a charity to proceed swiftly with a transaction with a huge saving in legal costs.

But then came the qualification! Whilst the Commission recognised that it could be costly to obtain landlords’ consents and recognised that by exercising its discretion it would override the need for those expensive consents and make massive costs savings for the charity, the Commission stated that it would ‘require notice of the proposed order to be given to the landlord and so give them an opportunity to make representations to the trustees’.

Sadly, in the real world, when an application is made to a landlord informing them that a tenant wishes to assign a lease, the landlord’s first reaction will always be to request that an undertaking be given by the tenant to be responsible for landlord’s legal and surveyor’s fees in connection with that application, whether or not it proceeds. The Charity Commission’s suggestion that landlords might actually make representations to the trustees without charge, and then on the basis of those representations, the Commission will determine whether to make the order, comes from the world of fantasy.

So what has been an extremely useful discretionary power exercised prudently by the Charity Commission to save charities from thousands of pounds of ‘wasted’ costs, has now seemingly been wiped away with one change, not of legislation, but of internal policy at the Charity Commission.

Surely it can do better than increase the overheads and costs of charities at a time when incomes are under such pressure.

A charity can have new buildings constructed at the VAT zero rate provided the buildings are used either for certain residential purposes, or for a ‘relevant charitable purpose’ – which means otherwise than in the course or furtherance of a business.

HMRC has long taken the view that charging fees broadly means that a business activity is being carried out, and so a building that is used to carry out fee-charging activity is being used in the course or furtherance of a business, so cannot be used for a relevant charitable purpose. It argues that the zero rate should not apply in these circumstances. HMRC takes this view even when the fee-charging income is relatively small, the activity being heavily subsidised by the charity, because VAT does not have a concept of profit or loss.

However, various tribunal cases have found against this HMRC view in recent years. The trend was started with St Pauls Community Project and Yarburgh Children’s Trust, which involved charitable nursery schools which set their fees at a level only sufficient to cover their costs. The tribunals found that they were operating purely for social purposes and not to carry on a business. Following these decisions, HMRC announced it would accept the point – but for day nurseries only. HMRC’s announcement never made sense, as the same principle clearly applies to other...
charitable activities that are run only at cost. Another case here involved Quarriers – HMRC argued that the charity was carrying out a business because it charged small fees in relation to its epilepsy centre. The tribunal, again, accepted that the charity was really carrying out an important social purpose.

My personal favourite is that of Jeansfield Swifts, which provides football coaching for children. HMRC argued that the charity could not have its new club house built at the VAT zero rate because it was carrying on a business – because children paid match fees (which only covered the cost of the referees and the linesmen) and because it operated a small hut selling teas and pies to the handful of spectators on match days! In addition, the club house was hired out to community groups for £5 a night – £7.50 a night if the kitchen was needed as well! The tribunal was scathing as to how anyone could regard that as a business and promptly found for the charity.

Which brings me to the latest in this line of cases – Longridge on the Thames. I have a personal interest here in that I advised the charity up to the point it took its case to tribunal.

In summary, the charity operates a water sports facility and charges low fees to the children and most of those who use it. It is heavily subsidised by volunteer time and grant income. It had a new building constructed (using grants and donations) to provide changing and shower facilities, and also training facilities. It wanted to have this constructed at the VAT zero rate. But HMRC argued that the charity was running a business, because it charged fees and so the zero rate was not available. Yet again the tribunal found for the charity because the fees were set at a less-than-cost level and because the charity was predominantly concerned with providing a low-cost activity – not in running a business.

Following the loss of the case, HMRC advised this was ‘bad news’ for the sector because it would mean that many business activities carried out by charities would now be seen as non-business activities – which would mean that they could no longer recover VAT on their costs. HMRC has completely missed the point: if charities could generally recover VAT on their costs they would not be worried about getting a building constructed at the VAT zero rate – they could recover the VAT charged on the construction. HMRC has also failed to appreciate that the majority of fee-charging activity carried out by charities tends to be VAT exempt – education, health, welfare, or sporting activities, for example – and if your income is VAT exempt you, again, cannot recover VAT on your costs.

Once again HMRC is in denial over the case law, and I fear will continue to be in denial until it is told by the Treasury to change its views. How many more tribunal losses will it take before there is a change in approach here?

Find out more
Charities may contact Bill Lewis for further advice on VAT and other tax related issues.