[2018] UKFTT 0535 (TC)

TC06719

Appeal number: TC/2016/00401

***VAT – supporter schemes and charitable donations – ADR meeting – FTT jurisdiction – what did the ADR decide – was there a contract – if a contract, whether unilateral mistake by HMRC – whether HMRC have the vires to make an agreement in those terms – held, agreement* ultra vires**

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE SERPENTINE TRUST LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at Taylor House, Rosebery Avenue on 4 and 5 June 2018

Richard Vallat QC and Mr Hugh Gunson of Counsel, instructed by Weil, Gotshal & Manges (London) LLP, for the Appellant

Mr Michael Jones of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. The Serpentine Trust Ltd ("the Appellant" or "the Serpentine") is a company limited by guarantee and a registered charity. It operates several supporter schemes ("the Supporter Schemes" or "the Schemes"), under which supporters make payments to the Appellant and receive a range of benefits.

2. In July 2013 the Appellant and HMRC held an Alternative Dispute Resolution ("ADR") meeting about the Schemes. During that meeting the parties sought to resolve a number of issues, including the position of five Supporter Schemes after 1 April 2013. The dispute now before the Tribunal concerns that issue only.

3. During the same ADR meeting the parties had also sought to resolve the position of four Schemes for periods from 03/09 to 06/12. HMRC's view was that all the money received by the Appellant from the Schemes during those periods was standard rated. HMRC had issued two decisions to that effect, and a related assessment.

4. The ADR process did not resolve that issue, and the Appellant appealed to the FTT. On 11 August 2014 the Appellant's appeal was heard by Judge Mosedale and her decision was published on 8 September 2014 as *The Serpentine Trust v HMRC* [2014] UKFTT 876 (TC) ("*Serpentine 1*"). Judge Mosedale found that the income received by the Appellant from supporters of those three Schemes during the periods 03/09 to 06/12 was standard rated because the Appellant had made a "single supply of the opportunity…to partake of exclusive events at, and offers by, the trust", see [108] of *Serpentine 1*. The Appellant did not seek to appeal *Serpentine 1*, and accepts that Judge Mosedale's analysis is correct.

5. Paragraphs [115] to [119] of *Serpentine 1* are headed "Footnote – the new arrangements". In those paragraphs, Judge Mosedale expressed her view that the approach which she understood to have been agreed in relation to the position of the Schemes for future periods was "wrong in law" and "inconsistent with [HMRC's] published position".

6. On 21 January 2015, HMRC wrote to the Appellant, saying they had not intended to agree anything contrary to HMRC policy. On 10 December 2015, HMRC issued an assessment for periods 04/13 to 12/14 ("the relevant period"), charging VAT of £65,268. The Appellant appealed that assessment to the Tribunal.

Issues in the case and outcome of the appeal

7. The parties agreed that the issues before the Tribunal were:

(1) whether the Tribunal has the jurisdiction to rule on the issues in dispute; and if so

(2) whether the paragraph about the Schemes which had been included in the document exchanged between the parties at the end of the ADR meeting had the meaning relied on by the Appellants, or the meaning relied on by HMRC;

(3) whether HMRC and the Appellant had concluded a contract, and in particular whether there was:

(a) agreement between the parties;

(b) an intention to create legal relations ("ITCLR"); and/or

(c) the omission of an essential term, so as to void the contract*;*

(4) if there was a contract between the parties, whether a unilateral mistake had been made by HMRC;

(5) if there was no unilateral mistake, whether HMRC had the power to make the agreement, or whether it was *ultra vires*.

8. I decided those issues as follows:

(1) the Tribunal has jurisdiction to rule on the issues;

(2) the meaning of the words in the document exchanged between the parties is that advanced by the Appellant;

(3) the parties had concluded a contract;

(4) there was no unilateral mistake by HMRC; but

(5) the term of that contract which concerned the Schemes was void as *ultra vires.*

9. I therefore dismiss the Appellant's appeal and uphold the assessment. The Appellant has also sought judicial review of HMRC's decision to issue the assessment; those proceedings are stayed until the outcome of this appeal. It will be for the High Court or Upper Tribunal to decide whether the Appellant had a legitimate expectation that it could rely on the terms of the contract it concluded with HMRC.

Evidence

10. The Tribunal was provided with a helpful Bundle of documents prepared by Weil, Gotshal & Manges (London) LLP on behalf of the Appellant. This included:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) various documents relating to the ADR meeting;

(3) brochures and website information about the Supporter Schemes; and

(4) the Appellant's Grounds of Appeal in *Serpentine 1* and HMRC's skeleton argument in that appeal.

11. Mr Socratous, director of SOC VAT Consultants ("SOC"), provided two witness statements, gave oral evidence and was cross examined. Mr Socratous had acted for the Appellant since 12 October 2012, and he attended the ADR meeting in that capacity. I found him to be an honest witness.

12. The following HMRC Officers provided witness statements:

(1) Ms Zharina Murdock, who visited the Appellant on 9 and 10 November 2011, and who subsequently issued the assessments appealed in *Serpentine 1*; she attended the ADR meeting;

(2) Ms Sandra Chambers, who in January 2014 replaced Ms Murdock as the HMRC officer dealing with HMRC's enquiries into the Appellant;

(3) Ms Senaka Attygalle, the line manager for both Ms Murdock and Ms Chambers; she attended the ADR meeting;

(4) Mr David Webb, a senior policy adviser at HMRC who also attended the ADR meeting; and

(5) Mr Mark Carnduff, whose experience is in international tax, but who is also accredited as a mediator by the Centre for Effective Dispute Resolution ("CEDR"). He was the mediator at the ADR meeting.

13. Shortly before the hearing, the Appellant notified HMRC that the evidence of all the above witnesses was unchallenged, other than that of Mr Carnduff. As a result, he was the only HMRC Officer to give oral evidence. As explained at §73ff, I found that evidence to be unreliable.

14. Attached as an exhibit to both Ms Attygalle's witness statement and to Mr Socratous's first witness statement was a witness statement given by Ms Jackie McNerney. She had worked for the Appellant between 1993 and 2013, most recently as Chief Operating Officer. In that capacity she had attended the ADR meeting with Mr Socratous; the witness statement which was exhibited by Ms Attygalle and Mr Socratous had been given for the hearing of *Serpentine 1*. Mr Jones cross-examined Mr Socratous on paragraphs 12 and 13 of Ms McNerney's witness statement, but only to put in issue Mr Socratous's own evidence. As both parties had relied on Ms McNerney's witness statement, I too accepted it into evidence.

The facts

15. This part of my decision sets out findings of fact from the evidence summarised above, together with certain background facts from *Serpentine 1*; the parties accepted that these had been accurately summarised by Judge Mosedale. In relation to some issues where the evidence was under challenge or inconsistent, I make further findings of fact later in this decision. All facts are for the relevant period, unless otherwise stated.

The Appellant and the Supporter Schemes

16. The Appellant runs two contemporary art galleries in Kensington Gardens, London: the Serpentine Gallery and the Sackler Gallery. Admission is normally free in ordinary opening hours. It operated the following Supporter Schemes:

(1) The Benefactors Scheme. Benefactors agreed to give the Appellant £500 a year for five years, and received a range of benefits, including free invitations to private views of exhibitions, priority bookings for other events, and advance notice to purchase limited edition prints.

(2) The Future Contemporaries Scheme. Members of this Scheme agreed to give the Appellant £1,000 a year. They received the same benefits as Benefactors, and additional benefits including free invitations to special events and the right to purchase tickets to the Appellant's prestigious summer party.

(3) The Patrons Scheme. Members agreed to give the Appellant £2,500 per year, and received the same benefits as Benefactors, and additional benefits including free exhibition catalogues and the right to purchase tickets to the Appellant's summer party.

(4) The Learning Council Scheme. Members agreed to give the Appellant £5,000 per year; they received the same benefits as Benefactors, and additional benefits including free exhibition catalogues, free invitations to two opening celebration dinners and priority booking for the summer party.

(5) The Council of the Serpentine Gallery Scheme ("the Council Scheme"). Members agreed to give the Appellant £50,000 over three years, and received the same benefits as Benefactors, and additional benefits including free invitations to exhibition opening dinners, to exhibition previews and to special tours and talks organised by the Appellant. Members were also entitled to private out-of-hours tours of the gallery, two free tickets to the summer party, and access to the Appellant's directors and advisors who would provide introductions to key opinion-formers on art to help with collecting, conservation, care etc.

17. The benefits listed above would only be provided if the supporter paid the stipulated amount for the particular Scheme he wished to join. It was not possible to pay a lesser amount and still receive the benefits.

18. Members of all Schemes, other than the Benefactors Scheme, were entitled to participate in "the Collectors Circle". This was a termly series of 10 tours of galleries and studios in London led by an art historian. Members of the Future Contemporaries Scheme had to pay a further £300 (plus VAT) per term to participate, but members of the Learning Council Scheme and the Council Scheme were not required to pay. Thus, entry was available only to members of the Schemes set out above.

19. Although the Collectors Circle is occasionally referred to as a "supporters scheme" – for example, in the appendix to the Appellant's letter of 31 January 2012 in the context of analysing its VAT treatment – the overwhelming weight of the evidence is that the Collectors Circle was not viewed as a scheme in its own right, see for example HMRC's opening statement for the ADR meeting at §38. Ms McNerney's witness evidence is also that there were five Supporter Schemes (not six). I find as a fact that this was the case, and the Schemes were those set out at §16 above.

The 2003 agreement about the Council Scheme

20. On 22 July 2003 an HMRC Officer, Mr Balanow, wrote to the Appellant about the Council Scheme. He said:

> "I agree that the amount of £3,000 would cover the benefits enjoyed by contributors…and that this amount is a taxable supply on which output tax should be accounted for. The balance of the three payments of £16,667 may be considered to be a donation, as there are no benefits attached to it apart from a list of donor's names, displayed as an acknowledgment of their support, at certain exhibitions...."

