



TC02048

Appeal number:TC/2012/1247

VAT – Input Tax – The Appellant a “not for profit” incorporated Society providing welfare and charitable services for sick and injured animals – Was the Appellant entitled to recover VAT on veterinary fees – No – The Pet Aid scheme was a non-economic activity – the veterinary supplies made to the pet owners not to the Appellant – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**THE PEOPLE’S DISPENSARY FOR SICK ANIMALS Appellant
 (“PDSA”)**

- and -

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

**TRIBUNAL: Judge Michael Tildesley OBE
Mohammed Farooq**

**Sitting in public at Tribunals Service, Phoenix House, 1-3 Newhall Street,
Birmingham on 16, 17 and 18 April 2012**

David Southern counsel for the Appellant

**Vinesh Mandalia counsel instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for HMRC**

DECISION

The Appeal

5 1. The Appellant appeals against HMRC's decision to refuse the following voluntary disclosures:

(1) A voluntary disclosure in the sum of £2,201,250.00 for the VAT periods 11 April 2004 to June 2007;

(2) A 'Fleming claim' dated 26 March 2009 in the sum of £1,917,323.00 for the periods March 1993 to December 1997 inclusive.

10 (3) A voluntary disclosure dated 29 March 2010, in the sum of £3,854,999 for the VAT periods 1 November 2007 to 31 August 2011.

15 2. The Appeals in respect of the first two disclosures had been consolidated under Appeal number TC2010/3798. After hearing representations the Tribunal decided to consolidate the third Appeal with the other Appeal under Appeal number TC2012/1247.

3. The Appellant is a "not for profit" incorporated Society providing welfare and charitable services for sick and injured animals. The Appellant was established in 1917 and now constituted under People's Dispensary for Sick Animals Acts 1949 and 1956.

20 4. The Appellant's charitable objects are to provide free medical or surgical treatment to animals belonging to persons who appear to the Appellant to be unable to afford the service of a veterinary surgeon and to do all such other things as are incidental or the Society may deem conducive to the attainment of those objects.

25 5. The Appellant delivers its veterinary services to those in financial hardship through a national network of 43 Pet Aid hospitals and five Pet Aid branches. In geographical areas too small for a Pet Aid hospital, the Appellant arranges for local veterinary practices ("Pet Aid practices") to provide treatment to sick and injured pets free of charge to registered owners under the Pet Aid scheme. Currently there are 375 Pet Aid practices.

30 6. The dispute in this Appeal is whether the Appellant was entitled to recover the VAT on the fees charged by the veterinary practices under the Pet Aid scheme. The Appellant argued that Pet Aid practices supplied it with services for consideration with the result that the VAT incurred on those supplies was attributable to the Appellant's taxable supplies made to registered pet owners. The Appellant, therefore, had the right to deduct the VAT on the supplies of the Pet Aid practices.

35 7. HMRC disagreed with the Appellant's contention relying on three separate arguments which were

(1) The Pet Aid scheme was not an economic activity (Non-Economic issue).

(2) The supplies of services by Pet Aid practices were made to the registered pet owners not to the Appellant (To Whom issue).

(3) The Appellant was making exempt supplies of insurance services (Insurance issue).

- 5 8. The Tribunal heard evidence from Dr Stuart Duff, Principal Veterinary Surgeon, and Mr Russell Eaton, Head of Accounting and Financial Control, for the Appellant. The witness statement of Ms Lesley Gilding, HMRC's review officer, and an agreed bundle of documents were admitted in evidence.

Background

- 10 9. The Appellant is a large national charity, registered in England and Scotland. In 2010 its total incoming resources were £93 million. The Appellant was ranked 42nd nationally on the Charity 100 Index in terms of the size of its overall income.

- 15 10. The Appellant's income was sourced from a mixture of fundraised income and commercial income in a ratio of approximately 3:1. The range of income streams was diverse but about 40 per cent of the total income came from gifts in wills.

11. In 2010 the Appellant expended £60 million on its charitable activities, of which £48 million was spent on the Pet Aid hospitals. Mr Eaton stated that the annual cost of the Pet Aid scheme was £6 million VAT inclusive which was sourced from charitable income (£5.6 million) and fees from registered pet owners (£0.4 million).

- 20 12. In 2010 the Appellant treated 407,000 sick and injured animals and administered 383,718 preventative treatments. The Pet Aid hospitals and the Pet Aid scheme covered 78.3 per cent of all eligible households in the United Kingdom.

Pet Aid Scheme

- 25 13. The Appellant introduced the scheme in 1993, and its format has remained largely unchanged since that date. The structure of the scheme allowed the Appellant to exert a more effective control on its costs. The predecessor to the scheme which involved veterinary practices screening pet owners for eligibility, treating the animals and then inviting the Appellant to pay the costs in full proved unaffordable. Under the former scheme the veterinary practices had no incentive to treat animals within
30 defined budgets. A key feature of the Pet Aid scheme was to provide Pet Aid practices with a regular defined pool of money which enabled registered pets that fell sick or were injured to be treated free of charge.

- 35 14. The scheme was open to pet owners who did not have the financial resources to pay for veterinary services. A pet owner was eligible for the scheme if he lived within the postcode boundary of a Pet Aid practice, in receipt of housing or council tax benefit and registers in advance with the Appellant. The application for registration

must be supported by a payment of £5¹ by way of a postal order and documents evidencing receipt of Housing or Council Tax Benefit.

5 15. The payment of £5 was described as an administration charge (hereinafter known as the registration fee²) in the application form. The registration fee was initially £2 when the scheme was introduced and has been increased incrementally since 1993. Dr Duff explained that a fee was imposed so that pet owners understood the value of the services offered by the Appellant. The level of the fee was a balancing act to ensure that principal donors were not discouraged from making donations and that animals did not suffer.

10 16. The Appellant on receipt of a completed application form issued a certificate to the pet owner valid for a fixed period of six months³. The owner must produce the certificate each time he visited a Pet Aid practice. A pet owner who was not registered or did not hold a valid certificate would not be entitled to receive veterinary services free of charge.

15 17. The Pet Aid scheme was restricted to one companion animal per household. The application form made explicit that registration operated as a passport to the Appellant's funded free treatment. Previous application forms emphasised that the Appellant provided charitable veterinary assistance. The current application form stated that the Pet Aid services were funded entirely by public support.

20 18. The information to Applicants on the scope and limitations of Pet Aid emphasised that throughout the duration of eligibility under Pet Aid the pet owner remained a client of the nominated practice. If a registered owner chose to consult another practice the Appellant would not accept responsibility for any fees incurred. The practice declaration on the application for registration stated that it agreed to
25 accept the pet owner as a client of the practice.

