October 2022.

Charities & Non-profit newsletter

Are we in business?

The basics

VAT must be charged on 'taxable supplies' by a 'taxable person' in the course of furtherance of any business carried on by that person. VAT is recoverable on related costs. A 'taxable person' is an individual, company or organisation, etc. that is registered or liable to be registered for VAT. 'Taxable supplies' are supplies made in the UK other than those qualifying for exemption.

By contrast, a non-business activity is one where no VAT is chargeable on income and no VAT is recoverable on related expenditure.

All very straightforward, but the fact that 'business' is not comprehensively defined in the VAT legislation has resulted in many disputes over the years. Litigation has involved both HMRC and taxpayers making the case for business or non-business treatment depending on the circumstances.

The old business test

A couple of cases in the early days of VAT established the 'business test', with the following six criteria used to determine whether an activity was a business activity for VAT purposes:

- Is the activity a serous undertaking earnestly pursued?
- Is the activity an occupation or function that is actively pursued with reasonable or recognisable continuity?
- Does the activity have a certain measure of substance in terms of the quarterly or annual value of taxable supplies made?
- Is the activity conducted in a regular manner and on sound and recognised business principles?
- Is the activity predominantly concerned with the making of taxable supplies for a consideration?
- Are the taxable supplies that are made of a kind which, subject to differences of detail, are commonly made by those who seek to profit from them?

We were presented with the forty-year-old 'business test' in a recent case with HMRC majoring on the importance of the six criteria despite more recent cases questioning the merit of the test. One such case was Wakefield College (A3/2016/1253) where a two-stage test was applied by the Court of Appeal in concluding that the College was providing education in the course of an economic activity.

The new business test

On 1 June 2022, HMRC announced a change of policy via Revenue and Customs Brief 10 (2022) whereby the two-stage test applied in the Wakefield College case should now be used when determining whether an activity constitutes a business activity. The two stages are:

- Stage 1: The activity results in a supply of goods or services for consideration
- Stage 2: The supply is made for the purpose of obtaining income therefrom (remuneration)

Under the new test, the purpose of a specific activity is the key point. The first stage of the new test necessarily requires there to be a legal relationship between the supplier and recipient and for there to be consideration. An activity that does not involve the making of supplies for consideration cannot be a business activity for VAT purposes. There is then no need to consider the second stage.

If there is a supply for consideration, stage 2 also needs to be answered in the affirmative for an activity to constitute a business activity.Unlike 'consideration', 'remuneration' is not an everyday word in the language of VAT.

The Court of Appeal in Wakefield College made a distinction between 'consideration' (which has a legal meaning) and 'remuneration' (which does not). 'Consideration' for VAT purposes is a well-known concept. It covers anything which might be done, given or made in exchange for something else. According to the Court of Appeal in Wakefield College, 'remuneration' may be said to encapsulate the concept of carrying on an economic activity "for the purposes of obtaining income therefrom on a continuing basis".

The new approach makes it clear that simply receiving income for a supply does not mean that an activity is a business activity. The activity must be carried out for the purpose of obtaining income for it to constitute a business activity. This is not an easily applied or understandable concept.

Charities

HMRC's change of approach is far reaching but is particularly relevant to charities and non-profit making organisations where non-business activities are more pronounced. The introductory part of Brief 10/22 references HMRC's past acceptance that childcare charities providing nursery of creche facilities at or below cost were not involved in business activities. It should not be assumed that this is the case now.

Charities, non-profit making organisations and nursery and creche facility providers should review their position to see whether existing practices need to change in the light of the new policy.

In a situation where a charity's priority is income-driven with that objective achieved through the subsequent generation of ensuing supplies for consideration, then this is likely to be a business activity. In a situation where the charity wants to provide services or goods in furtherance of its charitable aims with subsequent thought given to making some level of charge, then this could enable a non-business stance to be adopted. This analysis presupposes that HMRC's interpretation of its new policy is that activities carried out for 'remuneration' must have a structure, intention, and business-like attitude behind them. We cannot be certain of this from the limited commentary in Brief 10/22 where the elusive concept of 'remuneration' is not defined.

What next?

HMRC's new approach has more limited effect than the 'VAT – business and non-business activities' Brief 10/22 headline would suggest.

There have been a raft of business/non business cases since the Wakefield College case with the old business test having an influence on proceedings. HMRC acknowledge in Brief 10/22 that the old business test "can be used as a set of tools designed to help identify those factors which should be considered" for the purpose of the new business test.

Very recently, we have had The First-tier Tribunal decision in The Towards Zero Foundation (TC08547) where there was there was no old or new business test commentary in the decision (the case was heard just before the release of Brief 10/22).