21. From that date onwards, the Appellant accounted for VAT on £3,000 of the income provided by members of the Council Scheme, with the balance treated as a donation. The benefits were only available to members of the Scheme who paid the full amount of £50,000; it was not possible for a person to access the same package of benefits simply by paying £3,000 to the Appellant.

HMRC's enquiries

22. Towards the end of 2011, Ms Attygalle and Ms Murdock visited the Appellant. Following that visit the parties corresponded on a number of issues, including the VAT treatment of the income from Supporter Schemes (other than the Council Scheme). The Appellant was treating all the money received from those Schemes as donations, and as such outside the scope of VAT. Supporters signed a declaration agreeing to donate the total amount paid under each Scheme to the Appellant.

23. On 9 July 2012, Ms Murdock issued a decision letter stating that the income from four Supporter Schemes should have been standard rated, because they did not comply with paragraph 5.14 of VAT Notice 701/1 Charities. In the same letter, she also asked the Appellant for further information about the Council Scheme.

24. Paragraph 5.14 reads as follows:

> "Many cultural organisations operate patron or supporter schemes, which offer benefits in return for a minimum payment. Benefits may include free admission to special exhibitions, the right to receive regular publications, discounts on shop purchases, etc. The minimum payment is business income and is standard rated…
>
> If a patron or supporter pays more than the minimum amount you can treat the excess as a donation and outside the scope of VAT as long as the patron or supporter is aware that the scheme benefits are available for a given amount, and that anything in excess of that amount is a voluntary donation. This should be explicit in the patron or supporter scheme literature."

25. Ms Murdock subsequently assessed the Appellant to VAT in relation to the income from those four Schemes in the sum of £171,067; she also reduced the Appellant's repayment claim for the period 09/12 by £165,970.33.

26. At some point after receiving that decision letter, the Appellant decided to change the wording of the declaration signed by supporters of the four Schemes which were under challenge, to bring them into line with that signed by members of the Council Scheme. After those changes were introduced, the declaration for the Benefactors Scheme read:

"I hereby agree to donate £500 to the Serpentine Trust.

Donation	£470
Benefit (incl VAT)	£30
Total	£500"

27. Similar changes, reflecting the payment and benefits appropriate for each of the other three Schemes, were made to the declarations.

28. The parties continued to correspond on the issues in dispute, including the treatment of income from the four Schemes. On 30 January 2013, Ms Murdock wrote to SOC saying (where "TST" is the Appellant, and with the emboldening in the original):

> "…I remain of the view that the income in question is standard-rated business income and not a donation for VAT purposes…in essence TST receives income which is akin to sponsorship…and that in return TST supplies specified benefits to its different categories of supporters. TST require participants to pay the various stated amounts in full. Therefore that amount will be the consideration for the supply of benefits and output tax will be due **on the full amount** as it is not a donation **for VAT purposes**.
>
> This view is consistent with the Tron Theatre decision[1] that any money given in return for a package of benefits is consideration for those benefits. Thus if someone is willing to pay £1,000 for something that is normally priced at £10, VAT is still due on the £1,000. The only exception to this is if it is clearly demonstrated that a specific amount of the payment is a donation. It must also be demonstrated that if the supporter does not give the donation he will still receive the full benefits."

29. In the same letter, Ms Murdock asked for the following information relating to the Council Scheme:

(1) a copy of the supporter's pack so she could "gain an understanding of what participants in the Scheme have consented to;

(2) confirmation of the payment structure, adding "can the relevant benefit be received by participants in return for a £3,000 payment per annum for 3 years"; and

(3) a copy of any relevant literature which "makes clear the element of donation in each payment that they make".

30. The Appellant began to review the Supporter Schemes (other than the Council Scheme) to identify the value of the benefits provided to supporters. The Appellant hoped this exercise would allow it to include those values in its supporter packs and on its website, using the same approach as HMRC had accepted for the Council Scheme.

[1] *Tron Theatre v C&E Commrs* [1994] STC 177 ("*Tron Theatre*"), a decision of the Inner House of the Court of Session.

31. On 27 February 2013, Mr Socratous replied to Ms Murdock's letter of 30 January 2013. He attached an analysis of the value of the benefits provided to supporters under each of the Schemes (other than the Council Scheme), and said:

> "we are aware of the guidance in paragraph 5.14 of Notice 701/1. Whilst we acknowledge that the Trust has not clearly stated in its literature that an element of the 'subscription' is a payment for the benefits, we hope that the attached schedule of benefits shows that the value of the benefits is and has always been nominal in comparison to the level of the giving."

32. He went to say that the supporters had all signed declarations stating that the full amount was a donation, and he asked HMRC to agree that:

> "notwithstanding the lack of a specific reference to the value for the benefits, the Trust can account for VAT only on the value of the benefits for the past…if you are in agreement with the values ascribed to the benefits, it is proposed that the value of the benefits is clearly shown on both the website and the necessary paperwork so that it is clearer to supporters what the value of the benefits are for VAT purposes under each scheme…"

33. On 14 March 2013, Ms Murdock refused Mr Socratous's suggestion that the Appellant account for VAT only on the value being ascribed to the benefits. She said that "going forwards, TST may wish to review the information it supplies to participants of the schemes, so that going forwards it can treat elements of the revenue received as donations providing the requirements of PN701/1 paragraph 5.14 are properly met". She added that she had not yet received the information about the Council Scheme which she had requested.

34. On 8April 2013, Mr Socratous sent HMRC information about that Scheme. On 31 May 2013, Ms Murdock informed the Appellant that she "intended to review the documentation of the Council of the Serpentine Scheme, and reply under separate cover".

The ADR meeting

35. At some point before 31 May 2013, the Appellant asked HMRC if the issues in dispute could be considered for HMRC's recently introduced ADR scheme. One of those issues was the VAT liability of Supporter Scheme income for Schemes other than the Council Scheme. HMRC agreed to ADR, and Mr Carnduff was appointed as the mediator. His background is in international tax and he had no previous experience of the VAT issues in dispute between HMRC and the Appellant.

36. The ADR meeting took place on 29 and 31 July 2013. HMRC's representatives were Mr Webb, Ms Attygalle and Ms Murdock. The Appellant's representatives were Mr Socratous and Ms McNerney.

37. In advance of the meeting, the Appellant changed its website guidance on the disputed Schemes so that they were the same as that for the Council Scheme. No

change was made at this stage to any hard copy publications, because that change would incur costs.

38. During the ADR meeting both parties exchanged opening statements. HMRC's opening statement introduced the Supporter Scheme issue by saying:

> "HMRC has reviewed three of the Trust's 'supporter' schemes – Patron, Benefactor, and Future Contemporary. It is HMRC's understanding that the terms and conditions of the Learning Council supporter scheme are identical, except for an enhanced level of benefits reflecting the higher cost to the supporter. HMRC is willing to reconsider its view of this scheme if further information is forthcoming…
>
> HMRC has not reviewed the fifth scheme – the Council of the Serpentine Gallery. It will do so once the Trust had provided sufficient information to enable it to do so. However, in the light of the decision given by Mr Balanow in his letter dated 22/7/03, any decision of the correct VAT treatment of this scheme will be applied from a future date and not retrospectively."

39. It continued:

> "the material and application form provided by the Trust to potential supporters for each scheme does not differentiate in any way between an element of 'support' and an additional 'donation'…there is not a lower cost for obtaining the benefits of being a supporter plus an additional voluntary donation to the Trust."

40. The Appellant's opening statement includes the following passage:

> "The Trust has adapted its offering to its members on a 'without prejudice' basis to prevent any further exposure to assessments. Supporters are now advised of a value for the nominal benefits and what they can give as a donation.
>
> However, in relation to the historic position, the Trust disputes that there was a direct link between the donation and benefits supplied and even if there was, the consideration (i.e. on this analysis the donation) should be apportioned to take account of what may be supplied, eg printed matter or educational services."

41. After the first day of the ADR meeting, Mr Carnduff sent an email with an attachment to Mr Socratous and Ms Murdock. It was timed at 8.35 on 30 July 2013, and said:

> "I have tried to capture where we got to yesterday. It doesn't say anything about the historic supporters schemes as we didn't really get off the blocks.

> My understanding is that David [Webb] will be speaking to the policy holder[2] today if they are available."

42. Attached to Mr Carnduff's email was a note headed "ADR meeting between the Appellant and HMRC" ("the Day One Note"). It opens with the following words:

> "This document reflects where discussions about a possible settlement had reached by close of discussions on 29 July 2013.
>
> The statements reflect what was being discussed and both parties accept that neither party should be bound in any way by the content and that it does not represent the acceptance of either party of any of the arguments put by the other party."

43. Most of the Day One Note focused on the other issues in dispute, such as partial exemption. Under the heading "supporter schemes" it stated:

> "From 1/4/13 where the benefits package for supporter schemes is made separately available for purchase and this is clearly stated the payment above the price charged for the benefits package is to be treated as a donation.
>
> [I think this last point is fully agreed and not subject to any caveats about settlement]."

44. The ADR meeting continued on 31 July 2013. Later in this decision I make further findings about what happened during that meeting, see §89ff.

45. On 1 August 2013, Mr Socratous sent a note of the meeting to HMRC ("the Draft Meeting Note"), with a covering email saying "can you review and let me know if there are any amendments or additional points that need to be included at this stage please".

46. The Draft Meeting Note was headed, in bold: "ADR meeting between The Serpentine Trust and HMRC". On the next line were the words "This document records the agreement reached by close of discussions on 31st July 2013".

47. The first part of the Draft Meeting Note is headed "free admission and VAT recovery method", and contains eight detailed points. The next part is headed "Supporters Schemes" and reads:

> "1. From 1/4/13 where the value of the 'benefits' package for supporter schemes is identified and this is clearly stated (both in the application forms and on the website), this will be treated as the consideration. Any sums paid above the price charged for the benefits package is to be treated as a donation.
>
> 2. No agreement was reached with respect to the historic VAT position and the appeal continues in relation to this."

