[2018] UKFTT 516 (TC)

TC06685

Appeal number: TC/2017/01395 & 06402

INCOME TAX – repayment of tax treated as paid by charitable company on gift aid payments – whether donations qualifying: in part no – whether assessments to recover over-repaid tax valid: no – whether s 114 TMA 1970 applies: no – whether penalty assessments valid: no – whether behaviour careless: no – appeals allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHAMPIONS FUN LEARNING CENTRE (a charity) **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
AMANDA DARLEY

Sitting in public at Civil Justice Centre, Bristol on 14 June 2018, with post-hearing submissions on 29 June, 5, 13 and 14 July 2018

Mr Mark Brown, chairman of trustees, for the Appellant

Ms Larissa Mulder, solicitor in HM Revenue and Customs, for the Respondents

DECISION

1. This was the hearing of appeals by Champions Fun Learning Centre, a registered charity, against assessments made by the respondents ("HMRC") which sought to recover income tax which HMRC said had been over-repaid to the appellants. Because certain issues concerning the assessments were raised by the Tribunal in the course of the hearing we asked for further submissions. Mr Brown took the opportunity to respond to HMRC submissions on the law and to press his points on other matters.

2. Our decision is to cancel on procedural grounds the assessments to recover tax and to impose penalties. We have then also considered the arguments put forward by HMRC on the question whether some or all donations to the appellant are disqualified and set out our views. We have done this because, among other things, HMRC have withheld repayment for a later year for which there is, it seems, no assessment.

Evidence

3. We had a witness statement with exhibits from Mr Tony Johnson. Mr Johnson is the senior technical adviser in the Charities Unit of HMRC. His evidence is on two matters. He had reviewed the check carried out by Mr Mark Hewitt, the case officer, and he described the actions he took in the course of that review and produced the documents he had examined. We accept his evidence on the nature and form of his enquiry and what he did in the course of it. The second matter in his evidence was his "technical view" of what he found, ie his conclusions as to the effect of the law on the facts he and Mr Hewitt had found. These are in effect submissions on the law, and were incorporated into HMRC's statement of case and Ms Mulder's skeleton arguments and we treat them as such. It is opinion evidence and not evidence of fact, however expert Mr Johnson may be, and he is undoubtedly expert in the tax law and practice relating to the qualifications for a donation being treated as gift aid.

4. Mr Johnson was cross-examined by Mr Brown and asked questions by us.

5. Mr Brown also gave evidence and produced some further documents. One issue in particular arising from those documents was a matter of controversy. HMRC had issued questionnaires to a small number of donors and had received a smaller number still of replies which they used as evidence to demonstrate that the payments by the responders were not qualifying donations. Mr Brown produced statements from some of these responders in which they explained that they had not understood what they were being asked or why. We consider this issue and make findings of fact about it later. In all other respects we accept the evidence put forward by Mr Brown, but we have been careful to distinguish fact from the eloquent and heartfelt submissions made by Mr Brown.

6. We also had a bundle of papers which contained the correspondence between the parties, Mr Hewitt for HMRC and Mr Brown for the appellant. It also contained attachments such as printouts from the claim forms and the schedules attached to them, and the assessments on the appellant. We find as fact that the documents are what they say they are, and contain what they say they contain, but no more.

The law on gift aid donations

7. We consider it to be helpful if we set out here the law on qualifying gift aid donations so that the consideration of the facts can be seen in the light of them.

8. The provisions are in Chapter 2 Part 8 Income Tax Act 2007 ("ITA") as follows (we have omitted parts that are not relevant to this case as they form no part of HMRC's contentions):

> "*416 Meaning of "qualifying donation"*
>
> (1) A gift made to a charity by an individual is a qualifying donation for the purposes of this Chapter if—
>
> (a) conditions A to F are met, and
>
> (b) the individual … gives the charity … a gift aid declaration relating to the gift (see section 428).
>
> (2) Condition A is that the gift takes the form of a payment of a sum of money.
>
> (3) Condition B is that the payment is not subject to any condition as to repayment.
>
> …
>
> (6A) Condition EA is that the payment is not by way of, and does not amount in substance to, waiver by the individual of entitlement to sums (whether of principal or return) due to the individual from the charity in respect of an amount—
>
> (a) advanced to the charity, and
>
> (b) in respect of which a person, whether or not the individual, has obtained relief under Part 5B (relief for social investments).
>
> (7) Condition F is that—
>
> (a) there are no benefits associated with the gift, or
>
> (b) there are benefits associated with the gift but the restrictions on those benefits are not breached.
>
> *417 Meaning of "benefits associated with a gift"*
>
> A benefit is associated with a gift for the purposes of this Chapter if it is received by the individual who makes the gift, or a person connected with the individual, in consequence of making the gift.
>
> *418 Restrictions on associated benefits*
>
> (1) For the purposes of section 416(7), the restrictions on benefits associated with a gift are breached if condition A or B is met.
>
> (2) Condition A is that the total value of the benefits associated with the gift exceeds the variable limit, which is—
>
> (a) 25% of the amount of the gift, if the amount of the gift is £100 or less,

(b) £25, if the amount of the gift is more than £100 but not more than £1,000,

(c) 5% of the amount of the gift, if the amount of the gift is more than £1,000.

(3) Condition B is that the sum of—

(a) the total value of the benefits associated with the gift, and

(b) the total value of the benefits (if any) associated with each relevant prior gift,

is more than £2,500.

(4) "Relevant prior gift" means a gift—

(a) which has already been made by the individual to the charity in the tax year, and

(b) which is a qualifying donation.

(5) This section needs to be read with sections 419 to 421.

419 Gifts and benefits linked to periods of less than 12 months

(1) This section modifies the application of section 418(2) in relation to a gift if condition A, B, C or D is met.

(2) Condition A is that a benefit associated with the gift relates to a period of less than 12 months.

(3) Condition B is that a benefit associated with the gift consists of a right to receive benefits at intervals over a period of less than 12 months.

(4) Condition C is that a benefit associated with the gift is one of a series of benefits which are—

(a) received at intervals, and

(b) associated with a series of gifts made at intervals of less than 12 months.

(5) Condition D is that—

(a) a benefit associated with the gift is not one of a series of benefits received at intervals, and

(b) the gift is one of a series of gifts made at intervals of less than 12 months.

(6) If condition A, B or C is met, then for the purposes of section 418(2)—

(a) the value of the benefit is taken to be the annual equivalent of its actual value, and

(b) the amount of the gift is taken to be the annual equivalent of its actual amount.

(7) If condition D is met, the amount of the gift is taken for the purposes of section 418(2) to be the annual equivalent of its actual amount.

(8) The annual equivalent of the value of a benefit, or of the amount of a gift, is calculated as follows.

Step 1 Multiply the value or amount by 365.

Step 2 If condition A or B is met in relation to the benefit (and neither condition C nor condition D is met in relation to it), divide the result by the number of days in the period of less than 12 months referred to in subsection (2) or (as the case may be) subsection (3).

If condition C or D is met in relation to the benefit, divide the result by the average number of days in the intervals of less than 12 months referred to in subsection (4)(b) or (as the case may be) subsection (5)(b)."

Facts

Background

9. The appellant was established on 9 February 2009 and was registered with the Charity Commission as a charity on 3 November 2011. Its objects are the advancement of education of children aged 5-16 years old, particularly, but not exclusively, of those from ethnic minority groups. Its operations are in the Bristol area. It is also regulated by Ofsted.

10. Its current constitution is dated 31 August 2011 and was adopted on 31 October 2011. The charity has three trustees, one of whom is Mr Brown who is the chairman. It is closely associated with a church in Bristol from whose activities the appellant developed.

11. Article 5(r) of the Constitution states:

> "Every parent shall pay the CFLC a monthly sum as determined at the Annual General Meeting"

12. The Annual Report and Financial Statement 2015 filed with the Charity Commission includes:

> "2.3 Champions Fun Learning Centre Members
>
> Champions Fun Learning Centre Membership is open to those who:
>
> (i) Parents who have completed registration forms
>
> (ii) Meet CFLC fees/donation stipulations
>
> (iii) Commit themselves to our learning program
>
> (iv) Acknowledge their responsibilities as tutors.
>
> (v) Have their volunteer/staff applications accepted by CFLC Admin Team and have satisfied our children safety procedures."

13. The income and expenditure statement for the year ended 5 April 2015 shows the breakdown of income as follows:

	Total Revenue £ 2015	Total Revenue £ 2014
Cash from contributions (2)	59636	44725
Cash from loans	5000	1489
Revenue from VAT	5737	1867
Revenue from Gift Aid	19876	9242
Fundraising	318	
Cash from grants (1)	16990	15000
Opening bank balance	8379	254
Total Income	**115936**	**72577**

(1) Funds received from various foundations and grant making bodies.

(2) Suggested donations made by parents whose children use our services.

14. For the same year the breakdown of expenditure was

	Unrestricted funds	Restricted funds	Total Revenue £ 2015	Total Revenue £ 2014
Charity activities: premise, resources	37946	6158	45506	19126
Salaries and wages, remuneration	53164	7500	60664	37409
Professional fees	4126		4126	2789
Total Resources Expended	**95326**	**15058**	**110294**	**63944**

"Restricted funds" are the cash from grants.

15. Mr Johnson exhibited some shots of pages from the appellant's website dated 2 February 2018. At that time the website's FAQ pages:

(1) in response to the question "Can children attend more than one session?" said "Yes. … there may be a **cost** that reflects this".

(2) in response to the question "Are there any concessions available?" said "We do provide **concessions based on financial circumstances**, and as funding allows. We provide discounts on **registration fees** to anyone who has three or more children. We also except contributions for scholarship children".

(3) in response to the question "What if my children were unable to attend the learning centre at any time due to illness and emergency: would I get a refund of **fees** paid or any donations made for these days?" said "No. It is the duty and

responsibility of both parent(s) and pupil to ensure attendance. If the pupil doesn't attend the charity we still incur expenses. However **if it is possible to offer a refund, we will**."

(4) "Is the learning centre open during terms time only?" said "No. … The **fee** or **fixed donation** is paid each month regardless of school term breaks."

16. Mr Johnson's witness statement stressed the words we have emboldened.

17. He also referred to the appellant's PayPal donations page. This started "Purpose: Parent Contribution/Fees"

18. The appellant has made applications to HMRC through their online portal for repayment of tax that it is treated as having suffered on gift aided payments made to it. The evidence in the bundle shows they were made on 5 April 2014, 12 December 2014, 14 April 2015 and 14 April 2016.

19. Payments were made by HMRC on 7 April 2014, 12 December 2014, 6 May 2015 and 14 April 2016 according to those same documents in the bundle.

HMRC's check

20. On 31 March 2016 Mr Mark Hewitt, a Charity Assurance Officer with HMRC Charity, Savings & International 2 in Bootle, wrote to the "Directors" of the appellant. He referred to the Gift Aid repayment claim submitted on 14 April 2015 for £15,790.25 for the period 27 February 2014 to 5 April 2015. He asked for documents and information as set out in a schedule to be supplied by 10 May 2016.

