual cost to the appellant of the benefits (noting that this was different from the marginal cost of e.g. issuing monthly on-line bulletins to a new supporter) and the perceived value of the benefits by the supporters noting that it was normal for perceived value to exceed cost as this was how entrepreneurs make profit. At [69] she disagreed with the appellant’s argument that a payment for benefits of
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£5,000 for something which cost £1,000 was not de minimis by itself or by comparison and rejected the appellant's case that the payment was not "for" the benefits. On the evidence the judge was not persuaded that the benefits were objectively (or subjectively) de minimis by themselves or measured against the price paid by the supporter. For the same reasons she was not satisfied that the price was not paid "for" the benefits. Judge Mosedale found at [77] that "objectively (and subjectively)...the benefits had very real value to the supporters, and the value was likely to exceed the cost of providing the benefits."

49. The decision in *Church of England Children's Society* VTD 18633 (2004), an appeal before the VAT tribunal (Dr Nuala Brice and Mr L G Wilkinson FCIB) was also considered by the tribunal in *Serpentine*. The appellant there provided a newsletter to "committed givers" who agreed to make regular payments of £5 per month or more to the appellant and the appeal concerned input tax credit claimed in relation to the production and distribution of the newsletter. The argument focussed on the nature of the transaction and whether the £5 each month constituted the value given in return for the supply of the newsletters. The tribunal accepted that regard had to be had to the objective nature of the transaction. It considered the nature of the transaction and the documentary evidence, which included at [50] the mention of the word "gift" on a number of occasions, the fact that the donor was at liberty to decline the newsletters, statements given before the direct debit form was signed which emphasised that the donation would be received directly by the appellant who would use it for its charitable activities, and a letter sent to the donor which emphasised that payments were made by way of gift although there was a statement that givers would receive the newsletter. The tribunal also noted that for a nine month period every giver, not just the committed givers received the newsletter and the similarity with the forms completed on the website (website givers did not receive the newsletter). The Tribunal concluded at [51] that neither the appellant nor the donor agreed that the payment of £5 each month constituted value given in return for the newsletters "the transaction was that the donation was a gift to the Appellant to be used in its charitable work and that the Appellant would send the giver the free newsletters." In its discussion of this case the tribunal in *Serpentine* contrasted the situation where a payment was made for "very real benefits" with the one in *Church of England Children's Society* which it described as being one of a "gift with a stipulation which permitted donors to check what their donation was used for."

50. In *CCE v Tron Theatre* [1994] STC 177 the appellant, which ran a charitable trust to promote modern drama, invited sponsorship of new theatre seats. In return for a payment of £150 a brochure set out various benefits: a personalised brass plaque displayed on the theatre seat, acknowledgement of the donation in the foyer, a commemorative limited edition print and priority booking for two gala evenings. Many sponsors did not know or care about the benefits and through their value was about £5. The Court of Session held that the motives of the supplier or the recipient of a supply were not relevant and that it was of no consequence if there was an element of over-charging or of donation in the sum which was paid. The consideration for the supply of benefits was the amount of money which had to be paid in order to receive them.

The key issue in this appeal is whether objectively the benefits were “for” the “donation”. Mr Chapman for HMRC says it is not enough that the appellant gave benefits to the supporters and the supporters gave the appellant money emphasising the distinction between the situation of a *quid pro quo* which satisfies the test as
5 distinct from a *quid cum quo* which would not. He relies, for this proposition, on [41] of the Vice-Chancellor’s judgment in *Church Schools Foundation Limited v CCE* [2001] EWCA Civ 1745, Case C-246/08 *Finland* especially at [38], [44-45] and [51] and Warren J’s analysis at [40-57] of *Norseman Gold plc* [2016] UKUT 69 (TCC) in particular at [52] and [57]. Mr Vallat, for the appellant agreed the point of law was
10 common ground and that the authorities simply restated the principle.

51. We summarise the relevant legal principles and observations that may be extracted from the case law above as follows:

(1) The requirement that there be a legal relationship and reciprocity are necessary but not sufficient conditions for there to be a supply ([60] of
15 *Serpentine* referring to various European cases).