[2] It was common ground that the term "policy holder" meant the person responsible for that area of policy within HMRC

48. The third and final part of the Draft Meeting Note was headed "action points", and contained six action points for HMRC and six for the Appellant. The only points with any bearing on the Supporter Schemes were:

(1) HMRC were to send the Appellant hardship forms, and the Appellant was then to make a claim for hardship in relation to the FTT appeal (*Serpentine 1*) about the historic position of the Schemes; and

(2) HMRC were to confirm whether Extra-Statutory Concession ("ESC") 3.35 applied to the Schemes. HMRC subsequently decided, and the Appellant accepted, that the ESC does not apply to the Schemes.

49. On 12 August 2013, Ms Murdock sent a revised draft of the meeting note ("the Amended Version") back to Mr Socratous. Her covering email reads:

> "Thank you, Socrates, for the summary notes previously circulated. I have attached a PDF copy of the notes as amended by HMRC. Progress is being made with a number of the action points discharged already although there is still work to do."

50. The Amended Version made the following changes to the Draft Meeting Note:

(1) the first point, which dealt with the partial exemption method, was amended so that it was conditional not only on point two (staffing numbers), but also on point three (the Sackler Gallery);

(2) a detailed caveat, running to seven lines of print, was included in relation to the capital goods scheme in the context of the Sackler Gallery;

(3) a further action point (concerning submissions on penalties) was added to the Appellant's list; and

(4) detailed changes to the wording in the following places (emphases added):

(a) the words "all apportionments" were inserted into a sentence reading "a review after 4 years" so that it read "with a review *of all apportionments* after 4 years";

(b) the wording of the phrase "subject to HMRC approval which would be prioritised and approved" was changed to "subject to HMRC approval which would be prioritised and *considered*";

(c) the word "residual" was amended to read "*mixed use and* residual" in two places;

(d) the words "kitchen/cafeteria area" were expanded by the insertion of a parenthesis reading "i.e. equipment and restaurant furniture";

(e) the statement that certain works relating to the Sackler gallery would be "directly attributed to a taxable supply and 100% recoverable" was amended, with the words "directly attributed" corrected to "directly attribut*able*" and the reference to "100% recoverable" were removed; and

(f) the words "HMRC to process special partial exemption method within two weeks" were amended to read "HMRC to *provide accelerated*

timescale regarding special partial exemption method request. *It will be considered* within two weeks."

51. No changes were made to the passages in the Draft Meeting Note about the Supporter Schemes, or to the opening sentence of that Note which stated that "[t]his document records the agreement reached by close of discussions on 31st July 2013".

After the ADR

52. On 7 and 23 October 2013, Ms Murdock wrote to the Appellant about ESC 3.35, and on 26 November 2013 a meeting took place at which she informed the Appellant she was handing over to Ms Chambers.

53. On 13 December 2013 Ms Murdock wrote again, mostly about computational issues. She also said that she had noted the changes made to the Appellant's website about "Gift Aid and VAT", and asked that the words "due to HMRC regulations" be removed, saying that it was the Appellant's choice "to structure its supporter scheme as it does, not HMRC's choice or regulatory requirements". At the end of the letter, she set out "the outstanding issues at this handover point". These included:

(1) review of the Council Scheme; and

(2) review of "the supporter scheme literature issued to ensure that it enables TST to treat income generated as donations from a VAT perspective".

54. On 14 May 2014, Ms Chambers wrote to the Appellant asking for more information about the Council Scheme.

55. As already noted, the hearing of the Appellant's appeal about the historic position of the four Supporter Schemes in dispute took place on 11 August 2014. *Serpentine 1* was published on 8 September 2014, upholding HMRC's decision that the full amounts paid by the supporters of those Schemes was standard-rated for VAT purposes. Judge Mosedale added the following to the end of her decision, under the heading "Footnote – the new arrangements":

> "[115] The Trust may well be surprised, as indeed I was, that HMRC apparently considered the addition of the extra words in the supporters' brochure, as set out at §§38-39 above[3], was all that was required in HMRC's view to convert a VAT liability on £500 to a VAT liability on only £30.
>
> [116] The Trust may be surprised because such a small change appears to result in an enormous VAT saving; I am surprised because HMRC's view expressed at §§41 above does not appear to be in accordance with either the law or HMRC's own published guidance. The same criticism can be made of the 2003 clearance at §5 that was given to the Trust in respect of the Council scheme.
>
> [117] [*sets out paragraph 5.14 of Notice 701/1*]

[3] This cross-reference is to the new wording of the donation form, which is at §26 of this decision

> [118] At the hearing, HMRC defended their position by suggesting that the person who negotiated the ADR for HMRC believed that under the new arrangements the Benefits were available for the lesser amount (eg the £30 stated to be their value in the new Benefactors scheme). This did not appear to be a correct reflection of the views of the officers concerned with the 2003 letter or the ADR settlement as neither expressly required it to be a condition that a supporter could pay the lower amount and still receive the Benefits, and indeed their rulings seemed quite clearly to be based only on the *value* of the benefits.
>
> [119] I make no findings of fact in relation to the position after 1 April 2013 but I note a letter from the Trust to HMRC in 2012 had expressly drawn to HMRC's attention that in all cases the full amount had to be paid to receive the Benefits, and that the Trust's position at the hearing was that the 2013 changes involved no change in substance.
>
> [120] 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."

56. On 21 January 2015, Ms Chambers wrote to the Appellant. She began by referring to Ms Murdock's letter of 13 December 2013 (see §53) and continued:

> "this letter was sent following the conclusion of the ADR meeting. An outcome from the ADR meeting was an agreement for the VAT treatment of supporters' schemes incomes…the ADR agreement on this states.."

57. She next set out both the relevant paragraph of that document, together with Para 5.14 of Notice 701/1. She then said:

> "you may note that an essential element of the conditions of paragraph 5.14 which allow any excess payment to be treated as a donation centers [sic] on the benefits availability where a minimum payment is made. This is not explicitly stated in the wording of the agreement."

58. She continued:

> "I am concerned that the wording of the agreement may not specifically meet the terms of the conditions of Paragraph 5.14. It would appear that TST has interpreted the agreement to mean that the stated value for the benefits is merely the notional value…it would appear that the supporter must pay the full value of the scheme to secure any benefits. Clearly this is contrary to HMRC policy…it was not our intention to agree anything contrary to HMRC policy. In the context that Zharina Murdock set out our view of this matter in her letter 14/3/12 and we pursued litigation on the matter, I would be surprised if TST has misunderstood the agreement."

59. Ms Chambers also asked the Appellant to confirm a number of points, including whether the supporters receive the benefits without paying the full amount.

60. On 20 February 2015 Mr Socratous replied, expressing surprise at Ms Chambers' letter, and denying that the Appellant had misunderstood the ADR agreement or had failed to follow it. On 1 April 2015, Ms Chambers responded, saying she had:

> "noted your comments regarding the ADR agreement and your concern that HMRC may be seeking to revisit what was agreed at that time. However, I wish to confirm that HMRC'[s] main aim of seeking clarification of the agreement...is to ensure that the inconsistence that was referred to by the Tribunal…is corrected to reflect HMRC's published guidance. HMRC accept that there is an ADR agreement in place, however there appears to be a misunderstanding what the agreement means…The aim of this letter is to set the context and clarify the agreement as TST's understanding of the agreement is different from HMRC's."

61. On 10 September 2015, HMRC issued the assessment now under appeal for periods 04/13 to 12/14, of £65,268. The Appellant asked for a statutory review, and the assessment was upheld on 23 December 2015. The Appellant notified its appeal to the Tribunal and also made an application for judicial review.

Evidential issues and further findings of fact

62. The following issues arose from the evidence:

(1) HMRC's practice in relation to other clients and generally;

(2) Mr Socratous's evidence about the Draft Meeting Note and the Amended Note;

(3) Mr Carnduff's oral evidence; and

(4) the evidence of other witnesses on what was discussed at the ADR meeting in relation to the Supporter Schemes.

HMRC's practice in relation to other charities

63. SOC, the VAT consultancy firm run by Mr Socratous, advises a number of other charities. In his second witness statement, Mr Socratous said that from that experience he knew that HMRC had given other charities the same treatment as that agreed by Mr Balanow in respect of the Council Scheme. He said HMRC had "for years…been adopting an approach that deviates from their published guidance", and had only changed their position when *Serpentine 1* was published. He exhibited a redacted copy of a letter to one of his other clients, which reads (so far as relevant to the issues now under appeal):

> "Following the decision of the First Tier Tribunal in the case of the Serpentine Trust (TC/2013102713), HMRC's policy regarding the treatment of supporter or patron schemes has been clarified.
>
> Firstly, it has been established that the payment given by the supporter is 'for' the benefits provided even if the supply is grossly overvalued and-even If the supporter had donative intent.

> However, if [NN][4] in this case, offers the benefits for a fixed price and specifies anything additional is a donation then clearly the element of donation would not be 'paid' for the benefits.
>
> Consequently, to avoid accounting for VAT on the entire payment received from the supporter, [NN] needs to assign a value for the benefits provided for each class of supporter and to make it clear that any additional payment is a donation, it should also be made clear that the benefits can be obtained by only paying the amount stipulated for them without any additional donation.
>
> Secondly, where the benefits provided are closely related without any predominant element to which the other benefits are ancillary, this is seen as a single supply. I believe this is the case with the benefits provided…
>
> Consequently, [NN] is required to account for VAT on the full value of the benefits provided. As [NN] may have received misleading advice on the treatment of supporter payments in the past, you need only apply the current treatment from 1 October 2014."

64. Under cross-examination Mr Socratous said:

> "my experience of the sector, and I have to tell you that probably about 85% of our clients are charities, that the practical policy of Revenue when they are out visiting these kind of organisations was to accept that provided a charity identified a value and a donation, VAT was only due on the value for the benefits. That's what happened in practice."

65. He also confirmed that, following *Serpentine 1*, he was aware "of other organisations in the sector also having rulings withdrawn". Mr Jones pointed out that no ruling had been exhibited, but only the letter set out above.

