



TC02215

Appeal number: TC/2009/16120

CORPORATION TAX – Assessment – Whether the Appellant was entitled to claim gift aid on donations to its trading subsidiaries – No – Appeal dismissed – Assessment confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ODYSSEY (TENDERCARE) LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE
PETER DAVIES**

Sitting in public at Bedford Square London on 4 July 2012

Mr Thomas Hazeldine and Mr Richard Morgan for the Appellant

**Mr Matthew Smith, counsel instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

The Appeal

1. The Appellant appealed against an assessment dated 15 July 2008 in the revised sum of £99,935.05. HMRC issued the assessment to recover the said sum of monies which HMRC alleged had wrongly been claimed by and mistakenly paid out to the Appellant under the Gift Aid provisions pursuant to section 25 of the Finance Act 1990.

2. The Tribunal announced its decision with reasons at the end of the hearing on 4 July 2012. The Tribunal held that Mr Morgan did not give the sum of monies totalling £354,379 on various dates from 27 September 2005 to 27 January 2006 to the Appellant charity. The Appellant, therefore, was not entitled to claim gift aid relief on that sum of monies. Given those findings the Tribunal dismissed the Appeal and confirmed the assessment in the sum of £99,935.05. The Tribunal also stated that its findings implied no wrong-doing on the part of Mr Hazeldine and Mr Morgan. The purported claim for Gift Aid arose from a misunderstanding of the legal requirements governing such claims.

3. At the hearing the parties agreed pursuant to Rule 35(3) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 that it was unnecessary for this decision to include full or summary findings of facts and reasons for the decision. On 9 July 2012 HMRC changed its mind and required the Tribunal to supply a full decision.

Background

4. The Appellant provides an holistic approach to healthcare giving therapy and support to people with cancer and their carers. Daisa Morgan, Tom Hazeldine and Richard Morgan set up the Appellant in 1996 when a site at Westfield Lakes in North Lincolnshire was purchased. The site consisted of a derelict six bedroom guest house and two cottages. The two cottages were converted into a therapy centre, whilst the guest house was refurbished and operated as a hotel under the trading name of Reeds Hotel. During the next eight years additional land was acquired, the hotel was extended to 24 bedrooms, a teaching room was constructed separate from the hotel and a new premises, Nightingale House, was purchased for the purposes of the charity. Mr Morgan funded from personal resources the acquisition and development of the Westfield Lakes site.

5. On 5 September 2000 the Appellant became a company limited by guarantee and was registered with the Charity Commission for England and Wales on 9 June 2004 under charity number 1104244.

6. Reeds Hotel was managed by a company limited by shares with the same trading name and incorporated on 19 September 1997. The hotel land and buildings were owned by Odyssey Holdings Limited which leased the hotel property and land to Reeds Hotel Limited under a full repairing lease dated 27 September 2000. Odyssey Holdings was incorporated on 28 March 2000 as a company limited by

shares. In 2005/2006 the Appellant owned the entire issued share capital in Odyssey Holdings, which in turn owned the entire share capital of Reeds Hotel Limited.

5 7. On 11 December 2006 the Appellant submitted a claim to Gift Aid payment of £101,035.06 in relation to donations of money from Mr Richard Morgan totalling £358,279.00 in the period ending 27 January 2006.

10 8. On 5 January 2007 HMRC met the Appellant's claim for Gift Aid under a *pay now – check later* working practice. On 29 January 2007 HMRC commenced an audit to verify through documentary evidence of bank statements that a qualifying donation had been made by a qualifying donor to a qualifying charity. In this case the purpose was to obtain bank statements from Mr Morgan demonstrating that £358,279 had been transferred to the Appellant's bank account. Despite numerous requests the Appellant did not provide HMRC with the necessary information. On 18 July 2008 HMRC issued an assessment to recover the sum of £101,035.06 which had been paid over to the Appellant as Gift Aid relief.