19. Dr Duff accepted that the statements on the various documentation regarding pet owners being clients of the nominated practice were correct. Dr Duff, however, said there was a divergence between the official statements and the perceptions of the participants to the scheme. He considered that the Pet Aid practices regarded the pet
30 owners as the Appellant's clients. The pet owners were split between perceiving themselves as the Appellant's clients or clients of the Pet Aid practices.

20. Veterinary practices were required to enter into formal signed contracts with the Appellant to offer Pet Aid services. The contracts incorporated a set of rules and guidance notes which dictated the delivery of the charitable veterinary service from
35 the Pet Aid practices.

¹ £7.50 from November 2011.

² The charge paid by the registered owners was variously described in the Appeal proceedings as an access charge, administration charge and registration fee. The Tribunal adopts the neutral registration fee as the appropriate description in the decision.

³ 12 months in the case of pensioners.

21. The guidance notes re-affirmed the principle that registered pet owners were entitled to receive free of charge veterinary attention within the scope of the service. The Appellant paid the Pet Aid practice a monthly capitation charge for each registered client irrespective of whether or not treatment was provided. The capitation payments continued until cessation of the period of registration even where the pet had died during the registration. A certificate of registration was valid for a period of six months or twelve months in the case of those in receipt of state pensions. Pet owners were required to re-apply for registration if they wished to remain eligible for support under the Pet Aid scheme.

22. The Appellant also made additional payments for registered pets which suffered from chronic conditions. The additional payments fell into two categories. Class A which covered serious conditions such as, diabetes and Cushings Syndrome, and Class B for less expensive continuous medication or expensive treatments not given continuously. Class A payments ceased at the end of the month in which the pet died.

23. The Pet Aid scheme also provided a facility of special payments which was designed for emergency situations and to assist eligible pet owners who have never been previously registered to achieve initial registration. Applications for special payments were submitted jointly by the veterinary practices and the pet owner. Only one application was permitted on behalf of a pet owner. Also the practice must secure whatever payment the pet owner could afford against the treatment costs before submitting the application. Notification of the approval was made to the practice and the pet owner. Successful applications would also result in the registration of the pet owner as a Pet Aid client of the practice for a period of six months. Dr Duff also asserted that the pet owners were required to pay the registration fee. The guidance emphasised that although the pet owners were expected to contribute towards the initial treatment costs, they could not be required to pay for any treatment provided after registration.

24. The Pet Aid practice was required to complete a treatment receipt on each attendance of a registered pet owner. The practice was required to give brief clinical details and the category of treatment given on the receipt. Also the practice had to include details of the charge that would have to be made for the treatment if the pet owner had been a fee paying client. The purpose of this information was to raise the pet owner's awareness of the value of the Appellant's charitable gift. Finally the practice was obliged to encourage the pet owner to make donations to the Appellant which if made were recorded on the treatment receipt.

25. The monthly per capita allocations as at September 2008 stood at £9.60 for each of the first 100 registered clients, £7.20 for the second 100 registered clients and £6 for subsequent registered clients. The payments for chronic case allocations were £30 for class A conditions and £20 per animal for class B. These payments were exclusive of VAT.

26. At the beginning of each month the Appellant supplied each Pet Aid practice with a list of their current registered Pet Aid clients. The list signified those animals

which had been awarded additional payments for chronic conditions. The practice was required to return the list for the preceding month by the 10th day of each month with dates of first attendance of clients entered with all relevant treatment receipts attached. On receipt of the list the Appellant guaranteed to make monthly payments to the Pet Aid practice. The monthly payment comprised:

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- (1) Number of first 100 registrants x allocation;
- (2) Number of second 100 registrants x allocation;
- (3) Number of subsequent registrants x allocation;
- (4) Number of Class A chronic cases x allocation;
- 10 (5) Class B chronic cases x allocation;
- (6) Special payments;
- (7) VAT on (1-6) above;
- (8) A deduction for donations received.

27. The purpose of the monthly payment was to provide a pool of money out of which those registered pets that fell sick or were injured must be treated free of charge. The Appellant's guidance notes emphasised that

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“These monthly payments should be regarded as a fund awarded to the practice for the provision of the Pet Aid practice service, to an ethically acceptable standard free of charge to all registered pets requiring veterinary attention”.

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28. Dr Duff was of the view that the funding arrangements for the Pet Aid scheme were commercially attractive to practices, pointing out that the scheme had a number of Corporate practices which were renowned for their commercial approach to veterinary services.

29. The Pet Aid practice was responsible to the pet owner for the diagnosis and treatment of the registered animal. The practice was obliged to administer the treatment required without consultation and or approval from the Appellant. Dr Duff explained that where more costly treatment was required the practice took the risk as to whether an additional payment would be made by the Appellant. Dr Duff pointed out that a veterinary surgeon was in breach of professional ethics if he refused treatment. Also a surgeon who delayed treatment awaiting the Appellant's authorisation for the additional payment would not be welcome on the Pet Aid scheme. Dr Duff considered that the financial risk to the practices was, however, mitigated by the Appellant's guidance on the making of additional payments.

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30. The rules and guidance notes specified which services were not covered by the Pet Aid scheme. The non-eligible services included amongst others: house calls and out of call charges, prophylactic treatments, health checks and pregnancy diagnosis and laboratory procedures not essential for diagnosis. The rules and guidance emphasised that practices must provide the Pet Aid service to an ethically acceptable standard without charge to all clients who hold a certificate of eligibility whose

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registered pets required veterinary attention. It was not permissible for practice staff to offer a higher level of treatment, or more expensive medications, to a registered pet with the expectation that the client contributed towards or pays for that treatment.

5 31. Dr Duff accepted that the Appellant principally provided administrative support to Pet Aid practices in connection with the scheme. The Appellant would on occasions provide clinical advice to the practice which would normally be restricted to supplying treatment protocols and advice on ethical standards within a charitable context. Dr Duff, however, pointed out that each of the Appellant's hospitals had its own treatment protocols. In those circumstances the Appellant did not circulate the
10 protocols widely to the Pet Aid practices. Dr Duff acknowledged that the Appellant's principal role was to provide the Pet Aid practices with funding to carry out treatments of injured and sick animals belonging to owners unable to afford private veterinary fees.

15 32. Dr Duff explained that if a pet owner lived within the catchment area of Pet Aid hospital he would have to register in the same way as the Pet Aid scheme to receive free veterinary treatment for his sick or injured animals. The owner, however, would not have to pay a registration fee. The Appellant's veterinary staff administered the treatment from the hospitals direct to the pet owners. The Appellant acknowledged that Pet Aid practices acted in their own right. They were not the Appellant's agents
20 when administering the treatment.