66. However, Mr Jones did not challenge Mr Socratous's evidence that (a) the treatment given to the Council Scheme had also been given by HMRC to other charities, or (b) that those rulings had been withdrawn following *Serpentine 1*. None of HMRC's witnesses gave evidence that there was no such practice, or that the treatment agreed by Mr Balanow in relation to the Council Scheme was an anomaly.

67. I find as facts that:

(1) HMRC adopted the approach in the Council Scheme ruling in relation to at least some other charities;

(2) HMRC withdrew those rulings prospectively after *Serpentine 1* was published; and

(3) Mr Socratous genuinely believed that HMRC operated a practice of requiring only that the benefits provided to members of supporter schemes be quantified and communicated to those members, and did not require those benefits to be made separately available for purchase.

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[4] I have inserted "NN" where the client's name has been redacted

Mr Socratous' evidence about the Day One Note, the Draft Meeting Note and the Amended Version

68. Mr Socratous's second witness statement said that, at the end of the second day of the ADR meeting, he and the Appellant's legal advisers had made a number of amendments to the Day One Note. One of these was "substantially to rewrite" the paragraphs about Supporter Schemes. He said that those amendments had been made "to bring it into line with" HMRC's earlier ruling on the Council Scheme.

69. Mr Socratous agreed with Mr Jones that his purpose had been "to fundamentally change the meaning of that paragraph"; he also agreed that the aim of rewriting the paragraph was to reflect the Appellant's position that "VAT should only apply up to the value of the benefit that was being purchased". Mr Jones asked Mr Socratous if he had been "pleasantly surprised" when those paragraphs were unchanged when the Amended Version was returned by HMRC. Mr Socratous denied being surprised; he said his wording "reflected the Revenue's practice generally in the sector and reflected the existing [Council] ruling".

70. Mr Socratous also agreed with Mr Jones that HMRC had not changed their views during the ADR in relation to the historic position for the Schemes, and that the issue had subsequently been litigated in *Serpentine 1*. Mr Jones then asked Mr Socratous whether there was any basis for him to think that the position should be different for future periods. Mr Socratous replied "yes, because of the existing ruling".

71. He accepted that Ms Murdock had wanted to review the Council Scheme, but noted that she not done so; he emphasised that her correspondence throughout had focused on the historic position, where no value at all had been ascribed to the benefits. He also accepted HMRC had refused to exercise their discretion to ascribe a value to the historic receipts from supporters. However, he reiterated that there was a difference between the historic position and the position after 1 April 2013, because historically no value had been ascribed to the benefits.

72. I accept Mr Socratous's evidence that he was not surprised that his wording was not amended, because (a) HMRC had agreed a similar approach in some other similar charities and (b) that wording brought the Schemes into line with the Council Scheme.

Mr Carnduff's oral evidence

73. As noted at the beginning of this decision, I found Mr Carnduff's oral evidence to be unreliable. In order to explain why I have come to that conclusion, I have set out that evidence in some detail, as well as the relevant paragraphs from his witness statement. In that statement he said:

> "In respect of the supporter schemes generally, the different levels of support were discussed and the benefits that were made available to supporters…I recall that it emerged that HMRC would be content going forward if the Trust would show the benefits available within the supporter schemes being available to purchase separately from the supporter schemes on their website and would provide HMRC with details of the costing of the benefits to agree. The Agent [Mr

> Socratous] said he did not think this was necessary, however the Trust said they could do this. This seemed to provide agreement to a solution but I do not have a clear recollection of exactly what was said by the parties or of how long the discussions on this issue took.
>
> I thought the parties had reached agreement during the day that from 1 April 2013 where the benefits package for supporter schemes is made separately available for purchase and this is clearly stated the payment above the price charged for the benefits package is to be treated as a donation. I captured this in a note that was sent to both sides after the first day. I included a note that I thought this point was fully agreed and not subject to any caveats about settlement. To the best of my knowledge and memory no objection was raised to the content of my note in respect of this or any other point."

74. He added that "my recollections of the ADR are from memory, and from my note of day 1 that was circulated, as the notes I took at the time were destroyed. The dates and the location of the meeting were identified from my diary".

75. However, when asked by Mr Jones if he had any amendments he wished to make to his witness statement, Mr Carnduff said:

> "Reading it through again this morning, and the ADR statement, I realise that actually that's sort of true but not the whole piece. On the second day Mr Socratous…continued saying that he didn't think the treatment – he didn't think it was necessary to put the details on the website about buying the package separately."

76. Mr Carnduff then clarified that by "buying the package separately" he meant "buying the benefits part". Mr Jones asked how the HMRC representatives at the meeting had responded to Mr Socratous's suggestion that it wasn't necessary for the website to include details about buying the benefits separately, and Mr Carnduff said

> "Mr Webb and the other people from the HMRC team insisted that it was. I think that's reflected in the first draft of the final note."

77. Mr Jones then asked what Mr Socratous's response and that of the Trust had been, and Mr Carnduff said "I think we'd got to a place where people didn't agree again, as to whether or not it was necessary".

78. Mr Vallat opened his cross-examination by reprising that new evidence, saying:

> "although at the end of the first day you thought there was agreement; as discussions progressed on the second day, you thought maybe there was no longer agreement. I think that's what you've just said."

79. Mr Carnduff responded:

> "I don't think that's quite right. At the end of the first day, I thought where we'd got to is Mr Socratous and the trust had agreed they could change the website to show it, and that avoided having to sort out a disagreement about whether or not you needed to and that seemed a sensible way forwards."

80. Mr Vallat asked how that response fitted with his previous oral evidence, saying "I thought you had just qualified that answer or expanded on that answer by saying as discussions progressed on Day 2, you thought maybe people didn't agree?" Mr Carnduff said:

> "They didn't agree on the analysis, and they continue not to agree on the analysis. But my understanding was the way forward was still solid, and the only reason it wouldn't be like that was if the exemption applied, the [ESC] 3.35."

81. Mr Vallat then took Mr Carnduff to the Day One Note and the Draft Meeting Note, and Mr Carnduff said:

> "There was an original draft I did, in between, the end of the first day one, then I did a draft that [was] sent round HMRC and then Mr Socratous commented back. I think this is his comment back."

82. On being asked for clarification, he repeated "we did the first draft and then Mr Socratous commented on it" and "I thought I had done the first draft after the second day as well". Mr Vallat noted that no other witnesses had referred to a note of the second day having been originally drafted by Mr Carnduff, and there was no copy of any such draft in the Bundle. He took Mr Carnduff to the Amended Version, and Mr Carnduff repeated and expanded on his new evidence about having prepared the first draft of the note after the second day, saying:

> "Mr Socratous didn't do the first draft after the end of the meeting. And in the first draft after the meeting I think it still has the piece about having to show the amount separately."

83. Mr Vallat asked Mr Carnduff about the changes made to the Amended Version, and he responded:

> "I don't think Mr Socratous did the first draft…after we'd had the second meeting, I did a first draft and then it went round HMRC and it went round to Mr Socratous and the trust. And I think that had in it the piece about the benefits package being available separately, but I cannot now find the document because it's not in a time sequence [in the Bundle]. But if that was my first draft after the end of the meeting, that's where I thought we were. So I think it is quite important…It should be here."

84. Having taken instructions, Mr Jones said that those instructing him "weren't aware of any other documents".

85. At the end of the cross-examination I wanted to be sure I had understood Mr Carnduff's new evidence, and asked him to reiterate what he said had happened on the second day. He said:

> "we went through the agreement so far and we had to do some detail…I can't remember the detail, it's far too VAT-technical for me, but we did go over the piece with the supporter scheme and Mr Socratous said he didn't think the, if you like, bureaucracy part was necessary.

86. I asked what he meant by "the bureaucracy part" and he responded:

> "Showing it separately on the website at a different price – buying the benefits separately. And that was a point we had discussed the previous day and we got absolutely nowhere with because the parties wouldn't agree. They just had a different perspective."

87. I make the following findings about Mr Carnduff's evidence:

(1) In his oral evidence he said that the issue of whether the benefits should be separately available for purchase had been discussed on the first day "and we got absolutely nowhere with because the parties wouldn't agree". That evidence directly contradicts both:

(a) the Day One Note, which was drafted by Mr Carnduff, and which ends by saying in relation to the Supporter Schemes (my emphasis): "I think this last point is fully agreed and not subject to any caveats about settlement"; and

(b) his witness statement, which repeats the substance of the Day One Note.

(2) In his oral evidence, Mr Carnduff said that he had drafted a note at the end of the second day, which he "sent round HMRC" and then sent to the Appellant. No such document has been referred to by any of the other witnesses to whom such a document would have been sent, including HMRC's witnesses. No copy was provided by either party, and HMRC's legal team and those present at the hearing had no knowledge of any such document. It is entirely implausible that a draft document was in existence about which no other witness was aware, of which no copy exists and to which Mr Carnduff made no reference in his witness statement.

(3) In his oral evidence, Mr Carnduff said that there were discussions on the second day at which Mr Socratous "didn't think it was necessary to put the details on the website about buying the package separately" but the HMRC side "insisted that it was". No other witness has given similar evidence. Mr Carnduff's witness statement makes no mention of any such discussions.

88. I considered whether there were parts of Mr Carnduff's oral evidence on which I could rely, but decided it was unsafe to do so. I therefore set aside his oral evidence as unreliable.

The evidence of other witnesses as to what happened at the ADR meeting

89. Mr Jones cross-examined Mr Socratous at length about whether the parties had reached agreement in the course of the ADR meeting about the future VAT treatment of the Schemes. Mr Socratous said he was unable to recall what the position had been at the end of the first day, and when asked whether he had "a clear recollection" that the parties had come to a final agreement during the meeting, he responded:

> "you are asking me to remember something that took place five years ago. The only thing I have to go on is the notes that was finally agreed between the parties."

