TC02175

Appeal number: TC/2009/15080

VAT – supply – whether funds received by the Appellant were grant monies outside the scope of VAT or consideration for a taxable supply of goods and services within sections 4 and 5 VATA 1994 – held taxable supplies – appeal disallowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HOPE IN THE COMMUNITY LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL
MRS RUTH WATTS-DAVIES

Sitting in public at 45 Bedford Square London WC1 on 9 February 2012

For the Appellant : Mr Alun Mathias

For the Respondents : Mr Mark Mullen of Counsel

DECISION

The Appeal

1. Hope in the Community Ltd ("the Appellant") appeals the decision of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") contained in a letter dated 17 June 2009 to refuse its claim for repayment of £37,559.00 ("the second voluntary disclosure") dated 2 April 2009. The Appellant asserts that it incorrectly accounted for this amount as output tax in accounting periods between May 2006 and August 2008 in relation to grant-funded projects where it says the supplies to which the payment was attributable were outside the scope of VAT. The Appellant seeks to recover the VAT pursuant to s 80 VATA 1994 ("VATA"). HMRC contends that the supplies were within the scope of VAT and therefore the Appellant was required to account for output tax on them at the standard rate.

2. The Appellant also disputes HMRC's decision, contained in a decision letter dated 23 June 2009, to issue an assessment to recover the sum of £5,508.00 paid by HMRC on 9 March 2009 following the Appellant's submission of an earlier voluntary disclosure ("the first voluntary disclosure") on 25 February 2009 in relation to an amount which the Appellant says was accounted for as output tax in the accounting period ending February 2006. The Appellant asserts that the supplies to which this amount was attributable were similarly outside the scope of VAT. HMRC says that this voluntary disclosure was paid in error and an assessment to recover the amount repaid to the Appellant was issued on 23 June 2009.

3. The issue before the Tribunal is whether the payments received by the Appellant were grants and thus outside the scope of VAT or whether they were payments made in consideration of the supply of goods and services within s 4 and s 5 VATA.

Background and Chronology

4. The Appellant is a company registered for charitable purposes (registration number 1108850). Its aims and objectives are stated in its literature to be the provision of "an umbrella of support for faith and voluntary sector groups seeking to regenerate the communities which they serve". The Appellant registered for VAT with effect from 31 October 2003 (registration number 831 5777 15). In its application for registration it described the nature of its business as "not for profit consultancy and community regeneration projects".

5. On 3 May 2005 the Appellant wrote to HMRC's National Advice Service in Newcastle requesting a ruling as to the liability to VAT of five separate supplies. These included three "feasibility studies" undertaken between January 2004 and March 2005 for Medway Council, Chatham, Kent regarding a project known as "the Re-use Thameswood Project". Medway Council was the accountable body for the Thames Gateway Kent Partnership ("TGKP") which had secured funding from the South East England Development Agency ("SEEDA"). SEEDA is one of a number of

regional development agencies in England set up as non-departmental public bodies to facilitate regeneration projects. The two other supplies related to "management fees" undertaken on behalf of South East England Faiths' Forum ("SEEFF") between January and March 2004. The total feasibility study fees amounted to £73,000.00 and the management fees £845.00 – a total of £73,845.00.

6. On 10 May 2005 HMRC offered the initial view that the supply of feasibility studies and management consultancy services was subject to VAT at the standard rate but, for the purpose of issuing a formal ruling, requested further information including details of the source of funds, the beneficiaries of the work undertaken and copy contractual documentation between the Appellant and the bodies to whom the services were supplied.

7. On 9 June 2005 the Appellant provided copies of two contracts made between itself and Medway Council but did not specify which of the funds previously mentioned were attributable to which contract. HMRC nonetheless confirmed that because TGKP had been charged with delivery of the project and was responsible for ensuring that the aims and objectives of SEEDA were achieved, which in turn had been outsourced to the Appellant, the services provided by the Appellant constituted "supplies" within the scope of VATA. HMRC's view was that because TGKP had received a benefit the Appellant's supplies were taxable.

8. During a VAT inspection at the Appellant's premises in July 2006, liability to VAT of the Appellant's supplies was raised again in the context of other projects in which the Appellant was involved. HMRC's said that it was their intention to seek further advice from their Policy Unit. In the meantime, dialogue and correspondence between the parties as to whether the grant monies constituted payment for a taxable supply continued.

9. Eventually, in November 2007, the Appellant sought a formal ruling as to the liability to VAT of a further project in which it had an interest relating to grant funding again received from SEEDA. The project in respect of which the Appellant sought a ruling was referred to as the "Championing Neighbourhoods Project" which was supported by the GROW programme ("Giving Real Opportunities for Work") through a European Regional Development Funding ("ERDF") initiative. The Appellant explained that it was working with other voluntary groups regarding social and economic issues which adversely affected communities and the well-being of their residents. The Appellants said they were assisting the other groups in developing a management framework to encourage and enable local residents to establish projects designed to improve local regeneration, employment opportunities and cohesion within community neighbourhoods. It appears that approximately eighty projects were grant-funded under the GROW programme, some set up in the UK and others by their European partners in Italy, Poland, the Netherlands and Spain. The Appellants said that the project, which was administered by SEEDA, required it to commit itself to expenditure out of its own funds, which were then claimed back from the GROW programme, and in turn paid out of grant funding received from ERDF. The Appellant provided a range of services with regard to the project, including case

studies, a management framework to record and collate information regarding the project, the production of a website and the holding of meetings and conferences.