The Parties to the Pet Aid Scheme

33. Before dealing with the disputed issues the Tribunal considers it helpful to identify the relationships that make up the Pet Aid scheme which are:

25 (1) The Appellant and registered pet owners, whereby the owners pay a charge to the Appellant and are issued with a certificate of eligibility which entitles the owners to free veterinary services from Pet Aid practices for their nominated pets during the currency of the certificate.

30 (2) The Appellant and Pet Aid practices, whereby the Appellant supplies the practices with a pool of money to fund the treatment of sick and injured animals whose owners are unable to afford private veterinary fees.

(3) The Pet Aid practices and registered pet owners, whereby the Pet Aid practices provide diagnosis and treatment of the sick and injured animals belonging to registered pet owners.

35 34. The parties differ in their analysis of the relationships for VAT purposes. The Appellant viewed the relationships as a tri-partite arrangement whereby the pet owner paid consideration to the Appellant for veterinary services, which was provided by the Pet Aid practices. In this analysis the Appellant was making taxable supplies to the pet owner for consideration (the £5 registration fee) and the Pet Aid practices were making taxable supplies to the Appellant. The VAT incurred on the supplies of the
40 Pet Aid practices was attributable to the Appellant's taxable supplies to the owners, which allowed the Appellant to treat the VAT as input tax. The Appellant considers

that its analysis holds good if the Tribunal finds that the Pet Aid practices made supplies to both the pet owners and the Appellant.

5 35. HMRC's interpretation of the relationships was that they constituted three separate transactions. The transaction between the Appellant and the pet owners was not a taxable supply for consideration. The predominant purpose of the Appellant's dealing with the pet owners was to further its charitable objects of providing free veterinary services to those who cannot afford them. The Pet Aid practices supplied their veterinary services to the pet owners not to the Appellant. The fact that the Appellant provided the Pet Aid practices with a pool of money to fund the veterinary services did not change the nature of the supply made by the practices to the owners. 10 The Appellant by providing the money pool was simply fulfilling its charitable objects. In HMRC's analysis the pet owners were the recipients of the supplies of veterinary services in which case the VAT charged on those supplies by the Pet Aid practices was irrecoverable. The pet owners were the final consumers. The pool of 15 money provided by the Appellant to the Pet Aid practices constituted third party consideration for the supplies by the practices to the pet owners.

Non-economic Issue

The Parties' Representations

20 36. The Appellant argued that underlying HMRC's contentions was the unspoken assumption that if a charity was acting as a charity, it could not be acting as a business. In the Appellant's view, this assumption had no bearing upon the correct application of the VAT directive which was concerned with whether the Appellant was carrying on an economic activity. The fact that the activity was charitable was co-incident. The Appellant referred to a range of decisions (*CCE v RSPCA* VAT 25 decision 618; *HMRC v Three Counties Dog Rescue* [2011] TC 01653 and *CCE v Church Schools Foundation* [2001] EWCA Civ 1745) where charitable organisations were found to be undertaking economic activities.

30 37. Whether the Pet Aid scheme was an economic activity was a mixed question of law and fact. The Appellant considered that the following features of the scheme when looked at in the round supported the conclusion that the Appellant was engaged in economic activity.

- (1) The financial scale of the operation with £6 million spent annually on the scheme.
- (2) The degree of administrative resource and professional expertise involved.
- 35 (3) The continuous operation of the scheme since 1993.
- (4) The scheme was part of the Appellant's primary business and not some peripheral activity.
- (5) The payment of fees by pet owners to gain eligibility to the scheme.
- 40 (6) The scheme was designed to provide a workable and cost conscious solution and replaced previously unaffordable arrangements.

38. HMRC contended that the Appellant's activities insofar as they related to the operation of the Pet Aid scheme was not an economic activity for the purposes of Articles 2(1)(c) and 9(1) of the Council Directive 2006/112/EC. Further the provision of Pet Aid to those eligible was not a taxable supply made by the Appellant in the course or furtherance of any business carried on by the Appellant. According to HMRC the true nature of the Appellant's activity was to provide charitable support to ensure that veterinary treatment was available to sick and injured animals for pet owners who appeared to the Appellant to be unable to afford private veterinary fees. The Appellant was not concerned with the supply of services to the pet owners for consideration.

39. HMRC submitted that the registration fee paid by pet owners wishing to register with the Pet Aid scheme was outside the scope of VAT. The fee was paid to cover the Appellant's administration costs and was a flat fee entirely unrelated to the cost of the services provided by the Pet Aid practices. There was no direct link between the payment made by the pet owners and the supply of services from Pet Aid practices. Thus the Appellant was not making a taxable supply to the pet owners in the course or furtherance of any business carried on by it.

The Parties' Correspondence

40. By a letter dated 24 March 1993, the Appellant informed HMRC⁴ that it would be introducing a Pet Aid scheme with effect from 1 July 1993 and sought confirmation of its view that the registration fee would be outside the scope of VAT. The grounds put forward were that the fee was not a prepayment for treatment services but intended to recover part of the Appellant's administration costs, and that the Pet Aid scheme was a non business activity. HMRC responded on 5 May 1993 confirming that the registration fee could be treated as non business activity.

41. By letter dated 3 January 1997 the Appellant informed HMRC that it was considering a subsidised service rather than a free one, and sought confirmation as to whether the charge under such an arrangement would constitute a taxable business activity and so enable the recovery of related input VAT. HMRC indicated on 10 January 1997 that a subsidised service would be a taxable supply which would enable the recovery of input tax on those supplies.

42. On 1 March 2004 the Appellant wrote to HMRC requesting confirmation of its ruling in 1997 on the taxable character of the proposed subsidised services. HMRC confirmed its 1997 ruling on 17 March 2004.

43. On 14 November 2007 the Appellant following the *RSPCA* decision made a voluntary disclosure requesting the repayment of input tax on the basis that the registration fee paid by pet owners was consideration for the taxable supply of treatment. HMRC rejected the voluntary disclosure and that rejection formed the basis of this appeal. HMRC, however, at that time expressed the view that the Pet Aid registration fee was consideration for a taxable supply. On review dated 29 March

⁴ The respondents were then known as Her Majesty's Customs and Excise.

2010 HMRC overturned its decision regarding the status of the registration fee, stating that it was outside the scope of VAT. The Appellant has not introduced a subsidised service.

Reasons

5 44. For the purposes of Directive 2006/112/EC, VAT is concerned with any person who *independently carries out ... any economic activity ... whatever the purpose or results of that activity*. The economic activities referred to *comprise all activities of producers, traders and persons supplying services ... and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining*
10 *income therefrom on a continuing basis shall in particular be regarded as an economic activity*. The Court of Justice of the European Union has stressed that the concept of economic activity must be given a wide scope, and is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results.