90. Mr Socratous's position remained the same through the course of many exchanges between him and Mr Jones. For example:

> *Mr Socratous*: I don't recall precisely how we reached the conclusion that we did. But as I say, nevertheless there was a meeting note drafted which was circulated…
>
> *Mr Jones*: Is it your evidence that the Commissioners agreed with your argument during the course of the discussions?
>
> *Mr Socratous*: Well, we must have done because that's what we agreed in the agreement.

91. However, Mr Socratous accepted that HMRC's "starting point" had been that set out in their opening statement, and that this was in terms a reflection of the guidance in Para 5.14. He also accepted that HMRC had repeated that position during the ADR.

92. Ms McNerney's evidence was that:

> "I presented the summary of donor benefits and the associated costs at the ADR meetings, and HMRC did not question any aspect of it, including the valuations. Indeed, HMRC appeared content with the valuations we had applied and were happy for the Appellant to allocate the supporter payments to those valuations for VAT purposes, provided that it was clear from our supporter packs and the website which element of the payments constituted a payment for the benefits (with the excess constituting the donation)."

93. Mr Webb's evidence was that:

> "The ADR discussion around the supporter scheme issue focussed on the valuation of the various benefits and much time was spent challenging TST's approach of only attaching a value to tangible benefits e. g. an exclusive breakfast with an artist was valued by reference to the croissant and cup of coffee not the event itself. I got no sense whatsoever from either party that the donation principle was being set aside. My recollection of the day supported by my recent reading of the relevant section of the ADR meeting note was that all discussions around valuation took as read that the supporter would be fully aware of their ability to buy the benefits for the lower price and that this message would be communicated in the relevant supporter scheme literature."

94. Ms Murdock's evidence was that the Schemes were the first item on the agenda on the first day, but that little time was spent discussing this issue, with even less time spent during the second day. She said:

> "At the end of the meetings I did not leave with a belief that HMRC's position had changed or altered to differ from the published guidance which had been repeatedly referenced in conversations, correspondence with TST and (at that point) most recently in ADR. I did not believe that a message different to published guidance and conversations/ correspondence had been conveyed to TST and its representatives."

95. The relevant paragraphs of Ms Attygale's witness statement are as follows:

> 14. The Trust informed HMRC that with effect from 1 April 2013 they had altered their promotional material for the supporter schemes (paper and on-line) to meet HMRC's requirements. The material was not produced at the meeting or provided to HMRC before the meeting.
>
> 15. Applicability of Extra Statutory Concession 3. 35 was discussed, as was whether the concession applied to the Trust and the potential to zero rate some of the benefits.
>
> 16. The Trust produced a hard copy spreadsheet of an exercise they had carried out to value the benefits for the various supporter schemes (this was only presented at the meeting and a copy was not given to HMRC). There was some discussion around the valuation and liability of the benefits.
>
> 17. I cannot recall the exact context of the discussion around the valuation or whether it was to mitigate VAT liability of the past supporters scheme income, mitigate VAT liability of income going forward or both.
>
> 18. At no point did HMRC comment that the revised promotional material met HMRC's requirements. For the purpose of the ADR meeting HMRC had no reason to believe that the Trust had not followed the guidance of Zharina Murdock's letters….
>
> 19. There was no discussion regarding modifying HMRC's ruling or going against HMRC policy. If this was discussed I would certainly have recalled this discussion as it would have been contrary to HMRC Policy and therefore at odds with our Litigation & Settlements Strategy."

96. From this evidence I make the following findings:

(1) the Appellant produced a spreadsheet valuing certain benefits, and this was discussed during the meeting;

(2) the Appellant informed HMRC that it had revised its promotional material for the disputed Schemes, but this material was not produced during the meeting;

(3) most of the discussion around the Supporter Schemes focused on the historic position, but little time was spent on this with even less time being spent on the current/future position;

(4) HMRC's opening statement included a reference to the requirement in Para 5.14 that the benefits had to be available separately;

(5) however, there was no explicit discussion of that principle other than in the context of the historic position. I make that finding in reliance on the following evidence:

(a) Mr Webb ("all parties…took it as read that…");

(b) Ms Attygale ("HMRC had no reason to believe that" and "there was no discussion regarding modifying HMRC's ruling");

(c) Ms Murdock ("I did not leave with a belief that HMRC's position had changed");

(d) Ms McNerney ("HMRC appeared content" with the valuations); and

(e) Mr Socratous, who had no memory of any such discussion other than that HMRC made a general statement about Para 5.14.

Issue 1: Jurisdiction

97. The Appellant was assessed to VAT under the Value Added Taxes Act 1994 ("VATA"), s 73(1). This provides:

> "Where a person has failed to make any returns required under this Act …or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

98. Assessments made under VATA s 73 are appealable to the Tribunal, see VATA s 83(1)(p).

99. In *Southern Cross Employment Agency Ltd v HMRC* [2014] UKFTT 088 (TC), the Tribunal decided at [89] and [95] that it had the jurisdiction to decide:

(1) whether HMRC were precluded from raising a VAT assessment which was inconsistent with a binding contractual agreement; and

(2) whether such an agreement existed on the facts of the case.

100. The Upper Tribunal upheld the FTT's decision, see [38] of the judgment, under reference [2015] UKUT 0122 (TCC).

101. In the light of *Southern Cross*, the parties agreed that the Tribunal's jurisdiction under VATA s 83(1)(p) extended to deciding:

(1) whether the document signed at the end of the ADR meeting constituted a binding contract between the Appellant and HMRC; and

(2) if there was such a contract, whether HMRC were thereby precluded from raising the assessment which is under appeal.

102. I agree with the parties and find that the Tribunal has the jurisdiction to decide Issues 2 to 5, set out at the beginning of this decision but repeated here for ease of reference:

- what was the meaning of the words used about the Schemes in the document exchanged between the parties at the end of the ADR meeting (Issue 2);
- whether that document was a contract (Issue 3);
- if the document was a contract, whether HMRC made a unilateral mistake (Issue 4);

- if the document was a contract and there was no unilateral mistake, whether it was void because it was *ultra vires* (Issue 5).

Issue 2: the meaning of the words used

103. The parties disagreed on the meaning of the paragraphs about the Schemes which were contained in the document exchanged at the end of the meeting. In putting forward their submissions, Mr Vallat and Mr Jones relied on well known principles of contractual interpretation.

104. I considered whether it was therefore more logical first to consider whether the parties had entered into a binding contract (Issue 3). However, part of HMRC's case on Issue 3 (whether the parties had agreed the Appellant could depart from Para 5.14) only made sense if the disputed passage had the meaning contended for by the Appellant. I decided it was simplest to look first at the meaning of the words used, using the principles which apply to contractual interpretation, and then go on to consider whether there was a contract.

The principles

105. On the assumption that there was a contract between the parties, the parties agreed that the applicable legal principles for interpreting a provision in that contract were those set out in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR. 2900, cited with approval by Lord Hodge JSC in *Wood v Capita Insurance Services Ltd* [2017] AC 1173). Mr Jones helpfully summarised those principles in his skeleton argument; his references in square brackets are to the relevant paragraphs of *Rainy Sky*:

> (1) The ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant: see [14]. The relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract: *ibid*.
>
> (2) The exercise of construction is essentially a "unitary" one: see [21]. In other words, the language of the contract must not be viewed separately from the relevant background to it; rather the former must always be looked at in the context of the latter. In undertaking that exercise, the court must have regard to all the relevant surrounding circumstances: see [21].
>
> (3) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other: see [21]. When alternative constructions are available one has to consider which is the more commercially sensible: see [30].
>
> (4) Where the parties have used unambiguous language, the court must apply it: see [21].

The disputed passage

106. I set out the disputed passage again for ease of reference. The parties differed in particular on the meaning of the words "price" and "value", as emphasised below.

> "From 1/4/13 where the value of the 'benefits' package for supporter schemes is identified and this is clearly stated (both in the application forms and on the website), this will be treated as the consideration. Any sums paid above the price charged for the benefits package is to be treated as a donation."

Mr Vallat's submissions on behalf of the Appellant

107. Mr Vallat submitted that the first sentence only required the value of the benefits provided to supporters had been identified and clearly communicated. In the second sentence, "price" was synonymous with "value" used the first sentence, so that it meant:

> "From 1/4/13 where the value of the 'benefits' package for supporter schemes is identified and this is clearly stated (both in the application forms and on the website), this will be treated as the consideration. Any sums paid above the value of the benefits package is to be treated as a donation."

108. It followed that the amount equal to the value of the benefits constituted the consideration for the supply; the balance was a (non-taxable) donation, and he put forward the following arguments in favour of his reading:

(1) the paragraph makes no mention of any requirement that the benefits be made available for purchase separately from the supporter package;

(2) the Draft Meeting Note, provided by Mr Carnduff at the end of the first day, said (emphasis added) "where the benefits package for supporter schemes is made separately available for purchase and this is clearly stated". That wording was not included in the Amended Version. HMRC had the opportunity to make changes but did not do so;

(3) if the parties had intended that this requirement be included, on any reasonable view it would have been made explicit; and

(4) the Appellant's understanding of the meaning of this paragraph is consistent with what HMRC had agreed in relation to the Council Scheme;

Mr Jones's submissions on behalf of HMRC

109. Mr Jones said that the word "value" in the first sentence meant "price". In the second sentence the words "price charged" implies that there will be a separate, expressly stated, price charged for the benefits package, and this in turn requires the Appellant's scheme literature to make clear that the benefits are available at a given price, in line with HMRC guidance.

110. He submitted that the relevant background included Para 5.14, which was known to both parties to be HMRC's published guidance, and the HMRC witness evidence showed there had been no movement away from that guidance during the ADR meeting. He added that if the meaning was that for which the Appellant

contented, there was no reason not to agree the historic position on the same basis. Instead, that issue was litigated.

Discussion

111. The first sentence is unambiguous: it refers to the value of the benefits. It does not refer to their price. It is the value which is to be "identified" and "clearly stated" on the application forms and the website.