21. The appellant (through Mr Brown) replied sending in documents.

22. On 5 and 6 April 2016 HMRC wrote to 14 of the donors in respect of whom the appellant was seeking repayment of income tax. The 14 were a sample of the 139 donors shown by the appellant as having made donations in the year ended 5 April 2015.

23. HMRC received 4 replies from those 14 donors between 20 April 2016 and 3 June 2016.

24. On 3 June 2016 Mr Hewitt wrote again to the appellant asking if it used the same principles and format when submitting all Gift Aid claims for repayment.

25. The appellant (through Mr Brown) replied confirming that they did, and further explaining their procedures.

26. On 5 July 2016 Mr Hewitt wrote to the appellant suggesting the charity was offering a service (education) to donors, which, he said, meant that the payments do not qualify for Gift Aid.

27. He also queried the treatment of volunteer workers who return the cheques they get for their expenses or do not cash them.

28. He said that the appellant's gift aid declarations did not meet the requirements for being a valid gift aid declaration and that the charity must give further explanations to donors and obtain valid declarations within 30 days.

29. Finally he forewarned the appellant that penalties may be sought for inaccuracies.

30. On 3 August in reply to a letter from the appellant of 13 July 2016, Mr Hewitt said he had submitted Mr Brown's comments to a specialist, and that in the meantime he could not release any payment to the appellant (which we assume is a reference to an application made in 2016).

31. On 19 August 2016 Mr Hewitt replied saying that no repayments at all were due because the appellant was a limited liability partnership ("LLP") and those bodies were only available to "lawful businesses carried out with a view to profit". He listed the overclaims he maintained had been made by the appellant because it was an LLP and said any outstanding or future claim would not be paid.

32. On 26 August 2016 Mark Brown replied denying that the appellant was an LLP but adding they had formed an LLP to carry out for-profit activities but this had not yet started. He asked for a review by an independent body.

33. On 7 September 2016 Mr Brown must have had a telephone conversation with a Mrs Atkinson of HMRC technical team, as Mr Hewitt referred to it in a letter of 19 September 2016. In this letter he went back to the issue of whether the gift aid donations qualified and he reiterated HMRC's position on "services", adding that the "benefits" rule also applied. He quoted from statements on the appellant's website. He requested further information including a copy of the governing documents of the charity and more information about the LLP.

34. On 14 October 2016 Mr Brown replied setting out his final "defence" for an independent review.

35. On 10 November 2016 Mr Hewitt told Mr Brown that he had sent the latter's reply to technical colleagues for their review.

36. On 17 February 2017 Mark Hewitt gave his "view of the matter" to the appellant in the light of Mr Brown's request for an independent review.

37. On 20 January 2017 Mr Hewitt wrote in response to Mr Brown's letter of 14 October 2016 to confirm HMRC's view that the payments were not eligible for gift aid. He set out the tax claimed and the dates of payment of it to the appellant together with the amounts as follows:

Year of assessment	Tax claimed	Date of payment
2012-13	£147.50	7/4/14
2012-13	£147.50	12/12/14
2013-14	£7253.50	7/4/14
2013-14	£11033.75	12/12/14
2013-14	£13.50	6/5/15

2014-15	£15777.25	6/5/15
Total tax due	£34373.00	

38. In addition said he intended to withhold repayment of the £18,802.00 claimed for 2015-16.

39. He also said that the assessments would carry interest from a date 9 months from the end of the accounting period to a projected date for payment of 28 February 2017.

40. He further said that penalties would be charged under Schedule 24 FA 2007 on the basis that the charity had committed careless errors in submitting the claims, and that his calculations produced a penalty of £9,486.71 (15%). He added that he had decided to suspend the penalty for 12 months and that if the appellant implemented the suspension conditions before the expiry of that period, the penalties would be cancelled.

41. He then informed the appellant that he had raised three assessments under paragraph 52 Schedule 18 FA 1998 to make good the loss of tax.

42. The penalty explanation schedule attached to the letter shows in the narrative that the penalty was 18%, not the 15% shown in the letter. The penalty table at the end shows:

Period	PLR £	Penalty £	Amount to be suspended £	Amount of penalty we cannot suspend £
2012-13	737.50	132.75	132.75	0
2013-14	18300.75	3294.15	3294.15	0
2014-15	15942.75	2869.60	2869.60	0
2015-16	1723.50	3190.23	3190.23	0

43. We have added a further row of our own

Total	52704.50	9486.73 = 18%		

44. On 23 January 2017 HMRC wrote to the appellant with a closure notice.

45. On 7 February 2017 the appellant notified its appeal to the Tribunal.

46. On 10 May 2017 HMRC issued a notice of assessment of a penalty of £9,486.71 showing £0 suspended but also £0 payable.

Mr Johnson's "review"

47. On 21 March 2017 Mr Johnson undertook what he called a full review[1] of the file including the 4 donor responses (see §§22 and 23). He reviewed the constitution of the

[1] This review is not a statutory review under sections 49A to 49I Taxes Management Act 1970. Nor is it "independent" which is what Mr Brown was asking for.

appellant and examined the appellant's website, its Donations PayPal page and its 2015 Annual Report and Financial Statements.

The appeals in issue

48. HMRC accept that appeals against the three assessments have been made and that they are before the Tribunal for decision. We note though that the appellant made its appeal directly to the Tribunal, rather than to Mr Hewitt of HMRC as is required by paragraph 48 Schedule 18 Finance Act 1998.

49. We have no doubt that the appellant did this because it thought that it had had the independent review it had been seeking, and because Mr Hewitt said he had sent the file to a specialist "for a review". Given that HMRC were ready to hear the appeals, nothing is to be gained, and much valuable time would be lost, by standing on the formalities. Hence we waive those formalities and deal with the appeals.

50. HMRC also said the hearing was to consider the three appeals against the penalties. Thus we consider them as well.

The law relating to the assessments

51. Before the relevant law relating to the tax liability of the appellant can be set out, it is necessary to establish what sort of person or body of persons the appellant is. There was general acceptance by the parties that it was liable to corporation tax ("CT"). The Tribunal's first thoughts before reading the correspondence were that this was because the appellant was a limited liability partnership ("LLP") incorporated under the Limited Liability Partnerships Act 2000 and one which was not carrying on a business with a view to profit so was liable to CT by virtue of not meeting the condition in s 863 Income (Trading and Other Income) Act 2005 ("ITTOIA"). These thoughts arose because there was refence in the papers to a Champions Fun Learning Centre LLP included in HMRC's computer records, and such an LLP was registered at Companies House.

52. It was Mr Brown's evidence (see §32) that there was an LLP which had been registered for a specific purpose but the appellant was not an LLP. It was then, it seemed to us, either a trust or an unincorporated association. The constitution of the appellant demonstrated to us that it was not a trust but an unincorporated association of which Mr Brown was an officer. By s 1121(1) Corporation Tax Act ("CTA") 2010 an unincorporated association is a company and so liable to pay CT on its profits by s 2 CTA 2009.

53. Part 11 CTA 2010 provides certain special rules for "charitable companies". Section 467 of that Act is headed "definition of 'charitable companies'" but was repealed in 2010 by paragraph 27(4) Schedule 6 FA 2010. The definition is now to be found in Schedule 6 FA 2010, and there was agreement that the appellant met the conditions in Part 1 of that Schedule for it to be a charitable company for the purposes of CTA 2010.

54. Section 471 CTA 2010 provides:

> "(1) This section applies if a gift is made to a charitable company by an individual and the gift is a qualifying donation for the purposes of Chapter 2 of Part 8 of ITA 2007 (gift aid).
>
> (2) The charitable company is treated as receiving, under deduction of income tax at the basic rate for the tax year in which the gift is made, a gift of an amount equal to the grossed up amount of the gift.
>
> (3) References in this section to the grossed up amount of the gift are to the amount of the gift grossed up by reference to the basic rate for the tax year in which the gift is made.
>
> (4) The income tax treated as deducted is treated as income tax paid by the charitable company."

55. Section 1128 CTA 2010 shows how to do the calculation to find the "grossed up amount". If a gift is made of £100 this is the net amount (NA). If the basic rate (which by s 1119 CTA 2010 means "the basic rate of income tax determined in pursuance (*sic*) of s 6(2) of ITA 2007") is 20%, then the formula in s 1128, GA = NA + (NA x (R/(100-R))), gives GA = 100 + (100 x 20/80) ie £100 + £25, so a donation of £100 to the appellant results in it being treated for tax purposes as receiving £125.

56. Income tax of £25 (20% of the gross amount) is treated as having been deducted by the donor, and the appellant is also treated as having paid that income tax of £25[2].

57. In relation to CT liability section 472 provides:

> "(1) If a charitable company receives a gift from an individual and the gift is a qualifying donation for the purposes of Chapter 2 of Part 8 of ITA 2007 (gift aid), the grossed up amount of the gift is treated as an amount in respect of which the company is chargeable to corporation tax, under the charge to corporation tax on income.
>
> (2) But the grossed up amount of the gift is not taken into account in calculating total profits so far as that grossed up amount is applied to charitable purposes only.
>
> (3) References in this section to the grossed up amount of a gift are to the amount of the gift grossed up by reference to the basic rate for the tax year in which the gift is made.

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[2] Section 471, coupled with s 414 and s 424 Income Tax Act 2007 ("ITA"), is the last remnant in the Tax Acts of Lord Addington's scheme for deduction and retention at source of income tax on annual payments enacted in 1803. The donor retains tax at the basic rate, and so gets relief, by giving the charity an amount net of income tax at that rate, and so can be seen to retain and keep the income tax deemed deducted. The donor gets relief at the excess of the higher rates over the basic rate by an extension to the basic rate band (see s 414(2) ITA), thus reflecting predecessor provisions of the Income and Corporation Taxes Act 1988 ("ICTA") which did not say so in quite such clear terms, something which caused much misunderstanding in the case of *Chappell v HMRC* at both Upper Tribunal and Court of Appeal level. Where the donation is not paid out of profits or gains (ie income) of the donor, an assessment to recover some or all of the basic rate tax is made under s 424 ITA, which is also much clearer than its ICTA counterpart.

(4) The exemption under subsection (2) requires a claim."

58. Thus using the same figures, the appellant is chargeable to CT on income in respect of the gift on an amount of £125. But that £125 is not taken into account in arriving at its total profits for the purposes of charging CT if the £125 is applied for charitable purposes only and a claim to that effect is made[3].

59. There is no suggestion in the papers or made by HMRC that the limitation in s 472(2) applies, or that the appellant has not claimed exemption for CT in relation to any of the accounting periods concerned and so the appellant has no CT liability and is not required to make a return to HMRC under paragraph 3 Schedule 18 FA 1998.