10. Subsequently, the Appellant provided HMRC with details of two further projects with which it was involved, known as "The Guide Neighbourhood Project" and "Share First Project". Both projects involved the carrying out of evaluations, feasibility studies and the administration of grants to third parties. The Guide Neighbourhood Project was funded by the Home Office through "Housing Justice", a charity working in the area of social housing and homelessness. HMRC took the view that there was a benefit to Housing Justice in that the Appellants took responsibility for disbursing monies and administering their use, which meant that there was a taxable supply. The Share First project involved a feasibility study relating to the potential salvage and use of surplus supermarket foodstuffs. Again, HMRC concluded that the study amounted to a taxable supply.

11. Additional information provided by the Appellant regarding its activities indicated that it was also potentially engaged in other projects which initially involved consultancy services. In one of the projects the Appellant provided advice and services to a local church regarding the development of a community centre. In another, it provided management of a project for another church.

12. In March 2008 HMRC informed the Appellant that the Commissioners considered the Appellant's supplies to be liable to VAT. Although not entirely clear from correspondence between the parties, the ruling appeared to be confined to the four projects above-referred to, being the "Re-use Thameswood", "Championing Neighbourhoods", "Share First" and "The Guide Neighbourhood" Projects. HMRC said that whilst grant funding may pass down a chain and remain outside the scope of VAT it would be rare for that to happen more than twice, and where it did, in reality, the payment was consideration for the activities outsourced to the Appellant.

13. The first voluntary disclosure in the sum of £5,508.00 was submitted by the Appellant on 25 February 2009. The Appellant said that this sum related to the net amount accounted for as output tax in the VAT accounting period ending February 2006, but did not identify the specific supplies or general nature of the supplies to which it related. HMRC repaid the amount to the Appellant on 9 March 2009 without attempting to verify the claim prior to payment.

14. The second voluntary disclosure in the sum of £37,559.00 was submitted by the Appellant on 2 April 2009. This sum related to amounts accounted for as output tax during the VAT periods of May 2006 and August 2008. Again, the Appellant did not identify the specific nature of the supplies to which the claim related but stated that the majority of its claim related to amounts accounted for as output tax in respect of supplies made by it in the course of two of the projects, namely the "Guide Neighbourhood Project" in the sum of £30,127.57 and the "Championing Neighbourhoods Project" ("GROW") in the sum of £4,286.63.

15. HMRC responded to the effect that further checks would be required before the second voluntary disclosure could be addressed, but that in any event, a formal ruling had already been issued in respect of the projects referred to. HMRC said that, in the absence of any further material, its ruling remained unaltered and issued an assessment to recover the sum of £5,508.00 paid to the Appellant in respect of the first voluntary disclosure. Following a request for a review, HMRC confirmed that the decisions to decline the voluntary disclosures should be upheld.

16. On 15 October 2009 the Appellant lodged its notice of appeal with the Tribunal.

17. In March 2010 HMRC requested information as to how the figures contained within the two voluntary disclosures had been calculated. It also requested copies of contracts and further documentary evidence to illustrate the nature of the agreements under which the various supplies said by the Appellant to be outside the scope of VAT had been made. Some of the copy contracts and other information had already been supplied during the initial VAT inspection in July 2006, and on the occasion of subsequent visits to the Appellant's premises towards the end of 2007. It appears however that these had been destroyed by HMRC in accordance with departmental policy.

18. The Appellant's representative replied on 6 April 2010 stating that:

1) the Appellant's claims related to thirteen separate projects, but that most of the claim in financial terms related to the GNP and GROW projects;
2) HMRC would have to visit the Appellant's premises to inspect the evidence held by the Appellant in relation to the projects. The Appellant said that it had been necessary to reconstruct its records for the period 1 December 2005 to 13 August 2008 and that because of the breadth of information requested, spread over four years, they were too voluminous to provide by post. The Appellant said that HMRC had copied and taken away whatever documentation it needed at the earlier inspections and invited HMRC to visit the Appellant's premises and speak to the officers of the organisation who could provide first-hand explanations of each project;
3) the fact that HMRC was seeking additional material raised concerns that it had failed to review the Appellant's claims properly when arriving at the decisions to decline the voluntary disclosures

19. HMRC responded on 17 June 2010 that firstly, this was the first intimation that there were thirteen projects (rather than four), and secondly that if there was information which the Appellant intended to rely upon, then such information should be identified and disclosed.

20. On 5 August 2010 the Appellant was directed by the Tribunal to provide the Commissioners with "*copies of the written agreements, or such material evidence as is available in respect of such agreements, which are the subject of the voluntary disclosures leading to the repayment claims.*"

21. On 18 August 2010, pursuant to the Tribunal's direction, the Appellant provided details of the projects to which its claim related and the supplies which were the subject of its voluntary disclosure. These were as follows :