112. The second sentence reads "Any sums paid above the price charged for the benefits package is to be treated as a donation". The reference to "price charged" most naturally refers to the price charged to potential supporters, because it is only supporters who will be paying the Appellant an amount which exceeds the value of the benefits. It is not reasonable to infer from the final sentence that the benefits must be available on a stand-alone basis, separately from the donation.

113. I agree with Mr Vallat that his reading is also indicated by the relevant factual background. The Day One Note included the explicit and clear wording requiring the benefit package to be separately available for purchase; that was removed from the Amended Version. The reasonable observer, noting that change, would not have inferred that the requirement nevertheless remained in place.

114. I also disagree with Mr Jones's submission that if the meaning was that for which the Appellant contended, HMRC would also have agreed the historic position on the same basis. There is a difference between the historic positon (when the benefits were not valued at all) and the position from 1 April 2013 (when the benefits were valued, but not separately available for purchase).

115. I thus agree with the Appellant, and find that the paragraph did not require that the benefits be separately available for purchase. I note that this was also Judge Mosedale's reading (see *Serpentine 1* at [118]).

Issue 3: whether there is a contract

116. There was a difference between the parties in relation to their approach to this Issue. Although it is clear on the facts that at the end of the ADR meeting Mr Socratous sent HMRC the Draft Meeting Note, which was amended and returned by HMRC, and both versions opened by stating that "[t]his document records the agreement reached by close of discussions on 31st July 2013", see §46 and §51. Mr Jones nevertheless treated the disputed paragraph about the Scheme as if it was essentially free-standing, and sought to argue that it did not constitute a contract. In contrast, Mr Vallat treated the disputed paragraph as part of a wider agreement made between the parties at the end of the ADR meeting.

117. Of the three requirements for a valid contract to exist - agreement; intention to create legal relations and consideration – there was no dispute about the latter. Mr Vallat said in his skeleton (and Mr Jones accepted) that:

> "the Serpentine clearly gives good consideration. The Serpentine's opening position – and indeed its primary argument in the subsequent FTT hearing – was that the sums payable under the Supporter Schemes

> were entirely outside the scope of VAT. By entering into the ADR Agreement, the Serpentine gave up the chance to run that argument for periods post 1 April 2013."

118. HMRC's case was that the disputed paragraphs did not constitute a binding contractual agreement between the parties in relation to the Schemes for the future because:

(1) there was no agreement between the parties as to the treatment of the Schemes going forwards;

(2) there was no ITCLR; and/or

(3) the paragraph did not constitute a binding agreement, because this would have required the specification of term, and there was no such provision.

Whether there was an agreement

119. Mr Vallat relied on *Chitty on Contracts*, 2nd Edition ("*Chitty*"), paras 2-002, which states that "when deciding whether the parties have reached an agreement the courts normally apply the objective test", and then says:

> "Under this test once the parties have, to all outward appearances, agreed in the same terms on the same subject-matter then neither can, generally, rely on an unexpressed qualification or reservation to show that he has not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party therefore do not prevent the formation of a contract."

120. Mr Vallat submitted that this was what HMRC were seeking to do here. The document agreed between the parties at the end of the ADR meeting did not require that the benefits be separately available for purchase, and it was not possible as a matter of contract law for HMRC now to put forward reservations or qualifications about that agreement.

121. Although Mr Jones acknowledged that "in a sense of course, there's an agreement on the face of it because there's an agreed meeting note", he also submitted that there was no agreement on this point, because in his submission it was clear from the witness evidence that the HMRC attendees had not agreed that the Appellant could simply value the benefits without making them separately available for purchase.

122. I find that, as Mr Jones himself accepted, the Amended Version set out the agreement of the parties. It opens by saying "[t]his document records the agreement reached by close of discussions on 31 July 2013". It is not possible for HMRC to go behind the words of the document to which both parties have agreed.

123. Moreover, there is a list of "action points" at the end of the Amended Version, including a list of outstanding issues, see §48. The position of the Supporter Schemes after 1 April 2013 was not on that list. That too supports the Appellant's argument that the issue had been agreed.

124. Subsequent behaviour is not relevant in construing a contract, so I merely note that there is also no mention of this issue at any point in the subsequent correspondence until after the decision in *Serpentine 1*. Even then, Ms Chambers referred to the Amended Version as "an agreement" in her letter of 21 January 2015 (see §56) saying (emphasis added) "an outcome from the ADR meeting was an agreement for the VAT treatment of supporters' schemes incomes". On 1 April 2015 she confirmed that "HMRC accept that there is an ADR agreement in place, however there appears to be a misunderstanding what the agreement means…", see §60.

Whether a key term was lacking

125. Mr Jones also submitted that "the alleged contract is said to relate to future periods but contains no provision as to its duration". In his skeleton he submitted that this lack of a necessary term provided evidence that there was no ITCLR. In his oral submissions, he added that this omission meant that the agreement was incomplete and so not binding. He relied on *Chitty* at 2-119, which says:

> "Parties may reach agreement on essential matters of principle, but leave important points unsettled so that their agreement is incomplete. It has, for example, been held that there was no contract where an agreement for a lease failed to specify the date on which the term was to commence."

126. Mr Jones added that where a contract was incomplete because of the omission of a key term, it was not possible to remedy the deficiency by implying one or more terms, and he relied on *Devani v Wells* [2016] EWCA Civ 1106.

127. Mr Vallat's position was that the lack of a term specifying duration did not mean that the contract was incomplete. It was not fundamental in forming the contract, and it was therefore possible to imply such a term. He relied on *Chitty* at 14-032, which said "A contract which contains no express provision for its determination may yet be determined by reasonable notice on the part of one or both of the parties". He said that the term which was thereby implied was to found by "ascertaining, in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement". He drew a parallel with HMRC's ruling on the Council Scheme, which also contained no term as to duration, but where both parties had accepted that HMRC could withdraw that ruling on the giving of reasonable notice. Mr Vallat suggested that it would be reasonable to imply a similar term in relation to the passages in the ADR Agreement which deal with the Schemes.

128. I carefully considered Mr Jones's submissions. However, there is no realistic parallel between this case and the failure of a lease to specify a term. A lease is the grant of a right over land for a determinable period of time, so cannot come into being if duration is unspecified: it must follow that the failure to specify a term prevents the contract coming into being. In *Devani v Wells*, on which Mr Jones also relied, Mr Devani was an estate agent who had introduced a buyer to Mr Wells, and subsequently claimed commission. The Court held, by a majority, that there was no

agreed term as to when commission would become payable. That too was clearly a fundamental term in the context of that case.

129. I agree with Mr Vallat, for the reasons he gives, that the lack of a term as to duration is not so fundamental as to prevent a contract coming into being at all. Neither does the absence of the term as to duration require the inference that HMRC did not have the necessary ITCLR.

Whether there was ITCLR

130. Mr Jones made a more general submission on ITCLR, saying that HMRC had no intention to enter into a legally binding agreement which was at odds with their published policy. He said that it was clear from Ms Murdock's witness evidence that she had not changed her position; that Ms Attygale had said that there had been no discussion about moving away from the Para 5.14 guidance; Mr Webb's evidence was consistent with those two witnesses.

131. Mr Jones also placed significant reliance on the parties' failure to agree the historic position, saying "that dispute concerned precisely the same issue as was the subject of the Disputed Paragraph on which the Appellant now relies in its appeal".

132. Mr Vallat submitted that "the objective purpose" of an ADR is to resolve matters so as to avoid litigation, and there was no suggestion at the time of the meeting between these parties that this process was any different. After that ADR meeting, the parties worked together to record their agreement in a written document, which was clear on its face that it was intended to be a binding agreement. HMRC changed the Draft Meeting Note in various respects, but not in relation to the now disputed passages about the Supporter Schemes, and when that process was concluded, the parties agreed the Amended Version. Mr Vallat also referred to *Southern Cross* at para [67] where the Upper Tribunal said (emphasis added):

> "I agree with Mr Mantle that the pattern of correspondence between Horwath Clark Whitehill and HMRC, and specific wording used in it, tend to point towards a process of negotiation and, in the end, an intention to conclude a contractual agreement…<u>The individuals involved may or may not have seen things that way, but that is unimportant. Matters are to be assessed on an objective basis</u>."

133. I again agree with Mr Vallat. Whether or not there is ITCLR is an objective test, and the fact that Ms Murdock did not change her position is irrelevant. I have also already rejected Mr Jones's submission that the historic position (where there had been no valuation of the benefits) was the same as that agreed at the ADR about the position after 1 April 2013 (where benefits were valued, that value communicated to donors and subjected to VAT on the same basis as HMRC's ruling on the Council Scheme).

134. The document exchanged at the end of the ADR meeting, including the disputed paragraph about the Supporter Schemes, was clearly intended by both parties to be binding, and there is no doubt that ITCLR subsisted.

Issue 4: whether there was a unilateral mistake

135. The parties therefore made a binding contract, in which that the disputed paragraph has the meaning contended for by the Appellant. The next question was whether the contract contained a unilateral mistake.

The law

136. The legal position is summarised in *Chitty* at 3.022:

> "A mistake as to the terms of the contract, if known to the other party, may affect the contract. In this case, the normal rule of objective interpretation is displaced in favour of admitting evidence of subjective intention. In *Hartog v Colin and Shields* [1939] 3 All ER 566 the defendants offered for sale to the plaintiffs some Argentine hare skins, but by mistake offered them at so much per pound instead of so much per piece. The previous negotiations between the parties had proceeded on the basis that the price was to be assessed at so much per piece, as was usual in the trade. But the plaintiffs purported to accept the offer and sued for damages for non-delivery. The court held that the plaintiffs must have known that the offer did not express the true intention of the defendants and that the apparent contract was therefore void…"

137. *Chitty* continues:

> It is not clear whether for the mistake to be operative it must actually be known to the other party, or whether it is enough that it ought to have been apparent to any reasonable person in the position of the other party… In England there is no clear authority."