60. The exemption under s 472(2) is however an exemption from CT, not from income tax. The tax treatment of income tax paid by companies is provided by s 3 CTA 2009:

> "(1) The provisions of the Income Tax Acts relating to the charge to income tax do not apply to income of a company if—
>
> (a) the company is UK resident, …
>
> …
>
> (2) Subsection (1) does not apply to income accruing to a company in a fiduciary or representative capacity."

61. Section 967 CTA 2010 provides that any income tax borne by a company must first be set against its CT liability before being repaid, but this rule does not apply to a payment of income tax within s 472 CTA 2010. Thus there is no such limitation on a charitable company's ability to obtain repayment (rather than set off) for all of the income tax it is treated as having paid.

62. How is a repayment to be made? As far as HMRC are concerned it is done by using a form ChR1 which describes itself as a "claim". The ChR1 is used by charitable companies within the charge to CT as well as by charitable trusts which are within the charge to income tax.

63. Claims in relation to CT are governed in general by Part 7 Schedule 18 FA 1998[4]. Paragraph 54 provides that:

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[3] It has occurred to us to wonder what is meant to happen if the charity does not claim or is refused repayment of the tax deemed deducted. Since the tax element of the grossed-up amount will not have been applied for charitable purposes does that mean that in that situation the donor has a CT liability in respect of the income tax element? The problem does not arise in this case in the years assessed because the income tax was repaid and was presumably applied for charitable purposes. But it could arise in relation to the appellant's accounting period for the year ended 5 April 2016 where the repayment has been withheld.

[4] Although much of TMA applies to CT, section 117(1)(a) FA 1998 provides that Parts 2 (returns) and 4 (assessment and claims) of TMA do not apply so far as they relate to CT. It follows from this that s 42 (including Schedule 1A) TMA is (at first sight at least) inapplicable to this situation.

> "A claim under any provision of the Corporation Tax Acts for a relief, an allowance or a repayment of tax must be for an amount which is quantified at the time when the claim is made."

64. Paragraph 55 says that any claim for a relief must be made within certain time limits.

65. We do not think that these provisions apply to a repayment of income tax to a company in respect of tax treated as paid by virtue of s 471 CTA 2010. Section 471 does not provide for a "claim" for repayment of income tax. No other provision of Schedule 18 FA 1998, CTA 2009 (including in particular s 3) or CTA 2010 does so.

66. Until 1998 there was a provision requiring a claim for repayment of the income tax paid by a company. Section 7(5) Income and Corporation Taxes Act 1988 ("ICTA") provided that the exclusion from the charge to income tax for UK resident companies provided by s 6(2) ICTA, the predecessor of s 3 CTA 2009, was given effect to by means of a claim. Section 7(5) was repealed by s 165 and Schedule 27 FA 1998[5]. It follows that since then a repayment of income tax borne by a company is due without any of the formalities in Part 7 Schedule 18, including Schedule 1A to the Taxes Management Act 1970 ("TMA") (see paragraph 57(4) Schedule 18[6]) as to time limits, provisions about quantification and those about enquiries into claims not made in a return. It is an *entitlement* to be repaid, something that HMRC's Manuals[7] recognise exists in relation to excessive income tax suffered by an individual and which does not in their (and our) view require a claim within the meaning of the Taxes Acts and in particular s 42(1) TMA[8].

67. In this case HMRC have come to the conclusion that the repayments should not have been made, partly because there was a duplication of some amounts and partly because many if not all of the donations are not qualifying donations for the purposes

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[5] Very oddly the repeal was not made by Schedule 19 FA 1998 which contains multitudes of repeals consequent on the enactment of CT Self-Assessment in Schedule 18. Schedule 27 is the standard repeals schedule used in Acts at that time.

[6] There are contra-indications in paragraph 57(1A) Schedule 18 which explicitly excludes from Schedule 1A TMA a claim for repayment of income tax treated as having been paid "by virtue of … section 471 of the Corporation Tax Act 2010 (gifts qualifying for gift aid relief: charitable companies)". In our view this proceeds on the same misunderstanding as paragraph 9 (see fn.8), or else when it uses the term "claim" it means something other than a claim provided for by a provision of the Corporation Tax Acts or the Taxes Acts.

[7] See Self Assessment Claims Manual SACM 2005 & 2010.

[8] It must be noted that in relation to repayment of income tax, paragraph 9 Schedule 18 FA 1998 refers to "a claim by a company for any repayment of income tax called for by virtue of … section 3 of the Corporation Tax Act 2009 (exclusion of income tax charge in case of UK resident company or income within chargeable profits for corporation tax)" and "a claim by a company for repayment of income tax treated as having been paid by virtue of … section 471(2) of the Corporation Tax Act 2010 (gifts qualifying for gift aid relief: charitable companies), ..". In our view this is also based on a misunderstanding of the position.

of gift aid. They have made assessments under paragraph 52 Schedule 18 FA 1998[9] which says:

> "(1) The provisions of paragraphs 41 to 48 relating to discovery assessments apply to an amount to which this paragraph applies as if it were unpaid tax, unless—
>
> (a) it is assessable under those provisions apart from this paragraph, or
>
> (b) it is recoverable under section 826(8A) of the Taxes Act 1988 (interest overpaid which is recoverable in same way as interest charged)[10].
>
> (2) This paragraph applies to an amount paid to a company by way of—
>
> (a) repayment of tax[11] (or income tax) ...,
>
> …
>
> (c) interest paid under section 826 of the Taxes Act 1988,
>
> to the extent that it ought not to have been paid.
>
> (3) For the purposes of this paragraph—
>
> (a) an amount is regarded as paid if it is allowed by way of set-off, and
>
> (b) an amount is regarded as a repayment if it was intended as repayment but exceeds the amount paid by the company.
>
> (5) An assessment to recover—
>
> (a) an amount of tax repaid to a company in respect of an accounting period, or interest on any such repayment,
>
> …
>
> (b) an amount of income tax repaid to a company in respect of a payment received by the company in an accounting period, or interest on any such repayment,
>
> shall be treated as an assessment to tax for the accounting period referred to in paragraph (a) … or (b).
>
> (6) The sum assessed shall carry interest at the prescribed rate for the purposes of section 87A of the Taxes Management Act 1970 (interest

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[9] Why, we wondered at first, did s 30 TMA not apply here? It is a provision dealing only with over-repayments of income tax. Section 117 FA 1998 (see fn.4) only applies (Part 7) Schedule 18 in place of Part 4 TMA so far as that Part relates to CT. In this circumstance we are not concerned with CT, but income tax, as paragraph 52 Schedule 18 recognises. Maybe the specific overrides the general or it is simply more appropriate to use paragraph 52. But in any event paragraph 52 is appropriate.

[10] Section 826(8A) ICTA applies to excessive amount of repayment interest paid to a person. There is no information in the papers about any repayment interest added to the repayment of income tax. See §211.

[11] In Schedule 18 FA 1998 a reference just to "tax" is a reference to CT.

on overdue corporation tax, etc) from the date when the payment being recovered was made until payment."

Discussion – the assessments

68. HMRC accept that the burden is on them to show that the paragraph 52 assessments were validly made. Given that they import the discovery provisions of paragraphs 41 to 46, that is clearly correct (see *HMRC v Household Estate Agents Ltd* [2007] EWHC 1684 (Ch) at [48] per Henderson J (as he then was)). So we examine first that validity.

69. HMRC have themselves pointed out a number of errors in the assessments and have gone to great lengths to explain them and seek to show that they are not material. So an in-depth scrutiny is required.

70. We first set out what the appellant sought by way of repayment and how it sought it. It sought it by way of online submissions using the forms ChR1.

71. The printouts in the bundle show as follows.

1. Form Bundle number 71000221899

In the Tax Relief per tax year section it shows (we have omitted blank columns):

Tax year	Total Donations £	Gift Aid £
06.04.2012-05.04.2013	590.00	147.50
06.04.2013-Present	29014.00	7253.50
Total	29604.00	7401.50

In the Tax Relief per accounting period section it shows (we have omitted blank columns):

Accounting period	Total Donations £	Gift Aid £	Total (Gift aid & other income) £	Interest Start Date
06.04.2012-05.04.2013	590.00	147.50	147.50	06/04/2013
06.04.2013-Present	29014.00	7253.50	7253.50	06/04/2014
Total	29604.00	7401.00	7401.00	

Total amount payable: £7401.00

Date received 05 04 2014"

2. Form Bundle number 71000438183

In the Tax Relief per tax year section it shows (we have omitted blank columns):

Tax year	Total Donations £	Gift Aid £
06.04.2012-05.04.2013	590.00	147.50
06.04.2013-05.04.2014	44135. 00	11033.75
Total	44725.00	11181.25

In the Tax Relief per accounting period section it shows (we have omitted blank columns):

Accounting period	Total Donations £	Gift Aid £	Total (Gift aid & other income £	Interest Start Date
06.04.2012-05.04.2013	590.00	147.50	147.50	06/04/2013
06.04.2013-05.04.2014	44135.00	7253.50	7253.50	06/04/2014
Total	44725.00	11181.25	11181.25	

Total amount payable: £11181.25

Date received 12 12 2014"

72. In the other information section on this submission there was said:

> "The repayment claimed contained error as a result of our accounting date. The original accounting date was 31 December and was changed to April. The repayments submitted had money received as donation from April 2013 to December 2013. This showed donation of around 29000. Accounts file showed donated amount of 44725. We apologise for this error."

3. Form Bundle number 71000546521

73. In the Tax Relief per tax year section it shows (we have omitted blank columns):

Tax year	Total Donations £	Gift Aid £
06.04.2013-05.04.2014	54.00	13.50
06.04.2014-05.04.2015	63109.00	15777.25
Total	63163.00	15790.75

74. In the Tax Relief per accounting period section it shows (we have omitted blank columns):

Accounting period	Total Donations £	Gift Aid £	Total (Gift aid & other income £	Interest Start Date
06.04.2013-05.04.2013	54.00	13.50	13.50	06/04/2014
06.04.2014-05.04.2015	63109.00	15777.25	15777.25	06/04/2015
Total	63163.00	15790.75	15790.75	

75. Total amount payable: £15790.75

76. Date received 14 04 2015"

4. Form Bundle number 71000890273

In the Tax Relief per tax year section it shows (we have omitted blank columns):

Tax year	Total Donations £	Gift Aid £
06.04.2014-05.04.2015	165.00	41.25
06.04.2015-05.04.2016	70893.00	17723.25
Total	71058.00	17764.50

In the Tax Relief per accounting period section it shows (we have omitted blank columns):

Accounting period	Total Donations £	Gift Aid £	Total (Gift aid & other income £	Interest Start Date
06.04.2014-05.04.2015	165.00	41.25	41.25	06/04/2015
06.04.2015-05.04.2016	70893.00	17723.25	17723.25	06/04/2016
Total	71058.00	17764.50	17764.50	

Total amount payable: £18802.00

Date received 14 04 2014.

