Charity Buildings

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One of the biggest bones of contention in the world of charity VAT relates to buildings and the cost of VAT on new build.

Put simply, where a charity has to pay a lot of VAT on a building project it will prefer to reclaim it by making taxable supplies (where that is achievable and is a normal commercial situation). Where a charity does not make taxable supplies it would prefer the costs to be zero rated.

Construction of new build property can be zero rated but only where the user is a charity and the activity carried out in the building is not 'business'. But in some cases charities make charges for services which would be exempt if they were a business activity. HMRC tends to say they are a business activity. Charities tend to say they are not.

HMRC seems commonly to get on the wrong side of this debate, as recently shown in the failed appeal in the case of *Longridge on Thames*. This charity provides water sport tuition to children (and a few adults), and makes charges that are below cost. They use volunteer teachers as well. Otherwise, their activity is not unusual and can be replicated by the private or club sectors. In their case the new building was built with donated money. HMRC says the charges make it a business. The charity (with the support of the First Tier Tribunal) said that it does not amount to a business. HMRC had a chance recently to overturn that decision. I admit that I thought their chances were good, for reasons I would be happy to discuss but need not detain us here. But the problem with an appeal to the Upper Tribunal is that it is insufficient for the appellant to ask the Upper Tribunal to make its own mind up on the issue. Instead it must demonstrate that the lower tribunal made a mistake in law. Without that the Upper Tribunal simply accepts that the lower tribunal's decision stands. And that is what happened – the Upper tribunal found no error of law in the earlier decision, and upheld it accordingly.

This case has a kind of resonance with the interesting HMRC policy developments (or, to be more frank, 'evolutions') in the area of input tax recovery on such things as new buildings where the conditions for the zero rate are not met. HMRC is not happy that a charity that makes taxable supplies from such a building can reclaim all of the VAT if the income stream achieved from it is much lower than could possibly support the capital cost. Over the summer HMRC appeared to announce that the input tax in such a case would be restricted to the extent that the value of supplies made did not incorporate the cost sufficiently. This was a significant departure from previous understanding, but is presented by HMRC (as is their wont) as merely being an explanation of existing policy.

It is known that HMRC is contesting at least one case where this is at issue and has issued a number of assessments. But the theory appears to overlook the basic premise in the *French Republic* case that subsidised costs are fully VAT-recoverable if the resultant supplies are taxable, whatever the value of the taxable supplies.

HMRC has more recently sought to finesse their position, saying that loss making charities need fear nothing as long as the costs are reflected in some way in the setting of the prices for services. But it is unclear to me what this is really supposed to mean. The position remains a considerable threat to charities, and we will be 'watching this space'.

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