The Towards Zero Foundation ('the Foundation') is a non-profit making organisation that conducts free safety checks on cars and then publishes the results. HMRC argued that the VAT incurred on costs was not deductible as input tax as the free tests constituted a non-business activity. However, the Foundation successfully demonstrated that the free testing is an integral part of its business activities as the car manufacturers would then pay for further testing. The non-economic activity therefore formed part of the wider business activities so that the VAT incurred on the free tests was recoverable. This latest decision goes against HMRC's new policy. It is considered likely that HMRC will either appeal the decision or amend its policy. Meanwhile, organisations faced with HMRC challenges to input tax because 'no charge' denotes a non-business activity should resist such challenges.

Rob Plumbly
Director, VAT

e. rplumbly@pem.co.uk

The growth plan 2022

On 23 September, the Chancellor published a Mini Budget, entitled "Growth Plan". The key points affecting charities are outlined below:

Income tax and Gift Aid

The 1 percentage point cut to the basic rate of income tax will come in on April 2023, 12 months earlier than originally planned. A four-year transition period for Gift Aid relief will apply, to maintain the income tax basic rate relief at 20% until April 2027. This means that charities and CASCs will continue to claim Gift Aid and GASDS at 25p for every £1 of eligible donation made between 6 April 2023 and 5 April 2027.

The removal of the additional rate of income tax of 45% which was announced has since been reversed.

National Insurance

The 1.25% National Insurance increase introduced in April 2022 to be reversed from 6 November 2022. The Health and Social Care Levy due to be introduced in April 2023 will be cancelled.

Energy costs support

The government announced the new Energy Bill Relief Scheme, which will provide a discount on wholesale gas and electricity prices for all non-domestic customers (including all UK charities). This Scheme will apply to fixed contracts agreed on or after 1 April 2022, as well as to deemed, variable and flexible tariffs and contracts. It will apply to energy usage from 1 October 2022 to 31 March 2023, running for an initial 6 month period for all non-domestic energy users.

Corporation tax

The previously announced planned increase in the UK corporation tax rate from 19% to 25% that was due to take effect in April 2023 will not go ahead.

Off-payroll working rules

The 2017 and 2021 reforms to the off-payroll working rules will be repealed from 6 April 2023. From this date, workers across the UK providing their services via an intermediary, such as a personal service company, will once again be responsible for determining their employment status and paying the appropriate amount of tax and NICs, rather than the contractor being obliged to decide on their status.

Other changes which may impact charities and their employees

VAT - The Government will introduce a digital, VAT-free shopping scheme for non-UK visitors to Great Britain.

Stamp Duty Land Tax - From 23 September 2022, the threshold above which Stamp Duty Land Tax (SDLT) must be paid on the purchase of residential properties in England and Northern Ireland increased from £125,000 to £250,000. First Time Buyers relief was also made more generous with the threshold at which first-time buyers begin to pay residential SDLT increasing from £300,000 to £425,000, and the maximum value of a property on which First Time Buyers relief can be claimed also increased, from £500,000 to £625,000.

Universal credit – The Administrative Earnings Threshold will be increased to 15 hours a week at National Living Wage for an individual claimant (and 24 hours a week for couples) from January 2023. This is on top of the increase due to come into effect from 26 September 2022 which will raise the threshold from 9 hours a week to 12 hours a week for an individual (and 19 hours a week for couples).

Investment zones – Some businesses in certain areas across the UK will receive tax benefits such as 100% business rates relief, SDLT relief and enhanced capital allowances. These areas have yet to be identified.

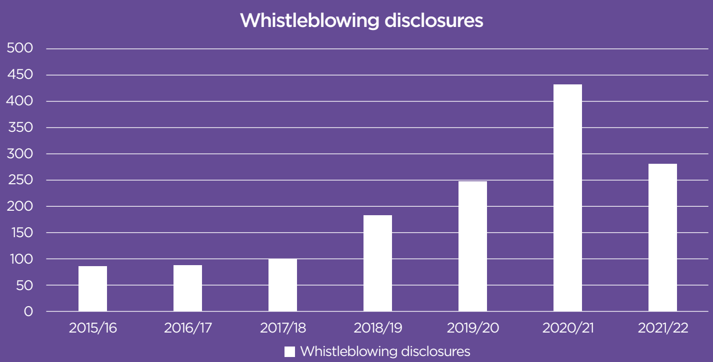
Judith Pederzolli
Director, Business Tax