77. This form also contained a "GASDS[12] calculation" section showing for the tax year 2015-16 Total Donations of £4,150.00 and GASDS of £1,037.50, so the total of £18,802 is made up of £17,764.50 plus GASDS top-up payment £1,037.50.

78. HMRC's opening letter on 31 March 2016 was, it said, notice of Mr Hewitt's intention to enquire under paragraph 5 Schedule 1A TMA into the "Gift Aid Repayment Claim" for the period 27 February 2014 to 5 April 2015 in the amount of £15,790.75. The appellant was asked to provide information set out in a schedule.

79. On 19 August 2016 HMRC informed the appellant that because it was an LLP it was not entitled to any repayment as from 29 December 2012, covering those made for £7,401.00 (22 December 2012 to 5 April 2014); £11,181.25 (22 December 2012 to 5 April 2014); £1,025.00 (6 April 2014 to 5 April 2015) and £15,790.75 (27 February 2014 to 5 April 2015).

80. On 19 September 2016 HMRC's view was that most of the gift aid donations were not qualifying.

[12] GASDS stands for "Gift Aid Small Donations Scheme". Payments made under the GASDS relate to small donations (under £20) which do not have to be accompanied by a gift aid declaration. The rules governing them are in the Small Charitable Donations Regulations 2013 (SI 2013/938). They contain a complete code for the administration of claims for "top up payments" under GASDS (the equivalent of repayment of income tax deemed paid, a rule which does not apply to GASDS). GASDS top up payments are required to be claimed as Schedule 1A TMA is applied with modifications and the regulations contain information powers and assessment powers which differ from those applying to normal gift aid payments. As no assessment has been made for 2015-16 to recover anything the question whether such an assessment would cover GASDS does not arise.

81. We have related (§37) that on 20 January 2017 Mr Hewitt of HMRC wrote to confirm his view that the payments are not eligible for gift aid. In that letter he set out the tax claimed and the dates of payment of it to the appellant. In addition he said he intended to withhold the gift aid claim of £18,802.00 for 2015-16 (ie including the GASDS top up payments claimed).

82. From this it can be seen that it had become Mr Hewitt's view that *all* of the repayment claimed (including the top up payments) was tainted by being in return for services or for having a benefit in excess of the limits provided. It had also been previously stated by Mr Hewitt that all of the repayments were recoverable because the appellant was an LLP, a statement from which he did not resile.

83. He also said that the assessments would carry interest from a date 9 months from the end of the accounting period to a projected date of 28 February 2017[13].

84. The assessments, each of which is dated 20 January 2017 and is said to be an assessment under paragraph 52 Schedule 18 Finance Act 1998, need to be set out in detail:

1. Assessment no 3968571685

"Notice of assessment for tax year ended 5 April 2013

Amount payable £1,180

Particulars	**Amount**
Paragraph 52 Schedule 18 Finance Act 1998	£1180
Amount chargeable	
£1180 at 25%	£1180
Amount payable	**£295**

2. Assessment no 3968571685(No 2)[14]

"Notice of assessment for tax year ended 5 April 2014

Amount payable £18300.75

Particulars	**Amount**
Paragraph 52 Schedule 18 Finance Act 1998	£18300.75
Amount chargeable	
£73203.00 at 25%	£73203.00
Amount payable	**£295**

[13] We discuss the interest position at §§211 to 213 while recognising it is something not within our jurisdiction.

[14] I can see no number or reference on the three assessments that is different one from another.

3. Assessment no 3968571685 (No.3)

Notice of assessment for tax year ended 5 April 2015

Amount payable £15777.25

Particulars	**Amount**
Paragraph 52 Schedule 18 Finance Act 1998	£73203.00
Amount chargeable	
£73203.00 at 25%	£18300.75
Amount payable	**£18300.75**

85. We start with the purported enquiry and its closure. The enquiry was said to be under paragraph 5 Schedule 1A TMA. It was opened on 31 March 2016. The application for repayment was made on 14 April 2015 and on 6 May 2015 the "claim[15]" was satisfied by repayment. That repayment was the giving effect to the "claim" as soon as practicable after it was made as required by paragraph 4(1) Schedule 1A TMA. Such giving effect to can only be prevented if the claim is enquired into – paragraph 4(3). This suggests that HMRC can only enquire into a claim *before* they give effect to it.

86. But assuming that is not so, the enquiry was into the "claim" covering the period 27 February 2014 to 5 April 2015. Paragraph 5(2) Schedule 1A sets a limit to the start date for an enquiry and it depends on whether the date of the enquiry is the later of three possible dates. One of them is the end of the quarter day next following the first anniversary of the claim. That would be 30 June 2016 as the claim was received on 14 May 2015 and is clearly later than the date of the opening of the enquiry so the notice of enquiry was in time.

87. On 23 January 2017 HMRC informed the appellant that they had completed their enquiries. They were required in that notice to amend the "claim" to eliminate the excessive amount. They did not, so far as we can see[16]. They were also required by paragraph 8 Schedule 1A to give effect to their amendment by making such adjustment as may be necessary. Where a claim is refused in full as here no adjustment would be necessary. There is scope for an assessment in paragraph 8(1) so it cannot be the case that a repayment will never have been made before a valid paragraph 7 enquiry. But there is no absolute ban on a repayment when an enquiry is started – that is the result of paragraph 4(3)(b) which allows a provisional claim by the officer starting the enquiry. The assessment power is therefore relevant if that provisional repayment turns out to be excessive. The assessment, if it is permitted, must be made "within 30 days after the date of issue of a closure notice". Here it was made three days *before* that date. Had paragraph 8(1) said "no later than" rather than "within" the assessment would

[15] It will have become apparent that we do not think that Schedule 1A applies. But here we look at it in its own terms.

[16] In this connection see *R (oao Archer) v HMRC* [2017] EWCA Civ 1962 where HMRC's failure to amend was cured by s 114(1) TMA, a subsection which is discussed below at §§103 to 124.

clearly be valid. But making the assessment before the conclusion notice is premature and arguably invalid.

88. But none of this really matters if, as is our view, there cannot be a Schedule 1A enquiry. This is because, as we have noted at §§65 and 66 no provision of the Taxes Acts requires a claim for a repayment of income tax suffered by a company[17].

89. HMRC could and should simply have made enquiries into the application for repayment for 2014-15 using Schedule 36 FA 2008 or they could have carried out an audit under regulation 5 SI 2000/2074 (using Schedule 36 as necessary in the course of that audit) and if they were not satisfied they could have simply issued an assessment under paragraph 52 Schedule 18 as they did for periods where no Schedule 1A enquiry was made.

90. We now turn to those assessments. Paragraph 52(1) Schedule 18 FA 1998 imports the provisions of paragraphs 41 to 48, so it is necessary to consider those paragraphs that are relevant with appropriate modifications.

91. With such modifications they read:

> "**41**—(1) If an officer of Revenue and Customs discovers as regards *an accounting period of a company* that—
>
> (a) an amount of [unpaid tax] which ought to have been assessed … has not been assessed, …
>
> they may make an assessment (a "discovery assessment") in the amount … which ought in their opinion to be charged in order to make good to the Crown the loss of tax.
>
> …
>
> *Restrictions on power to make discovery assessment or determination*
>
> **42**—(1) The power to make—
>
> [an assessment under paragraph 52]
>
> is only exercisable in the circumstances specified in paragraph 43 or 44 and subject to paragraph 45 below.
>
> …
>
> (3) Any objection to [an assessment under paragraph 52] on the ground that those paragraphs have not been complied with can only be made on an appeal against the assessment or determination.
>
> [Paragraphs 43 to 45 do not apply in this case as no company tax return was made]
>
> *General time limits for assessments*

[17] Schedule 1A TMA derives from s 42 TMA and by s 42(1) can only apply to a claim made under a provision of the Taxes Acts.

46—(1) Subject to any provision of the Taxes Acts allowing a longer period in any particular class of case no assessment may be made more than 4 years after the end of the accounting period to which it relates.

(2) An assessment in a case involving a loss of tax brought about carelessly by the company (or a related person) may be made at any time not more than 6 years after the end of the accounting period to which it relates (subject to sub-paragraph (2A) and to any other provision of the Taxes Acts allowing a longer period).

(3) Any objection to the making of an assessment on the ground that the time limit for making it has expired can only be made on an appeal against the assessment.

Assessment procedure

47—(1) Notice of an assessment to tax on a company must be served on the company stating--

(a) the date on which the notice is issued, and

(b) the time within which any appeal against the assessment may be made.

(2) After that notice has been served on the company, the assessment may not be altered except in accordance with the express provisions of the Taxes Acts.

Appeal against assessment

48—(1) An appeal may be brought against any assessment to tax on a company which is not a self-assessment.

(2) Notice of appeal must be given--

(a) in writing,

(b) within 30 days after notice of the assessment was issued,

(c) to the officer of the Board by whom the notice of the assessment was given."

[Our emphasis in italics; our interpolations in the text in [ ]]

92. The time limit in paragraph 46 is overridden where relevant by paragraph 53 which says:

"(1) An assessment made by virtue of paragraph 52 is not out of time under paragraph 46(1) (general 4 year time limit for assessments) if it is made—

(a) before the end of the accounting period following that in which the amount assessed was paid, or

(b) if later, before the end of the period of three months beginning with the day on which an officer of Revenue and Customs completes an enquiry into a relevant company tax return by the company concerned.

> (2) Sub-paragraph (1) above is without prejudice to paragraph 46(2) and (2A) (time limit for assessment in case of loss of tax brought about carelessly or deliberately)."

93. The assessments we are considering were all made within the time limit in paragraph 46(1), so it is not necessary to consider whether any loss of tax was brought about carelessly. The provisions of paragraph 47 are met, so the questions that remain are whether the officer concerned discovered, as regards *an accounting period* of a company, that an amount paid to the appellant by way of repayment of tax which ought to have been paid had not been assessed and whether the assessments set out the correct figures of tax for the correct periods. [Our emphasis.]

94. Those periods are accounting periods rather than tax years, something which permeates Schedule 18 FA 1998, not just paragraph 41, and is reflected in the second details section on the ChR1 form.

95. The accounting periods of the appellant covering the relevant periods were those for the 12 months ended 31 December 2012, 12 months ended 31 December 2013, 1 January 2014 to 5 April 2014, 12 months ended 5 April 2015 and 12 months ended 5 April 2016. This is clear from the information given by the appellant in its second ChR1, and from the information on the Charity Commission website.

96. The assessments however were made for the years ended 5 April 2013, 2014 and 2015. Only the last period was an accounting period of the company.

97. The first accounting period for which a repayment was made was that for the year ended 31 December 2013. The amount of the repayment in relation to that period was twice £7401.50 or £14,803.00. This is because HMRC wrongly thought that the ChR1 No 2 was a fresh claim whereas it was a revised claim to include payments in the period from 1 January 2014 to the end of the accounting period on 5 April 2014, something that was made clear in the information section of the ChR1. The first claim had gone up to 31 December 2013 only.

