

B E T W E E N:

PARENTS AND CHILDREN TOGETHER

Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

**Tribunal: Stephen Oliver QC (Chairman)
Shahwar Sadeque
Lynneth Salisbury**

Noel J Tyler, VAT Consultant, for the Appellant

Mr Hugh McKay of Counsel, instructed by the Solicitor for Customs and Excise, for the Respondents

Sitting in London on 15 May 2001

Decision: 5 June 2001

DECISION

The appeal

1. At issue in this appeal is a ruling that supplies made by Parents and Children Together (“PACT”) in preparation for prospective adoptions fall to be standard rated. The ruling was given on 5 April 2000 and upheld on review in a letter of 13 October. We quote the ruling -

“... the Commissioners of Customs and Excise are of the opinion that ... the supply of PACT’s service of “home studies” of prospective adopters is not one of exempt welfare. The Commissioners are also of the opinion that the recipients of the supply are the prospective adopters, not the children, and that the place of supply of PACT’s services is the UK. PACT’s service is thus standard-rated for VAT purposes.

Facts

2. The facts found in this Decision are based on the evidence of Andrea Orchard, adoption manager for PACT, and of Catherine Curry, finance director of PACT. They are also drawn from certain documents provided in evidence. One of these, produced by PACT, is called “Introducing Inter-

Country Adoption”. This refers to certain Department of Health publications on inter-country adoption which we have obtained from the Internet.

3. PACT is a non-profit making organisation and a registered charity. Any surplus of income over expenditure is retained in reserves and held to be used for the charitable objects of PACT which are -

“(a) to promote the moral improvement of persons within the Diocese of Oxford and

(b) to relieve destitute and orphaned children by finding homes for them.”

4. PACT operates from premises in Reading. It is an approved voluntary adoption agency. It is officially accredited to undertake inter-country adoption work. The Adoption (Inter-country Aspects) Act 1999 provides for the first time a statutory basis for the regulation of inter-country adoption. It is being brought into effect by stages and when fully operative it will enable the UK to ratify the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption. The Convention’s aims are to:

- ✚ establish safeguards to ensure that inter-country adoptions take place in the best interest of the child and with respect for his or her fundamental rights as recognized in international law and without any profit being made from the process;

- ✚ establish a system of co-operation amongst those who have ratified the Hague Convention to ensure that those safeguards are respected and thereby prevent the abduction of; the sale of, or traffic in children and

- ✚ secure recognition of adoption orders between convention countries.

One provision of the 1999 Act which is already in force is section 13 which inserts a new subsection (3A). This makes it clear that references in the 1976 Adoption Act to “making arrangements for the adoption of a child” includes arrangements for an assessment to indicate whether a person is suitable to adopt a child or not. The effect of this is that only councils and approved voluntary adoption agencies may undertake an assessment of a person’s suitability as an adopter. Section 14, which inserts a new section (section 56A) into the 1976 Act makes it an offence for anyone habitually resident in the British Islands to bring a child into the UK for the purpose of adoption unless they meet the requirements prescribed in the regulations.

5. Adoption is a way of providing a new family for a child when living with his or her own family is not possible. An adoption order, when made, severs all legal ties with the birth family and confers parental rights and responsibilities on the new adoptive family. The birth parents no longer have any legal rights over the child and they are not entitled to claim him back. The adopted child becomes a full member of his or her family, takes the family surname and assumes the same rights and privileges as if he had been born to the adoptive parent or parents.

6. Inter-country adoptions are allowed, by the Department of Health, to proceed only if-

- ✚ the child cannot be cared for in any suitable manner in his own country;
- ✚ inter-country adoption take place in the best interest of the child and with respect for his fundamental rights as recognized in the international law;

and

- ✚ safeguards and standards equivalent to those which apply in domestic adoption are to be applied in inter-country adoption to protect the welfare of the child concerned.

(We have drawn this from a Department of Health publication headed “Intercountry Adoption: Frequently Asked Questions”.)

7. The process relating to inter-country adoptions that PACT, as an approved voluntary adoption agency, undertook to carry out covers four stages.

8. The first stage is the provision of information, advice and counselling for persons considering adopting from overseas. This covers information about the process and the cost of this plus the offer of preparation classes. In the case of PACT this starts with an interview of the prospective adopters with one of its social workers. Not all applicants are accepted as suitable by PACT. Those who are go on to the second stage.