15 9. On 05 September 2008 the Appellant lodged a late appeal with HMRC against the notice of assessment. The material produced in support of the appeal showed that Mr Morgan only paid £3,900 of the £358,279 to the Appellant with the remainder going to either Reeds Hotel Limited or Odyssey Holdings Limited. HMRC amended its assessment to £99,935.05 which allowed that part of the claim relating to the gift of £3,900.

25 10. Reeds Hotel Limited went into administration on 17 September 2009. The administrator accepted an offer of £36,500 from the directors for the business and assets of the company, which were sold to Prexmanor Limited, a newly incorporated, wholly owned subsidiary of Reeds Hotel Limited. Prexmanor was then sold for a nominal sum to a new social enterprise holding company Reeds Country Hotel Limited. Mr Hazeldine as at 26 May 2011 was the only current member of the social enterprise holding company. According to Mr Hazeldine the financial and governance affairs of the Appellant, and the new social enterprise holding company were now fully separated with the charity standing alone.

30 11. On 8 October 2009 the Appellant appealed out of time to the Tribunal which extended the time for filing the appeal on 26 March 2010.

35 12. At the hearing on 4 July 2012 Mr Hazeldine presented the case and gave evidence for the Appellant. Mr Morgan also testified for the Appellant. An agreed bundle of documents was admitted in evidence. Finally Mr Hazeldine read passages from a book entitled *Beneath the Mask*¹ which described the personal journeys of the co-founders of the charity and the creation of the Odyssey Cancer Care Centre.

¹ Published in 2010 by Bridge Publishing UK Limited

The Dispute

13. Mr Hazeldine contended that the Appellant was entitled to Gift Aid relief on the entirety of Mr Morgan's donation totalling £358,279. HMRC disagreed, stating that relief was restricted to the sum of £3,900 given direct to the Appellant

5 14. Mr Hazeldine argued that the principle behind the Gift Aid scheme was that charities should be able to reclaim tax on free will, voluntary donations made to them for the purposes of the furtherance of the charity and its aims. Mr Hazeldine considered that the Appellant and its two trading subsidiaries were one entity. Mr Hazeldine asserted that Mr Morgan's donations to the trading subsidiaries ultimately
10 benefited the Appellant charity, and should, therefore, be eligible for Gift Aid.

15 15. HMRC's principal position was that Mr Morgan's donation, except the £3,900 payment, was not a sum of money made to a charity, and as a result did not meet the statutory requirements for Gift Aid relief as set out in sections 25(1) and (2) Finance Act 1990. In the alternative if the donation was made to a charity Mr Morgan received
15 a benefit from the donation in that it discharged his personal guarantee for the liabilities of Reeds Hotel and Odyssey Holdings with the Royal Bank of Scotland. If that was the case the donation was not a qualifying donation in accordance with section 25(2)(d) of the 1990 Act.

The Law

20 16. Sections 25(1) and (2) Finance Act 1990 set out the legal requirements for Gift Aid relief at the time the disputed payments were made. Section 25(1) and (2) provides so far as is relevant to this Appeal as follows:

25 Donations to charity by individuals.

25 (1) For the purposes of this section, a gift to a charity by an individual ("the donor") is a qualifying donation if—

(a) it is made on or after 1st October 1990,

(b) it satisfies the requirements of subsection (2) below, and

(c) the donor gives an appropriate declaration in relation to it to the charity.

30 (2) A gift satisfies the requirements of this subsection if—

(a) it takes the form of a payment of a sum of money;

(b) it is not subject to a condition as to repayment;

35 (e) neither the donor nor any person connected with him receives a benefit in consequence of making it or, where the donor or a person connected with him does receive a benefit in consequence of making it, the relevant value in relation to the gift does not exceed ["the limit imposed by subsection (5A) below] and the amount to be taken into account for the purposes of this paragraph in relation to the gift does not exceed £250.