	Project Name	**Funder**	**Documentation**	**Amount claimed**	**Appellant's description of payment**
1	Guide Neighbourhood	Housing Justice	Grant letter; Grant terms and conditions MofU	£30,127.57	Grant
2	Employ Kent Thameside	Kent Thameside Delivery Board	Agreement MofU	£174.97	Grant
3	Sharefirst	SEEDA	Grant Letter MofU	£1,806.59	Grant
4	Becoming More Enterprising	Enterprise Agency Kent	Invoice MofU	£70.00	Educational
5	Swale Services	Medway Council	Agreement MofU	£2,174.24	Grant
6	Bromley-by-Bow	SEEDA	Grant Letter and Schedules MofU	- £60.88	Grant
7	Swanscombe Café	Dartford BC	Agreement and Schedules MofU	- £314.43	Grant
8	Championing Neighbourhoods	GROW	Grant letter and Annexes; letter dated 20August 2009. MofU	£4,286.63	Grant
9	Re-use Thameswood 55-58 Burch Road		Correspondence MofU	£382.75	Disbursement
10	Developing Community Experiences	United Reform Church	Correspondence MofU	£912.47	Educational
11	Global Grant Funding-Interfaith Project	TGKP	Agreement MofU	£2,304.96	Disbursement
12	Valuing Community Experiences	URC	Agreement MofU	£553.86	Educational
13	Faiths Together Conference	SEEFF	Agreement MofU	£636.65	Educational

(MofU – Memoranda of Understanding)

Evidence

22. The hearing bundle consisted of an agreed bundle of documents contained in two lever arch files. Volume 1 consisted primarily of procedural documents and correspondence and two witness statements filed by the Appellant. One by Reverent Peter Southcombe, a director of the Appellant charity, and another by Alison West, an officer of the charity. Volume 2 contained the copy documention relating to various projects in which the Appellant had been involved. The Tribunal also heard oral evidence from Reverend Southcombe. No witnesses were called on behalf of the Respondents.

Relevant Law

23. EC Law

Article 2 of Council Directive of 28 November 2009 (2006/112/EC) provides:

> Article 2
> 1. The following transactions shall be subject to VAT :
> (c) the supply of services for consideration

Article 73 of Directive 2006/112/EC provides:

> Article 73
> In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the suppliers, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.

24. United Kingdom Legislation

VATA provides:

> Section 1(1)
>
> Value added tax shall be charged in accordance with the provisions of this Act
> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply.)
>
> Section 4
>
> (1) VAT shall be charged on any supply of goods or services made in the United Kingdom where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> Section 5 (meaning of supply)
>
> (2)
>
> (a) "supply" in this Act includes all forms of supply; but not anything done otherwise than for a consideration;
> (b) anything which is not a supply of goods but is done for a consideration (including if so done, the granting, assignment or surrender of any right) is a supply of services.

Section 80 (Credit for repayment of overstated or overpaid VAT)

[(1) Where a person—

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, has brought into account as output tax an amount that was not output tax due,

the Commissioners shall be liable to credit the person with that amount.

(2) The Commissioners shall only be liable to [credit or] repay an amount under this section on a claim being made for the purpose.

[(2A) Where—

(a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and

(b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,

the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.]

(6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.

[(7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them.]

Regulation 35 of the Value Added Tax Regulations 1995 ("VATR") provides:

35 Where a taxable person has made an error-
(a) in accounting for VAT, or
(b) in any return made by him,
then, unless he corrects that error in accordance with regulation 34 he shall correct it in such manner and within such time as the Commissioners may require.

Regulation 37 VATR provides:

37 Any claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated.

25. The following cases were referred to:

Staatssecretaris van Financiën v Cooperatieve Aardappelenbewaarplaats GA [1981] ECR 445
T J Tolsma v Inspecteur der Omzetbelasting Leeuwarden [1994] 2 CMLR 908
Customs and Excise Commissioners v Redrow Group plc [1999] 1 WLT 408
Church Schools Foundation v Customs and Excise Commissioners [2001]EWCA Civ 1745
Bath Festivals Trust Ltd v Revenue and Customs Commissioners [2009] BVC 2194
Wolverhampton Citizens' Advice Bureau (decision 16411)

Appellants case

26. The Appellant's claim relates to thirteen projects where it says output tax has been wrongly declared. These are summarised in the chart in paragraph 21 above. The Appellant's grounds of appeal as stated in its notice of appeal are that the income it received in respect of the projects was grant-funded, the purpose of which was to fund projects which were of benefit to local community and voluntary groups. The Appellant says that the grant funding was obtained through a grant application process and received from bodies who were offering grants to similar organisations under the same scheme. The Appellant says that the funding bodies were not paying consideration in return for a supply of goods and services within the meaning afforded by Sections 4 and 5 VATA as there was no consideration paid for a supply. Consequently, the Appellant says that the income received was not subject to VAT.

27. It should be noted that, in its notice of appeal, the Appellant made no reference to the projects involving anything other than grant monies. It made no reference to payments being made with regard to the supply of educational facilities or the payment of disbursements. The Appellant's claim that these projects fell outside the scope of VAT for reasons other than that they were grant monies was not one of the initial grounds of appeal. This was only raised by the Appellant following the directions hearing.

28. At the hearing, Mr Mathias on behalf of the Appellant, acknowledged that the Appellant must charge VAT on certain types of supplies, that is consultancies, the writing of reports and the carrying out feasibility studies where they were not directly connected with grant-aided projects. Mr Mathias argued that the basis of the Appellant's appeal is that, for a taxable supply of services to exist, there must be consideration paid in return for, and directly linked to, a supply and that, in grant-aided projects, there was no such link. He also submitted that, where feasibility studies were carried out in connection with such projects and formed part of the services undertaken, grant payments were not directly linked to a supply.

29. Mr Mathias referred to Section 5(2)(a) VATA, which defines "supply" and submitted that a supply is considered to have taken place only where there is payment in return *for* a supply. Therefore he argues that, in order for a supply of services to exist, there must be consideration paid *in return* for that supply.