15 45. Although EU legislation uses the term *economic activity* rather than the term *business*, the provisions of UK legislation relating VAT to *business* activities are derived from Directive 2006/112/EC article 9. Thus under section 4 of the VAT Act 1994 VAT is levied on supplies of goods and services in the course or furtherance of a business. Section 24(1) provides that input tax is VAT charged on the supply to
20 taxable person, of goods or services used or to be used for the purposes of a business carried on by him. Finally a person is liable or entitled to be registered for VAT only if he makes, or intends to make, taxable supplies in the course or furtherance of a business. It follows from above that a supply which is not made in the course or furtherance of a business is not subject to VAT. The expression *business* is, therefore,
25 fundamental to the operation of VAT.

46. It is common ground between the parties the wide definition of economic activity enables charities to make taxable supplies and recover input tax attributable to those taxable supplies. The fact that an activity may be performed in the furtherance of charitable aims and objectives does not by definition prevent it from being deemed
30 a business activity for VAT purposes. In VAT terms charities are generally regarded as making a mixture of business and non-business supplies.

47. HMRC accepted that the Appellant was a taxable person, having been registered for VAT with effect from 6 July 1981 and that it did make taxable supplies. The dispute concerned whether a particular aspect of the Appellant's activities, the Pet Aid
35 scheme, was an economic/business activity.

48. The word "business" is not exhaustively or precisely defined in the VAT legislation. The High Court in *C & E Comrs v Lord Fisher* [1981] STC 238 at 246 set out six indicators to ascertain whether the activity is properly to be regarded as a business:

- (1) Whether the activity is a serious undertaking earnestly pursued or a serious occupation not necessarily confined to commercial or profit-making undertakings.
- 5 (2) Whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity.
- (3) Whether the activity has a certain measure of substance as measured by quarterly or annual value of taxable supplies made.
- (4) Whether the activity is conducted in a regular manner on sound and recognised business principles.
- 10 (5) Whether the activity is predominantly concerned with the making of taxable supplies to consumers for a consideration.
- (6) Whether the taxable supplies are of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them.
- 15 49. The Tribunal makes the following findings of fact in relation to the Pet Aid scheme:
- (1) The Appellant has operated the Pet Aid scheme on a continuous basis since 1993, which has been earnestly carried out in pursuit of its charitable objective of providing free veterinary treatment to sick and injured animals of pet owners who could not afford the fees of veterinary surgeons.
- 20 (2) The Pet Aid scheme was well organised and efficiently run. The relationships between the parties to the scheme were documented clearly setting out their respective obligations. The Appellant exercised control over the costs of the scheme, which ensured its affordability. The scheme had been set up to overcome the financial weaknesses of the previous scheme.
- 25 (3) The Appellant incurred significant annual expenditure of about £6 million on the Pet Aid scheme.
- (4) The expenditure of the Pet Aid scheme was funded 93.34 per cent (£5.6 million) from public donations, the majority of which comprised legacies, and 6.66 per cent (£0.4 million) from the registration fees.
- 30 (5) The registration fees had increased incrementally since the inception of the scheme: £2 (1993), £3 (1995), £5 (2008), and £7.50 (November 2011).
- (6) The contribution of the registration fees to the annual cost of running the scheme was minimal.
- 35 (7) When fixing the level of the registration fee the Appellant ensured that it did not represent a significant departure from its charitable object of free veterinary services which would have deterred the giving of donations.
- (8) The payment of the registration fee entitled pet owners to free veterinary services from Pet Aid practices for their nominated pets during the currency of the certificate.
- 40 (9) A pet owner would not receive free veterinary services unless he had been registered under the scheme and had paid the registration fee.

- (10) The registration fee was payable whether or not the eligible pet owner received treatment for his nominated animal during the currency of the certificate.
- 5 (11) The registration fee was a fixed flat fee which had no relationship to the actual costs of the veterinary treatment if administered to the registered animal during the currency of the certificate.
- (12) A registered pet owner was not required to contribute to the treatment costs of the Pet Aid practice in respect of his sick or injured animal, although donations were encouraged.
- 10 (13) The Appellant described the registration fee in the application form as an administration fee.
- (14) The Appellant provided Pet Aid practices with a regular pool of money to fund free veterinary services to sick and injured animals of eligible pet owners.
- 15 (15) The per capita payments to the Pet Aid practices were made regardless of whether the pet owners have attended the practice.
- (16) The Appellant did not provide the veterinary services direct to the pet owners.
50. Each of the indicators of business activity identified in the *Lord Fisher* case are merely that, and may point in differing directions. The Tribunal's task is to assess
20 the various indicators and come to decision on whether the activity in question is business or non-business.
51. The Appellant was a large national charity with total incoming resources of £93 million and ranked 42nd nationally on the Charity 100 Index. Given that context the
25 Tribunal considers its findings on the organised, efficient and continuous nature of the Pet Aid scheme as against the other indicators was not persuasive in determining whether the Pet Aid scheme constituted a business/non business activity. The Tribunal is of the view given the size and the established nature of the Appellant that the themes of organisation and efficiency were constant throughout the whole range of its activities encompassing both the economic and non-economic aspects.
- 30 52. The Tribunal considers that its findings on the character of the actual supplies that make up the Pet Aid scheme carried weight in determining whether the Appellant was engaged in a business activity. The critical supply is the one between the Appellant and the pet owner. The Appellant maintained that this was a taxable supply of services. The European Court of Justice in, *Staatssecretaris van Financien v*
35 *Coöperatieve Aardappelenbewaarplaats* (Case 154/80) [1981] ECR 445 and *Tolsma Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509 has emphasised that a provision of services is taxable only if there is a direct link between the service provided and the consideration received.
- 40 53. The Tribunal concludes from its findings there was no direct link between the registration fee paid by the pet owners to the Appellant and the veterinary services supplied by the Pet Aid practices. The registration fee was paid regardless of whether the animal of the registered Pet Owner received treatment during the currency of the

eligibility certificate. The amount of the registration fee was flat and had no relationship to the costs of the veterinary services provided under the Pet Aid scheme. The pet owner paid no consideration to the Pet Aid practice which was required to provide the veterinary services free of charge. The Appellant did not provide the veterinary treatment direct to the pet owners.

54. In this respect it is helpful to compare the facts of this Appeal with that for the Tribunal decision in *RSPCA*. Here the RSPA provided veterinary services direct to pet owners who were unable to pay for private veterinary fees. At the end of the treatment the RSPCA gave a bill, which was based on the owner's ability to pay, for its services. RSPCA expected the owners to meet the bill, although not all owners paid up. RSPCA excused no cases from payment. The Tribunal at page 17 of the decision said:

“I also hold that where payments were made for treatment there was a direct link and on that point I accept the submission of Mr Thornhill who posed the question *why was the payment made?* to which the answer followed *because the treatment had been carried out*, nor do I consider that the policy of RSPCA not to enforce such payments makes any difference”.