138. Mr Jones submitted that, in fact, there was clear authority, as referred to in the next part of that Chapter, which refers to *O.T. Africa Line Ltd v Vickers Plc* [1996] CLC 722. In that case Vickers had offered to settle a dispute with OT Africa Line for £150,000 rather than the $155,000 it had intended. In the judgment, Mance J said at p 726:

> "Here, there is objectively agreement on a particular sum. The question is what is capable of displacing that apparent agreement. The answer on the authorities is a mistake by one party of which the other knew or ought reasonably to have known. I accept that this is capable of including circumstances in which a person refrains from or simply fails to make enquiries for which the situation reasonably calls and which would have led to discovery of the mistake. But there would have, at least, to be some real reason to suppose the existence of a mistake before it could be incumbent on one party or solicitor in the course of negotiations to question whether another party or solicitor meant what he or she said."

139. Mr Vallat accepted Mr Jones's submissions on the legal position. As explained in the next part of this decision, I have found that the Appellant succeeded on this issue. I merely note that the test may be less demanding than that relied on by the parties. Later in the passage cited above, *Chitty* refers to the authorities on rectification, saying that in such cases "it has been said that a unilateral mistake made by one party is a ground for rectification only if the other party actually knew of it", and giving a cross-reference to Chapter 3-070. The case law discussed, both there and that in the following Chapters, was less clear cut than that on which the parties relied. That may be why *Chitty* concluded that "there is no clear authority" on whether "it is enough that [the mistake] ought to have been apparent to any reasonable person in the position of the other party". I decided, however, that it was not necessary for me to delve further into these authorities.

The parties' submissions

140. I begin by noting that both parties took the position that it was Mr Socratous who was acting for the Appellant (and not, for example, Ms McNerney), and that it was therefore his state of mind which was relevant to Issue 4.

141. Mr Jones submitted that if, contrary to his submissions already set out, the Tribunal were to find that (a) the parties had made a binding contract, and (b) the meaning of the words were those contended for by the Appellant, the contract contained a mistake, and the Appellant knew, or ought reasonably to have known, that HMRC did not intend to agree to those terms. As a result, the contract was void.

142. He submitted that it was clear from the witness evidence that HMRC's position remained the same throughout, and had been correctly summarised in the Day One Note. Nothing happened on the second day to change HMRC's position. Furthermore, it was obvious to Mr Socratous, or should have been obvious to him, that the wording of the ADR Agreement did not reflect HMRC's position on the Supporter Schemes.

143. Mr Vallat submitted that, on the evidence, Mr Socratous had not known that HMRC had made a mistake. I have already found as a fact that this was correct, see §72. The remaining point of contention is therefore whether Mr Socratous should have known that HMRC had made a mistake.

144. In deciding the question, I take into account the following:

(1) At the time of the ADR meeting, the Council Scheme ruling remained in place. It makes no mention of the benefits being separately available for purchase. Mr Socratous's experience of the sector was that similar rulings had been given to other charities, and it is clear from the redacted letter set out at §63 that this was the position. It was not until after *Serpentine 1* that HMRC withdrew those rulings.

(2) It is true that HMRC's position was set out in the Day One Note, and there was no further explicit discussion of the point on the second day. However, Mr Socratous's Draft Meeting Note, with the new wording, was sent to HMRC for comment. Ms Murdock made extensive and detailed changes,

including not only points of substance, but also numerous clarificatory amendments, see §50. No changes were made to the wording of the paragraphs concerning the Supporter Scheme.

145. The reasonable person with Mr Socratous's knowledge of the Council Scheme and of HMRC's practice, noting the nature and extent of Ms Murdock's amendments, would have believed she had agreed the paragraph about the Schemes. This is therefore not a situation where the situation "reasonably call[ed] for" Mr Socratous to make enquiries as to whether HMRC had accepted the wording of the disputed paragraph. He had no "real reason to suppose the existence of a mistake". The contract is therefore not void because of a unilateral mistake by HMRC.

Issue 5: whether the contract was *ultra vires*

146. HMRC's case on the final issue was that HMRC did not have the *vires* to make a contract of this nature which was binding for the future. The Appellant's position was that HMRC frequently made future agreements, of which the ruling on the Council Scheme was an example.

147. Six main authorities were cited. In chronological order these are: *Gresham Life Assurance Society v A-G* [1916] 1 Ch 228 ("*Gresham*"); *Preston v IRC* [1985] AC 835 ("*Preston*"); *GUS Merchandise Corp v C&E Commrs (No 2)* [1993] STC 738 and [1995] STC 279 ("*GUS High Court*" and "*GUS CoA*" respectively); *R* (*oao Wilkinson*) *v IRC* [2003] EWCA Civ 814 ("*Wilkinson*"); *Al Fayed v Advocate General* [2004] STC 1703 ("*Al Fayed*"); and *Oxfam v HMRC* [2010] STC 686 ("*Oxfam*") which refers to the VAT Tribunal decision under reference VTD 20752.

148. The Appellant also sought to rely on *R (oao Lower Mill Estate) v HMRC* [2008] EWHC 2409 (Admin). However, I agree with Mr Jones that *Lower Mill* was decided on the basis of legitimate expectation, and is not a relevant authority for the purposes of this decision.

149. I first set out the key points from the other six cases and then consider how they can be reconciled.

Gresham

150. The appellant in *Gresham* was a life assurance society which in 1912 had agreed with an Inland Revenue Surveyor, acting on behalf of the Board, that it would be assessed on its profits rather than on the alterative income less expenses ("I-E") basis, and that the level of profit would be based on the appellant's previous quinquennial valuation. The appellant was assessed on that basis for the first two years. In July 2014 Parliament passed Finance Act 2014, which imposed tax on the foreign income of life insurance companies. In November 2014, the Inland Revenue assessed the appellant on the basis of its income without reference to the quinquennial valuation. The appellant applied for a declaration that the agreement it had entered into with the Surveyor was binding, and an injunction to restrain the Board from enforcing the assessment.

151. Astbury J considered whether such an agreement could lawfully be made on behalf of the Crown. He first noted that income tax was a yearly tax, and then said, at page 240:

> "The defendants contend, and I think rightly, that the taxing authorities in 1912 had no power to make any contract with this society either as to the assessment which should be made in any subsequent year or as to the basis upon which the assessment should be made. The authorities, as each yearly Act is passed, have an option to tax the society either on a profit or an income basis. I conceive it to be their duty as each year comes round to ascertain the rate of the tax of the year and the circumstances existing, and then tax the subject in the way most favourable to the Crown. In this particular case I do not think the letters bear the meaning the society put on them, but assuming they do, and that the surveyor intended to bind the taxing authorities for the succeeding four years to an agreement that whatever might be the changes in the law and the circumstances of this society they would continue to tax them on a profit basis, however undesirable that basis might become, that agreement would in my judgment be invalid and one which the surveyor, and indeed the taxing authorities, would have no power or right to enter into."

152. Astbury J also said (at p 239) that although the appellant was taxed on a profits basis for the first two years:

> "there is nothing proved before me to show that the authorities in so assessing the society for those two financial years were acting or purporting to act upon any agreement which they considered binding upon themselves to prevent them reverting, should they think fit, to an assessment upon an income basis."

Preston

153. The facts of *Preston* are summarised in the headnote:

> "In 1978 an inspector in the special investigations section of the Inland Revenue informed the taxpayer that he did not intend to raise any further inquiries on his tax affairs if the taxpayer withdrew certain claims for interest relief and capital loss. The taxpayer withdrew the claims and paid capital gains tax on a transaction about which the inspector had been inquiring. Following the receipt of new information in October 1979 relating to the same transaction, the Inland Revenue Commissioners concluded that the taxpayer had received from the transaction a tax advantage of a kind to which section 460 of the Income and Corporation Taxes Act 1970 applied…On 14 September 1982 the Inland Revenue Commissioners gave the taxpayer formal notification initiating the procedure under section 460 of the Act of 1970 for the cancellation of a tax advantage."

154. Lord Templeman, giving the leading judgment with which the other law lords agreed, confirmed the finding of the High Court (Woolf J) that Mr Preston had "no remedy" for breach of contract, because the Inland Revenue:

> "could not in 1978 bind themselves not to perform in 1982 the statutory duty of counteracting a tax advantage imposed on the commissioners by section 460 of the Act of 1970. The only remedy which might be available to the appellant was the remedy of judicial review."

Wilkinson

155. In *Wilkinson* the Court of Appeal considered HMRC's practice of making extra-statutory concessions in the context of TMA s 1(1), which at that time read "Income tax, corporation tax and capital gains tax shall be under the care and management of the Commissioners of Inland Revenue". That wording was amended with effect from 18 April 2005 by the Commissioners of Revenue & Customs Act 2005, Sch 4 paras 11 and 12 and SA 2005/1126, so that it now reads "The Commissioners for Her Majesty's Revenue and Customs shall be responsible for the collection and management of (a) income tax, (b) corporation tax, and (c) capital gains tax". However, neither party submitted that anything turns on the replacement of "care" by "collection" in this section, and I have taken the same approach.

156. Lord Philips, giving the judgment of the Court, first considered the authorities and then said:

> "[45] It seems to us that the effect of these authorities is plain. One of the primary tasks of the commissioners is to recover those taxes which Parliament has decreed shall be paid. Section 1 of the 1970 Act permits the commissioners to set about this task pragmatically and to have regard to principles of good management. Concessions can be made where those will facilitate the overall task of tax collection. We draw attention, however, to Lord Diplock's statement [in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] STC 260 at p 269] that the commissioners' managerial discretion is as to the best manner of obtaining for the national exchequer the highest net return that is practicable.
>
> [46] No doubt, when interpreting tax legislation, it is open to the commissioners to be as purposive as the most pro-active judge in attempting to ensure that effect is given to the intention of Parliament and that anomalies and injustices are avoided. But in the light of the authorities that we have cited above and of fundamental constitutional principle we do not see how s 1 of the 1970 Act can authorise the commissioners to announce that they will deliberately refrain from collecting taxes that Parliament has unequivocally decreed shall be paid, not because this will facilitate the overall task of collecting taxes, but because the commissioners take the view that it is objectionable that the taxpayer should have to pay the taxes in question."