(2) The notion of a payment being “for” something connotes a *quid pro quo* as distinct from a *quid cum quo*. (*Church School Foundation* referring to the jurisprudence developed by the European Court in *Apple and Pear Development Council*, *Naturally Yours*, *Tolsma* and *First National Bank of Chicago*).
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(3) The question of whether a payment is “for” a benefit is an objective one of fact (see [61] where Judge Mosedale agrees with tribunal in *Church of England Children’s Society*).

(4) Whether supporters chose to pay on the basis the payment was a donation and irrespective of benefits offered or whether they only paid because they wished to receive the benefits –i.e. what the supporters thought – is irrelevant as the test is objective. ([70] of *Serpentine*).
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(5) Labels and descriptions are not determinative but may be relevant (see [62] and [63] of *Serpentine*). We also note that the tribunal in *Church of England Children’s Society* did (at [50]) examine the language used in the direct debit form.)
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(6) Actual cost (as opposed to marginal cost) and perceived value by the supporter are potentially relevant (there is nothing unusual in perceived value exceeding cost.) (See [61] of *Serpentine*).

(7) Payments in return for very real benefits may be distinguished from gifts with stipulations which permit donors to check what their donation is used for are not supplies ([77] *Serpentine* referring to *Church of England Children’s Society*).
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52. What also emerges from the above tribunal decisions is the fact that, beyond
40 emphasising the objective nature of the analysis, the conclusion as to whether a payment was “for” a benefit was very much dependent on the inferences the tribunal drew having assessed the particular facts of the case and that there was not necessarily the same single attribute of the transaction under consideration which is

determinative. In *Serpentine*, the conclusion that the payments were “for” the benefits was inferred from the finding that benefits of very real value to the recipient were provided which were likely to exceed the cost of providing them. That makes sense because when a benefit is provided only to a person who has made a payment and in the situation where that person perceives the benefit to be of very real value this set of circumstances is more consistent with the payment being “for” the benefit than not. A further relevant fact was the prominence given to the benefits in the relevant literature. In *Church of England Children’s Society* the relevant factors were the documentary evidence which referred to the payment being a “gift”, the ability to opt-out of the newsletter, and the fact that for a period even those who did make the minimum payment received the newsletter.

53. Before considering the application of the principles to the facts there a couple of issues which affect the scope or approach to the issue under appeal which it is convenient to deal with. The first is the relevance of the issue of whether supporters have a legal entitlement under domestic law to Earthmatters and the benefits. Mr Chapman, for HMRC accepts there does not have to be a contract between the appellant and the supporter in order for there to be a supply but argues the existence of a contract is a relevant objective factor. HMRC disagree the supporter has a legal right to receive Earthmatters based on the following: The absence of written contracts of terms and conditions attached to supporter payments. ((a) The supporter did not know about the magazine (there was ambiguity over which of the versions of the direct debit versions were actually used, and in one them it was suggested that the reference to Earthmatters was in small print and the frequency with which the magazine was received was not explained). (b) Even if a supporter knew he or she would get a magazine three times a year if paid £3 a month or more that would not mean he or she intended to enter into a legal relationship to receive it. (c) Contact received by the appellant from supporters if the supporters did not get a copy of the magazine did not mean the supporters were legally entitled to it). Mr Vallat, for the appellant, submits the supporters were legally entitled to the magazine. He points out that it is clear that written terms are not required for the formation of a contract. But in any case, as the parties agreed, it was unnecessary to show that there was a legal contract under domestic law in order to establish a payment was consideration for a supply.

54. In our view, the issue of whether there is a contract will clearly be relevant to the question of whether the “legal relationship” element in the analysis is satisfied but we are not persuaded the existence of a contract under domestic law is necessarily a relevant objective factor when it come to the question of whether the payment was “for” the benefit. It is also the case that the mere fact of a supporter becoming entitled to receive a benefit upon payment does not necessarily mean the payment was “for” the benefit. We note that in *Serpentine* it was accepted at the outset (see [48] and [56]) that the arrangements were contractual yet that feature was not considered in the objective analysis and it obviously did not prove to be a determinative factor because the characterisation of the payment was still at large even though the benefits were contractual. (This view is also consistent with the approach taken in *Church of England Children Society* where having noted there was little argument on the

question of legal relationship, the tribunal did not analyse the transaction in terms of contractual entitlement).