30. As Mr Mathias pointed out, the expression "consideration" is defined in neither UK nor European legislation. Courts have therefore taken account of decisions made

under the 2nd Directive where "consideration" is defined as "everything received in return for the supply of goods or the provision of services…". This is reflected in Directive 2006/112/EC ART 73 where a taxable amount is defined as "everything which constitutes consideration which has been, or is to be, obtained by the supplier in return for the supply from the customer or a third party". Mr Mathias acknowledged that the reference to a "third party" emphasises that consideration may be obtained from a person other than that to whom the supply is made.

31. Mr Mathias also referred the Tribunal to HMRC's internal guidance (V1-3 Supply and Consideration) para 7.2 which says :

"The phrase "in return for [in relation to the EC definition above] the supply" is interpreted to mean that there must be a direct link between the supply and the consideration."

32. Following on from the principles outlined above, Mr Mathias submitted that it is normal and common for grant income to be treated as outside the scope of VAT because no supply is created unless there is a supply made in return for the payment made. Mr Mathias says that grant-giving organisations commonly make payments to fund projects which are consistent with their strategic objectives and that in the vast majority of cases in the UK, grants given in such cases are outside the scope of VAT, because the grant giver is not making a payment in return for a supply of goods or services. He argues that, although the giving organisation may sometimes specify the type of work which needs to be carried out, this does not create a supply. Each project must be considered on its own merits.

33. Mr Mathias acknowledged that in some cases it is possible for income described as a grant to create a supply, particularly where there is a contractual and direct benefit arising to the grant giver. He says however that such cases would be rare, because, generally, organisations should not use funds which they have allocated for distribution as grants, for their own direct benefit.

34. Mr Mathias provided the Tribunal with a summary and analysis of those areas which he says could sometimes cause difficulty in determining whether a payment was a grant or consideration for a taxable supply.

Detailed analysis

35. Mr Mathias argues that confusion can arise when funders insist that detailed reports and information is presented to them so that they can assess and monitor the delivery of a project. On occasions, such obligations can be so detailed in their terms and conditions that they lead to the false conclusion that a supply of services has been created. He argues that the provision of data and reports whose purpose is to allow for assessment of the project by the funder does not necessarily involve a direct benefit to the funder. Were it to do so he submits, all grant income in the UK would be subject to VAT at the standard-rate.

Feasibility work

36. Mr Mathias acknowledged that, if the Appellant is paid by a third party organisation to carry out feasibility work on a project to be run by that third party, the supply must be taxable. The third party would receive a direct benefit for the work performed. He submits however that the Appellant sometimes approaches a grant-giving organisation with a proposal to carry out a grant-funded project and, in response, the grantor may agree to release funds for the feasibility phase of the work, choosing to see the results of this phase before committing to any further funding. He therefore argues that, in these cases, the grant for the initial feasibility work forms part of the overall grant-aided project and is therefore outside the scope of VAT. He also argues that in any event, even though payment is made for the feasibility report, there is no supply because the report is for the benefit of the grant applicant, rather than the grantor. On this basis he says feasibility grants are routinely treated as VAT-free by all of the most important grant-giving organisations in the UK, including all of the Lottery grant-giving bodies.

Payments for services rendered to third parties

37. Mr Mathias said that occasionally funding was made available in order to pay for specific services to be supplied to beneficiaries, and in some cases there was a supply. A good example of this is, he says, is the case of "Keeping Newcastle Warm", in which householders were able to contract with KNW to receive specific energy advice for which a set fee was payable. However instead of receiving payments from the householders, payments were made to KNW by a national agency. These payments were then specifically allocated to individual consultancy contracts with householders and therefore were deemed to be payments made in return for a supply of services.

38. Conversely in the case of Wolverhampton Citizens Advice Bureau, the Local Authority made payments and issued a Service Level Agreement which obliged WCAB to provide a certain range of services to the public. Because these services were made generally available and were not crystallised into specific individually valued contracts, there were no payments made in return for any specific supplies of services and the payments made by the Local Authority were deemed to be outside the scope of VAT.

39. Mr Mathias argued that applying these principles to the case of the Appellant would mean that grant-funding could be deemed to be taxable if the payments made are in respect of specific and individually valued contracts with third parties. If however the Appellant received funding to make services generally available to a target group of beneficiaries as it claimed, no supply is created. He refers to the "Guide Neighbourhood Project" where the Appellant's role was to encourage networking and provide free advice to beneficiary groups and that consequently the services should be treated in the same way and non-taxable, as the general advice given in the Wolverhampton CAB case.

Written agreements

40. Mr Mathias says that written agreements often obscure the fact that services may have been given freely. He submits that agreements often focus on conditions attached to the agreements rather than its underlying nature. He argues that there is no motivation, or indeed legal reason, for the agreement to specifically state that funds are *not* given in return for a specific service. He therefore contends that, as there is no supply of services in return for the grant, it is difficult to see why the agreement should contain details of such a non-existent supply. The documents therefore invariably remain silent on the matter.

41. Based on the above principles, Mr Mathias outlined what he regarded as significant factors relevant to determining whether a payment was a supply or grant income or to be treated as outside the scope of VAT. He submits that :

(1) Indicators that a payment is not for a supply

- Income is described as a 'grant' in the correspondence between the parties.
- The giving organisation is known as an organisation which gives grants and is treating the payment as a grant within its own audited accounts.
- The grantor is a local, central or European government body giving the money through an established grant scheme.
- The grant was acquired through a grant application process, rather than through a competitive tender.
- The direct beneficiaries of the project are other than the grantor. (The grantor will invariably have an interest in seeing a benefit accrue to the beneficiaries, but this does not create a direct benefit to the grantor).
- The grant payments are not treated as trading income or expenditure in the Accounts of either party.
- Funding is drawn down as a re-imbursement of expenditure incurred, rather than as payment for services.