55. The direct link found between the treatment and the fee paid by the pet owner in *RSPCA* was not present in this Appeal. In the *RSPCA* case the pet owners were given a bill for the cost of the treatment and expected to pay for it or at least make a contribution, the amount of which was related to the cost of providing the supply. The registration fee paid to the Appellant by the pet owners had no relationship to the treatment costs given by Pet Aid practices. There was no element of sufficient reciprocity between the payment of the fee and the treatment received.

56. The question, therefore, what was the precise character of the registration fee. The Appellant in its documentation described it as an administration charge or to assist with administration costs of the Pet Aid scheme. The benefit given by payment of the fee subject to meeting the other eligibility requirements was receipt of a Pet Aid certificate which entitled the holder to free treatment of his sick or injured pet from a Pet Aid practice.

57. The Tribunal finds that

(1) The size of the registration fee was not related to the potential benefits afforded to the pet owner from the Pet Aid scheme. The fee was a flat fee which was the same for all pet owners. The amount was nominal which has only seen a small increase since the inception of the scheme in 1993. Under the scheme pet owners received different degrees of benefit from no to expensive treatment for the same payment. The Tribunal is satisfied that the necessary reciprocity or direct link has not been established between the payment of the registration fee and the benefits under the Pet Aid scheme (see *Apple & Pear Development Council v CCE* (Case 102/86) [1988] STC 221 at 235).

(2) The purpose of the payment was to give the Pet Owner access to free veterinary services, which has been funded overwhelmingly (93.34 per cent) by

charitable donations. The provision of free veterinary services to sick and injured animals of owners unable to pay for private veterinary fees was the Appellant's charitable object not incidental to the object.

58. In view of its findings the Tribunal agrees with HMRC's characterisation of the registration fee which was that it was outside the scope of VAT. The fee was a contribution to cover the administration costs of the Appellant, and not a taxable supply by the Appellant in the course or furtherance of any business carried on by it.

59. The Tribunal holds that the Appellant's activities in so far as they related to the operation of the Pet Aid scheme did not constitute economic activities. The Pet Aid scheme did not involve the Appellant in the making of taxable supplies. The Pet Aid scheme in reality was the manifestation of its charitable object the provision of free veterinary services to owners unable to afford private veterinary fees. The Pet Aid scheme was funded by charitable donations. The Pet Aid scheme was not concerned with the making of taxable supplies to consumers for a consideration. Further the activities of the Pet Aid Scheme were not of a kind which, subject to differences of detail, commonly made by those who seek to profit by them.

To Whom Issue

60. This issue is only relevant if the Tribunal is wrong on its finding that the Appellant did not engage in economic activities in relation to the operation of the Pet Aid scheme. The *to whom* issue presupposes that the Appellant was making a taxable supply to the pet owners in consideration of the registration fee. The dispute between the parties was whether the veterinary services of the Pet Aid practices were supplied to the Appellant alone or to both the Appellant and the pet owner or to the pet owner alone. If the Tribunal finds that either one of the first two situations applied, the Appellant was entitled to recover the VAT charged on the veterinary services in furtherance of its taxable supplies to the pet owner. If the Tribunal finds that the supplies of the Pet Aid practices were to the pet owners alone, the Appellant was not entitled to recover the VAT charged on the veterinary services.

The Parties' Representations

61. The Appellant submitted that ultimately the *to whom* issue was a question of fact. The proper inference to be drawn from the facts was the supply of veterinary services by the Pet Aid practices was made to the Appellant or to the Appellant and the registered pet owners.

62. The Appellant played the key role at all stages in the Pet Aid scheme by first arranging payment of the registration fees which enabled access for registered pet owners to the veterinary services of the Pet Aid practices, and then actively providing those veterinary services by means of its contracts with Pet Aid practices. According to the Appellant there was close collaboration between the Appellant and the Pet Aid practices. The fact that the pet owners were described as the clients of the Pet Aid practices was not determinative of the issue. The VAT invoices issued by the Pet Aid practices named the Appellant as the payer of the services.

63. The Appellant contended as a matter of law that where a person arranges a supply and receives a benefit from that supply for which he pays that supply is made to him. It is irrelevant that the same transaction may also constitute a supply to someone else (*C&E Comrs v Redrow Group Plc* [1999] STC 161. The Appellant received benefits from paying for the veterinary services, namely, enabling the fulfilment of its charitable object and simultaneously discharging its obligations to the pet owners. In the Appellant's view the payment to the Pet Aid practices did not constitute third party consideration. The decision of The Court of Justice in *Loyalty Management v R & C Comrs.* (Case C-53/09 and C-56/09) [2010] STC 2651 was concerned with business promotion schemes and had no relevance to the disputed issues in this Appeal. Essentially the Appellant was involved in one overall transaction not two separate transactions.

64. The Appellant saw no merit in HMRC's argument that a finding in its favour compromised the fundamental principle that VAT was a tax on consumption. According to the Appellant the reason why the pet owners only paid VAT on the registration fees and not on the veterinary fees was that they indirectly received the benefit of large charitable donations which was VAT free. The Appellant stated that its situation was analogous to zero-rated supplies which were subsidised by every taxable and exempt supplies, in that the input tax was recoverable even though no output tax was paid.

65. HMRC disagreed with the Appellant's submissions contending that VAT was charged at each stage of the supply chain and that where there was a supply for consideration by a taxable person the final burden fell on the consumer. The Court of Justice in *Loyalty Management* emphasised that consideration of economic realities was a fundamental criterion for the application of the common system of VAT. Such consideration involved identifying the nature of the transactions involved.

66. According to HMRC the facts of this Appeal showed that the veterinary services were supplied solely to the pet owners. The Pet Aid practices and the Appellant regarded the pet owners as clients of the practices. When treatment was required the registered pet owner would take his sick or injured animal to the Pet Aid practice. The diagnosis and the treatment were made by the Pet Aid practice in consultation with the owner. The practice was obliged to provide that treatment without consultation with and or approval from the Appellant. Under this arrangement the pet owner was liable to pay for the treatment. The only reason that he did not was because of his financial circumstances. The Appellant in pursuit of its charitable object provided Pet Aid practices with a pool of money to pay for the treatment of animals belonging to registered pet owners. This pool of money constituted third party consideration for the supplies to pet owners which meant that the VAT incurred was irrecoverable as the supplies were to the final consumer, the pet owner.