55. Another disputed issue concerning the way in which the question under appeal is approached concerns the relevance of the specific VAT rules around the time at which a supply is made and the relevant point in time in the relations between the supporter and the appellant at which to consider whether there is a supply or a donation. The significance of this goes to the breadth of materials which need to be considered.

56. The appellant notes that VATA 1994 provides prescriptive rules as to the time of supply and highlights the time of supply is when payment is made; at that point in time the supporter has been made aware of his or her right to receive the magazine and other benefits through the various pieces of literature and the direct debit form that have been sent to him or her. The supporter must confirm his or her direct debit details before any payments can be taken from his or her account. The time at which a purported supply is made and for which consideration is given must, the appellant argues, be relevant.

57. HMRC accept that as a proposition of law the time of supply is when the magazine or other benefits are sent or payment is received but say it is wrong to suggest that a donation from the outset can become something else by dint of the materials sent to supporters later. HMRC suggest that the relevant time to assess whether there is a supply or donation is when a street fundraiser engages with a potential supporter on the street and the potential supporter decides to support the charity.

58. While we note that there are indeed prescriptive rules referred to in s6 VATA 1994 on the time of supply we note that these are rules which deem when a supply of goods or services are to have taken place for the purposes of the charge to VAT. Logically, it will first have to have been determined whether something is a supply of goods or services in order for the time of supply of such goods or services to then be deemed.

59. But that is not to say that the materials accessible to the supporter after the fundraiser has engaged with them are of no relevance. First, because, as the appellant points out, the payment is not taken until the supporter has had an opportunity to correct the payment details and amount, and second because the way parties have conducted themselves before and after the transaction may throw light on the objective characterisation of the transaction between the appellant and the supporter and in particular the question of whether the payment made is “for” the benefits in question. We do not therefore limit ourselves to looking simply at what was said by the street fundraiser as HMRC invite us effectively to do, but will also consider what if anything the direct debit form, and any later materials there were which were accessible to the supporter, add to the picture.

Objective test: irrelevant matters

60. As emphasised by the case law referred to above the test of whether a payment is supply for consideration is to be approached objectively. It is worth keeping in mind that this means a number of matters which on the face of it might seem relevant are not. As the appellant points out the question of a supporter's motivation in making a payment and any desire on his or her part to benefit charity is not relevant – it speaks to the supporter's subjective intention in making the payment. The appellant accepts the obvious fact that the supporters are making payments primarily to support the charity and its objects but argue that that fact is not inconsistent with the proposition that objectively they are making payments for the magazine and other benefits. However for the same reason, certain points which the appellant relies on and which go to the appellant's motivations in relation to providing the benefits, for instance Ms Pritchard's view that Earthmatters has a proper value in recruiting and retaining supporters, also evince a party's subjective views and must be put to one side in the objective analysis.

61. Similarly although much was made by HMRC at the hearing about the treatment of the payment in the appellant's accounts which were prepared according to the Charities SORP as "membership subscriptions that are, in substance, donations rather than payments for goods" these points were not relevant; they simply disclose the appellant's or its advisor's subjective views on the treatment of the payments according to their understanding of the relevant accounting principles. (A similar point arose in *Serpentine* where the appellant in that case sought to rely on its accounts which it asserted showed the payments in issue as donations. At [37] of her decision Judge Mosedale explained that it would have made no difference if the supporters' payments were shown as donations in the accounts and that the auditors' view of the law could not influence her decision.) As regards the application HMRC made on the morning of the second day of the hearing to adduce new documents which set out the Charities SORP (following Ms Kavanagh's reference to it in her cross-examination the previous day) it follows, we disagree with the suggestion that it is plainly relevant and we reject the application.