(2) Factors which are generally not conclusive in either direction :

- The conditions of funding are complicated and detailed.
- The grantee is obliged to provide reports and information to the grantor in relation to the funded project.
- During the course of the project the grantee may carry out work which would be taxable in another context.
- A Service Level Agreement is in place.

(3) Indicators that the income is likely to be taxable :

- The arrangement between the parties is subject to a commercial contract for the provision of goods and services.
- The contractor is treating the transactions as trading expenditure in its accounts.

- The contractor is not an organisation which normally gives grants or runs grant schemes.
- The contract was entered into following a competitive tendering process.
- The contractor is clearly the direct beneficiary of the work to be carried out.

42. Mr Mathias asserts that, if one examines, in the context of the indicators above, those projects where grant money is received, the conclusion must be that they fell outside the scope of VAT.

43. We were referred to the documentation including the copy agreements, grant letters, correspondence and memoranda of understanding which he says support the conclusion that the monies received by the Appellant charity were gratuitous payments which neither the funder nor the Appellant ever contemplated or intended to constitute a taxable supply.

These are summarised below :

(i) The Guide Neighbourhood Project

There is an offer letter which sets out the offer of 'a grant' for the year commencing 1st April 2005, the purpose of which was to 'support the Guide Neighbourhood Project'. The Guidance Notes referred to in the document were not provided. The offer letter sets out detailed terms and conditions, including 'an agreed work programme' of 'works and tasks' within 'agreed time limits' to be undertaken by the Appellant. The offer document expressly states that it should be read in conjunction with a Draft Funding Bid, Work Programme and Budget, none of which were provided.

There is a memorandum of understanding signed by a representatives of the funder, Housing Justice, and by Rev Southcombe on behalf of the Appellant charity.

(ii) Employ Kent Thameside Project

An unsigned 'service agreement' provides for the establishment of a pilot project to provide training and the development of a training programme. 'Service targets'. 'outcomes and monitoring' are also referred to.

There is a memorandum of understanding signed only by the Appellant.

(iii) The Sharefirst Project.

A detailed letter sets out the terms of the funding and the Appellant's obligations to carry out the 'Project' and to 'deliver outputs and milestones'. Sub-contractors could be engaged to deliver the Project subject to the funder's consent. There is a letter providing the funder with an indemnity. The funder may also require the Appellant to re-perform its obligations under the contract 'without additional charge'. A schedule

describes in detail what the project will deliver and the 'milestones' for achieving it. It also expressly identifies the benefits that the project would deliver to the funder.

A memorandum of understanding has been signed by both the Appellant and the funder.

(iv) The Becoming More Enterprising Course

The only document provided is a VAT invoice addressed to the funder, The Enterprise Agency of Kent. The Appellant was engaged to provide a course to individuals, who paid a fee to the Enterprise Agency to undertake the course. There is a single invoice which does not appear to provide sufficient information to establish the supplier's liability to tax or otherwise.

A memorandum of understanding has only been signed on behalf of the Appellant.

(v) The Swale Services Project (otherwise known as the North Kent Construction Skills Project)

A Service Agreement provides for the establishment of a pilot project to provide training and work experience and the development of a training programme, to provide a link with social enterprises and to develop a business plan for the future development of those activities. The Agreement also provides for 'service targets' and 'outcomes'. It is recorded that funding was received from Medway Council to pay for the delivery of courses to ex-offenders in the Sheerness area.

A memorandum of understanding has only been signed on behalf of the Appellant.

(vi) The Bromley-by-Bow Project

Two detailed letters set out the 'Provider's Obligations' which appear to have been study tours of church buildings adapted for community use and attended by, amongst others, personnel of the funder. The letters refer to the delivery of certain 'outputs and milestones' and provides the funder with an indemnity. The funder may require the Appellant to re-perform its obligations without additional charge to the funder. There are extensive provisions relating to breach of the terms of funding.

There is a memorandum of understanding which is signed only on behalf of the Appellant, and not the funder.

(vii) The Swanscombe Café Project

A contract expressly states that the Appellant was to provide services to Dartford Borough Council. It is also recorded that the Appellant was 'commissioned' to carry out a feasibility study. The agreement is unsigned and undated.

There is a memorandum of understanding which is signed only by representatives of the Appellant.

(viii) The GROW Project

There is a lengthy contract setting out terms of payment and the project completion date of November 2007. 'Outputs and results' are also set out, including construction of a project website, delivery of training needs assessment; study visits and training sessions. It is recorded that the Appellant was to act as the accountable body for the Project and would have responsibility for 'total contract compliance' including monitoring the performance of project partners. 'Key outputs and results' were to be delivered.

There is a memorandum of understanding signed by both a representative of the Appellant and also the funder.

(ix) Re-use Thameswood Project

The project appears to relate to services in connection with a variation of proposed lease documentation. The documents provided appear to be part of a number of agreements, but some of the agreements are not included and are unsigned.

(x) The Developing Community Experiences Course

The United Reform Church commissioned the Appellant to develop and deliver a course on its behalf.