e. jpederzolli@pem.co.uk

Whistleblowing

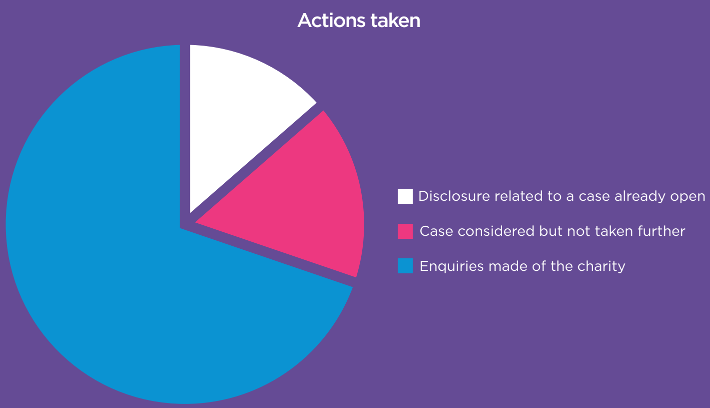
Whistleblowing disclosures help the Charity Commission detect serious problems such as fraud, safeguarding concerns and mismanagement in charitable and therefore play as valuable role in their regulation of the sector.

In the year to 31 March 2022 the Charity Commission received 281 whistleblowing disclosures. This is a significant decrease from the prior year and is more aligned with pre pandemic reporting.



The Charity Commission recognise that trustees and volunteers do not have the same statutory protections as employees but will treat any and all concerns received seriously. However the majority of disclosures still come from employees. The Charity Commission report published on the 29 September 2022 states that the primary issues raised were governance, safeguarding or financial management concerns. For employees and ex-employees most reports related to safeguarding. A full analysis of the whistleblowing disclosures is provided on the Charity Commission website.

The Charity Commission consider that the increased number of disclosures in the prior year were most likely as a result of the challenges caused by the pandemic as well as improved processes at the Charity Commission for handling whistleblowing disclosures.



Of the cases closed by the end of the reporting period 45% required no further action after enquiries were made. Responses to other closed cases included regulatory advice and guidance, action plan set up, information gathered, verified trustee actions, or signing posting to another Regulator.

The Charity Commission uses a confidential advice line service run by the independent charity Protect. This service as be accessed via Protect's freephone number 0800 055 7214. Or the Commission can be approached directly at whistleblowing@charitycommission.gov.uk. The Charity Commission will follow up all emails with a phone call.

Fundraising focus

A new five year plan

On 1 September 2022 the Fundraising Regulator published a five year strategic plan covering 2022 to 2027. The Fundraising Regulator was established in 2016 and during that time technology has developed rapidly, with the pandemic further accelerating the use of various electronic media in an organisation's approach to fundraising. Some charities are starting to use digital currencies, blockchain, machine learning and artificial intelligence in their fundraising approaches and systems. Platforms such as JustGiving and Virgin Money Giving (closed in February 2022) are proliferating and enable individuals to raise funds for their favourite charity from members of the public without oversight.

The Fundraising Regulator is preparing to address these and other issues over the next five years.

The plan sets out the four key strategic objectives of the Regulator and highlights the core activities planned to meet those objectives in a five year action plan. One of the first activities is a review of the Code, to make sure it remains effective and relevant, and that consultation was launched on the 6 October 2022.

In addition, the Regulator will collect data from various and varied fundraising organisations to understand the new technologies and traditional methods of fundraising used, and how regulation can address concerns, including those around data security and consent.

The Regulator will continue to promote the fundraising badge and monitor compliance alongside exploring proportionate ways of raising standards in a changing world. The basis of the fundraising levy will come under scrutiny in the second and third years of the plan.

The Strategy is available on the Fundraising Regulator website.

Calls for feedback on the fundraising code

The Regulator suggests that respondents consider the following five questions when submitting feedback, although comments on any aspects of the Code are welcome. The Regulator hopes to update and future proof the Code, aiming to protect donors without creating undue constraints on fundraisers.

Responses should be emailed to the Regulator at consultations@fundraisingregulator.org.uk by 25 November 2022. More information is available on the Regulator's website.

The five questions are below:

- Which parts of the code do you think work well, and why?
- Are there any issues relating to charitable fundraising that the code does not adequately cover?
- Do any standards in the code need be updated, for example, to reflect advancements in technology, new legislation, or changes to donor and fundraising behaviour?
- Do any parts of the code contain overly prescriptive or unnecessary standards?
- Are there any ways in which the code could be made shorter, clearer or more accessible?