62. HMRC also highlight the fact that the appellant has treated the payments entirely as gifts for the purposes of the gift aid regime for direct tax purposes. The appellant argues its treatment on gift aid is irrelevant as that is a separate regime and that there is no correlation between the question of whether something is consideration for a supply for VAT purposes and whether a donation qualifies for gift aid for direct purposes. In particular there is a statutory de minimis limit for what counts as gift aid (someone could make a gift of £36 and receive benefits of £9 without losing gift aid. The appellant's position derives from the quantification of the benefits being less than 25%). HMRC in turn say this point does not alter the point that gift aid relief relates to gifts/donations and payments for goods or services sold; the fact that a benefit is stipulated for a gift does not mean the gift is *for* the benefit: were that to be the case it would not be a gift at all and gift aid relief would not be available.

63. In our view even if we were to put aside any concerns as to whether what counts as a gift for direct tax purposes correlates to the analysis for VAT purposes, the more fundamental reason for the irrelevance of HMRC's point is that the way the appellant

has treated the payments for the purposes of its compliance with direct tax requirements can at best show the appellant's views on the interpretation of the relevant direct tax law. It does not assist the tribunal in an objective assessment of the transaction.

5 *Application of law to facts*

64. Turning then to the application of the law to the facts, there are various disputed matters of fact concerning what, if anything, the potential supporters were told about Earthmatters and the various other benefits when speaking to fundraisers and what, if any, material the supporters were handed that needs to dealt with.

10 65. Although the appellants' witnesses intimate that the fundraisers would have mentioned the magazine on the street we find the likelihood that this was the case to be very low for the reasons set out by HMRC. The fundraisers were encouraged to prepare their own script based on a short sharp pitch, focussed on a particular topical environmental issue as a means of engaging with the potential supporter (e.g. declining bee population, mobile phone components). The exhortation to hone in on a particular issue to grab the potential supporter's attention and the lack of mention of Earthmatters in the written and visual training material that the fundraisers took away, make it unlikely in our view that references to Earthmatters and the other benefits of becoming a supporter and paying a minimum contribution were incorporated into the fundraisers' standard pitch. While that is not necessarily inconsistent with fundraisers going off script and mentioning the availability of Earthmatters magazine we think it unlikely that having talked about e.g. bees, or the impact of mining metals for mobile phone components, or another particular burning environmental issue, the fundraiser would readily segue to mentioning Earthmatters magazine, particularly if there was no sample copy provided as was the case. We find that in all likelihood the magazine and benefits were not mentioned in the vast majority of engagements with supporters. We cannot exclude the possibility that Earthmatters or other benefits were mentioned on an exceptional basis, in particular if it was the case that a potential supporter was wavering over the amount and considering paying less than £3 and the fundraiser had recalled the conditions around receiving Earthmatters from the verbal mention of it at the fundraisers' training.

35 66. Although, as the appellant points out HMRC's view that that Earthmatters was mentioned only on some occasions to "waverers" is a matter of opinion, it is nevertheless for the appellant to put forward sufficient evidence which would enable a finding to be made that Earthmatters was mentioned, and the frequency with which it was mentioned. Such evidence that there was, was given in very general terms and reflected the appellants' witnesses opinion that the magazine was a tool / had a role to play in persuading those contemplating less than £3 to contribute more. There was insufficient detail to suggest the extent to which that sort of situation arose and we are unable to make a finding of fact on the point. Further, while we appreciate what the appellant has said about the difficulties in "policing" or monitoring what was said in the pitches by the fundraisers to potential supporters, the fact there are difficulties faced in gathering evidence that would tend to show a particular fact cannot amount to evidence of the fact sought to be proved.

67. In its written reply the appellant refers to various matters raised in evidence which it maintains indicate that Earthmatters was mentioned. As regards the items of Ms Pritchard's evidence, and Ms Kavanagh's evidence referred to in the submission, as we have explained above we do not dispute that the fundraisers were told about the magazine as part of their training. The point is that we find it unlikely the fund-raisers referenced it in their pitch to supporters.