There is a memorandum of understanding signed by both the Appellant and on behalf of the URC.

(xi) The Global Grant Funding Project

A contract headed 'project contract' does not refer to the Appellant charity. The document suggests that the Appellant received monies on behalf of the Thames Gateway Kent Partnership and accounted to it for them. It is not clear from the document why the Appellant charity would have made provision for VAT when accounting to TGKP.

There is a memorandum of understanding signed by both parties.

(xii) The Valuing Community Experiences Course

The United Reform Church commissioned the Appellant to develop and deliver a course for it.

There is a memorandum of understanding signed by both a representative of URC and the Appellant charity.

(xiii) South East England Faith Forum (undertaken in conjunction with the Bishop of Guildford Foundation).

The agreement which has been provided does not appear to be complete because specific terms are incorporated into the appendices which have not been provided. The services are expressed to consist of a consultancy agreement in response to a request by SEEFF for 'a freelance conference organiser to take on 10 days work' to organise a conference, for which SEEFF charged a fee to attendees.

There is a memorandum of understanding signed only by representatives of the Appellant charity.

44 Mr Mathias says that the majority of the indicators referred to in paragraph 41(1) are present and that none of the indicators in paragraph 41(3) are present. He refers to the memorandum of understanding in respect of each project, which he says make it clear that the payment received by the Appellant was not intended to be consideration for the supply of services. He acknowledged that some of the memoranda were not signed by the funder. He also acknowledged that documentation often indicates that there was an agreement relating to the provision of services for and on behalf of the funder. He says however that the description and terminology used in that documentation did not reflect the true underlying nature of the arrangements which he submitted were for the unconditional payment of money to the Appellant and not for the supply of services.

45. In two of the projects (Nos 9 and 11 in the chart in paragraph 21), Mr Mathias says the Appellant received income, not as principal but on behalf of a third party, for practical financial reasons. The money received was not in relation to any supply being made by the Appellant; therefore there is no basis on which to argue that the sums received should be subject to VAT.

46. Mr Mathias also argues that in four of the projects income was received in return for supplies which are exempt from VAT because they related to the provision of services closely related to the provision of education and, as such, were exempt from VAT by virtue of Group 6, Schedule 9 VATA. The relevant provisions are :

> "Item No.
> 1. The provision by an eligible body of-
> (a) education….
>
> 4. The supply of any goods or services….which are closely related to a supply of a description within item 1 (the principal supply) by or to the eligible body making the supply provided-
> (a) the goods or services are for the direct use of the pupil, student or trainee.. receiving the principal supply; and
> (b) where the supply is to the eligible body making the principal supply, it is made by another eligible body…
>
> Notes:
> (1) For the purposes of this Group an "eligible body" is…
>
> (e) a body which-
> (i) is precluded from distributing and does not distribute any profit it makes; and
> (ii) applies any profits made from supplies of a description within this Group to the continuance or improvement of such supplies;"

HMRC's submissions

Mr Mullen, on behalf of HMRC, made the following submissions :

47. Because the Appellant seeks the repayment of VAT already accounted for, it bears the legal and evidential burden of establishing that the supplies to which the payments relate are of such a nature as to be outside the scope of the VAT system.

48. The Appellant has failed to adduce any or sufficient evidence to establish that the supplies are outside the scope of VAT in relation to any of the projects, in respect of which it received payment. By virtue of section 80(6) VATA, HMRC are able to prescribe the manner in which a claim for repayment is made and, under Regulation 35 VATR, HMRC are able to set down the manner in which a person purporting to correct an error is to do so. In this respect HMRC's Notice 700/45 lists the information that a prospective claimant is required to produce. Mr Mullen argues that the evidence the Appellant has adduced in support of its claim is both incomplete and insufficient to support its contentions.

49. In any case involving a claim for repayment under section 80 VATA (whether or not it arises by virtue of something that can be categorised as an "error"), the claimant is required, by virtue of Regulation 37, to explain how its claim was quantified, and do so with reference to documentary evidence within its possession.

50. The Appellant, when submitting its voluntary disclosures, failed to explain how its claims were quantified or to identify the nature of any supporting documentary evidence as was in its possession. It purported to remedy this defect in August 2010 when complying with the directions order but failed to identify what proportion of its total claim of £43,067.00 is attributable to which supply on the basis of the documents provided, or show how this total figure was arrived at, as a number of the agreements make no provision for cost. Some gave alternative figures subject to certain conditions being met. Others were expressed in different units of currency. It is argued that the Appellant has not sought to remedy this defect by providing a coherent audit trail linking the receipt of specific payments from to amounts of output tax accounted for to HMRC.

51. Insofar as the Appellant asserts that the supplies in issue are either exempt or outside the scope of VAT, then it must bear all the legal consequences that treatment, not simply those that are to its advantage (*Ursula Becker v Finanzamt Münster-Innenstadt - Case 8/*81). Consequently any repayment of output tax to which it might otherwise be entitled would have to be adjusted to reflect the amount which it incorrectly sought to deduct as input tax. The Appellant, in its notice of appeal, purports to have incorporated such a deduction in its claim but has failed to provide any indication of the expenses to which its input tax claims throughout the relevant periods relate, or which of those expenses it has attributed to the supplies which it now asserts to be outside the scope of VAT.

52. The Appellant, by its failure to explain how its claim is quantified with reference to an intelligible methodology, has failed to comply with the requirements for a valid claim set out in Regulation 37 VATR. Consequently they were correctly refused.

