



# Arts organisations – VAT on patron schemes

Many arts charities operate ‘supporter schemes’, where supporters are offered packages of benefits that are designed to comply with the Gift Aid rules. A new tax tribunal case, *Serpentine Trust*, has highlighted that such schemes, whilst they may work for Gift Aid, can be problematic for VAT.

The tax tribunal has found that for several of the Trust’s supporter schemes, designed to fit within the Gift Aid benefit rules, the whole minimum payment is consideration for a standard-rated supply of benefits. The tribunal has rejected arguments for ignoring the benefits on de-minimis grounds, for splitting the minimum payment between consideration and donation elements, for treating as a mixed supply (so for example printed matter is a zero-rated benefit) and treating as a wholly VAT exempt supply.

The result is that, if unchallenged, HMRC may start to demand standard-rated VAT on all minimum donations under similar supporter schemes. However, if you have an existing VAT agreement with HMRC, you should be able to rely on that until HMRC either revoke it or make a public announcement on the matter.

The tax tribunal did not examine the ‘ESC 3.35 issue’. ESC 3.35 is an HMRC concession that allows non-profit membership bodies to apportion their subscriptions for VAT. HMRC staff used to accept that ESC 3.35 applies to supporter schemes but HMRC has decided it no longer accepts this, on the basis that ESC 3.35 only applies to ‘genuine’ membership

subscriptions, that is where the member gets a say in how the organisation is run via voting rights etc.

## Gift Aid position

The supporter packages usually specify a minimum payment (a ‘minimum donation’) that must be made in order to secure a package of benefits. The benefits are usually designed to meet the Gift Aid rules in one of two ways:

- 1 The total benefit value is within the Gift Aid donor benefit limits so the whole minimum payment can be Gift Aided
  
- 2 The total benefit value is above the Gift Aid donor benefit limits but (as permitted by HMRC) the ‘split payment’ treatment is used. This splits the supporter payment into a part which is consideration for the benefits (not eligible for Gift Aid) and a part which is a donation (eligible for Gift Aid). In order to use this treatment HMRC require two conditions to be met:
  - The benefit must be separately purchasable and
  - The supporter is aware of this at the time of donation

For the split payment option, the marketing literature usually states the consideration value and donation value and explains that, if they wish, the supporter can purchase the benefits by paying just the consideration amount and no donation. The hope is that supporters will pay the full suggested amount anyway.

## VAT position

For VAT, HMRC accept that the split payment treatment also works for VAT (subject to the same conditions) so any output VAT that may be due is only due on the consideration element and the gift element is outside the scope of VAT.

The problem lies with supporter payments where the whole payment is treated as a gift for Gift Aid (where the benefit value is within the Gift Aid limits). Here there is usually no option to purchase the benefits for less so, on the face of it, as the supporter has to pay the specified minimum donation in order to obtain the benefits, the whole of the minimum donation is consideration for those benefits and as such, within the scope of VAT.

This is what HMRC has successfully argued in the Serpentine Trust case. In order to understand why, it is necessary to look at two historic cases on this issue.

## The Tron Theatre case

In the 1994 case Tron Theatre the Scottish Court of Sessions examined a theatre supporter scheme under which a package of benefits (seat plaque, name on foyer display board,

limited edition prints and priority bookings) was offered in return for a £150 ‘donation’. Many supporters did not care about the benefits or thought they were worth about £5. The Court came to the conclusion that despite a substantial difference between the required minimum donation and value of the benefits provided, the whole of the minimum supporter payment was consideration for the benefits and as such subject to VAT. The Court held that the motives of the supporter are not relevant and that it is of no consequence if there is an element of over-charging or of donation in the sum paid; the consideration for the supply of benefits is the amount of money which has to be paid in order to receive them.

## The Children’s Society case

The VAT Tribunal came to a different conclusion in the Church of England Children’s Society. The charity obtained committed givers who filled in a form and could tick a box to receive regular updates on the charity’s activities in the form of a printed magazine (3 per year, 16 full colour pages). The Tribunal held that the £5 was not consideration for the newsletters on the basis that, following the European Court of Justice decision in Kuwait Petroleum (heard after the Tron case), there was no evidence of any bargain between the parties that the donation would be wholly or partly consideration for the magazines. In effect, the magazines were provided to explain to the donors how their donations were being spent, in the same way a charity can provide project reports to a grant funder without the grant becoming consideration for the reports.