98. The second accounting period for which a repayment was made was that for the period 1 January 2014 to 5 April 2014. The amount of the repayment in relation to that period was £18,300.75.

99. The third accounting period for which a repayment was made was that for the year ended 5 April 2015. The amount of the repayment in relation to that period was £15790.75.

100. In our view only one of the assessments can be regarded as being made for the correct period, and that is that for the accounting period of 12 months to 5 April 2015.

101. The amount of tax charged in that assessment is £18,300.75. But Mr Hewitt's schedule in his letter shows only £15,777.25. The amount shown as payable in much smaller type than the £18,300.75 in the body of the notice of assessment is £15,777.25.

102. The assessment also shows the "amount" as being £73,203. But paragraph 52 provides for an assessment of an "amount paid by way of … repayment of income tax", not an amount to which a rate of tax is applied to produce that amount. And as an amount of the income on which the tax was borne it is wrong, even assuming that £18,300.75 is the correct tax figure. £18,300.75 is the tax on a gross amount of £91,503 because the basic rate of tax (the rate mentioned in s 471 CTA 2010) is 20%, not 25%.

103. This assessment is plainly riddled with errors. The question raised by HMRC in their skeleton and probed by us at the hearing is whether s 114 TMA can apply to correct any or all of these assessments.

104. That section provides:

> "(1) An assessment, determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.
>
> (2) An assessment … shall not be impeached or affected—
>
> (a) by reason of a mistake therein as to—
>
> (i) the name or surname of a person liable, or
>
> (ii) the description of any profits or property, or
>
> (iii) the amount of the tax charged, or
>
> (b) by reason of any variance between the notice and the assessment …".

105. HMRC at our direction made supplementary submissions on these assessments.

106. They point out that the assessments:

(1) are correctly addressed to the company at its registered office

(2) state the date on which they are issued

(3) give the time limit for appeals

and so are within paragraph 52(1) Schedule 18 FA 1998.

107. They say that:

(1) In accordance with the judgment of the Court of Appeal in *Honig and others (administrators of Emanuel Honig) v Sarsfield (HM Inspector of Taxes)*[18] and the decision of the Special Commissioner (Charles Hellier) in *Corbally-Stourton v*

[18] 59 TC 337

HMRC[19], Mr Hewitt took the decision to make the assessments in the amounts set out in his letter of 20 January 2017 to the appellant, and conveyed that decision by email to a Mr Aspinall who input the figures into the computer[20]. Evidence for the making of the assessment is on a screenprint from HMRC's EMTP system.

(2) Section 114(1) is concerned with any "want of form" in assessments, not notices of assessment. An error in a notice of assessment can be cured by reissue of the notice and there is no want of form or errors in the assessments on the appellant and they were "in substance and effect in conformity with and according to the intent and meaning of the Taxes Acts".

(3) The clerical errors in the notices are not "gross" or "fundamental". In *Baylis (HM Inspector Taxes) v Gregory*[21] ("*Baylis*") the errors were as to the year of assessment which was wrongly stated in the assessment book as well as on the notice.

(4) As the underlying assessments were correct, then s 114(2) applies so as not to impeach or affect the underlying assessments.

(5) None of the errors could result in the notices misleading the appellant.

108. Mr Brown submitted that:

(1) It was clear to the appellant that the assessments were incorrect and, that incorrect assessments lead to incorrect notices of assessment. So both the assessment and the notices are null and void.

(2) They were confused about how HMRC arrived at some of their figures and what seemed like random assessments and that HMRC provided incorrect figures in each year of assessment.

109. The first thing to consider is the question of the periods to which the assessments relate. We have held that the only assessment which is for the correct year is that for the year ended 5 April 2015. The question of the wrong period of assessment was the only procedural issue in *Baylis*. In the High Court Vinelott J held that a mistake made in the assessment and notice, that of typing "74-75" instead of "75-76" (the correct year of assessment), was a mistake but one that could be cured by s 114(1). The Court of Appeal disagreed. Slade LJ said:

> "Section 114 apart, I find it is impossible to say that an assessment for one specified fiscal year can ever be or take effect as an assessment for another fiscal year. Section 114 apart, the fact that the taxpayer may have appreciated that a mistake has been made on receiving the notice of assessment is, to my mind, irrelevant in this context."

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[19] [2008] SpC 692

[20] Although HMRC do not says so, this is an implicit reference to s 113(1B) TMA which validates this "two person" procedure which was the subject of the decision in *Burford v Durkin (HM Inspector of Taxes*) 63 TC 645.

[21] 62 TC 1

110. We consider this statement must also apply to accounting periods of companies. Slade LJ went on:

> "The learned Judge took the view that s 114 will enable an assessment expressed to be for one year to be treated and take effect as an assessment for another year provided that the Crown can show that there was a genuine mistake and that in all the circumstances there was no real possibility that the taxpayer was in any way misled. While I again have some sympathy with this view (which was supported by Mr. Sher in this court by way of alternative submission), I do not find myself able to concur in it, since I do not think it is warranted by the wording of the section.
>
> Subsection (2) has no application to the facts of this case. The only words of subs (1) which can possibly be relied on by the Revenue are the following:
>
> > 'An assessment … which purports to be made in pursuance of any provision of the Taxes Acts shall not … be affected by reason of a mistake … if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts …'
>
> The assessment in the present case, which the Crown asserts 'is not to be affected …', is an assessment for 1974-1975. Mr. Flesch accepted and contended that, as an assessment for that fiscal year, it would not be affected by reason of a mistake if the other conditions specified in s 114(1) were satisfied. However, as he pointed out, the subsection does not provide for rectification of an assessment; it is not the equivalent of the 'slip rule'. The relevant fiscal year of assessment is an integral, fundamental part of the assessment itself, I, for my part, find it impossible to read the wording of s 114(1), wide though it is, as justifying in any circumstances the treatment of an assessment made for one fiscal year as an assessment made for another fiscal year. If the Revenue make an assessment for the wrong year, their proper course is to issue a new assessment for the correct year. It is pertinent to observe that s 29(6) of the 1970 Act would preclude them from themselves amending an assessment by substituting a reference to one fiscal year for another.

111. The other two Lord Justices had nothing to add on this point, and the House of Lords did not have to deal with this issue. The judgment of Slade LJ is clear. The only subsequent Court of Appeal decision to deal with s 114 TMA is *Donaldson v HMRC* [2016] EWCA Civ 761. That case was not concerned with the year of assessment for which an assessment was raised: the Court said that in the particular circumstances that was not the relevant question. And it was not concerned with the wrong period, but an omission to state a period at all. *Baylis* was not mentioned, but Lord Dyson MR did say:

> "In *Pipe v Revenue and Customs Commissioners* [2008] STC 1911 at para 51, Henderson J said that a mistake may be too fundamental or gross to fall within the scope of the subsection. I agree. The same applies to omissions."

112. In [51] the only case mentioned by Henderson J is *Baylis*.

113. In our view then the assessments that purported to be for the periods 6 April 2012 to 5 April 2013 and 6 April 2013 to 5 April 2014 cannot stand, as there were no such accounting periods.

114. That leaves just the assessment for the year ended 5 April 2015. The cases on s 114(1) such as *Baylis* and *Pipe* have made it clear that an important question when considering s 114(1) is whether the recipient of a notice of assessment would be misled by the notice, and that that is an objective test. In *R (oao Archer) v HMRC* [2017] EWCA Civ 1962 Lewison LJ said at [36]:

> "the test under section 114 must be an objective one: see *Pipe v HMRC* at [51]. However, in applying an objective test the reader of the closure notice must, I think, be taken to be equipped with the knowledge that Mr Archer and KPMG had, including knowledge of what had led to the enquiry and what HMRC's conclusions were."

115. So here the question is whether a reader of the notice equipped with the knowledge of HMRC's enquiries would be misled, and would he know how much he had to pay and how that amount was arrived at? In our view the answer is no[22]. There is an unexplained discrepancy between the amount in the right hand most column of the last line and the amount shown before the details and as the amount of tax which should be sent to HMRC. There is an unexplained discrepancy between the amount on which the tax is shown as charged and the amount of income on which the tax arises, an unexplained use of a tax rate of 25%. Finally the figure used of £18,300.75 is shown on the penalty schedule and elsewhere as being the figure for the previous tax year, 2013-14. We draw comfort from the case of *Pitcher v HMRC* [2017] UKFTT 406 (TC) (Judge Kevin Poole) while acknowledging that there, unlike here, Judge Poole was dealing with a penalty. And in his correspondence Mr Hewitt seemed to have accepted at one stage that not all the donations were "tainted" yet the amount shown as payable in one place is the total amount. We do not see how the appellant, or anyone in his position, could have been sure what the amount to pay was.

116. We also say that the number of errors made the case one where the mistakes were too fundamental as well as being too misleading to be cured by s 114(1) TMA.

117. HMRC suggested in their skeleton and supplementary submissions that s 114(2) TMA applied, not s 114(1). In particular they say that the assessing system used for cases other than those for self-assessment, EMTP, shows a figure of £15,777.25 so there is a discrepancy between the notice and the assessment, which can be cured by s 114(2).

118. In *Pipe* Henderson J said at [51]

> "However, Baylis v Gregory, as I have already pointed out (see paragraph 30 above), was not a decision on section 114(2) at all, and the language of section 114(2)(b) is clear and unqualified. The force of the words 'any variance' is that no variance of any description between the notice and the determination is to invalidate the determination. I accept

[22] We have take into account Mr Brown's submissions that *he* was confused as to what he was supposed to pay, but as the test is objective it clearly cannot be determinative.

> that there may come a stage where the error or discrepancy in question is so fundamental in character that it could not properly be described as a 'variance' at all; but in my judgment a mistake about dates of the type made in the present case gives rise to a 'variance' within the ordinary and natural meaning of that word."

119. In *Pipe* the position was rather different from this case. The appellants there did not produce grounds of appeal until the hearing of the General Commissioners and they were concerned with a wrong date in the notice of determination (the equivalent of a notice of assessment for Part 10 TMA penalties). They did not appeal against the fact of imposition or the amount. That is important because at [49] Henderson J said:

> "Accordingly, acceptance that a mistake had been made in the Penalty Notices implied acceptance that the underlying determinations had been made for the correct dates."

120. We do not see why this follows. What the appellants there knew was that certain dates stated in the notice were wrong (not the date of the notice). They were trying to use the error as a way of invalidating the collection of the substantial daily penalty, but they went about it the wrong way. They could have had no idea whether the determination matched the notice or even if the determination referred to the dates at all. The phraseology of their appeal may have been clumsy or inept, but we do not see why saying there is a mistake in the notice inevitably carries the implication that the determination itself does not contain that error. If however Henderson J meant no more than that the appellants' failure to put the actual determination in dispute meant that they could not rely on any error in it, then it is clearer to us at least. And indeed Henderson J held that as there was no appeal against the determination itself it was not incumbent on HMRC to show that the determination was correct and there is nothing in the decision which points to what the determination itself said.