9. The second stage is the assessment. The prospective adopters complete an application form. They give the agency consent to obtain police, social security and written personal references. In the case of PACT the prospective adopter then signs an agreement relating to its charges.

10. The agreement is between the prospective adopters and PACT. The amounts payable are greater for the first application to adopt than for the second. The agreement provided to us reads, so far as is relevant, as follows:

“PACT agrees to undertaking assessment of the applicants in accordance with their professional principles and practice, to present a Home Study Report to their Adoption Panel and to notify the applicants of the Panel recommendation. PACT will then forward the papers to the Department of Health with their recommendation. PACT undertakes to complete the assessment within a reasonable period of time.

THE APPLICANTS agree to pay the costs of the assessment in full (first application to PACT) = £4,230 Payment being due as follows:-

£88.12 prior to initial interview followed by £2,026 at the beginning of the assessment should you wish to proceed with an application and £2,015 four weeks before the Home Study report is presented to the Panel. For administrative convenience, these payments will be made direct to PACT, each payment being non-refundable.”

We were told that all the amounts quoted include amounts equal to VAT. PACT proposes to repay those latter amounts to the prospective adopters if the

present appeal succeeds.

11. As part of the second stage PACT runs inter-country workshops. These are designed to give the protective adopters an insight into what inter-country adoption is like, giving them the chance to meet other adoptive parents, potential and experienced, and to hear talks by child care specialists. The largest part of the second stage is the “Home Study”. This is a comprehensive assessment of the prospective adopters’ suitability to adopt a child from another country; and it operates to prepare the prospective adopters for adoption. The preparation usually takes four to six months from the point that the Home Study begins. It includes a series of meetings between the assigned adoption worker and the prospective adopters and other members of their families. The Home Study report is prepared at the end and then checked and signed by the prospective adopters.
12. The third stage in the assessment of the prospective adopters is the consideration of the Home Study report by the adoption panel. The PACT panel will consist of six to ten individuals, two of whom will be PACT social workers and one will be a medical adviser. The panel considers the report and makes its recommendation to PACT’s “decision maker” who is its chief executive. If the decision is in favour of proceeding to adopt on, the decision and the accompanying papers supporting the prospective adopters’ suitability are submitted to the Department of Health. The Department of Health checks these and, if appropriate, endorses the decision. This is followed by the issue of a certificate of eligibility by the Department of Health. The certificate states that the prospective adopters have been assessed as being suitable to adopt and that a child adopted by the couple will be granted leave to enter the United Kingdom subject to entry clearance and the making of the adoption order.
13. The fourth stage normally involves the prospective adopters taking the decision to go ahead; if so, they travel to meet the child. When they decide to adopt the particular child, they apply to the UK authorities for entry clearance for the child. Where the child’s country is a “designated country” i.e. a Commonwealth country and certain specified foreign countries, the adoption of the child by order of a court of that country will be recognized here. Otherwise adoption will depend on an order of the UK court. All being well the adopters and the child will then travel to the UK. Once the child is home here, PACT offers post-adoption support on a voluntary basis.
14. The fee for assessment and preparation payable by prospective adopters to PACT covers the following items:
 - ✚ Social workers’ fees; these cover work with the prospective adopters and their referees, the preparation of the Home Study report and attendance at the adoption panel.
 - ✚ Agency costs: these include the costs of the agency’s co-ordinator and cover preliminary contacts and interviews, supervision and management, liaison with the local authority and miscellaneous advice and follow up.
 - ✚ Preparation groups.

- ✚ Service support: this includes typing, clerical and administration.
- ✚ Panel: this covers the agency social work members' time and the expenses of the other members.

PACT's work under the agreement with the prospective adopters take them up to the submission of the panel's decision to the Department of Health. Work done after that, e.g. post-adoption support, is not covered by the agreement. We were told that some 6% of applications that reach panel stage are turned down. Applicants who are thought to be unsuitable are usually advised to discontinue at an earlier stage. Occasionally, PACT's leaflets said, prospective adopters who start out applying to adopt from abroad change their application to pursue adoption from within the UK; in that circumstance the prospective adopter may qualify for a reimbursement of the "Home Study" fees.

15. A feature of inter-country adoption, stressed in PACT's leaflet and by the witnesses, is that the children chosen for adoption may be vulnerable and will in many cases be emotionally damaged. Many children will have been abandoned or placed for adoption by parents who cannot be contacted; there will consequently be uncertainties about the health of the children and little or no information about their families of origin.