40 (12) For the purposes of this section—

(a) "charity" has the same meaning as in section 506 of the Taxes Act 1988 and includes each of the bodies mentioned in section 507 of that Act

17. Section 506 of the Taxes Act 1988 defines a charity as any body of persons or trust established for charitable purposes only. Section 507 is restricted to the National Heritage Memorial Fund, The Historic Buildings and Monuments Commission for England, and The British Museum.

The Facts Found

18. The Appellant was set up to provide a holistic approach to support and care for persons with diagnoses of cancer and their families. The care to families continued for a further 12 to 18 months should the person with cancer die. Over the years the Appellant has delivered over 18,000 complementary therapies and supported persons with over 15 different types of cancer. The Appellant provided its services from the Odyssey Cancer Centre at Nightingale House which was situated outside the Westfield site, housing Reeds Hotel.

19. The Appellant did not charge for its services, and has to find more than £108,000 per annum to run the Odyssey Centre. The Appellant relied on individual donations and voluntary contributions from the founders of the charity for its funding.

20. On 14 May 2004 the Appellant entered into an agreement with the trustees of the Odyssey Foundation whereby the net assets and undertaking of the Foundation were transferred to the charity. The main asset of the Foundation was a building known as Bodhi Lodge² on the Westfield site but separate from the hotel. The Lodge was used for workshops, Reiki healing and attunements and meditation. The fees for these activities were given to the Appellant.

21. Odyssey Holdings Limited owned the hotel from which Reeds Hotel Limited traded. The only source of income for Odyssey Holdings Limited was the rent for the hotel which was not paid by Reeds Hotel Limited. In the year ending 31 August 2006 Reeds Hotel's debt of £1.7 million to Odyssey Holdings Limited was written off in its accounts.

22. Reeds Hotel Limited traded as a provider of hotel, restaurant and spa services. The hotel had three stars and utilised the Best Western Hotel chain as a marketing agency to sell bedrooms. The hotel had 26 bedrooms and employed 45 permanent and temporary staff. The hotel offered facilities for weddings and conferences. The profit and loss accounts for the years ended 31 August 2005 and 31 August 2006 showed a loss of £2,641,220 and £1,415,137 respectively. The Administrator appointed for Reeds Hotel Limited on 17 April 2009 reported that the statutory accounts for the year ended 31 August 2007 showed that the Company made losses and continued to rely upon Odyssey Holdings Limited for financial support.

² Bodhi Lodge is now part of The Lakeside Education Centre. The expenditure on Bodhi Lodge was originally incorporated as a fixed asset in the Appellant's accounts. In August 2008 the Appellant's trustees reviewed its accounts for earlier years and decided that the expenditure on Bodhi Lodge should be included in the current assets as a debt due by Odyssey Holdings.

23. Odyssey Holdings Limited and Reeds Hotel Limited were not companies established for charitable purposes only.

24. Mr Hazeldine asserted that Odyssey Holdings Limited and Reeds Hotel Limited were set up to provide income for the charity from their profits. The reality was somewhat different. In the year up to 31 August 2006, 94 per cent of the funding to run the charity was donated by one of the trustees and six per cent from other sources. On 17 November 2005 the Appellant acquired the share capital of Odyssey Holdings Limited by way of gift from Mr Morgan. Since the acquisition of the shares, Odyssey Holdings Limited and Reeds Hotel Limited have traded at a loss. In 2006 the Appellant loaned Odyssey Holdings Limited funds to pay for the hotel and its further development.

25. The Charity Commission³ observed that the monies spent on the Appellant's charitable activities were extremely low in proportion to the monies expended on the trading subsidiaries. The Charity Commission estimated that the Appellant's expenditure on its charitable activities was almost nine times less than that spent elsewhere with the majority going to Reeds Hotel Limited. The Tribunal concluded that the trading subsidiaries were loss-making ever since their transfer to the Appellant and that it was the Appellant subsidising the trading subsidiaries rather than vice versa.