40 ***Reasons***

67. The Tribunal identifies the following legal principles which are relevant to the determination of the *to whom* issue:

- 5 (1) The principle of the common system of VAT involves the application to goods and services up to and including the retail trade stage, of a general tax on consumption exactly proportional to the price of the goods and services whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged (*Banca popolare di Cremona Soc Coop arl v Agenzia Entrate Ufficio Cremona* (Case C-475/03) [2006] ECR I – 973).
- 10 (2) The consideration of economic realities is a fundamental criterion for the application of the common system of VAT, and secondly as regards the identification of the person to whom goods/services are supplied (*Auto Lease Holland BV v Bundesamt fur Finanzen* (Case C-185/01) [2005] STC 598).
- 15 (3) Only an economic definition of the supply of goods/*services* (Tribunal's italics) is compatible with the objectives of the VAT directive. This view is in accordance with the purpose of the VAT directive, which is designed inter alia to base the common system of VAT on a uniform definition of taxable transactions. This objective might be jeopardised if the pre-conditions for a supply of goods/*services* varied from one member state to another (*Auto Lease*).
- (4) Identification of the nature of the transactions is necessary to provide an answer to the *to whom* question (*Loyalty Management*).
- 20 (5) It is not a requirement of the VAT directive that for a supply of goods or services to be effected for consideration, the consideration for that supply must be obtained directly from the person to whom the goods or services are supplied. The directive provides that the consideration may be obtained from a third party (*Loyalty Management*).
- 25 (6) The six characteristics of a supply of services are (1) it must have constituted a transaction, (2) something must have been done by the person said to have made the supply, (3) that which was done must not fall within the definition of a supply of goods, (4) that which was done must have been capable of being used by and for the benefit of an identified recipient (5) the benefit given to an identified recipient must be capable of being regarded as a cost component of the activity of another person in the commercial chain, (6) that which was done must have been done for a consideration: (a) there must be a legal relationship between the provider of the service and the service; (b) pursuant to the relationship there must have been reciprocal performance; (c) to amount to consideration the remuneration received by the provider of the service must constitute the value actually given in return for the service supplied (*Mirror Group Newspapers Ltd v C & E Commrs* [2000] STC 156).
- 30 (7) The fact that someone else had also received a service as part of the same transaction, did not deprive the taxable person who had instructed the service and who had to pay for it, of the benefit of the deduction (*Redrow Group plc*). The Tribunal did not accept HMRC's submission that the decision in *Loyalty Management* had questioned the correctness of the decision in *Redrow Group plc*.
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(8) But to ask who benefited from a service is not necessarily to find the answer to the question of *to whom* the service was supplied (*R&C Commrs. v Jeancharm Ltd* [2005] STC 918).

5 68. Turning to the facts of the Appeal, the Tribunal agrees with HMRC's analysis that the economic reality of the Pet Aid scheme was that it consisted of three separate transactions, namely:

10 (1) The Appellant and registered pet owners, whereby the owners pay a charge to the Appellant and are issued with a certificate of eligibility which entitles the owners to free veterinary services from Pet Aid practices for their nominated pets during the currency of the certificate.

(2) The Appellant and Pet Aid practices, whereby the Appellant supplies the practices with a pool of money to fund the treatment of sick and injured animals whose owners are unable to afford private veterinary fees.

15 (3) The Pet Aid practices and registered pet owners, whereby the Pet Aid practices provide diagnosis and treatment of the sick and injured animals belonging to registered pet owners.

69. The two key transactions for the analysis of the *to whom* question were the Pet Aid practices and registered pet owners, and the Appellant and Pet Aid practices. The nature of the transaction between Pet Aid practices and registered pet owners
20 comprised taxable supplies of veterinary services. The Tribunal finds that it was the registered pet owners who initiated the treatment from the Pet Aid practices by taking their sick or injured animals to the practice. The diagnosis of the illness and the treatment of the animal were carried out by the veterinary surgeon in consultation with the pet owners. The veterinary surgeon was required by his professional code of
25 ethics to administer the necessary treatment. The Pet Aid documentation emphasised that the registered pet owners were the clients of Pet Aid practices. On these facts the registered pet owners were the recipients of the taxable supplies. They used the service and received a benefit from it. The Appellant, however, pointed out that it provided the consideration for the supplies not the registered pet owners. In those
30 circumstances the pet owners could not be the recipients of the supplies. The validity of the Appellant's submission depended upon whether the Appellant's payment to the Pet Aid practices constituted third party consideration.

70. Before considering the question of third party consideration the Tribunal examines the nature of the transaction between the Appellant and the Pet Aid practice.
35 The transaction was governed by the terms of a written agreement which incorporated the rules and guidance notes for the operation of the Pet Aid scheme. The objective of the agreement was to extend the availability of a charitable veterinary service to geographical areas where there was no Pet Aid hospital. The objective was achieved by helping registered pet owners by paying the cost of the treatment carried out by Pet
40 Aid practices. The Tribunal is satisfied that the terms of the agreement supported the finding that the Appellant stepped in for the pet owner and paid his bill for veterinary services from the Pet Aid practice.

71. The Tribunal considers that the evidence on the actual arrangements between the Appellant and the Pet Aid practices reinforced the view that the Appellant's role was essentially a funding one. Dr Duff confirmed that the Appellant's relationship with the Pet Aid practices was directed at providing the necessary finance to carry out the treatment of injured and sick animals belonging to owners unable to afford private veterinary fees and giving the required administrative support in connection with the Pet Aid scheme. Further the Tribunal is satisfied on the evidence that the Pet Aid practices were obliged to administer the treatment required without consultation and or approval from the Appellant. There was no persuasive evidence that the Pet Aid practices and the Appellant collaborated with the provision of clinical services. The Tribunal formed the view that when the Appellant gave clinical advice it was infrequent and restricted to high level guidance on treatment within a charitable context. The Appellant did not instruct Pet Aid practices on the treatment given to sick or injured animals brought in by the registered pet owners.

72. The Appellant asserted that it benefited from the supplies of veterinary services of Pet Aid practices by discharging its essential charitable role and giving assurance to its donors that their gifts were being deployed to helping sick and injured animals. The fact that the Appellant derived a benefit from the supplies was not conclusive that it received a service. The Tribunal holds that the benefits identified by the Appellant were incidental and indirect to the services supplied by Pet Aid practices. The veterinary services were directed at treating the particular animal brought into the practice by the pet owner.