68. A further dispute centres around whether written material was handed out by the street fundraisers. In particular it is suggested by the appellant that the reference to the leaflet being handed out by a "paid fundraiser" (described at [26] onwards above), could include street fundraisers. On the other hand Ms Pritchard's evidence was that an example of the tried and tested techniques and guidelines that street fundraisers worked to was that they did not hand out literature on the streets. Taking account of that evidence and noting that the appellant also used other types of paid fundraiser channels (where support was solicited through door to door engagement and literature was handed out) we find on the balance of probabilities that the leaflet was not handed out by the street fundraisers.

69. Therefore, as at the time of the signature of the direct debit forms (on the street) we are unable to make a finding of fact that Earthmatters was mentioned other than exceptionally by the street fund raiser or that the fund-raiser handed any literature to the supporter.

70. The supporters did however receive welcome materials and a direct debit confirmation form afterwards once they had signed up on the street. These did mention Earthmatters and other benefits and as indicated above at [59] onwards they are materials which are relevant to take account of. HMRC ask us to note the descriptions the appellant used - "gifts, "donations". Earthmatters was described as "complimentary" and supporters were thanked for their generosity and support. HMRC also highlight the lack of prominence to the benefits only being available if the payment was £3 or more.

71. The appellant says these are labels and should be put to one side – the fact the magazine was described as complimentary did not mean that the right to receive it was not enforceable. The appellant also submits that it is to be expected that this kind of "soft" language will be used in the charity sector; the appellant was not behaving as salesperson selling Earthmatters but soliciting contributions for a charitable endeavour. HMRC say the language described the reality and the explanation for the use of the language is in itself revealing; the appellant was not a magazine salesman but asking for charitable contributions.

72. As discussed above the labels parties use are not determinative but we do not agree we should put them to one side – there are a factor to be taken into account. The Tribunal for example in *Serpentine* noted at [63] after recording that descriptions were not determinative went on to look at the documents as a whole; on the facts of that case it noted text on benefits exceeded text which stated what benefit would be used for.

73. While HMRC may have overstated matters by suggesting that the text relating to Earthmatters is in “small print” (the print size did not strike us particularly small given the print size of the other text on the document) the overall impression we formed from looking at the direct debit and welcome materials was that the text devoted to describing the benefits was less prominent and substantial than the text setting out the importance of the good work that would be done by the contribution and the appellant’s gratitude for it. Also while not a significant point in its own right the lack of knowledge the supporter would have as to the frequency of the magazine which HMRC sought to highlight would not, as the appellant argued in reply, be fatal to a legally binding contract forming, it is in our view relevant to the question of whether when the consideration was paid, it was paid “for” the benefit. In our view a supporter who was aware that their minimum £3 subscription would get them three copies of the magazine would be more likely to be party to a transaction whereby the payment was for the benefit than a supporter who was not aware of the frequency.

15 *Perceived value /actual cost and value of the benefit*

74. As regards the value of the benefits HMRC argue that they were no more than a token of de minimis subjective value to its supporters; they question how something more than de minimis value could be attributed by the supporters to something they had not seen. Even once supporters had been made aware of the magazine HMRC submit the sum of £3 a month did not genuinely represent the subjective value all supporters attached to a thrice yearly magazine.

75. The appellant disagrees with HMRC’s suggestion that the magazine and other benefits were unimportant and which, the appellant says, goes against the unchallenged evidence on the quality of the magazine, the positive feedback from readers, that on the evidence supporters would have had sufficient idea of what the magazine was about and that in any case the subjective value is irrelevant.

76. Having had the opportunity to examine various sample issues of the magazine we agree the magazine is a quality product and would be a benefit to someone interested in finding out not just about the appellant’s activities but about topical environmental issues and well-known figures in the field. We do not understand there to be any disagreement that it is a quality product nor that it is not simply an update on the appellant’s activities as was the case with the newsletter in *Church of England Children’s Society*. It is clear that from the feedback received, and the enquiries received when the magazine was not delivered that at least some readers appreciated the magazine and missed it when it did not arrive. (The inherent limitations of that evidence must be acknowledged though because we have no idea what people who did not give feedback thought or the extent to which there were those who did not receive the magazine but were not concerned enough to chase up on it).