121. In this case though the appellant has put the whole basis of the assessment in dispute: they haven't objected to the form or content of the notice in this appeal. It is in my view incumbent on HMRC to show, faced with what are serious and significant errors on the notices, that the actual assessment is not infected by the same errors. As Judge Thomas pointed out in *Eric Scowcroft v HMRC* [2018] UKFTT 295 (TC), in the days of computerised assessing, the scope for any variance between the assessment itself and the notice should be very limited. We would expect that the result of the inputting of figures by Mr Aspinall resulted in the making of an assessment in those figures and that the computer would automatically print, or cause to be printed, a notice of assessment that reflected those figures.

122. HMRC have said in their submission that the figure of £18,300.75 is wrong, and that the correct amount payable of £15,777.25 is evidenced by Mr Hewitt's letter of 20 January 2017 and the figure entered into the EMTP system. But the first is not evidence of the assessment, and the second is unsupported by evidence of what was input into the EMTP system. On 4 June 2018 Ms Mulder wrote to the Tribunal including two further exhibits, one of which was a screenshot from the EMTP. We have several problems with this if it was intended as evidence of the assessment. First, it is headed "Champions Learning Centre LLP" which we assume is the LLP Mr Brown said was set up and which Mr Hewitt wrongly thought was the appellant. Second, the only

charge details on it relate to Class 1 and 1A National Insurance Contributions. Third, the "Accounting Period" boxes are blank. Fourth, the date of raising the charge is 24 January 2017. The only faint resemblance to the assessment in question is that the "To date" is given as 5 April 2015.

123. We cannot accept that there is sufficient, or indeed any, evidence to show that there was any variance between the assessment and the notice. That means that section 114(2) is not in point.

124. We therefore hold that all the assessments are invalid, and that invalidity cannot be cured by s 114(1) TMA.

125. We also add that our decision that Schedule 1A TMA does not apply means that it is not necessary to consider whether a tax charge for 2014-15 could arise simply by putting a figure into EMTP so as to be reflected in the statement of account between HMRC and the appellant and thereby collectible. This alternative argument was put forward by HMRC we think because they realised that the errors in the paragraph 52 assessments were possibly fatal and wanted another string to their bow. Because of our decision, paragraph 52 is the only available string. But we are not attracted to this argument based on the EMTP even if there had been evidence of the how the EMTP system works and of the relevant details.

Discussion - penalties

126. Penalties were charged under Schedule 24 FA 2007 on the basis that the charity had committed a careless error in submitting the claims, producing, said the letter of 20 January 2017 from Mark Hewitt, a penalty of £9,486.71 which he said was 15% of the potential lost revenue ("PLR"). This therefore represents total PLR of £63,244. He added that he had decided to suspend the penalty for 12 months and that if the appellant implemented the conditions before the expiry of that period, the penalties would be cancelled.

127. The penalty explanation schedule attached to the letter of 20 January 2017 shows in the narrative that the penalty was 18%, not the 15% shown in the letter. The penalty table at the end shows:

Period	PLR £	Penalty £	Amount to be suspended £	Amount of penalty we cannot suspend £
2012-13	737.50	132.75	132.75	0
2013-14	18300.75	3294.13	3294.13	0
2014-15	15942.75	2869.60	2869.60	0
2015-16	17723.50[23]	3190.23	3190.23	0

128. We have added a further row of our own

Total	52704.50	9486.73 = 18%		

[23] This figure does not include the GASDS top up payment, probably correctly.

129. On 10 May 2017 a letter without a signature block or signature was sent to the appellant by HMRC Wealthy & Mid-sized Business[24] Compliance. It purported to be a Notice of Penalty Assessment with assessment number 396871685 (the same number as on the paragraph 52 assessments – see §84). It showed a total penalty charged of £9,486.71 and the total amount suspended was £0.00. That according to the notice left a total amount now payable of £0.00. There was in the notice of assessment a table splitting the penalty into "tax periods" which were the same tax years as those for the assessments, save that there was also a penalty for the year ended 5 April 2016, and this was repeated on a schedule NPPS2 attached to the letter which was the notice of assessment.

130. Also sent on the same day was a Notice of Penalty Suspension, telling the appellant about the penalties HMRC were suspending, which were the whole. It sets out conditions the appellant had to meet by 20 January 2018, noting that the suspension period started from 20 January 2017. If the condition was met the penalties would be cancelled.

131. On 13 November 2017 Mr Hewitt wrote to appellant about the penalties. He said that HMRC was withdrawing the penalty of £3,190.26 relating to the year ended 5 April 2016. This was because they had yet to finalise the tax position for the year. They reserved the right to reissue the notice once the Tribunal had determined the tax position.

132. HMRC have the burden of showing that the penalty assessments are validly issued, and that there were inaccuracies in a relevant document. The appellant is required to show that there were no, or fewer, inaccuracies and that any reduction given for co-operation etc was insufficient. To consider this we examine the relevant paragraphs of Schedule 24 FA 2007, the provision under which the penalties were purportedly assessed.

133. Paragraph 1 requires there to have been shown to be an inaccuracy in a document given to HMRC which is listed in the table. The first relevant item in the table is "Return, statement or declaration in connection with a claim for an allowance, deduction or relief." The question is whether the ChR1 is such a document, bearing in mind that it is completed and transmitted online.

134. The answer is in paragraph 28(h) Schedule 24. "Giving a document" includes communicating information to HMRC in any format and by any method (whether by post, fax, email, telephone or otherwise)". Here it must be "otherwise" ie over the internet.

135. And we are satisfied that the ChR1 is either a return or a statement. But we do not think that a company's ChR1 is given in connection with a claim for an allowance, deduction or relief. What a company that bears income tax by deduction has is an entitlement to repayment of the tax as a result of the exclusion of its income from the

[24] The appellant is neither wealthy, mid-sized or a business!

charge to income tax. There is no allowance or deduction involved and in our view a person is entitled to a relief from tax only if they would otherwise be chargeable.

136. The only other item is the final "sweep up" provision, any document which is likely to be relied upon by HMRC to determine, without further inquiry, a question about repayment to a person. It is clear that HMRC do not make routine enquiries into ChR1s. Routinely they simply repay the amount included in the return, often on the same day as it is received. Are HMRC thereby relying on the document to answer a question about repayment? We do not think so. It is the ChR1 which is the claim form, and for charitable trusts it is a form containing a claim to exemption and hence repayment (see s 538 and s 538A ITTOIA). If HMRC were to enquire into a claim and they received an inaccurate response from the claimant that would fall within the sweep up item as it would be an inaccuracy in a document given in relation to a claim for relief.

137. From this we hold that penalties cannot be imposed on a charitable company for inaccuracies in the ChR1.

138. But lest we be wrong, we continue to examine Schedule 24 on the basis that the ChR1 is within paragraph 1 Schedule 24.

139. We doubt that even on this assumption that there is an inaccuracy in a relevant document which amounts to or leads to a false or inflated "claim" to repayment of tax (paragraph 1(2)(b)), because of the meaning of "claim" in the Taxes Acts. Nevertheless we proceed.

140. Paragraph 1 requires the inaccuracies penalised to be careless or deliberate. Whether they were careless inaccuracies is something we determine when we come to look at the question whether there were gift aid payments which were not qualifying ones. HMRC do not suggest that there was any deliberate (ie fraudulent) conduct by the appellant. To anticipate §208 we have held that any inaccuracies were not careless, and so we could also end there, but we proceed.

141. HMRC have correctly determined that the maximum penalty for a careless inaccuracy is 30% of the PLR (paragraph 4(2)(a).

142. The normal rule for calculating PLR applies here. It is the "additional amount due or payable in respect of tax as a result of correcting the inaccuracy". By paragraph 5(2)(a) Schedule 24 that phrase includes an amount payable to HMRC having been erroneously paid by way of repayment of tax. That is the amount shown on the ChR1 which is referable to the inaccuracies. The actual amount depends on whether there are inaccuracies and in what amount, but there is one matter we mention here.

143. For the period ended 5 April 2013 the appellant submitted a ChR1 requesting repayment of £7,401, which was paid. It then submitted a replacement claim for £11,181.25 explaining the circumstances. It was clearly thereby requesting and expecting a repayment of £3,780.25, the difference. Instead HMRC repaid £11,181.25. The repayment of another £7,401 was a careless error, but not by the appellant. HMRC may recover it by assessment if they can, but the PLR for these periods cannot exceed

£11,181.25. On being asked about this at the hearing HMRC accepted that a penalty would not be appropriate on the second amount of £7,401.

144. The reduction for disclosure given by HMRC is 80%, which reduces the 30% maximum by 80% of the difference between the minimum 15% and 30%, resulting in a penalty of 18%. We do not consider this to be the correct reduction, for the simple reason that Mr Hewitt told the appellant that the reduction would be 100%. Why his penalty explanation schedule showed 80% we do not know, but in view of his letter we would reduce the penalties to 15%.

145. Paragraph 13 relates to assessment of the penalties. Three things are required of the person making the assessment, that they should make it, that they should notify the appellant and that they should state in the notice a tax period in resect of which the penalty is assessed. The first two were done. As to the third the tax periods were stated as the years ended 5 April 2013, 2014, 2015 and 2016. There is no problem in relation to the year ended 5 April 2015 and 2016 as those years coincide with the appellant's accounting periods. But the assessments for 2013 and 2014 are inaccurate as they do not state the correct periods, and they cannot stand, and s 114 TMA cannot cure them for the reasons given above.

146. By paragraph 13(2) any procedural rules of TMA 1970 relating to income tax assessments apply to the penalty assessments. These include s 30A(3) TMA which requires the notice of assessment to state the date on which it is issued and the time for appealing and s 30A(4) TMA which prevents any amendment to it except by law (ie determination by the Tribunal or deemed determination by s 54 TMA agreement).

147. In this context it is difficult to understand what Mr Hewitt means by "withdrawing" the penalty assessment for the year ended 5 April 2016. See *Baylis* at 62 TC 1 at p 124.

148. Section 30A(1) TMA requires that an assessment which is not a self-assessment shall be made by an officer of HMRC. It is clear that Mr Hewitt made the paragraph 52 assessments, but there is no clue as to which officer of the HMRC, or indeed whether any officer of HMRC, made the penalty assessments. Certainly no named officer issued the notices of assessment, which did not come from Mr Hewitt's department of HMRC.