Nikki Loan
Director, Audit & Accounts

e. nloan@pem.co.uk

Inquiry reports

Conflicts and mismanagement

As we have noted before, inquiries into charities who have defaulted on their statutory filing obligations on two or more occasions (double defaulters) often identifies more serious concerns on governance and financial management. In the Achiezer case published on 22 August 2022, the inquiry concluded that the trustees had not managed the conflicts of interest, as there were no independent trustees, and the basis of payments made to a property development company, of which two trustees were partners, was unclear.

The charity did not have its own bank account and the transactions with other entities also controlled by the trustees were complex. The Regulator also concluded that one of the trustees had obtained personal benefit by attempting to avoid business rate by letting property to the charity, the rates were eventually paid by the trustee.

The two trustees were removed and disqualified from acting as a charity trustee. The charity was wound up and its remaining funds were distributed to charities with similar aims.

The report drew out the following issues for the wider sector:

- Trustees have a legal duty to submit annual updates and returns; failure to do so is a criminal offence.
- Conflicts of interest are more likely when there are only a small number of trustees, when the trustees are closely related, or when the charity has dealing with organisations in which the trustees have interests.

“It is vital that trustees avoid becoming involved in situations in which their personal interest may be seen to conflict with their duties as trustees.”

Over £100k in charitable donations to be recovered for Wrexham charities after judge orders ex-trustee to pay out

This headline was published on 29 September 2022 and is a reminder that the Charity Commission can pursue wrong doers. In this case, after successful legal action, the sole trustee, who misused charitable funds, will be required to make restitution. Over £117,000 will be recovered and distributed to support cancer patients in Wrexham and District hospitals.

Interim manager appointed

After an official warning in May 2022, an interim manager has been appointed and a statutory inquiry opened. The Commission determined that, due to an ongoing dispute at the charity about control of its administration and management, there was an increased risk that appropriate actions would not be taken to protect the charity from further undue risk and harm. The inquiry is focussing on the following matters:

- Whether the trustees have been properly appointed and/or removed at the charity since autumn 2021, in accordance with the governing document of the charity.
- Whether there is an accurate and clear understanding at the charity about establishing its members, including in terms of notifying and consulting with members about all relevant events at the charity.
- Whether the trustees have learnt from the issues which led to the charity receiving an Official Warning from the Commission in May 2022 and are willing, and able, to further the charity’s objects in an appropriate manner.
- Whether the charity’s income and expenditure has been properly accounted for, since autumn 2021, as part of appropriate financial management.
- Whether the charity’s expenditure has been used to carry out activities that exclusively furthered a charitable purpose.

Whilst these points are particular to the inquiry, these themes reflect areas of good governance upon which all trustees should be confident in answering about their own charities.

Preventing charity fraud

Each year there is a campaign to raise awareness and share good practice around tackling fraud and cybercrime. This years' campaign is taking place 17-21 October 2022.

The Prevent Charity Fraud website has a number of resources and helpsheets for charities, organisations and individuals, including free e-learning resources covering cyber security for charities and small organisations and top tips for staff staying safe online.

A general reminder on how to protect yourself is included below:

- Do your research: never send money to anyone you don't know personally, or purchase anything you're not entirely sure of.
- Look out for spelling and grammatical errors in emails and texts, not being addressed by your name and poor layouts.
- Never reveal personal or financial data including usernames, passwords, PINs, or ID numbers.
- Don't open email attachments or click on links in communications from unknown sources.
- Make sure your antivirus software is up to date and run a scan before opening anything you're suspicious of.
- Always update software, apps and operating systems when prompted, or set them to update automatically.
- Think before you click. If something seems too good to be true, it probably is.
- To check whether a website is likely to be legitimate or fraudulent, enter its address at getsafeonline.org/checkawebsite

The Charity Commission also provides links to various toolkits and resources in its guidance Protect your charity from fraud and cybercrime.

Trustees' week - 7-11 November 2022

Now in its 12th year, this is a time for the sector to come together and thank those volunteer trustees who are making a difference in changing times.

The week is supported by many organisations across the sector so look out for activities on the trustees' week website or on a partner website, such as the NCVO, which is running a week of webinars to support trustees, both new and experienced.

Kelly Bretherick
kbretherick@pem.co.uk

Nikki Loan
nloan@pem.co.uk

Michael Hewett
mhewett@pem.co.uk

Kathryn Hebden
khebden@pem.co.uk

Gemma Baratte
gbaratte@pem.co.uk

Judith Pederzolli
jpederzolli@pem.co.uk

Kate Millard
cmillard@pem.co.uk

Robert Plumbly
rplumbly@pem.co.uk

PEM
Salisbury House
Station Road
Cambridge CB1 2LA

t. 01223 728222
e. pem@pem.co.uk

pem.co.uk

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