77. It follows from the fact that the magazine was mentioned in the direct debit confirmation / welcome letter that supporters would be made aware of the magazine (albeit not with a great degree of prominence) that the subjective value was not de minimis and also that supporters would have gained a reasonable appreciation of the nature of the magazine. But, in our view the appellant is not correct to say that the

subjective or perceived value of the benefit is irrelevant (it formed part of the analysis by the tribunal in *Serpentine* as explained above at [48]). There is also nothing inherently inconsistent with the idea that perceived value of the benefit in the transaction (something which is determined subjectively) may be a factor in an objective analysis of the transaction. The point about the objective nature of the test is that it excludes the subjective views of the parties as to nature of their transaction.

78. Of course the fact that the magazine did have a perceived value is a point which is prima facie helpful to the appellant albeit that it is not one that is determinative or one that should be considered in isolation from the costs of the benefit.

79. In terms of the costs of producing the magazine and Ms Kavanagh's evidence that £3 per month was a level the appellant was "economically satisfied" with and that it was not the appellant's intention to generate profit from it, we did not feel equipped to make any finding as to the specific actual cost of the magazine. It was apparent though that there would be more than a minimal cost in producing the magazine, given the obvious printing, postage, and mailing costs, the staff time in commissioning and editing the copy and in sourcing and producing the visual material and photography.

80. Returning to the question of whether the payment was "for" the benefit HMRC depict two limbs to the "for" test: 1) Is the benefit for the payment? 2) Is the payment for the benefit? It is a point in the appellant's favour that the supporter does not get the magazine and other benefits unless the minimum payment is made. In that sense the benefits are clearly "for" the payment and the first leg of the test is met.

81. The appellant suggests we ask what do the supporters give (minimum £3) and what do they receive (benefits). Another way the appellant characterises the transaction is that it amounts to: "You, the supporter, make a donation and if it is at least £3 then you get a magazine." While these elements are essential to the analysis what is still, as HMRC rightly point out, in issue is the second limb of the test and whether it has been established that the minimum £3 is, objectively, "for" the benefits. As HMRC argue the fact a supporter would receive and knew he would receive a benefit does not mean the payment is for that benefit.

82. Having said that there are certain points in relation to which HMRC rely on the absence of a certain feature which in our view do not assist.

83. HMRC say the evidence indicates that supporters who had no interest in the magazine still got it. (For this proposition they rely on correspondence from the appellant's agent which states that all supporters receive the magazine (and other benefits) if they pay a minimum of £3 per month.) The appellant points out this does not amount to evidence that the supporters received the magazine even when they were not interested in it and HMRC, the appellant submits, are unreasonable to draw such an inference. It is not in dispute that the magazine was only given to those who paid £3 or above per month. However, we do not see how it would help objectively to know whether the magazine was only given to those who were interested in it. If it were the case that non-interested supporters did not receive the magazine and also that

no payment was taken from them or any payment that had been made was returned then that would, we agree, tend to suggest the payment was “for” the magazine. But, the absence of such a combination of features would not help us one way or the other.

5 84. HMRC also suggest asking: has the appellant established that any given potential supporter did not and/or would not have made the payments if he had not received the magazine? While, we would not rule out that, a finding of fact that a supporter stopped making payments because they did not receive the magazine, would be more consistent with the objective transaction being one where the payments were for the benefit of the magazine than not, the absence of such a finding is not something which
10 in our view points towards a conclusion that the payment was not for the benefit.

Reasons why the payment was not “for” the benefits

15 85. In our judgment it is quite clear when viewed objectively that the £3 minimum monthly payment was not “for” the magazine and benefits, or in other words a *quid pro quo* for them. The magazine and benefits were *quid cum quo*, the transaction being that the payment was a gift to the appellant to be used in its charitable work and that the appellant would send the supporter free copies of Earthmatters.