53. The question of whether an agreement constitutes a supply for consideration is one of fact, however the concept of "supply" must be given a broad definition for the purposes of VAT. VAT liability is determined by the substance of the agreement (*T J Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] 2 CMLR 908); the parties cannot elect to remove a supply of services for consideration from the VAT system by referring to it as a grant.

54. In relation to all of those supplies for which agreements have been provided, there is a high degree of imposition as to how the Appellant may utilise the funds paid to it, both in the objective to be achieved and the method of performance. In all instances it is possible to identify a specific outcome that the Appellant undertakes to provide, and in all instances the agreement makes provision for its rescission in the event that stipulated requirements are not met. In the event of a breach of the terms, it would be no answer for the Appellant to assert that, while failing to meet the requirements stipulated in the agreements, it had nevertheless applied the money in a manner that broadly supported its charitable objectives. Consequently it is submitted that in each instance there is a direct link between the Appellant's supplies and a payment received and therefore the agreements constitute a supply of services for consideration.

55. Mr Mullen referred us to Sections 4 and 5(2) VATA and the case of *Customs and Excise Commissioners v. Redrow Group Plc* where Lord Hope noted at 412 that:

> 'The word "services" is given such a wide meaning for the purposes of VAT that it is capable of embracing everything which a taxable person does in the course of furtherance of a business carried on by him which is done for a consideration. The name or description which one might apply to the service is immaterial, because the concept does not call for that kind of analysis. The service is that which is done in return for the consideration.'

56. We were also referred to the case of *Staatssecretaris van Financiën v Cooperatieve Aardappelenbewaarplaats* GA [1981] ECR 445 which confirmed that a supply of services is effected 'for consideration' if there is a 'direct link' between the service provided and the consideration received'. A legal relationship under the terms of the contract is not a requirement in addition to a 'direct link'. It is however an indication that there is a direct link. The court, in *Tolsma*, confirmed that the question is whether services carried on by the Appellant were carried on *for* the payment or merely *with* the payment.

57. Mr Mullen referred to the case of *Redrow* as authority for the proposition that the supply may consist of the delivery of goods or services to a third party. In that case Lord Millett noted (at 418):

> 'what must await events is not the identity of the party to whom services are rendered for different services are rendered to each; but which of the parties is liable to pay for the services

rendered to them and so bear the burden of the tax in respect of which it claimed a deduction may arise.'

58. We were also referred to the case of *Bath Festivals Trust Ltd v Revenue and Customs Commissioners* which considered the provision of funding to a charitable company. Mr Mullen observed that, in reaching the conclusion that the Trust was supplying services for the payments received from the funder, the Tribunal did not regard it necessary that the payments be hypothecated. It was enough that they were restricted by the agreement between the trust and the funder. It was noted at paragraph 56 :

> 'We do not accept that the necessary link which the authorities say there must be means that the funds provided by B&NES must be specifically related to an identifiable part of either the music festival or the literary festival. B&NES imposes on the Trust specific requirements as to the content of the international music festival, and has also imposed the requirement of the provision of Box office and website facilities to other organisations as well as other specific obligations as set out above.... in our view the key issue is the satisfaction of the provisions in the service level agreements which do not permit the Trust a completely free hand…'

59. HMRC's case, as summarised by Mr Mullen, is that the Appellants provided services for consideration described as 'grant' funding. They Appellants were asked to perform various services but were subject to clear obligations as to what services they were to provide and how they were to provide them. He argues that this appeal is not a case where funding was given to the Appellant to further its own objects. Rather, payments were made to the Appellant to provide services to achieve the objectives of the funder and the fact that they may have complimented the general aims of the Appellant as a charitable body is not relevant.

60. With regard to the exemption claimed by the Appellant in respect of certain educational supplies under Group 6 of Schedule 9 VATA, Mr Mullen said that the Appellant had not addressed in evidence any entitlement to the exemption. Moreover, he said that this exemption was not initially claimed by the Appellant and therefore could not be the subject of the decision under appeal. Similarly, there had been no previous claim that certain projects only involved the repayment of disbursements. Claims on this basis had not been considered by HMRC and therefore were not the subject of the decision under appeal. The projects considered by HMRC, as set out in their written review and conclusions letter, did not address any claim other than that the 'grant' funding for the projects mentioned were outside the scope of VAT. Mr Mullen argued therefore that the requirements for claiming a refund under section 80 VATA had not been satisfied. The Appellant had not put forward a coherent explanation supported by documentation and calculations as to how its claim was made up, either at the time of the decision or in the appeal.

61. Mr Mullen went on to examine the documentation relating to the various projects. In his submission there was very little substantive information and no detailed account of how the arrangements worked in practise and some of the memoranda of understanding were only signed by the Appellant. Moreover, much of the documentation supplied (including copy agreements between the Appellant and the funding organisation) were quite plainly contracts for the supply of services. He

argued therefore that it is necessary to call into question the assertions to the contrary in the memoranda of understanding. In Mr Mullen's submission, the Appellant did not have a "free hand" in the services undertaken. It was subject to detailed provisions as to what service was to be provided, how and when. Many of the projects include copy letters with detailed terms and conditions which, for some of the projects, included an "agreed work programme and time limits". Some of the relevant documentation relating to part of the period concerned (for example from 01 April 2005 to 31 March 2006) were not provided. Moreover, at least one of the projects expressly indicated that the Appellant had undertook to perform activities in consideration of payment. The agreements sometimes provided for "service targets" and the delivery of "outputs and milestones" with built-in obligations and indemnities in favour of the funder in the event of non-compliance. These he said were clear indicators that the payments received were within the scope of VAT.