73. Equally the Tribunal considers the fact that the invoice for veterinary services was in the name of the Appellant did not determine the identity of the recipient of the services. The invoice took the form of a self billing invoice prepared by the Appellant. This arrangement was a reflection of the administrative strictures imposed by the Appellant to ensure financial control of the Pet Aid scheme. The Tribunal is of the view that the details of the self billing invoice were outweighed by the compelling evidence supplied by the written terms and the actual arrangements for the transaction between the Appellant and the Pet Aid practices.

74. The Appellant argued that the facts of this Appeal were very different from those in *Loyalty Management*. The capitation fees paid to Pet Aid practices were not related to the number of treatments provided by the practices. Further the Appellant was simply outsourcing the supply of treatments which it would have made in its own veterinary hospitals. The practices did not own anything and the pet owners made no payment for the treatment other than the registration fees.

75. The significance of the *Loyalty Management* decision for this Appeal was not its specific facts which the Tribunal accepts were directed at business promotion schemes but the restatement of general principles that effect the application of the common system of VAT. The key principles identified in *Loyalty Management* which were relevant to this Appeal related to the economic reality, the nature of the transactions, and the existence of third party consideration. The Tribunal has already dealt with its findings on the nature of the transaction between the Appellant and Pet

Aid practices, concluding that essentially it was one of funding the veterinary bills on behalf of the registered pet owners.

76. The Appellant contended that its funding of the Pet Aid practices did not constitute third party consideration because the capitation fees were not related to the number of treatments provided by the Pet Aid practices. The Tribunal notes that this argument could also be deployed against the Appellant's assertion that it was the recipient of the veterinary services supplied by the Pet Aid practices.

77. The Court of Justice in a series of cases⁵ sets out the criteria for determining whether a supply of goods/services was effected for consideration which apply equally to the question of third party consideration and can be summarised as follows:

(1) There must be a direct link between goods supplied or services provided and the consideration received.

(2) There must be a legal relationship between the supplier and recipient pursuant to which there is reciprocal performance, the remuneration received by the supplier constituting the value actually given in return for the supply.

(3) The consideration must be capable of being expressed in money.

(4) The consideration is a *subjective value*.

78. The Appellant's argument regarding capitation fees and the number of treatments is dealt with by the *subjective value* criterion. Lord Walker of Gestingthorpe in *Lex Services plc* [2003] UKHL 67 at 79 explained *subjective value*:

"... that such consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria".

79. Lord Walker referred to Lord Justice Hobhouse's formulation of subjective value in *Rossgill Group Limited v Customs and Excise Commissioners* [1997] STC 811:

"The second question involved the value of the barter element in the supply of the blouse. The value is that which the parties put on it, attributed to it, in the actual transaction between them. It is not a valuation exercise but simply the giving of an answer to a factual question, which is normally a simple exercise. In the present case the answer is provided by the parties own documentation".

80. The Pet Aid contract documentation specified that the capitation fees together with additional sums for chronic conditions provided a pool of money out of which those registered pets that fell sick or injured must be treated free of charge. In the Tribunal's view it was clear from the documentation that the Appellant's monthly payments constituted consideration for the individual treatments given by the Pet Aid

⁵ See *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA* (Case 154/80) [1981] ECR 445 at 454, *Julius Fillibeck Söhne GmbH & Co KG v Finanzamt Neustadt* (Case C-258/95) [1998] STC 513, *Kuwait Petroleum (GB) Ltd v Customs and Excise Commissioners* (Case C-48/97) 1999 STC 48, & 2001 STC 62

practices, and in that respect represented third party consideration. Dr Duff confirmed that the Pet Aid practices viewed the funding arrangements as commercially viable which demonstrated that the consideration received was related to the actual value of the treatments administered to the animals of the registered pet owners.

5 81. The Tribunal's conclusion that the pet owners were the recipients of the
supplies of the Pet Aid practices, and that the Appellant's role was restricted to
providing the pet owners with the necessary funds to pay for the services was
highlighted by the special payment element of the Pet Aid scheme. Here the Appellant
would cover any shortfall of up to £200 in the veterinary fees that a pet owner was
10 liable to pay provided the owner met the eligibility requirements for the Pet Aid
scheme. Where a special payment was made the owner was required to discharge any
outstanding fees for the initial course of treatment to his sick or injured animal. The
special payment regime displayed in sharp contrast the precise nature of the respective
transactions. The pet owner was the consumer of the veterinary supplies with the
15 Appellant stepping in and meeting the shortfall so that the pet owner could fulfil his
obligation to pay the bill for those services.

82. The Tribunal summarises its findings as follows:

(1) The pet owners instructed the Pet Aid practices to treat their sick and
injured pets, and received the benefit of those supplies of veterinary services in
20 the form of diagnosis and treatment of their animals.

(2) The pet owners had an agreement with the Appellant that it would pay for
the veterinary services on their behalf.

(3) The Appellant did not instruct the Pet Aid practices on the treatment of the
sick and injured animals belonging to registered owners.

25 (4) The Pet Aid practices administered the treatment to the sick or injured
animals without consultation with or the approval of the Appellant.

(5) The benefits identified by the Appellant of essentially furthering its
charitable objects were incidental and indirect to the services supplied by Pet
Aid practices.

30 (6) The fact that the self billing invoice named the Appellant for the purposes
of paying the veterinary services was not determinative of the identity of the
recipient of the veterinary services.

(7) The nature of the Appellant's relationship with the Pet Aid practices was
that it stepped in for the pet owner and paid his bill for the veterinary services.

35 (8) The capitation and additional payments for chronic conditions funding
arrangements was the agreed method for paying for the individual treatments.

83. The Tribunal concludes from the above findings that the registered pet owners
were the recipients and the consumers of the veterinary services from the Pet Aid
practices. The Appellant was not a recipient of those services either on its own or in
40 conjunction with the pet owners. The Appellant's payment to the Pet Aid practices

constituted third party consideration. The Appellant was, therefore, not entitled to recover the VAT incurred on the fees of the Pet Aid practices.

84. The above analysis is consistent with the principles underpinning the common system of VAT. The Appellant asserted that the supplies of the Pet Aid practices were used for the purpose of its taxable supplies to the registered owners in the sense that there was a direct and immediate link between the two supplies with the veterinary services being a cost component of the taxable supplies. In this respect the Tribunal agrees with HMRC's submission that the concept of direct and immediate link incorporates an economic relationship between the cost of the incoming supply and the price of the outgoing supply. In this Appeal the Tribunal finds that there was no direct and immediate link between the two supplies because the cost of the veterinary treatments as compared with the price charged for registration was so disproportionate with costs exceeding price by 1,500 per cent⁶.

85. The Tribunal's decision that the pet owner is the recipient and the consumer of the veterinary supplies results in a position which conforms to the common system of VAT. The pet owner as final consumer is not entitled to recover the VAT incurred on the supplies and the economic relationship between cost and price in the transaction chain is upheld.