20 86. We reach this view taking account of the low likelihood that the magazine and benefits were mentioned at the time the supporter signed up to a direct debit on the street, the low level of prominence of the magazine and benefits, and the way in which the payment and magazine were referred to in the communications with the supporter following that engagement on the street in the form of the welcome letter and direct debit confirmation form.

25 87. That evidence, when viewed in the round, is simply not consistent with the transaction objectively being one where the person was paying a subscription for Earthmatters and other benefits. We are not satisfied that the appellant and the supporter agreed that the payment constituted value given in return for Earthmatters and the other benefits. It was quite clearly a donation to support the appellant’s charitable activities.

30 88. Even if there was mention of Earthmatters by the street fundraiser to “waverers” before they completed their details and payment amount on the street this would not mean the payment was necessarily for the magazine. It is just as consistent with the supporter making a donation but understanding that as a consequence of it being above a certain amount they would receive a free copy of Earthmatters.

35 89. When we look at the statements later on the direct debit form – read in their whole context, taking account of the relative sizes of text and placement – these do not indicate the person was making a direct debit as value given in return for Earthmatters. There are multiple references to “gift”. Earthmatters is described as “complimentary”.

40 90. The fact that the benefit is not just an update on activities does not of course mean it is provided “for” the payment. The fact that the magazine had a perceived value

does not on the facts of this case help the appellant to establish that the parties agreed the £3 monthly payment constituted value for the magazine and other benefits. It is relevant we think that any perceived value would only really become apparent to the supporter once the supporter had actually received the magazine (it would either not be apparent at all because it was not mentioned, or no real clue could be gained from what was said about it – the reference to “award-winning supporter magazine” would be insufficient in our view to convey what value the magazine did have.) The perceived value up until that point would be minimal. The fact that a payment was made at a time when the benefit was of minimal perceived value makes it more likely that the payment was not for the benefit.

91. The fact that the appellant would only provide the benefits if the minimum payment of £3 was made does not turn the payment into value given in return for Earthmatters. It still retained its character as a donation. It is just as consistent with the transaction being one whereby the appellant undertook to send a free copy of the magazine where donations were made above a certain level.

92. Similarly to the extent the appellant’s evidence is that there were occasions where it was explained to those supporters thinking of cancelling or reducing their subscriptions below £3 (we had insufficient evidence to make any finding of fact as to frequency with which this happened), the mention of the magazine, and the non-reduction or non-cancellation are just as consistent with the supporter deciding to continue their donation but not wanting to lose the benefit they had enjoyed. Their behaviour would not necessarily mean the payment was being made “for” the magazine going forward and in fact it would tend to suggest that up until the period of the intervention that there had been no agreement between the parties that the payment constituted value for the benefits because, if there had been, it is likely the supporter would be well aware already of the cut-off amount for getting the magazine and would not need to be told about it.

93. We should point out that we are able to reach this conclusion without relying on the points made by HMRC which were disputed by the appellant in relation 1) to the value of the payments. (HMRC make the point that if these were “for” the benefits a significant proportion would be in the sum exactly of £3. This, HMRC says, tends strongly to indicate the payments were gifts) and 2) HMRC’s general argument that VAT is rooted in the real world and the obvious reality is the donors chose to gift money to a charity to support it in its objectives.

35 *Can payments be split into an amount which is part consideration and part donation?*

94. The appellant’s submission was that if they were successful in establishing the payment was consideration “for” a benefit then all of the payment (contrary to HMRC’s position) had to be treated as consideration (on the basis of *Tron*). We did not understand them to be arguing in the alternative that even if the payment was not consideration, then the amount up to £3 was consideration with the excess being a donation. Given that and our conclusion above it is unnecessary to consider the parties’ submissions on these points.

Conclusion

5 95. The payments were donations to the appellant. They were not consideration for the supply of the magazine and other benefits. It is not therefore necessary to deal with the parties' arguments as to the attribution of the supply and whether it was zero-rated.

96. The appellant's appeal against HMRC's decision to disallow VAT incurred on the cost of recruiting supporters to its supporter scheme is dismissed.

10 97. 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.

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SWAMI RAGHAVAN

TRIBUNAL JUDGE

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