The case for PACT

16. The case for PACT is based on two contentions. First, it is said that the supplies covered by the agreement are exempt under item 9 of Group 7 of Schedule 9 to VAT Act 1994. This is because PACT's services are directly connected with the protection of children. The reason for the production of the Home Study reports is to assess the suitability of the prospective adopters as providers of, and as persons responsible for, the protection of vulnerable children and their protection from further damage. Second, it is said, the supplies are zero-rated within Schedule 8 Group 7 item 2(c), being services consisting of making arrangements for supplies of services made outside the Member States.

The relevant statutory provisions

17. VAT Act 1994 section 4 provides -

- “(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
- (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply”.

Schedule 9 Group 7 item 9 provides, in respect of exempt supplies, as follows:

“... the supply, otherwise than for profit, by a charity or public body of welfare services and of goods supplied in connection therewith”.

Note (6) to Group 7 provides, so far as is relevant -

“In item 9 “welfare services” means services which are directly connected with -

- (a) the provision of care, treatment or instruction designed to promote the physical or mental welfare of elderly, sick or disabled persons;
- (b) the protection of children and young persons; ...”

The corresponding provision of the Sixth Directive is Article 13A.1(i) which directs the exemption of “... the supply of services and goods closely linked to the protection of children ... by bodies ... recognized as charitable ...”.

18. Schedule 8, item 2(c) provides, in respect of zero-rated supplies, as follows -

- “2. The supply of services consisting of the making of arrangements for -
...
(c) any supply of services which is made outside the Member States.”

Conclusions

19. The first question for us is whether the services provided by PACT for consideration are “directly connected”, or in terms of Article 13A.1(i), “closely linked” with the protection of children. Relevant to this are the following features:

- (i) PACT’s contractual undertakings are with the prospective adopters.
- (ii) PACT’s undertakings which cover the provision of the Home Study reports end with the submission of its Panel's recommendation to the Department of Health.
- (iii) PACT plays no part in finding children for prospective adopters. That is the responsibility of the agencies in the country where the particular child resides prior to adoption.
- (iv) Until the prospective adopters have been certificated as eligible to adopt, no child will normally have been identified; only the country of residence of children sought for adoption by the prospective adopter will have been selected.
- (v) At any stage during the Home Study process the prospective adopters might decide to give up the idea of an inter-country adoption and go for a local adoption instead; in that case, as noted above, PACT could make a refund.

20. Safeguards and standards laid down by the statutory regime governing inter-country adoption and the procedures adopted within the UK are, as noted in paragraph 6 above, designed to protect the welfare of the child concerned. The consequence of the eventual adoption will be that the child is provided with a new family and, it is to be hoped, with all the care, protection and stability that goes with family life. Overall, therefore, it is generally correct to say that the protection of children is the product of the statutory regime and the domestic procedures. But here, as we have noted, PACT’s contractual services are supplied to the prospective adopters. PACT’s services are designed to enable

the prospective adopters to obtain certificates of eligibility. PACT will always have discharged its contractual commitments before any particular child has been adopted (they will usually have been completed well before any particular child has been identified. The child may well turn out to be in need of protection. But, is protection of children, or something “directly connected” or “closely linked” to protection of children, the character of the services that PACT supplies to the prospective adopters in return for the consideration given by the prospective adopters?

21. We think not. The services are made to the prospective adopters; they are designed to assess the suitability of the prospective adopters for inter-country adoption and, if suitable, to enable them to obtain certificates of eligibility from the Department of Health. Although the end result of PACT’s service, coupled with the prospective adopter’s actual adoption of a child, may be the provision of protection for that child, this does not, we think, mean that PACT’s contractual services are “directly connected with” that state of protection or even “closely linked to” it. For those reasons we are against PACT’s argument that the services are exempt.
22. For PACT’s services to qualify for zero-rating they must consist of the making of arrangements for the supply of services “made outside” the UK. Here, we think, PACT’s services are made wholly in the United Kingdom. PACT’s obligation to provide the services is based on its agreement with the UK prospective adopters who will be United Kingdom individuals. The services are supplied to them and PACT’s commitment to make the supplies comes to an end before any overseas child has been adopted. The services are in fact provided locally and cannot properly be described as made to any child situated outside the United Kingdom. For that reason we are against PACT.
23. We dismiss the appeal.