## The Serpentine Trust case

The Trust tried various counter arguments:

- **Children’s Society argument.** The Trust argued there is no agreement between the charity and supporter that the benefits are for the donation as in Children’s Society case. The judge rejected this. In the Children’s Society case, the charity was simply reporting back to the donor on how their funds were being spent. This is different, there are substantial benefits explicitly advertised and provided in return for the minimum donation. There was an arts magazine but the judge considered this more like the listings magazine Time Out than the Children’s Society magazine.
- **De–minimis benefits.** The Trust argued the level of benefit is de–minimis when compared to the payment amount so the whole payment should be treated as outside the scope of VAT. The tribunal rejected this using the logic of the Tron case.
- **Mandatory apportionment.** The Trust argued the payment is partly a donation and partly consideration as a matter of fact and so is required to be split between donation and consideration by VAT law. This approach was rejected in the Tron case and the judge rejected it on the same basis

- **Multiple supply.** The Trust argued the whole payment is within the scope of VAT but it is a multiple supply, so some benefits are zero-rated and some are exempt. The judge rejected this based on an analysis using the standard ‘CPP’ and ‘Levob’ single supply/multiple tests
- **Zero-rated carve out.** The Trust argued the zero-rated elements (printed matter) should be ‘carved out’ and zero-rated on the basis of the ECJ Talacre decision. The judge rejected this. Talacre applies where the whole supply would be zero-rated under the single / multiple supply rules. That is clearly not the position here
- **Single exempt supply.** The Trust argued that even if the whole payment is consideration for the benefits, the single supply is correctly VAT exempt. Again the judge rejected this on the basis the benefit packages cannot be properly described as an exempt supply in accordance with UK law, although the judge accepted the benefits include elements that would be exempt in isolation

The result was that the whole minimum payment was subject to standard-rated VAT.

## The post-2013 arrangements

With effect from April 2013 the Trust agreed with HMRC that they could state on their literature (using the Benefactor scheme as an example): “I hereby agree to donate £500 to the Serpentine Trust: Donation £470; Benefit (incl. VAT) £30; Total £500”.

HMRC accepted this was effective in splitting the minimum donation between a within the scope of VAT consideration component and an outside the scope of VAT donation component, despite the benefits not actually being available for £30 (as per the HMRC stipulation for the split payment treatment – see above). The Tribunal judge criticised this agreement stating “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.”

## Where now?

Options for avoiding standard-rating the whole minimum donation include:

- Explicitly adopting the split payment treatment, the problem being this renders a part of the payment ineligible for Gift Aid and it might mean supporters opt to pay for benefits only
- Try to get an agreement with HMRC similar to the Trust’s post-2013 agreement. However, given the judge’s disapproval, it seems rather unlikely HMRC would agree to this now

- Structure the benefit package so it is a single VAT zero-rated or exempt supply. Making the package a single zero-rated supply would mean limiting benefits to being principally zero-rated items such as printed matter so that is probably unrealistic. However the scope for VAT exemption appears more realistic, especially if the supplier is an eligible body for the purposes of the cultural exemption.

## Single exempt cultural supply?

In relation to the argument the supporter packages were single exempt supplies of cultural services the judge commented: “I do not 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.”

A possible argument against this is the Upper Tier Tax Tribunal decision in British Film Institute which suggests that “cultural services” is an EU wide concept that the UK may not limit, in the BFI’s case by excluding admissions to the BFI’s film shows. If this decision is correct then it seems at least arguable that on this wider test some of the Trust’s packages are single supplies of cultural services (or if not, could be restructured so as to be such) and as such VAT exempt. However the BFI case has been appealed by HMRC and referred to the Court of Justice of the EU so it is likely to be some time before we know the scope of the exemption for cultural services and consequently whether or not exemption of mixed benefits provided under supporter schemes is a possibility for bodies that qualify for the cultural exemption.