GUS

157. HMRC are empowered by VATA 1994, Sch 11 para 2(6) and Regs 67 and 68 of the VAT Regulations 1995 to permit a retailer to determine the value of supplies taxable at other than the zero rate by a method described in a notice published by them, or agreed with the retailer. At the relevant time, these powers were in VATA 1983, Sch 7, para 2 and the Value Added Tax (Supplies by Retailers) Regulations 1972.

158. Under those powers, HMRC had agreed with GUS that it could use a modified version of what was then Retail Scheme H, with the details to be agreed for periods of three years. In 1986, HMRC and GUS agreed the arrangements for the following three years. However, in 1987 GUS conducted a sampling exercise which indicated that it was overpaying its VAT. HMRC accepted that the revised percentage could be used for the next three year agreement, but not for 1986 through to 1988.

159. Lord Steyn, giving the leading judgment in the Court of Appeal with which Savile LJ and Sir John May both agreed, held that GUS had entered into a binding agreement with HMRC and "the essence of the agreement was that the companies were precluded from altering the agreed basis for calculation within a three-year period save with the agreement of the commissioners".

Al-Fayed

160. The facts of the case are again well summarised in the head note:

> "The three petitioners were brothers. The first petitioner, F, was resident in the United Kingdom, the second and third petitioners were resident in the United States of America and Switzerland, respectively. The petitioners were not domiciled in the United Kingdom and were therefore subject to income tax and capital gains tax on foreign source income on the remittance basis. They could avoid paying tax on their foreign remittances provided they ensured that the remittances originated in a fund consisting exclusively of capital and therefore did not constitute income or capital gains. In order to avoid a time-consuming and expensive investigation into the petitioners' affairs in order to determine whether their foreign remittances originated from a capital fund, the Revenue entered into a forward tax agreement with the petitioners in 1997 under which the petitioners agreed to pay specified annual sums in respect of specified future years of assessment. The Revenue agreed to accept those sums in lieu of any income tax and capital gains tax to which the petitioners might otherwise have been liable. The agreement was expressed to be irrevocable except that the Revenue had the right to repudiate it if a payment under the agreement remained owing for a specified length of time. The agreement did not provide for its being suspended by either side for any reason. In March 2000, after F had given evidence in a civil trial revealing, inter alia, that he had access to large sums of cash, the Revenue wrote to the petitioners' accountants stating that the agreement was suspended."

161. The Inner House of the Court of Session first acknowledged at [69] that the Inland Revenue had a "managerial discretion" to enter into agreements with taxpayers:

> "The Revenue had a managerial discretion, and there were circumstances in which they had power to enter into an agreement with the taxpayer for the payment of a sum of money in respect of the taxpayer's tax liability, even where it may be said that they have foregone the collection of some part of the total amount of tax which was due. They can properly take into account the extent of the

> information which is likely to be obtainable, and the difficulty involved in identifying the extent of the exact sum which is due."

162. Having considered the case law on extra-statutory concessions, including *Wilkinson*, the Court confirmed at [45] that the Inland Revenue could "lawfully regulate the tax treatment of future transactions by means of such concessions". However, it concluded at [78] that:

> "The decisions in relation to extra-statutory concessions make it plain that it is not lawful for the respondents to make a concession where it would be in conflict with their statutory duty."

163. In relation to that statutory duty, the Court said at [73]:

> "Under taxation legislation the respondents have the duty of collecting tax as it falls due in respect of actual transactions…The respondents have no power…to contract with the taxpayer as to his future liability (see *Gresham Life Assurance Society v A-G* [1916] 1 Ch 228, 7 TC 36)."

164. It added at [80]:

> "Even if we had not reached the view that forward tax agreements were *ultra vires* of the respondents, we would have held that, in the absence of any terms in the 1997 Agreement which would have ensured that no sum was payable under the Agreement unless it was a genuine and realistic approximation to the actual liability of the petitioners, it was *ultra vires*. The 1997 Agreement, like its predecessors, contained no provision for termination or alteration of the agreement on a material change of circumstances."

Oxfam

165. When it appealed to the VAT Tribunal, Oxfam submitted that a binding agreement (ie a contract) was made in October 2000 between it and HMRC which governed the method for apportioning input VAT between its business and non-business supplies. Under that method, Oxfam's VAT exclusive expenditure on its business activities was divided by the total of its VAT exclusive expenditure on its business and non-business activities.

166. Following the decision in *Church of England Children's Society v C&E Commrs* [2005] STC 1644, Oxfam argued that the denominator of the apportionment fraction no longer included expenditure on professional fundraisers and that because HMRC were bound by the formula, Oxfam could recover a further 10% of its input VAT. The VAT Tribunal (Michael Tildesley OBE and Mohammed Hussain) decided at [81]-[83] that there was no binding contract. Sales J (as he then was) dismissed Oxfam's appeal on the basis that "the tribunal was entitled to find on the evidence before it that there was no intention on the part of the parties to create a binding contract", see [42] of the judgment. He also said, at [16]:

> "In fact, it is not altogether clear that HMRC, in the exercise of their tax management powers, could enter into a binding contract with a taxpayer regarding a method of apportionment of input tax. The Court

> of Appeal in *GUS Merchandise Corp Ltd v Customs and Excise Comrs (No 2)* were of the view that HMRC's general tax management powers do include the power to enter into a binding contract in relation to such matters, but the point went by concession... My own preliminary view is the same as that of the Court of Appeal. One could imagine a situation in which it might greatly ease the burden on HMRC in collecting tax to reach an agreement on some simple method of calculating the appropriate apportionment of input tax as between taxable and non-taxable supplies by the taxpayer, and where the taxpayer refuses to agree such a method unless it is made binding as a contract between HMRC and the taxpayer. In such circumstances, it would seem that the making of such a binding contract could be regarded as falling within the scope of the proper exercise of HMRC's tax management powers. But Miss Moore for HMRC wished to reserve their position on this issue, and indicated that it would be necessary for me to consider other authorities and hear more extensive argument before I could finally decide the point. Since it is not necessary for me to resolve this question for the purposes of deciding the case, I do not rule on the point."

Types of future agreements

167. The Appellant sought to rely on *GUS, Wilkinson* and *Oxfam,* and to distinguish the other cases; HMRC sought to rely on *Gresham, Preston* and *al Fayed;* distinguished *GUS,* and noted that in *Oxfam* Sales J did not decide the issue.

168. I have fully considered the helpful submissions of both Counsel, and mean no disrespect when I say that it is not necessary to summarise their submissions. My analysis is that there are different types of future agreements:

(1) those for which specific *vires* is given to HMRC by Parliament; the retail scheme considered in *GUS* is a good example*;*

(2) published extra-statutory concessions ("ESCs"). HMRC has the power under TMA s 1 to make such concessions, but only if it is not "in conflict with its statutory duty", which is to act in "the best manner of obtaining for the national exchequer the highest net return that is practicable", see *Wilkinson* at [45] and *Al Fayed* at [78];

(3) contracts between individual taxpayers and HMRC which are stated to be binding for a stated future period, or to be irrevocable. These purported contracts are *ultra vires* because they do not allow HMRC to take account of changes in the law or of the taxpayer's circumstances, see *Gresham* and *Al-Fayed;* and

(4) contracts between individual taxpayers and HMRC, which prevent HMRC from applying a taxing provision (other than in circumstances where the reason for that concession is for the purpose of HMRC's overall task of collecting taxes). Such contracts are *ultra vires* and a change of positon by HMRC can only be challenged by judicial review, as Lord Templeman said in *Preston* at p 262.

Application of the case law to the facts of this case.

169. It is clear from the analysis above that HMRC do have the power to make forward agreements of certain types. However, there are no specific *vires* allowing HMRC to make the ADR agreement, so it does not fall within (a) above. It is not an ESC, so (b) also does not apply. It neither binds the parties for a specific future period, nor is it irrevocable, so (c) is inapplicable.

170. However, (d) is relevant. In *Serpentine 1* Judge Mosedale considered whether the total consideration paid by the supporters could be apportioned under VATA s 19(4 between a donation and a payment for the benefits, before deciding at [83] (emphasis in original):

> "The appellant's case on s 19(4) runs totally contrary to the settled case law of the CJEU. If the Trust had offered benefits for a fixed price and specified anything additional was a donation, then clearly the element of donation would not be paid 'for' the benefits. But here the Trust required the **full** amount to be paid in return for Benefits. There is nothing for s 19(4) to apportion."

171. The Appellant had instead made a "single supply of the opportunity…to partake of exclusive events at, and offers by, the trust", see [108] of *Serpentine 1*. In order for apportionment to be possible, supporters must be able to purchase the benefits separately. There is now no dispute that Judge Mosedale's decision was legally correct. It must inevitably follow that what had been agreed at the ADR in relation to Supporter Schemes was wrong as a matter of law. Thus, if HMRC were bound by the agreement, they would be unable to apply VAT law to the Supporter Schemes.

172. It follows from *Preston* that the agreement made between HMRC and the Appellant about the current/future treatment of the Supporter Schemes was therefore *ultra vires*. The only way for the Appellant to challenge HMRC's change of position is by a judicial review action on the ground of legitimate expectation.

Decision and appeal rights

173. For the reasons given above, I find that:

(1) the Tribunal has jurisdiction to rule on the issue;

(2) the meaning of the words in the document exchanged between the parties at the end of the ADR meeting is that advanced by the Appellant, and not that advanced by HMRC;

(3) the document was a contract;

(4) there was no unilateral mistake by HMRC; but

(5) the contract was *ultra vires* HMRC's powers and so void.

174. This document contains full findings of fact and reasons for the decision. The Appellant 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 the Appellant. 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.

Anne Redston

TRIBUNAL JUDGE
RELEASE DATE: 31 July 2018