149. The absence of a name on the notice makes it impossible for the recipient to comply with s 31A(1)(c) TMA which is applied to penalty assessments by paragraph 16 Schedule 24. Who is the "relevant officer", the "officer by whom the notice of assessment is given" (see s 31A(4)(b))? If it were important to determine this matters we would hold that the assessments do not comply with paragraph 13(2) and so are invalid for that reason (see in this connection *Craig Shaw v HMRC* [2018] UKFTT 381 (TC) (Judge Nigel Popplewell)).

150. But going on through Schedule 24, paragraph 13(3) gives the time limit for making the penalty assessments. In this case it is 12 months from the date of the end of the appeal period for the paragraph 52 assessments. That appeal period has not ended so the assessments are in time. But that is so only in relation to the penalty assessments

for the periods up to that ended 5 April 2015. There is no assessment for the year ended 5 April 2016. That being so paragraph 13(3)(b) applies so that the time limit is 12 months from the date the inaccuracy is corrected. The inaccuracy has not been corrected, so the question is can a penalty assessment be made before a paragraph 52 assessment has been. We think not, because there is no PLR. PLR can only be calculated when the inaccuracy has been corrected (paragraph 6(1)). Here it hasn't been. So the penalty assessment for this period is invalid for yet another reason.

151. HMRC may suspend a penalty. By paragraph 14(1) they must give notice in writing of the suspension, which notice must state what part of the penalty is suspended, a period of suspension of not more than two years and the conditions to be complied with by the appellant.

152. In this case Mr Hewitt said in his letter of 20 January 2017 that he had decided to suspend the penalties for 12 months to enable the trustees of the appellant to implement changes recommended in an attached document NPPS100, and that if the trustees met the conditions the penalty would be cancelled. He asked the trustees to sign and return the penalty suspension confirmation by 20 February 2017. The penalty explanation schedule also said that the penalties were suspended.

153. But on 10 May 2017 the penalty assessment was issued showing no amount suspended and no amount payable. Also on 10 May 2017 a notice of penalty suspension was given including some suspension conditions. The notice showed that the penalties were suspended and that at the end of the suspension period HMRC would write to the appellant to ask them to confirm that the conditions were met.

154. There is no further correspondence in the bundle on suspension. It seems therefore that the appellant has not satisfied HMRC that the conditions of suspension have been complied with. Nor is there any evidence of an appeal against the suspension conditions imposed by HMRC. The penalties have not therefore been cancelled, and so would be payable but for this decision. We should point out to HMRC that there is nothing in Schedule 24 that requires the appellant to formally agree the terms of suspension. Evidence of compliance with the conditions by the deadline is all that is required.

155. At the hearing HMRC asked us to reset the suspension conditions to run from a period of one year from the date of the hearing. Had we not found the penalty assessments invalid we would have declined to do that. Firstly the appellant has not appealed against the conditions of suspension. Secondly we would have had no jurisdiction to reset the period unless the appellant appealed against the decision to suspend. What has happened is that HMRC has set conditions that expired in early 2018. It would have been for HMRC to judge whether those conditions had been met. If they were not satisfied by the appellant the penalties would have ceased to be suspended.

156. The upshot of all of this is that all the penalties are cancelled.

Discussion – the gift aid payments

157. HMRC say there are four issues for the Tribunal:

(1) Whether there has been a double payment of "Gift Aid relief" to the claimant.

(2) Whether the payments made to the appellant are gifts at all.

(3) Whether if they are gifts, the conditions for them to be qualifying donations are complied with as to (i) refunds or (ii) benefits above the limits.

(4) Whether the volunteers' donations of their entitlement to expenses are qualifying donations.

158. We agree that this delineates the issues. We consider them separately .

Duplication

159. HMRC's arguments on this point is that the 12 December 2014 claim must have duplicated in part the 7 April 2014 claim.

160. Mr Brown does not deny that HMRC paid over £7,000 twice, but says that this was HMRC's fault as he had made it clear in the white space that the second claim as cumulative, not additional, and so replaced the first claim.

161. We find that there was a duplicated repayment, and that it is recoverable.

Were the payments gifts?

162. HMRC say a "gift", to be within the definition in s 416 ITA 2007, must be a voluntary disposition. They cite *Osborne v HMRC* [2010] UKFTT 368 (TC) in support. In this case the contributions are mandatory, as evidenced by the Constitution article 5(r) (§11); the references to fees, fixed donations etc on the website (§15); the questionnaires completed by four parents who said the payments they made "were in support of tuition for their children, rather than donations" (§§179 to 182); the 2015 Financial Statements at 2.3 referring to a condition of membership being to "meet CFLC fees/donation stipulations" and the PayPal donation page (§17).

163. Further HMRC say a gift does not include a payment in return for a service, citing Tolley's commentary on Gift Aid. They point to the offering by the appellant of learning programmes and compare this to school fees which Tolley's commentary says are not eligible for gift aid.

164. Mr Brown had provided a statement of case for the hearing, which he amplified in oral submissions.

165. He said that the passages from the website that Mr Johnson had highlighted in his witness statement about membership fees regarding children under 18 were ambiguous.

166. Mr Brown also said that the appellant had always sought to follow HMRC guidance and referred to statements in their guidance on membership schemes about under 18s.

167. He also pointed out that not all contributions to the charity are made by parents/guardians. There are volunteer refunds, donations from the general public and supporters of the charity. He pointed out that about 15% of parents do not make donations.

168. He produced at the hearing statements made by some of the donors who had responded to HMRC's questionnaires.

169. He maintains that all payments are voluntary: they are "suggested donations".

170. We deal first with the donor questionnaires and responses. The questionnaires are a standard form (CTYAUD8). The top part of page 1 asks three questions.

(1) Have you made a payment(s) (*sic*) to the charity?

(2) Did you complete a Gift Aid declaration giving the charity permission to claim Gift Aid on your payments?

(3) Have you received anything in return for your payments to the charity? If yes, please give details below in a White space box.

171. To the right of each question are two boxes. The heading for the first column of boxes is "No" and for the second is "Yes".

172. Below the white space box is the question in bold "Do your payments fall under any of the following categories?" After that, but not in bold is written "(Tick all that apply)".

173. The list is General donations; Membership; Admissions; Sponsorship; Donated Goods; Collections and Other (which has a single line box for completion below it, we assume, to describe what the "other" is).

174. To the right of each item is a box. The column of boxes is under the column of boxes for the first three questions which is headed "No".

175. The second page asks for "information about your payments". There are boxes for payment type (Cash, cheque, etc), frequency of payment and approximate total donated during the period specified in the letter.

176. There is then a large white space box for "Any other relevant information".

177. The accompanying letter from Mark Hewitt gave the period as "27 February 2014 to 5 April 2015". The questionnaires were said to be to "help" Mr Hewitt with the charity's claim. It also informed the recipient that if they wanted to cancel the Gift Aid declarations they should tell the charity.

178. One responder to the questionnaire had ticked all the boxes "no", emphasising that "No" applied to the "category" questions. They added that "this was tuition which my daughter goes to after school and I paid £40 every month by direct debit that is all I know about it".

179. Another also ticked every box "No" and added "I have never made a payment/donation" and "I do not give consent for any payments to be taken from my account". They added in a letter "I was not aware that I had committed to a gift aid scheme. Therefore I would like to cancel my Gift Aid Declaration."

180. A third ticked the "Yes" box to the first question after having ticked and crossed out the "No" box. The other two questions were answered "No". They said they paid by direct debit £120 per month, and added "The payments I pay for are not for charity or the Gift Aid declaration. They are specifically for my daughter private tuition."

181. The fourth ticked "Yes" to the first and third question, and put "?" against the second. She added that she received in return for the payments "Tuition for 1 child 2 days £120.00".

182. Mr Brown's documents were from the second and third responder.

183. The first document was on the appellant's notepaper and was addressed to the "Magistrate". It said :

> "This letter confrims (*sic*) that I made voluntary donations to Champions Fun Learning Centre up to 2015/16 to help the charity with their objectives.
>
> The letter I received from HMRC was confusing and I didn't understand what it was saying and someone helped to write the response.
>
> I also signed the declarations again."

184. It is signed with recognisably the same signature.

185. The letter from the other responder was identical even as to the typo.

186. We cannot give much weight to either the responses to the questionnaires or the letters produced by Mr Brown. We accept that many of those to whom the questionnaires were sent did not have English as their first language. We also accept that recipients may well not have understood the questions or the purpose of the questionnaire and may have thought that either they or the charity would get into trouble if they gave the "wrong" answer. But we cannot be sure either that the letters produced by Mr Brown were understood by the writers. We have no doubt that the letters were drafted by Mr Brown and say what he wanted the recipients to say.

187. We also have some doubts about the appropriateness of the layout of the questionnaire. The accompany letter says "I understand you may have made a donation …". The first box for the question "Have you made a payment to the charity" is "No". Since this is a random selection HMRC can have no suspicion that the 10% of those on the schedule of donors are the ones who did not make payments and the overwhelming likelihood is that the recipient did make a payment. It seems to us psychologically odd to put "no" as the first possible answer.

188. But we do give some weight to the responses because they all show that the recipients thought they were paying a monthly sum for tuition of their children.

189. Mr Brown maintains that the appellant was running a membership scheme and that the donors were getting membership benefits for their contributions.

190. Membership subscriptions are covered in Chapter 3.37 of the HMRC Guidance. We are sure that all readers of this decision are aware of, and probably members of, charities which operate a membership scheme. The main text is:

> "3.37.2 Most membership subscriptions aren't gifts, they're made to gain access to the facilities and services provided by the charity. However, membership subscriptions paid to charities that secure voting rights and the right to attend a charity's AGM are gifts provided they meet the conditions in the next paragraph. These payments will, of course, still have to satisfy the benefit rules referred to above.
>
> 3.37.3 The conditions referred to are that the:
>
> - payments do no more than secure membership of the charity
> - payments don't secure a right to personal use of any facilities or services provided by the charity
>
> 3.37.4 The provision to members of, for example, periodic newsletters explaining the work of the charity, or opportunities to visit and view the work of the charity wouldn't breach these conditions. So, a wildlife conservation charity that allowed members admission to its sites to view its conservation work wouldn't be regarded as providing services or facilities for personal use.
>
> The payment of a subscription to a charity to simply receive a copy of its magazine isn't a payment to become a member of the charity. Such a payment is the purchase of a magazine subscription and can't be Gift Aided.
>
> 3.37.5 Similarly, the opportunity to take part in activities by which the charity carried out its charitable objectives are acceptable as long as the activities don't amount to making personal use of its facilities. So, a youth organisation that provided various activities in furtherance of its broader educational objectives wouldn't be regarded as providing services or facilities for personal use.
>
> 3.37.6 Membership subscriptions that secure the right to personal use of facilities or services aren't gifts. So, for example, subscriptions that are made in order to obtain for an individual or individuals' tuition, coaching or other educational instruction are not gifts. Similarly, subscriptions to a sports charity or a charitable film society are not acceptable if they secured for members the free or discounted use of, say, a golf course or a swimming pool or the viewing of films that aren't available on similar terms to non- members.
>
> 3.37.7 Where a charity separates that part of the membership subscription that simply gives the basic rights of membership and does no more than cover the basic administration costs of the charity from any part that relates to the provision of services or facilities the membership element can be a gift. So, for example, a sports charity that charges a basic membership subscription, with additional, variable, training or playing charges depending on the member's standard, could

> regard the basic membership as a gift. The additional training or playing charges couldn't be treated as gifts. A charity that charges a standard membership fee that covers membership and participation couldn't treat any part of the subscription as a gift if participation in the activities involved personal use of services or facilities."