26. The details of Mr Morgan's payments on which Gift Aid relief was claimed were as follows:

Paid into Odyssey Holdings Limited

Date	Payment (£)
27 September 2005	30,000
27 October 2005	46,300
25 November 2005	9,600
29 November 2005	39,800
11 January 2005	10,650
27 January 2006	40,964
Total	177,314

³ See the Minutes of the Meeting on 24 April 2009 between Mr Hazeldine and Mr Morgan and the Charity Commission.

Paid into Reeds Hotel Limited

Date	Payments (£)
18 November 2005	49,065
1 November 2005	128,000
Total	177,065

Paid into the Appellant

Date	Payments (£)
29 November 2005	3,900
Total	3,900

- 5 27. The Appellant supplied the schedule of Mr Morgan's payments as set out above. HMRC had experienced difficulties with identifying the totality of Mr Morgan's payments from the bank statements provided by the Appellant. HMRC believed that the payment of £128,000 to Reeds Hotel Limited was used to discharge its PAYE debt. The Tribunal is satisfied that the Appellant's schedule represented an accurate
10 statement of Mr Morgan's payments.

Reasons

28. This issue in this Appeal is not about the value of the Appellant's charitable work or the motives of those controlling its affairs. The issue is whether the relevant statutory criteria for Gift Aid relief have been met.
- 15 29. Section 25(1) of the 1990 Act specifies that in order for a donation to qualify for Gift Aid the individual must gift a sum of money to a charity. The Tribunal's findings showed that Mr Morgan's payments totalling £358,279 on which Gift Aid relief was claimed were either made to Odyssey Holdings Limited or Reeds Hotel Limited
20 except for £3,900 which was given to the Appellant. Odyssey Holdings and Reeds Hotel were not charities within the meaning of sections 506 and 507 of the Taxes Act 1988 as applied by section 25(12)(a) of the 1990 Act. Thus Mr Morgan's payments totalling £354,379 to those two companies were not qualifying donations and the Appellant was not entitled to the Gift Aid of £99,935.05 on those payments.
- 25 30. The Appellant accepted that Mr Morgan gave £354,379 to Odyssey Holdings Limited and Reeds Hotel Limited but sought to argue that the monies were ultimately for its benefit. The Appellant contended that in reality the three companies were one.

According to the Appellant, the two trading companies were established to provide from their profits the funding for the Appellant's charitable activities.

5 31. The Appellant's argument fails in law and in fact. The wording of the 1990 Act confines Gift Aid to donations made to charities which are bodies established solely for charitable purposes. The 1990 Act does not extend Gift Aid to donations made *for the benefit of* charities. The rationale for this restriction is two-fold. First, payments to a charity would actually be applied for charitable purposes. A gift to a charity results in the trustees of the charity being duty-bound to determine how to apply those funds in the best furtherance of their charitable objects. On the other hand, a gift to a trading subsidiary of
10 a charity would be applied by the directors to the requirements of the subsidiary and not exclusively for charitable purposes. Second, the incorporation of the concept *benefit* would add unnecessary complication and uncertainty in the application of Gift Aid.

15 32. On the facts the Appellant, Odyssey Holdings Limited, and Reeds Hotel Limited were not one entity. They were three separate companies, with different purposes and constitutions. Further Odyssey Holdings Limited and Reeds Hotel Limited have been loss-making ever since their transfer to the Appellant. They have provided no benefit to the Appellant. The reality was that the Appellant was subsidising the trading subsidiaries.

Decision

20 33. The Tribunal for the reasons given above dismisses the Appeal and confirms the assessment in the sum of £99,935.05.

34. The Tribunal made no findings in respect of HMRC's alternative argument (a benefit to Mr Morgan) which is left open if there is an appeal against this decision.

25 35. 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)"
30 which accompanies and forms part of this decision notice.

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**MICHAEL TILDESLEY OBE
TRIBUNAL JUDGE**

RELEASE DATE: 5 July 2012

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