

BUILDING ISN'T taxing

With the BSF project accelerating building works in school, **Andrea Squire** and **Martin Scammell** consider the legal and VAT implications



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FUNDING FOR MAINTAINED SCHOOLS

Section 22 of the School Standards and Framework Act 1998 provides generally for the funding of "maintained" schools. The duty to defray all expenses of maintaining the school rests with the local education authority.

An exception is made for capital expenditure to voluntary aided (VA) schools, where the responsibility for such expenditure rests with the governing body and paragraph 5 of schedule 3 of the 1998 Act envisages direct grants being made available to the governing body by the Secretary of State.

BUILDING WORKS TO VA SCHOOLS

Whilst traditionally, works would have tended to have been procured by the governing body (with strategic and sometimes financial support being provided by the relevant diocese or trustee body), the strategic focus of BSF and PCP has led to the centralisation of procurement through a pre-procured LA controlled single supplier framework, otherwise known as the "local education partnership" or LEP.

VAT SUPPLIES AND SECTION 33 RECOVERY

The supply of building works is normally standard rated unless a relief or an exemption applies. Recovery of any VAT paid is generally only possible if the person receiving the supply is registered for VAT purposes and is also making a taxable supply i.e. it is charging for goods or services on which it adds VAT. LEAs and governing bodies are not generally in this position.

Section 33 of the Value Added Tax Act 1994 contains a special refund scheme which allows specified bodies (such as LAs) to recover VAT incurred on their non-business activities. The HM Revenue and Customs (HMRC) Brief 53/09 has clarified when section 33 can be used in the context of buildings works. It is no surprise that HMRC has confirmed that it is appropriate for LAs to recover VAT under section 33 where it is incurred by the LA in relation to expenditure for which it is responsible. This will therefore include all expenditure in relation to maintained schools except capital expenditure to voluntary aided schools (even where paid for from the delegated budget) which of course is the responsibility of the governing body.

In an interesting development the same guidance has clarified that where the LEA is spending its own funds, i.e. not delegated budget

or grant from DCSF on capital works to VA schools, then provided it contracts directly with the supplier it may recover any VAT on such expenditure. This could be useful where monies obtained from, for example, section 106 agreements and related disposal programmes, are being used to top up or fund works to VA schools.

NEW BUILD WORKS AND ZERO RATING RELIEF

It is clear from Brief 53/09 that HMRC is still expecting VAT to be charged on the supply of building works to the governing body of a VA school. The obvious point is made and continues to be recognised by DCSF that where there is irrecoverable VAT, then any grant must be grossed up to enable the governing body to meet its full liability.

In some cases, the construction of a building for a charity can be zero-rated under Schedule 8 Group 5 of the VAT Act, so that no VAT is chargeable by the contractor. The legislation requires the building to be intended 'solely' for a 'relevant charitable purpose'. This means use by a charity in non-business activities, or as a village hall or similarly.

If the charity does qualify for zero-rating, it needs to issue a certificate to the contractor stating its intended use of the building and if the actual use changes within 10 years there could be a claw back of the VAT originally saved.

REMOVAL OF THE EXTRA STATUTORY CONCESSION 3.29

The Revenue & Customs Brief 39/09 announced the withdrawal of the Extra Statutory Concession (ESC) 3.29 from 1 July 2010. ESC 3.29 enables charities to meet the "solely" test provided that the building is intended to be used 90 per cent or more for non-business purpose as measured by one of three specific measures (time, floor space or headcount). This was extended in 2007 so that, provided the intention was there when the certificate was issued, there would be no claw back if the use changed during the 10 year claw back period. The loss of this concession is a blow to VA schools.

A governing body wishing to issue a zero rating certificate on the new basis of "solely" using the building for a relevant charitable purpose will have to show that the relevant use of the building is 95 per cent or more. How that is to be calculated is to be left with the person issuing the certificate and any method can be used provided that it is "fair and reasonable".

COMMUNITY USE AND THIRD PARTY USE UNDER BSF PROPOSALS

Recent government policy has encouraged schools to think actively and creatively about bringing the community into the school and the school into the community. New facilities intended to be used when not in school use are being designed and built.

The restriction of non-business use to five per cent poses some real problems for schools, potentially putting them on a collision course with HMRC, LEAs, local planning authorities and DCSF. HMRC are likely to show little flexibility in considering what constitutes non-business use, whilst precedent in other contexts suggests it may not be easy to agree on what is a "fair and reasonable" calculation.

The role of schools and colleges within their communities may be changing but there is a real concern that significant progress to date in this area will come to a stop. In practice, this is not an area where we can expect much in the way of "joined-up" government.

Experience suggests that HMRC will take little account of broader government objectives and whatever reassuring noises HMRC are making now, many VAT officers will look for any excuse to deny zero-rating. It is to be hoped that those seeking the transformation of our school estate will be prepared to fund the necessary cost.

IMPLICATIONS FOR OTHER SCHOOLS AND COLLEGES

The approach taken in relation to VA schools should be considered by FE colleges and academies, where governing bodies also take primary responsibility for capital expenditure and where the LEA has an overarching commissioning role.

There may be questions over the continued use of section 33 for capital work to academies, although to date government has shown more sensitivity to VAT problems here than for schools in general. And, the implications of community use and third party use may also be significant if the trend towards LEA procurement of capital works for all schools and colleges continues. **EE**

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