Conclusion and reasons for decision

62. The Appellant's grounds of appeal are that the "grant" payments did not amount to a supply within s5(2)(a) VAT or Article 2 of the VAT Directive 2006/112/EC because, in principle, a supply is outside the scope of VAT unless it is made for consideration. The Appellant says that there was no consideration because any monies received by it were not paid in return for services. The Respondent disagrees and maintains that there was a "supply" *for* which "consideration" was received.

63. Both parties agree that "supply" has a broad meaning and that, if a payment is expressed to be a 'grant' or forms part of arrangements subject to detailed terms and conditions, then this is only indicative and not determinative of the true nature of the agreement. It was common ground that the underlying and essential nature of the payments, and the presence or otherwise of a direct link between the monies paid and the provision of services, determines the true character of the payment.

64. Both parties also agreed that no supply is made for a consideration where goods or services are supplied gratuitously, even though they may be provided with a view to receiving payment (*Tolsma*). The determining factor is whether a consideration is due, not whether it has been received.

65. The decision therefore turns on a close examination of the agreement or arrangement between the Appellant and the funder in each of the projects. We were not provided with any information relating to the Appellant's other charitable activities, nor told what proportion the thirteen projects concerned made up of the Appellant's overall business activities. There was also little detail relating to the Appellant's activities on a practical day-to-day level, and no information as to whether any of its other activities were funded by individuals or public bodies when not outsourcing their charitable activities. The additional documentation provided following the directions hearing could not be described as complete in terms of assisting the Tribunal in arriving at a decision.

66. Both Article 2 of the VAT Directive 2006/11//EC and s5(2) VATA require that there is a supply for a consideration. Insofar as the Appellant seeks to assert that its supplies were not liable to VAT, it bears the burden of establishing this. On the basis of the available documentation, there is insufficient evidence to establish that the payments made to the Appellant were not in consideration of a supply of services. The Appellant has not been able to show that the relationship between it and the funder was one of informal optional cooperation not giving rise to any transaction capable of recognition as a supply. Indeed, many of the agreements, letters and other documents provided by the Appellant actually support HMRC's case that there was a direct link between the supply and payment of the "grant" monies. We accept it is unlikely that these documents were ever drawn in the expectation of close legal scrutiny. The terminology and the terms and conditions embodied in the agreements are indicative only of the true legal nature of payments made to the Appellant. However, the Appellant's modus operandi appears to have been to undertake outsourced activities on behalf of the funder organisations rather than carrying out its own charitable aims and objectives with the assistance of independent unconditional gratuitous payments. The fact that the general nature of the projects may have complimented the Appellant's declared charitable objectives is not relevant in determining whether there has been a supply in consideration of the payments made.

67. The commercial activity of the Appellant and the number of projects undertaken would have been significantly curtailed in the event of a withdrawal or reduction in grant funding. The Appellant's methodology appears to have been to undertake only those projects where its applications for grants or gratuitous payments were successful. All the grants appear to come from public bodies set up to achieve charitable objectives and aims. The Appellant may have received other donations from individuals or public bodies unconnected with the charitable objectives of the funder and such donations may not have been given for any particular purpose. These would clearly be outside the scope of VAT. However, donations of that nature are not the subject of the claims made by the Appellant in its voluntary disclosures. The claims relate to grants which were part of a mechanism whereby the Appellant's activities were promoted and generally for the direct, or indirect, benefit of the funder. The payments were not made casually, without commitment or as acts of benevolence but as part of specific schemes whereby the funder and the Appellant collectively intended to carry out specified aims and objectives, albeit charitable in nature. The payments were made either as a condition of, or in expectation of, services rendered by the Appellant.

68. It is clear from both the evidence and the Appellant's own submissions that the Appellant would not have committed itself to certain projects without a clear statement of intent and financial support from the funder. That does not necessarily mean that payments were made in consideration of a proposed supply. Furthermore, whether or not a legal relationship existed and whether or not the funder was to benefit from the services are only issues to be taken into consideration. Nonetheless, it could not be said that the services were undertaken only 'with a view' to receiving payment in return. There was some reciprocity which clearly indicated a direct link between the service provided and the consideration expected. The question, taking

into account the structure of the arrangements and services undertaken, is whether the constituents of reciprocal performance were exchanged from which to determine a clear direct link between them. It is not necessary to attribute a particular payment to a particular service as long as there is a link between the level of benefit provided and the payments received (*Church Schools Foundation Ltd v Commissions of Customs and Excise 2001)*. However, on the basis of the evidence, it is clear that there was a direct correlation between the services undertaken and the level of funding. The Tribunal does not accept that the agreement by the funders to make payments and agreement by the Appellant to supply services existed entirely unconnected with each other.

69. Taking all the evidence into account, the Tribunal concludes that the services provided by the Appellant in return for payments described as "grants" in the four projects which were included in HMRC's decision were supplies within the meaning of s5(2)(a) VATA. It has not been shown by the Appellant that the services undertaken by the Appellant in the remaining nine projects were not similarly payments in return for services, although in any event the services undertaken in respect of these projects were not included in HMRC's decisions under appeal. No information had been provided to HMRC regarding those projects until after the notice of appeal was lodged.

70. The appeal is accordingly disallowed.

71. 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.

MICHAEL S CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 8 August 2012