Insurance Issue

86. This only comes into play if the Tribunal is wrong on either the non-economic or the *to whom* issue. The issue presupposes that the supplies of the Pet Aid practices were made to the Appellant. Given that position the Appellant states that it was entitled to recover the VAT on the supplies of the veterinary services because they were a cost component of the taxable supplies to the registered pet owners. HMRC disagrees contending that the supplies to the taxable owners were exempt supplies of insurance services.

The Parties' Representations

87. The Appellant contended that the registration fee paid by the pet owners was not an insurance premium because there was no risk allocation by it. Insurance contracts provided for a sum of money to be payable on a contingency, for example, fire in a building or getting ill on holiday. According to the Appellant, there was no contingency element in the transaction between the Appellant and the pet owner. Once the pet owner was registered, the Appellant was liable to pay the capitation fees to the Pet Aid practices without the need for a further event to occur. In the Appellant's view there was simply a commercial bargain between the Appellant and the Practices.

88. HMRC argued that the transaction between the Appellant and the pet owners had all the essential hallmarks of an insurance transaction. The situation here was that

⁶ The annual costs of the Pet Aid scheme were £6 million. The annual contribution from registration fees was £0.4 million.

5 in return for prior payment of the registration fee, the Appellant indemnified the pet owner against the cost of veterinary treatment for his sick or injured animal provided the treatment fell within the scope of the Pet Aid scheme. The registration fee was akin to a premium, and the risk covered by the Appellant was illness or injury to the animal belonging to the pet owner.

Reasons

10 89. Group 2 of schedule 9 of the VAT Act 1994 exempts from VAT insurance transactions and reinsurance transactions. Prior to 1 January 2005 the exemption was restricted to a supply of insurance made by a permitted insurer. The legislation was changed as a result of the decision of the Court of Justice in *Card Protection Plan Ltd v C & E Commrs* (Case C-349/96) [1999] STC 270 which ruled that any person supplying insurance qualified for the exemption, as did supplies of insurance transactions effected by block policyholders.

15 90. There is no legal definition of insurance. The Court of Justice in *Card Protection Plan* stated [1999] STC 270 at 291:

“16. The Sixth Directive does not define the expressions 'insurance transactions' and 'insurance agents' used in art 13B(a).

20 17. With respect, first, to the interpretation of the expression 'insurance transactions', it must be observed that EC Council Directive 73/329 does not define the concept of insurance either. However, as the Advocate General states in para 34 of his opinion, the essentials of an insurance transaction are, as generally understood, that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded.

25 18. It is not essential that the service the insurer has undertaken to provide in the event of loss consists in the payment of a sum of money, as that service may also take the form of the provision of assistance in cash or in kind of the types listed in the annex to EC Council Directive 73/239 as amended by EC Council Directive 84/641. There is no reason for the interpretation of the term 'insurance' to differ according to whether it appears in the directive on insurance or in the Sixth Directive.

35 19. Moreover, it is common ground that the expression 'insurance transactions' in art 13B(a) covers in any event cases where the transaction is carried out by the actual insurer who has undertaken to cover the risk insured against. As the United Kingdom government has correctly pointed out, it is for the national court to determine whether CPP itself has accepted insurance obligations”.

40 91. In *Medical Defence Union v Department of Trade* [1979] 2 All ER 421 the judge held there must be three specific elements present in any contract of insurance:

- (1) the contract must provide that the insured will become entitled to something on the occurrence of some event;

- (2) the event must be one which involves some element of uncertainty and
- (3) the insured must have an insurable interest in the subject matter of the contract.

5 92. VAT Notice 701/36 which sets out HMRC's policy on insurance regarded generally something as insurance for VAT purposes if it was an activity that required the provider to be authorised as an insurer under the provisions of the Financial Services and Markets Act 2000 (FSMA). The provisions of FSMA make it illegal for UK businesses to effect contracts of insurance without being authorised to do so (with the exception of certain bodies specifically granted exemption from the need for
10 authorisation). The VAT notice acknowledged the decision in *Card Protection Plan* and that insurance supplied by unauthorised insurers was exempt from VAT. The VAT Notice, however, warned that HMRC might refer unauthorised insurers to the Financial Services Authority in case it wished to prosecute.

15 93. At the hearing the Tribunal expressed concerns about the presentation of this issue particularly by HMRC. Until raised by the Tribunal there was no reference to the legal position prior to 1 January 2005 which affected part of the period covered by the voluntary disclosures. The evidence did not deal with the question of whether the Appellant was an authorised insurer. The Tribunal acknowledges that the burden of proof is on the Appellant. The Tribunal, however, considers that HMRC has some
20 responsibility to establish what it asserts on the issue of insurance.

25 94. In some respects the analysis of the insurance issue is strained by the fact that it is the third alternative scenario presented by HMRC for denying the Appellant's voluntary disclosures. This means that the Tribunal has to assume that the Appellant was engaged in economic activities in respect of the Pet Aid scheme and that the supplies of the Pet Aid practices were made to the Appellant. Those assumptions are contrary to the Tribunal's findings on the first two issues which are in the alternative. In the Tribunal's view it may have been better for HMRC to focus its case on a narrower range of issues.

30 95. The Tribunal is required to make decisions on the evidence and the arguments presented to it. It is not the Tribunal's job to make good the deficiencies in the parties' presentations.

35 96. The Tribunal finds that the economic reality of the transaction between the Appellant and the pet owners was not one of insurance. The registration fee did not have the characteristics of a premium. It was a flat fee and had no relationship to the potential costs of the purported risks of injury or illness to the pet. Payment of the registration fee gave the pet owner access to free veterinary services during the currency of the registration certificate without the necessity of making a claim when his animal fell ill or was injured. There was no evidence that the Appellant had accepted insurance obligations in respect of the Pet Aid scheme. The Tribunal holds
40 that the transaction between the Appellant and the pet owners was not an exempt supply of insurance.

Decision

97. The Tribunal decides that

5 (1) The Appellant’s activities in so far as they related to the operation of the Pet Aid scheme did not constitute economic activities.

(2) The registered pet owners were the recipients and the consumers of the veterinary services from the Pet Aid practices. The Appellant was not a recipient of those services either on its own or in conjunction with the pet owners.

10 (3) The transaction between the Appellant and the pet owners was not an exempt supply of insurance.

98. In view of the Tribunal’s decision on the economic issue and in the alternative on the *to whom* issue, the Appellant is not entitled to recover the VAT incurred on the veterinary fees of the Pet Aid practices. The Tribunal, therefore, dismisses the Appeal.

15 99. 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
20 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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TRIBUNAL JUDGE

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