191. The reference by Mr Brown to under 18s comes from the following passage:

> "Paying other people's subscriptions
>
> 3.37.10 The payment to a charity to secure individual membership rights for a person other than the donor aren't gifts to the charity. This includes an individual membership purchased for a family member (spouse, parent) that's not secured as part of a family membership scheme. This is because although the payment is made to the charity the gift is to the person whose membership subscription is being paid.
>
> However, this doesn't extend to payments made in respect of a donor's minor children (children under 18 years of age). So, a payment that satisfies the conditions to be treated as a gift if made in respect of the donor personally will be accepted as a gift if it's made for their minor child."

192. It seems to us that Mr Brown has misinterpreted this passage. It doesn't say that where services are provided to a minor any payment made by the parent or guardian for membership will be a gift.

193. But although Mr Brown has foresworn any suggestion that the appellant runs a school, one of his arguments seems to reflect something that the Guidance deals with in connection with educational charities at 3.34[25]:

> "3.34.1 This section explains when educational trusts (Trusts) can claim Gift Aid in respect of payments made to such Trusts by parents and persons connected to a pupil.
>
> 3.34.2 A Trust is established to provide education for children as an alternative to state education. Parents may pay for textbooks, exercise books, exam fees and consumable materials. However, they're often not required to pay any set fees to cover the costs of tuition and other overheads, but instead may make payments described as donations.
>
> 3.34.3 The payment of fees to a charity isn't a gift to charity and so fees paid to a Trust aren't eligible for the Gift Aid Scheme. Whether non-fee payments (donations) made by parents (and persons connected to them) to a Trust qualify as Gift Aid payments depends upon the surrounding circumstances and the situation for each Trust is judged on its own merits.
>
> 3.34.4 There's a cost in providing education for a child and if that cost is met in consequence of the Gift Aid payments being made to the Trust then that cost is a benefit for the purposes of the Gift Aid Scheme. This includes the cost of tuition, heating and lighting of premises and other

[25] The text refers to trusts, but we do not see why it should not apply to charitable companies.

administrative costs, which would be taken into account by a private school in setting fees.

Whether or not a benefit is received 'in consequence of' the Gift Aid payments is a question of fact to be determined in the light of the surrounding circumstances. In particular, it's important to consider whether the Trust would be able to meet the costs of providing the education in the absence of the donations.

In considering whether the level of fees is sufficient to cover operating costs trusts can take account of reliable, ongoing income sources such as endowments, but not one-off or periodic donations or grants where no binding commitment exists.

3.34.5 As far as alternative sources of funding are concerned, these are relevant only in as much as they form part of all the circumstances a court might look at in deciding whether the overall funding structure was genuinely able to maintain the activities of the charitable trust to the extent that additional contributions from individuals receiving a benefit were unnecessary.

3.34.6 Where the trust has a genuine fee structure in place HMRC will accept that the benefit of receiving education arises from payment of the fees. Consequently, the receipt of education wouldn't be received as a consequence of making donations over and above the fees and so those donations could qualify for Gift Aid. A genuine fee structure is one where fees are charged in respect of all students and the fees are set at such a level that enables the Trust to operate without needing additional support.

3.34.7 Where there's no fee structure or only nominal fees are charged, insufficient to enable the trust to operate without additional donations the additional donations give rise to a benefit. Such consequential benefits will generally be in excess of the benefit limits for donations made by parents and persons connected to them and so the donations will usually fail as Gift Aid payments.

3.34.8 Where there's no fee structure or only nominal fees are charged, but sufficient alternative, unconnected, funding sources can be clearly identified, there will be no benefit arising as a consequence of donations from persons connected with the children receiving education. In situations where this is clearly the case, providing the other Gift Aid criteria are met, Gift Aid relief might be available on those donations."

194. It seems to us from the accounts we have set out that less that 60% of the appellant's annual income comes from parental contributions. What we do not know is how much of the expenditure, particularly on salaries etc relates to the tuition. On this basis we would not be prepared to say that all or some of the parental donations are not gifts without a further and more detailed analysis of the accounts[26].

[26] We might also wish to consider whether the elaborate provisions in sections 420 and 421 ITA, which were clearly designed to help well known major charities with formidable lobbying power who provide access to land and buildings, discriminate against charities of the appellant's type and size.

Refunds

195. As to item (3)(i) (refunds) HMRC refer to s 416(3) ITA 2007 which provides that a donation cannot be subject to a condition for repayment. The appellant's website says that if a pupil is not able to attend a refund may be possible. That discretion means that there is "a condition as to repayment".

196. We do not consider that the possibility of a refund of itself is such a condition. If any particular monthly payments were refunded then we would agree that they were not gifts.

Benefits

197. As to item (3)(ii) HMRC say there is a benefit in the form of education received by an associated person, the child of the donor, and it is received in consequence of the donation.

198. In any event the small benefits rule is broken, as the appellant has stated that the payment by the donors is £5 to £8 per week and the real cost of providing tuition is between £25 to £30.

199. Mr Brown says that HMRC are looking at these figures the wrong way round. He says that the benefit is about 16% of the value of the services provided which is small in relation to the donation

200. We agree with HMRC that the provision of tuition is a benefit where the donation is made by a parent, as the child would be an associated person within s 417 ITA 2007 read with s 993 and s 994(1)). Where the payment is made by a guardian the test must be whether the child is connected within the meaning of s 417 as so read: it is not a given, as it is with a parent/child connection.

201. We agree with HMRC that the small benefits provisions in s 418 do not apply. The value of the benefit is, absent any other suggestion, the cost to the appellant of providing the service and the size of the benefit is not to exceed a percentage of the donation, not the other way round.

Volunteer payments

202. As to item (4) HMRC say that the appellant must physically pay the expenses to the volunteer who can then choose to hand it back. Only then is there a "payment of a sum of money" (s416(2) ITA 2007). Mr Brown seems to accept this. We are not so sure. The case from which HMRC derive their views on this is clearly *Peter Anthony Simpson and others as Trustees of the East Berkshire Sports Foundation v HMRC* [2009] SpC 00732 (Special Commissioner Howard M Nowlan) at [34] to [39].

203. The crucial point to us is that the appellant is liable to pay the expenses claim by the volunteers, and it meets this liability by issuing a cheque which it has the funds to meet, so that its resources are diminished. The action by the volunteer in returning it, tearing it up or simply not presenting it has the effect that, sooner or later, the diminution in resources is reversed. That situation could be achieved though with more palaver by the volunteer giving a cheque for the same amount to the appellant and the appellant

cashing it. The appellant then runs the risk that the payer may not be good for the amount of the cheque.

204. HMRC accept that such an exchange of cheques would amount to payment of a sum of money and this is trenchantly supported by Special Commissioner Nowlan at [39]. To draw a distinction between the two situations is to us picking at nits.

205. We are also struck by Condition EA in s 416(6A) which treats certain waivers as not being gifts if certain conditions apply. The assumption that could be drawn from this is that other waivers can be gifts.

206. We therefore would uphold the appellant's contention on the volunteers' waivers.

Conclusions

207. Although it is not be necessary for our decision as we have held that all the assessments are invalid, it may be worth pointing out that had we not so found, the assessments would have had to be reduced to take account of the fact that contrary to the implication from the assessments, not all of the gift aid payments failed to qualify. Not every donation was made by a parent whose child was receiving tuition. Given the lack of information we would have had to make a decision in principle and ask the parties to agree figures.

Carelessness?

208. Having decided that the only disqualified donations were parental contributions, we consider whether the actions of the appellant in making the claims was careless, as otherwise the penalties imposed could not have stood even if they were not flawed for the reasons we have given. In our view they were not. Mr Brown has been conscientious in examining HMRC's website in relation to membership schemes and other matters, and although he has an incorrect view of what constitutes a benefit in the circumstances of this case, we do not think it was careless of him to come to that view.

Observations

2015-16

209. No assessment has been made for the accounting period of the year ended 5 April 2016. Nor has a repayment been made. We cannot understand why not. HMRC would have assumed that Schedule 1A applies (including as modified by regulation 3 SI 2013/937 in relation to the GASDS claim). But nowhere in the papers can we see that HMRC have informed the appellant that they would enquire into the claims for that year. They are now out of time to do so. Simply telling the appellant that they would not repay is not the opening of an enquiry. They must then repay the full amount.

Interest

210. The assessments were said in HMRC's letters to carry interest from the date on which the income was chargeable to tax, which date was said to be a date 9 months following the end of the "accounting period". We struggle to see where that date comes from. Paragraph 52(6) Schedule 18 provides that interest runs on a paragraph 52

assessment from the date that the payment being recouped was made. Those dates were 5 April 2014, 12 December 2014, 14 April 2015 and 14 April 2016: none is 9 months from the end of an accounting period. But any interest that has been paid will in any event be repaid following the cancellation of the assessment.

211. The papers are also silent about repayment interest. By s 826(3) ICTA repayment interest runs where what is being repaid is income tax in respect of a payment received by a company (s 826(1)(b)) from that date after the accounting period ends to the date of payment. The evidence is that all repayments of income tax suffered were made after the relevant account period, so we would have expected repayment interest to have been paid. But HMRC have not sought to recover repayment interest. This is either because they have not paid any when they should have done, or, if they have paid it, because they have no power to recover it. If it is for the first reason, then they should now pay the repayment interest. If non-recovery is because HMRC do not think they have a power of recovery, then we think they are correct. The only mechanisms for recovering overpaid repayment interest are s 30 TMA or paragraph 52 Schedule 18 FA 1998. The former only applies to repayment supplement given by s 824 ICTA (not this case) and paragraph 52(1)(b) Schedule 18 only applies to recovery of repayment interest to which s 826(8A) applies and that subsection does not apply to a payment of repayment interest where the tax is income tax falling within s 826(1B).

212. We reiterate that we have no power to adjudicate on questions of interest, and in the absence of assessments to recover overpaid repayment interest there can be nothing for us there to adjudicate on. But we suggest that HMRC look into these questions.

Decision

213. The assessments made for the years ended 5 April 2013, 5 April 2014 and 5 April 2015 are, in accordance with s 50(6) TMA, reduced to nil.

214. The penalty assessments made for the years ended 5 April 2013, 5 April 2014 and 5 April 2015 are, in accordance with paragraph 17(1) Schedule 24 FA 2007, cancelled.

215. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 28 AUGUST 2018