

Donor benefits - VAT

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It is not unusual for charities, particularly those in the heritage, education, and culture sectors, to attract donations by means of minor benefits in return for specific suggested donations. They are usually called 'committed giving schemes', or perhaps 'friends' schemes'.

We have, for a long time, understood that there is a significant VAT danger in such arrangements. Following the twenty year old decision in the case of *Tron Theatre* it is established case law that where benefits are offered in return for a 'donation' then, irrespective of the intrinsic value of those benefits, VAT can be chargeable on the full payment made in return, which equates in effect to the full donation. This contrasts somewhat misleadingly with the gift aid rules which only give rise to a tax disadvantage where the value of the benefits (on an intrinsic basis) exceeds certain parameters. The only way around this, subject to obtaining HMRC's clearance for something more benign, is to show the donor how much the benefits are worth, show the balance as the true donation, and imply (indeed, it is preferable to state clearly) that the benefits can be procured only by paying the value of the benefits, and no donation is actually necessary. In practice most organisations find that the benefits that they offer are only of interest to those who would not dream of only paying the basic cost value, and this rarely leads to any particularly difficulty in obtaining the donatory sum.

It appears that Serpentine Gallery did not take this point on board, and simply equated the receipt of certain fairly low level benefits with the full sums of the donation that each 'friend' would provide. HMRC challenged this and the case has proceeded to the First Tier Tax Tribunal. Unfortunately, the Tribunal was not prepared to overturn the superior case law of *Tron Theatre*. It confirmed the unfortunate fact that a donation of a potentially very significant sum of money could be regarded as 'payment for' some fairly immaterial benefits except where those benefits have a clear cut open market price which can be used as a peg in order to limit the apparent taxable value. The Gallery tried to argue that the benefits were 'de minimis', but they were not. It tried to argue that the true value should be used for the VAT valuation, but ran into the *Tron* precedent and failed.

More alarmingly, perhaps, it tried to argue that part of the charge should be for either exempt or zero rated supplies, and only part of the price standard rated, and this also was not accepted by the Tribunal. This is unfortunate, since it implies that there was a single supply of 'involvement' with the Gallery, whereas, if one looked carefully at the activities offered to the donors, there was a variety which did not particularly impinge on each other. But the Tribunal did not see it that way, and although it is only a court of first instance and therefore not binding on any other tribunal, it seems to set some kind of precedent.

Furthermore, the Tribunal unfortunately put the spotlight on an extra statutory concession (ESC 3.35) which allowed such an apportionment for 'membership charities'. HMRC had not accepted in this case that the Gallery was offering membership, and therefore denied the application of the particular extra statutory concession. This came as something of a surprise to the Gallery, and indeed the entire art and culture sector. The concession does refer to 'members' rather than 'donors', but that distinction has rarely been applied in the past. It is now clear that HMRC does take the view that it limits the definition. I have seen other examples where HMRC has recently taken that line. Organisations that are applying the concession to 'friends' schemes' where the friends are not formally 'members' of the charity, may find that they are challenged in the future by HMRC.

The best way to deal with this is to consider the position afresh, without ignoring the gift aid impact. The best approach is a 'split payment' approach as discussed above. Short of that, the charity should review its correspondence with HMRC to see if there is any comfort in regard to its current way of treating donations. If there is any degree of doubt, the charity should take professional advice.

Withers offers professional advice in regard to the VAT and gift aid treatments of sophisticated donation packages, and would be very happy to help anyone who believes that might be an issue for them.

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